NEWSLETTER

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Contributions to this publication are always welcome and should be sent to the editors at the addresses on page 3.

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FROM THE CHAIR

Introduction to Mining Law Committee newsletter

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It is a particular pleasure for me to write this introduction to the Mining Law Committee's first newsletter for 2009. Not simply because it is our first newsletter of the year, but because it heralds a new beginning with a new committee and a new editorial team.

The committee changed leadership at the beginning of the year. Patricia Nunez stepped down as Chair after a distinguished period in office and I have assumed office for the next two years, with a newly elected committee with more diverse representation from the mining as well as the developing world. Florencia Heredia, Loredana De Angelis and Michael Neumann have ceased to be newsletter editors after a most successful term. I would like to thank them all for their hard work and enthusiasm in ensuring that our committee continues to make an important contribution to the organised legal profession.

The 2009-11 Mining Law Committee accordingly comprises the following:

Peter Leon, Chair, South Africa
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Rahmat Soemadipradja, Special Projects Officer, Indonesia

This newsletter is intended to provide general information regarding recent developments in mining law.
The views expressed in this publication are those of the contributors, and not necessarily those of the International Bar Association.

The Committee plans a range of activities this year. In addition to upgrading our website and publishing this newsletter three times a year, it will be hosting sessions at the IBA's Annual Conference in Madrid on mining industry topics as diverse as water resources, new financing trends, indigenous mining agreements and the development of best practice regulatory models. In addition, some members of the committee will be attending and participating at the joint IBA/Rocky Mountain Mineral Law Foundation conference in Buenos Aires between 20–22 April which, as usual, offers an excellent and stimulating programme. I very much hope to see as many of you as possible in Madrid and at least some of you in Buenos Aires!

The end of a six-year commodity boom, the longest in recent memory, creates great challenges for the mining industry, but also new opportunities, as much as it does for mining lawyers. That is why I am particularly pleased that our first edition of the newsletter for 2009 includes an article by committee member Casper Herler on the new draft Finnish Mining Act, as well as a note by John Southalan of CEPMLP in Dundee on judicial interpretation of indigenous mining agreements. Both are topical as much as timely.

One of my aims for the committee this year and next is for us to help develop a best practice regulatory model for the international mining industry. As mining lawyers, we all understand the importance of security of tenure; objective criteria for the grant of exploration and mining licences, as much as we do the dangers of unbridled administrative discretion. By initiating and developing such a model, I believe that that all of us can contribute significantly to the success as much as the sustainability of the industry in these challenging times.

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New draft Finnish Mining Act

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Background

The project to revise the current Finnish Mining Code initially started in 1994 as Finland joined the European Economic Area. A year later, the EEA membership was broadened to full EU membership. At this stage, mining investments were opened to foreign investors to a larger extent than previously. A working group including both industry and landowner representation was set up in 1999 and it concluded its work in 2002, presenting a proposal to revise the current Mining Act. This proposal was to be further developed by a new civil service-based working group which, however, rejected the proposal and began the preparation of a new proposal in order better to assess and take into account all basic rights provided in the amended Constitution of 1995. The new working group presented a first draft text in March 2008 to stakeholders and a draft for government proposal on 8 October 2008. Nearly a hundred statements by stakeholders were sent to the Ministry of Employment and the Economy and these are currently being processed, as the proposal is subject to political assessment by the government. The proposal is planned to be sent to the Parliament in mid-2009 and to enter into force in 2011. This text will address certain main issues related to the draft.

Despite that Finland may not be a worldwide known mining country, the sector has a long tradition and the geologically old bedrock contains commodities such as iron, copper, nickel, cobalt, zinc, chromium, gold, diamonds, phosphate, uranium and a range of industrial minerals. The geological databases are considered extensive, infrastructure is available and the investment environment is very stabile, which is why Finland as a nation was ranked number three after Quebec and Nevada in the *Fraser Institute Annual Survey of Mining Companies 2007/2008* on most favourable host countries for mining investments.

