



IN THIS ISSUE

From the Chair 1

Committee officers 3

EUROPEAN UNION

Mining policy in the EU – present situation
and new initiatives 5

The European Directive 2006/21/EC on the
management of waste from extractive
industries – scope, requirements and
implementation status 7

NEW MINING LEGISLATION

A New Mining Law for Indonesia 9

Current state of Ecuador's mining industry 12

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

International Bar Association

10th Floor, 1 Stephen Street
London W1T 1AT, United Kingdom
Tel: +44 (0)20 7691 6868. Fax: +44 (0)20 7691 6544
www.ibanet.org

© International Bar Association 2009

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without the prior permission of the copyright holder. Application for permission should be made to the Managing Editor at the IBA address.

FROM THE CHAIR

Introduction to Mining Law Committee newsletter

Peter Leon

Webber Wentzel, Johannesburg
peter.leon@webberwentzel.com

Welcome to the second edition of the Mining Law Committee's newsletter for 2009. I hope that you will find the articles in this issue of interest, ranging as they do from mining policy in the EU, Indonesia's important new mining law, to a discussion on the state of Ecuador's mining industry and the European Council's Directive on waste management for the extractive industries.

As the Madrid conference draws closer, and Buenos Aires closer still, I thought it may be helpful to tell you a little more about both:

SEERIL/RMMLF joint conference in Buenos Aires, 20-22 April 2009

Mining Law Committee members may wish to know about the forthcoming conference in Buenos Aires on 20-22 April 2009 co-sponsored by the Section on Energy, Environmental, Natural Resources and Infrastructure Law (SEERIL) and the Rocky Mountain Mineral Law Foundation. The three day conference on international mining, oil and gas law, development and investment, addresses a large range of topical subjects for lawyers involved in these fields. These include water rights and water usage, the allocation of profits to communities, conflicts among surface owners, miners and other titleholders, corporate responsibility and human rights, as well as an overview of and project finance for Latin American mining regimes. A case study on mining disputes in North and South America will be presented, as well as a comparative overview of uranium exploration and development. A panel will examine the creeping nationalisation of mineral projects; a topic of great importance to Latin America and, to a lesser extent, Africa. Mining and ecosystems preservation will be discussed in a separate panel. Of more general interest, joint sessions will examine the US Alien Tort Statute, the US Foreign Corrupt Practices Act and the impact of the US Office of

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.

Foreign Assets Control (OFAC) on the funding of natural resources projects. Officers and members of the Mining Law Committee will be attending and participating at the conference, while several current and former officers of the mining law committee are members of the organising committee. Members who wish to attend the conference can register online at www.rmmlf.org or contact the RMMLF directly on info@rmmlf.org.

IBA Annual Conference, Madrid, 4-9 October 2009

Water resources for the mining industry – joint session with the Water Law Committee.

Like all other industries, mining companies need water to make bare rock give up its valuable minerals. However, since modern society has almost finished exploiting its water resources, will water resource limitations curtail the mining industry operations? This panel will explore the use of water resources in the mining industry and will try to answer questions such as:

- Should water resources be restricted in their application in the mining industry?
- How can water use in the mining industry be made more sustainable?
- Are there alternative methods to avoid or limit the use of water resources in the mining industry?

TUESDAY 1000 – 1300

Developing international best practice regulatory models for the international mining industry – joint session with the African Regional Forum, the Latin American Regional Forum and the Public Law Committee.

Mining is a high-risk, capital-intensive industry, in which security and continuity of tenure are said to rank immediately after geology in assessing the viability of new mining projects. In the developing world, high levels of administrative

discretion, coupled with an outbreak of resource nationalism during the recently ended commodity boom, potentially undermine these principles. A multidisciplinary panel examines how a best practice regulatory model can be developed for the international mining industry which promotes objective decision-making and secure rather than precarious tenure.

TUESDAY 1500 – 1800

New trends for financing mining projects – joint session with the Project Finance Subcommittee.

The international financial crisis and the ups and downs of the commodities prices, pose yet another challenge to the financing of natural resources projects. At the same time, the continuing availability of raw materials is paramount to keep the business activity on track, and even bolster economic growth. This need applies to the mining exploration, construction, and production phases alike. This panel will analyse the implications of the current international financial situation for the mining industry and the services ancillary to it. The speakers will also explore alternatives available for the financing of resources projects in different parts of the world.

WEDNESDAY 1500 – 1800

Indigenous mining agreements – joint session with the Indigenous Peoples' Committee.

Mining activities often occur in areas which are inhabited by indigenous communities. In recent times there have been considerable developments in the relationship between mining companies and such communities in the many different jurisdictions where minerals are extracted.

The panel will mainly address the topic of the agreements that can be entered into in order to govern such relationships and determine rights and obligations of each party. Particular focus will be made on the judicial interpretation and approaches to these agreements as well as determine the overall process for decision-making in their construction.

THURSDAY 1500 – 1800

Terms and Conditions for submission of articles

1. Articles for inclusion in the newsletter should be sent to the Newsletter Editor.
2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
3. Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other

medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Managing Editor at editor@int-bar.org.

4. The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

COMMITTEE OFFICERS

Chair

Peter S G Leon
Webber Wentzel
10 Fricker Road
Illovo Boulevard, Johannesburg 2196, South Africa
Tel: +27 (11) 530 5240
Fax: +27 (11) 530 6240
peter.leon@webberwentzel.com

Senior Vice-Chair

Luis Carlos Rodrigo
Rodrigo, Elías & Medrano Abogados
Av San Felipe 758 Jesus Maria
Lima 11, Peru
Tel: +51 (1) 619 1912
Fax: +51 (1) 619 1919
lcrodrigop@estudiorodrigo.com

Vice-Chairs

Michael J Neumann
5301 Grand Lake Street,
Bellaire, 77401, Texas, USA
Tel: +1 713 201 3431
Fax: +1 713 218 6232
michael.mj.neumann@bhpbilliton.com

Ignacio J Randle
Estudio Randle
Carlos Pellegrini 1135, 2º, Buenos Aires
C1009ABW, Argentina
Tel: +54 (11) 5252 0700
Fax: +54 (11) 5252 0700
irandle@randlelegal.com

Secretary

Pedro Freitas
Veirana Advogados
Av Presidente Wilson, 231/23º - Centro
Rio de Janeiro, RJ 20030-021, Brazil
Tel: +55 (21) 3824 4752
Fax: +55 (21) 2262 4247
E-mail: pedro.freitas@veirano.com.br

Treasurer

Florencia Heredia
HOLT Abogados
Avenida Santa Fe. 1592
4th floor, Buenos Aires C1060ABO
Argentina
Tel: +54 (11) 5235 0200
Fax: +54 (11) 5235 0235
fheredia@holtlegal.com.ar

Newsletter Editors

Hubert André-Dumont
McGuireWoods LLP
Avenue Louise 250, bte 64
1050 Brussels, Belgium
Tel: +32 (0)2 629 4260
Fax: +32 (0)2 629 4222
handredumont@mcguirewoods.com

Michael Bourassa

Fasken Martineau DuMoulin LLP
Toronto Dominion Bank Tower
Toronto Dominion Centre
Box 20, Suite 4200, 66 Wellington St West
Toronto, Ontario M5K 1N6, Canada
Tel: +1 (416) 865 5455
Fax: +1 (416) 364 7813
mbourassa@fasken.com

Carlos Vilhena

Pinheiro Neto Advogados
SAFS Quadra 02, Bloco B
Ed. Via Office, 3º Andar
70070-600
Brasilia, Brazil
Tel: +55 (61) 3312 9402
Fax: +55 (61) 3312 9444
cvilhena@pn.com.br

Special Projects Officers

Barry Irwin
Clayton Utz
Levels 22-35, No 1 O'Connell Street
Sydney, NSW 2000, Australia
Tel: +61 (2) 9353 4143
Fax: +61 (2) 8227 6700
birwin@claytonutz.com