The current Finnish Mining Act dates from 1965 but it has been amended on several occasions - especially during the last 15 years - particularly in connection to new environmental regulation. The structure of the tenure system is based on a claim system, in which priority to explore and mine the minerals is given on a first-come-first-served basis, independent of tenure of the surface land. In Finland, the state has not declared the minerals to be owned by itself. Due to the existing and traditional tenure system, the minerals have never been clearly a part of the landowner's property, as the mineral law system has restricted title, with the possibility that a third party may claim the minerals and - through a later mining licence - obtain a title to use the ore as well as the land required above. However, the landowner is entitled to compensation for the ore, damages and limitation of access to land. When the mining policy behind the current legal structure is analysed, it is evident that the aim has been to enhance investments in exploration and mining. Control of the impact on environmental aspects, land use and indigenous people has mainly been carried out through other legislation than the Mining Act itself.

Integration of environmental aspects?

The new draft Mining Code has raised a lot of domestic public and political attention, especially as it has been heavily criticised by the mining industry, industry and labour associations. Somewhat surprisingly, the draft has also been questioned by the environmental permit and control authorities with respect to the far-reaching, independent and overlapping environmental assessment proposed in the Mining Act, compared with the existing one in environmental legislation.

The proposed control of environmental and land use aspects in the Mining Act is also one of the issues with a significant impact on a level of legal principles. Finland is a civil law jurisdiction and mining law is generally considered to have connections with the legal areas of business law, property law and environmental law. As the Mining Act regulates the right to carry out a certain field of business and as the rights deriving from the exploration and mining licences have a property value and can be transferred and also used as security for financing, it is obvious that mining regulation cannot be structured and governed under the general principles of environmental law, despite exploration and mining activities having an integrated land-use aspect. Having said that, it needs to be clarified that under Finnish law, all mining projects need at least an environmental permit, which goes beyond the demands set by the EU's integrated pollution prevention and control directive (IPPC). Further, larger projects are in need of an Environmental Impact Assessment (EIA), which also can be demanded based on a case specific assessment for projects not exceeding thresholds.

In this respect, the national discourse has an international connection: Should mining regulation also cover an integrated assessment of effects and other concerns or should this be carried out through separate regulation? The integration principle in environmental law supports such development, but as mentioned above, mining regulation cannot be governed only by looking at the general principles of environmental law. Further, a structure of this first-mentioned characteristic could be more acceptable if the legal structure can provide integrated proceedings (eg possibilities to combine public consultation of EIA, environmental permit, water permit, land use planning, building permits and mining licence), but if the regulation remains overlapping and independent, the justification can in my view be questioned.

Concerns regarding uranium exploration and mining

The Finnish public and political discourse around the new Mining Act has been heavily influenced by increasing uranium exploration activity in Finland since 2005. Due to exploration claim applications for uranium fairly close to the capital region of Finland. NGO movements against the applications began and the issue became political and also connected with the introduction of new nuclear power capacity in Finland (the political decision on the sixth reactor will apparently be taken by the Parliament parallel with processing the Mining Act proposal). The outcome of the new claim applications was that hearing obligations of landowners were introduced by the Ministry of Employment and the Economy in 2006, through interpretation of other legislation, and the EIA legislation was changed to cover all uranium extraction and enrichment. Further, the claim applications in question were rejected due to extensive size.

In the draft for the new Act, new permit procedures for enrichment and mining of uranium is proposed to be added to nuclear legislation as well as a veto right for municipalities. As regards other aspects of these projects, exploration and mining of uranium and thorium is proposed to follow the same general principles as for non-radioactive minerals. However, many new provisions containing discretionary and flexible norms have apparently been drafted, bearing in mind activities related to radioactive minerals, although this is not clearly indicated in the wording of the Act or the explanatory part of the proposal. Therefore, these provisions are also proposed to be applicable to the exploration and mining of all other minerals.