Rahmat Soemadipradja

Soemadipradja & Taher
Wisma GKBI Level 9
Jl Jenderal Sudirman No 28
Jakarta 10210, Indonesia
Tel: +62 (21) 574 0088
Fax: +62 (21) 574 0068
rahmat_s@soemath.com

Website Officers

Casper Herler
Hammarström Puhakka Partners
Bulevardi 1 A
Helsinki 00100, Finland
Tel: +358 (9) 47421
Fax: +358 (9) 474 2324
casper.herler@hpplaw.fi

Membership Officer

Daniel Altikes
Antofagasta Minerals SA
A Apoquindo 4001 Floor 18º Las Condes
Santiago 7550162, Chile
Tel: +56 (2) 798 7022
Fax: +56 (2) 798 7322
daltikes@aminerals.cl

LPD Administrator

Lisa Raynor, lisa.raynor@int-bar.org

Madrid

4-9 October 2009

International Bar Association Conference

Register before 17 July to receive early registration discount

What will Madrid 2009 offer?

Madrid is considered the major financial centre of the Iberian Peninsula. It combines the most modern infrastructure with an important cultural and artistic heritage; the legacy of centuries of fascinating history, while its diversity and culture perfectly reflect the ethos of the International Bar Association.

- The largest gathering of the international legal community in the world – a meeting place of more than 3,500 lawyers and legal professionals from around the world
- More than 150 working sessions covering all areas of practice relevant to international legal practitioners
- The opportunity to generate new business with many of the leading firms in the world's key cities
- Registration fee which entitles you to attend as many working sessions throughout the week as you wish
- Continuing legal education and continuing professional development
- A variety of social functions providing ample opportunity to network and see the city's key sights
- Integrated guest's programme
- Excursion and tours programme

Save the date:
4-9 October 2009

International Bar Association

10th Floor, 1 Stephen Street, London W1T 1AT
Tel: +44 (0)20 7691 6868 Fax: +44 (0)20 7691 6544

www.ibanet.org/conferences/Madrid2009

Official Corporate Supporters



LexisNexis®

MADRID
www.promomadrid.com



the global voice of
the legal profession

Mining policy in the EU – present situation and new initiatives

Casper Herler

Hammarström Puhakka Partners Attorneys Ltd, Helsinki

casper.herler@hplaw.fi

Introduction

Demand on raw materials in the EU has increased quite rapidly in the past few years. This fact is accompanied with a growing lack of raw material resources within the EU and also in some industrialising countries such as China and India. The EU is largely dependent on imports of many significant raw materials, and this dependence can be considered critical as regards, for example, high-tech metals. This has led to the recent situation where the cost of raw materials has heavily increased and, as a result, many industrial actors expressed their concern on the matter. Simultaneously and recently the EU has encountered actual risks in both energy and commodities supply, notably natural gas and timber imports from Russia, which threatened power and heat generation in the eastern Member States this winter as well as contributing to close downs of Finnish forest industry sites last year due to uncertain raw material supply.

One reason why the situation has been considered hard to deal with is that the EU lacks a comprehensive policy on mining and extractives. According to a study commissioned by the European Commission in 2004, the minerals policy in many EU Member States is a low key issue, and few Member States have specific, clearly defined and published mining policies. The situation is accelerated by a fairly advanced nature protection scheme practiced within the EU (covering some 12 per cent of EU territory). Also various land use regulations limit the possibility for green field mining. In addition to this, access to land has been considered a challenge for the non-energy extractives industry. Firstly, the newly-discovered mineral deposits might be in conflict with other means of land use. Secondly, in some Member States mining is dependent on landowner consent. Thirdly, the permit processes vary between the Member States and several permits from various authorities may be required before the actual extraction operations can be initiated. These facts combined make it more difficult to develop replacement mines for the exhausted deposits.

New EU initiatives

In order to improve the current situation resulting from the afore-mentioned facts, the Commission drafted a staff working document entitled 'Analysis of the competitiveness of the non-energy extractive industry in the EU' SEC(2007) 771, on 4 June 2007. This document is followed by a Communication from the Commission to the European Parliament and the Council entitled 'The raw materials initiative – meeting critical needs for growth and jobs in Europe' COM(2008) 699, dated 4 November 2008.

The communication aims to secure and improve access to raw materials for EU industry; its background is to a great extent driven by Vice-President Günther Verheugen, Commissioner for Enterprise and Industry.

Part of the background of the initiatives is a concern as to whether Europe's manufacturing industries will be able to obtain reliable and steady supplies of raw materials at competitive prices in the future. A lack of a strategic resource policy for the EU is also discussed. The Commission's report from 2007 aims to provide an objective overview of the non-energy extractive industry operating in the EU, together with its markets and its main competitors. It also identifies and assesses the factors which could potentially have the greatest impact on the competitiveness of the sector.

The 2007 report presents an overview of the non-energy extractive industry in Europe. It deals with and assesses the performance of three main mineral sub-sectors, namely construction minerals, industrial minerals and metallic minerals, construction minerals constituting the largest proportion of the industry's activity in the EU. Ownership of mineral rights and land use as well as control over extraction and approaches to forward planning for mineral supply are also studied. In addition, mineral production, uses, markets and international trade are discussed in the report.

One of the most central issues covered in the analysis is competitiveness in the raw materials industry. The report concentrates on analysing the factors considered to affect competitiveness. According to the stakeholders the following topics were the most important issues relating to the competitiveness of the non-energy extractive industry:

- exploration;
- investment and operating costs;
- the regulatory framework;
- access to resources within the EU;
- the availability of a skilled workforce;
- research and innovation;
- health and safety.

The report highlights that the availability and affordability of minerals are important considerations in the competitiveness of much of European industry. Concern regarding the sufficient supply of minerals in the future is expressed at many points within the analysis and it is concluded that more attention should be paid to the existing operations in order to make them more competitive and sustainable. Access to new resources should be made simpler by means of lightening the administrative burden. The demands for a cut down on the administrative burden on enterprises also links to more general policies recently addressed

within the Union, for example through the Action Programme for Reducing Administrative Burdens, COM(2007) 23.

A follow-up by the Commission, the raw materials initiative, also focuses on the means of securing reliable and undistorted access to raw materials. The initiative is built on the above discussed analysis SEC(2007) 771 and it aims at forming a first step towards a more coherent EU policy as well as a common approach in the international discussion on raw materials supply.

The Commission proposes various means of securing the supply of raw materials within the EU and reducing the high import dependency, for example strategies to enhance resource efficiency, as well as recycling and reuse. The recycling markets in particular should be developed and more information on the quality of recycled materials needs to be offered. One of the most important reasons behind the present situation is that, compared to, for example, Japan and the US, there is currently no integrated policy at the EU level to ensure sufficient access to raw materials at reasonable and undistorted prices.

Due to the above reasons the Commission proposes that the EU should agree on an integrated raw materials strategy based on the following three pillars:

- ensuring access to raw materials from international markets under the same conditions as other industrial competitors;
- fostering sustainable supply of raw materials from European sources by setting framework conditions within the EU;
- reducing the EU's consumption of primary raw materials and decreasing import dependence by increasing resource efficiency and promoting recycling.

In addition to this strategy, the Commission has drafted a preliminary list of critical raw materials for the EU. The list is supposed to be completed in cooperation with the Member States and stakeholders.

Under the first pillar, the Commission suggests that enhanced international cooperation should be promoted and raw materials diplomacy should be actively pursued with third partner continents and countries such as Africa, China, Russia, the US and Japan. It has also highlighted that in EU trade and regulatory policy access to primary and secondary (recycled scrap) raw materials should be the prior interest. Due to the fact that many important raw materials are located in developing countries, attention is also paid to EU development policy. The development policies are emphasised as a means to strengthening states (good governance), promoting a sound investment climate to help increase supply and promoting sustainable management of raw materials.