Indigenous people's rights

Finland, Sweden, Norway and Russia are inhabited by citizens belonging to the Sami-people (Lapplanders) [NB Finnish Govt spelling is Saami], who are generally regarded as indigenous under the International Labour Organization (ILO) Convention (no 169) concerning Indigenous and Tribal Peoples in Independent Countries. Finland is estimated to be inhabited by approximately 7,000 Samis (approximately 0.13 per cent of the total population), whereas the corresponding figure for Sweden is approximately 15-25,000. Norway has approximately 40,000 and Russia approximately 2,000 Samis. Finland and Sweden have not ratified the ILO convention due to the unclear historical land ownership situation in the state owned Northern parts of both countries occupied partly by the Samis, but also by a majority of non-Samis. A significant element of Sami culture is reindeer herding which as a form of land use may cause conflicts with exploration and mining. The interests of the Sami people and reindeer herding are protected by Sami and reindeer legislation (of which the latter also covers herders other than Samis). According to the Finnish Supreme Administrative court's ruling KHO 1999:14, the interests of Sami reindeer herding must be taken into account by authorities when assessing claim applications. In order to reduce conflicts, the Ministry has prepared a detailed guide for exploration and mining in these areas as well as nature protection areas (English version: www.tem.fi/?l=en&s=2364). In the new draft Mining Act, the indigenous communities have been taken into account by consultation procedures as well as material provisions. However, the provisions are based on the concept 'indigenous people's rights' which is not defined in the Act itself, and thereby leaves a lot of discretion and creates legal uncertainty with respect to possible future interpretations beyond the safeguarding of reindeer herding.

Security of tenure

A major issue in the Mining Act reform relates to the degree it relates to security of tenure. The current Mining Act contains a tenure procedure which leaves little room for discretion, as exploration claim and mining licence applications only can be denied if certain clearly expressed conditions are fulfilled. In operation, however, number of other permits are also needed (eg for the recently opened Ni-mine Talvivaara, some 30 authority procedures altogether).

The main concerns of the mining industry regarding security of tenure relate to:

(a) the proposed introduction of interest-balancing of pros and cons in connection to mining licence applications,
(b) the removal of the current (in practice) right to gain a mining licence when exploration proves the project feasible;
(c) the uncertainty created by a significant amount of authority discretion and flexible norms used in the Act;
(d) the proposed removal of the specific possibility to use the exploration and mining licences as separate and independent securities for the financing of the project; and
(e) the retroactive application of the new mining licence criteria to existing exploration projects as well as the possibility of also amending old mining licences (without any compensation) if later on other, interests are considered to be significantly affected, despite time priority in favour of the mining project.

The introduction of hearing procedures in exploration claims in 2006 has extended the processing time of claim applications from approximately two months to one and a half years, and mining licence applications currently take some three years, which nationally is considered unacceptable. However, the introduction of the proposed new requirements together with an introduction of a two-stage appeal procedure and extended appeal rights to NGOs are likely to extend the time required for permit procedures rather than shorten these.

Issues of mining policy

In an international context, it has been emphasised that a Mining Code reform should be based on a mining policy, drafted prior to the legislative reform. From a policy point of view, the Finnish Mining Act reform is based on the very general principles given in the Government Programme of Prime Minister Matti Vanhanen's second cabinet, 19 April 2007. The policy content is limited to the mentioning of 'due consideration to environmental viewpoints, basic civil rights and the safeguarding of living conditions, the opportunities of local authorities to exert an influence and the rights of land owners on the one hand, and to the conditions required for prospecting and the development of mining operations on the other'.

No specific attention in the draft proposal is given to

international competition in mining investments, despite Finland, Sweden and Norway being equally suitable neighbouring host countries for projects. Instead, the draft aims to increase exploration fees to a level which at its maximum is ten times higher than in the neighbouring country, Sweden. Further, the recent developments within the EU addressing the need for securing raw material supply for industry, announced by EU Commission Vice President Günter Verheugen, have in no way been taken into account.

The Finnish Government's approach to royalty and taxation policy for mining projects can be regarded as passive. This also applies to taxation, as no specific taxation policy is applied to mining investments. The proposal would mean a removal of all fees paid to the state for exploration and mining licences. However, it is suggested that the level of fees to landowners would rise. In addition, the Finnish state owns major areas and there are no exemptions regarding fees to the landowner in this respect. All in all, it seems that the Finnish mining policy is to gain from mining investments through employment, infrastructure development synergies, and taxation in the long run, especially as many projects are allocated to areas suffering of urbanisation and closedowns in forest industry. On the active side, the Finnish Government decided 16 September 2008 on a generous package for infrastructure investments and other support instruments for Finnish mining investments (www.tem.fi/?89518_m=92681&l=en&s=2470). However, this investor-friendly approach is not coherently present in the draft Mining Act.