Under the second pillar, certain framework conditions are set out. Access to land is considered to be the most important requirement for the extractive industry, but at the same time the areas suitable for extraction are planned to be exploited for other kinds of land use. The Commission also considers that a prerequisite for the sustainable supply of raw materials is a wide-ranging knowledge base of mineral deposits within the EU. This knowledge still needs to be improved along with land use planning. Through promoting different research projects and involving national geological surveys in land use planning, the supply of raw materials should be enhanced. One of the most far reaching proposals in the initiative, which also underlines a new policy approach, relates to a reassessment of mining

possibilities within areas belonging to the Natura 2000-network, which is one of the main legal instruments of protecting biodiversity under the EU Habitats Directive and Bird Directive.

Under the third pillar, the Commission emphasises the importance of promoting resource efficiency, recycling and substitution and the increased use of renewable raw materials. These actions would help to ease the already critical dependence on primary raw materials and import. Measures taken under this pillar also include the increased use of secondary raw materials. In order to fully exploit these secondary raw materials, more attention should be paid to organising relevant recycling channels with a view to reducing the loss of valuable secondary raw materials. In addition, new legislative measures, such as full implementation and enforcement of relevant recycling legislation, are suggested for example to prevent illegal exportation. The recently adopted new EU Waste Framework Directive is not mentioned in this context in the initiative. The new directive, however, is likely to improve reuse and recycling possibilities of waste within the categories of by-products and end-of-waste. This is an issue which has been much demanded by industry and has also generated a significant amount of ECJ case law on the borderline issues on the waste/non-waste definitions.

The Commission proposes to launch a European raw material initiative and it will report to the Council in two years from the publication date (4 November 2008) on the implementation of the initiative.

Conclusions

The EU is heavily dependent on mineral imports, for example the domestic production of metallic minerals is limited to approximately three per cent of the world production. As many countries apply aggressive strategies in order to ensure their commodities supply the EU has also found it necessary to form a more active approach on safeguarding its interests. Despite the significant economic interest and the long term importance for the economy within the EU, the union currently lacks legal instruments to enforce these resource policies. The legal and policy tools to mitigate conflicts with other land use interests as well as access to land are inexistent. The resource perspective has not gained much attention within the Member State policies either and has been losing ground since the mid-20th century to other competing fields of policy, despite the fact that the foundations of the EU have been built on access to coal and steel through the European Coal and Steel Community (ECSC, 1951-2002).

An example of the fact that there is still some way from the new initiative to legal instruments affecting Member State resource policies and regulation can be found in the current Finnish mining act proposal (reviewed in the previous newsletter in February 2009). The recent EU openings and initiatives on raw materials have not formed any major guiding principle in the Finnish proposal compared with the attention given to environmental, land owner and indigenous people's interests. Due to the existing hard law rules on particular interests in sector legislation and the merely policy character of resource initiatives it has so far been difficult to achieve a coherent approach on mining regulation, something a future implementation of said initiative might change.

The European Directive 2006/21/EC on the management of waste from extractive industries – scope, requirements and implementation status

Gilles Carbonez

Associate

Hubert André-Dumont

Partner

McGuireWoods LLP, Brussels
handredumont@mcguirewoods.com

Major environmental incidents which occurred in Spain – (Aznalcóllar pyrite mine), where the Guadiamar river and Doñana natural park were contaminated by millions of cubic metres of heavy metals following a dam burst – or in Romania – (Baia Mare gold mine), where the Danube river was contaminated by a cyanide spill following a damburst of a tailings pond – increased public awareness of the environmental and safety hazards of mining activities and underlined the necessity for the EU authorities to specifically regulate the management of waste from the extractive industry. In recent years, Members of the European Parliament regularly expressed their concerns to the European Commission regarding the possible significant adverse environmental impact of mines, for example in Romania¹ (Rosa Montana gold mine), Greece² (gold mines in the region of Perama) or in Bulgaria³ (Chelopech copper and gold mine).