Conclusions

The reform of the current Finnish Mining Act is needed, especially with respect to rules on mine security and close-down obligations. However, in many respects, the existing mining law provisions - taken together with all other legislation applicable - creates a legal framework which only may need slighter adjustments. Currently, there is social and political pressure to create a set of material criteria to hinder projects in residential and similar areas. These should, however, be easily predictable rather than consisting of a general-interest balancing tool, bearing in mind the specific legal character of mining law which enhances security of tenure.

A large amount of detailed provisions still needs to be redrafted in order to ensure reduction of arbitrary rules. Further, the draft contains virtually no attention on improving the investment environment, eg with rules improving financing through joint venture arrangements. It remains to be seen to what degree the government will take especially the mining policy and security of tenure aspects into consideration and demand necessary changes to the draft.

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Court interpretation of indigenous agreements – research at CEPMLP

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The last two decades have seen significant changes in the relationship between indigenous people and resource management. Previous practices, in which governments and developers simply dealt with land and resources while ignoring indigenous interests in that land, are no longer accepted.[1] There is a growing preference for negotiated outcomes, where developers and/or governments seek agreement with indigenous parties in relation to developments which will affect them.

Even though there is more emphasis on negotiated outcomes, agreements with indigenous parties are not new. There are many court and tribunal decisions interpreting and applying agreements, and other legal documents, involving indigenous people. The significance of these agreements cannot be underestimated - documents from the 1800s are still being used by courts today in deciding contemporary legal relations involving indigenous parties.[2] Some court/tribunal decisions result in agreements operating as the contracting parties intended, but other decisions involve companies and indigenous parties being frustrated by the unintended effects arising from the interpretation and effect given to earlier documents.[3]

There are many different types of documents involving indigenous parties, eg treaties, impact & benefit agreements, petitions, land use agreements. Court/tribunal approaches to interpretation differ according to what 'type' of agreement has been made.[4] Nevertheless, valuable guidance for developer-indigenous agreements can be derived from court decisions involving all these types of agreements.[5]

The Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP), with assistance of a grant from the Nuffield Foundation, will build and maintain a free, searchable database of court and tribunal decisions that have interpreted or applied documents involving indigenous parties in Australia, Canada, New Zealand and the United States. This database will be of value to parties working and researching on developer-indigenous agreements, by helping identify relevant decisions which provide important guidance to understand current or future agreements.

The database will be a comprehensive record of decisions from courts/tribunals that interpret or apply documents involving indigenous parties, summarising for each decision:

- the content of the document(s) involving indigenous parties;
- the court's/tribunal's engagement with that document; and
- the external circumstances/materials the court referred to in its application/interpretation of the document.

The database will be launched in 2009. The work on this project can be seen at:
www.dundee.ac.uk/cepmlp/mining/indigenous/.

References and note

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Note: The Nuffield Foundation is one of the UK's best known charitable trusts. The foundation was established in 1943 by William Morris (Lord Nuffield) to 'advance social well being', particularly through research and practical experiment. The foundation aims to achieve this by supporting work which will bring about improvements in society, and which is founded on careful reflection and informed by objective and reliable evidence, www.nuffieldfoundation.org.

Endnotes

1 This can be seen at the international level (through declarations and treaties, and decisions of treaty bodies and international courts) and also domestically in litigated and legislated outcomes.
2 For example, the 2002 decision of Australia's High Court in *Yorta Yorta* (considering an 1881 petition); the 2007 decision of Canada's Federal Court in *Ochapowace* (considering an 1874 treaty); the 1993 decision of the Privy Council in NZ Maori Council (considering an 1840 treaty).
3 For example, in *Yorta Yorta*, 2002, the courts decided that an 1881 petition signed by ancestors of current indigenous litigants weighed against the current indigenous people having their customs/connection to land protected by Australia's legal system; in Minara Resources 2007, the Western Australian Supreme Court has ongoing litigation between a company and indigenous groups about obligations from a 1996 agreement.
4 For example a treaty or equivalent will often involve principles of international law in its interpretation and implementation.
5 For example, court decisions on treaties show that their interpretation can change over time, with the courts referring to different developments (and attributing varying significance to them) in deciding the contemporary meaning of the treaty.