In this context, the European Parliament and the Council adopted, on 15 March 2006, the Directive 2006/21/EC on the management of waste from extractive industries⁴ (the Directive) under which Member States are required to take measures to prevent or reduce, as far as possible, any adverse effects on the environment, particularly water, air, soil, fauna and flora and landscape, and any resultant risks to human health, caused by the management of waste from the extractive industries.⁵

Scope of the Directive

The scope of the Directive covers the management of waste⁶ resulting directly from the prospecting, extraction, treatment and storage of mineral resources and the working of quarries.⁷ As a consequence, waste covered by this Directive no longer falls within the scope of Directive 1999/31/EC on the landfill of waste.⁸

Requirements of the Directive

The Directive imposes a general obligation on Member States to ensure (i) that extractive waste is managed without endangering human health, and without using processes or methods which

could harm the environment; and (ii) that operators take all necessary measures to achieve these outcomes.⁹

These requirements are supported by the following specific measures to be implemented by Member States:

- a **waste management plan** for the minimisation, treatment, recovery and disposal of extractive waste must be submitted by operators for approval by the competent authority of each Member State;¹⁰
- a **major-accident prevention policy**, including a safety management system and internal emergency plan, must be drawn up by the operator for those waste facilities classified as Category A under Annex III of the Directive, that is to say, facilities containing hazardous waste¹¹ or dangerous substances,¹² or where failure or incorrect operation of the facility could give rise to a major accident.¹³ The competent authority is also required to draw up, with public participation, an external emergency plan specifying the measures to be taken in the event of an accident;¹⁴
- no extractive industry waste facility may be allowed to operate without a **permit** issued by the competent authority. To obtain such a permit, the operator of the facility must comply with the relevant requirements under the Directive¹⁵. The public must be informed by Member States of applications for permits and be able to participate in the procedure and express comments and opinions;¹⁶
- Member States have to ensure that waste facilities are **managed by a competent person** and that **technical development** and **training of staff are provided**; moreover, when a new waste facility is built or an existing one modified, the competent authority must satisfy itself that (i) the facility is suitably located, (ii) its physical stability is ensured and soil and water pollution are prevented, (iii) it is monitored and inspected by competent persons, and (iv) arrangements are made for the closure of the facility, the rehabilitation of the land and the after-closure phase;¹⁷
- **closure and after-closure** procedures of a waste facility and monitoring are to be organised by Member States pursuant to the requirements of the Directive;¹⁸
- the competent authority must satisfy itself that waste facility operators have taken the measures necessary to prevent

water and soil contamination.¹⁹ Concerning cyanide in particular, the Directive requires that the concentration of 'weak acid dissociable cyanide' in tailings ponds is reduced to the lowest possible level using best available techniques (BATs).²⁰ In addition, specific maximum concentration limit values are set. The implementation of the Directive is supported by a Reference document on Best Available Techniques for Tailings and Waste-Rock Management in Mining Activities,²¹ which addresses, *inter alia*, the use of cyanide and its discharge into tailings ponds;

- waste facility operators must provide a **financial guarantee** before the beginning of waste processing operations so as to ensure that all obligations under the permit issued are complied with and that financial resources for the rehabilitation of the site are available;²²
- in accordance with Directive 2004/35/EC²³, operators of waste facilities are subject to a **presumed liability** in respect of **environmental damage** caused by their operation:²⁴ an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the costs of necessary preventive or remedial measures,²⁵ except if such operator proves that such damage is the result of certain events, exhaustively listed, beyond the operator's control.²⁶
- moreover, in general, the Member States are required to lay down rules on **penalties** for the infringement of provisions of national law adopted pursuant to this Directive.²⁷

Implementation status of the Directive

As of mid-March 2009, the Directive has been implemented in due time in all Member States except Austria, Cyprus, Estonia, France, Greece, Ireland, Spain and the United Kingdom.²⁸ However, the fact that national implementation measures were taken by Member States does not necessarily mean that these measures are either comprehensive or compliant. Indeed, for example, in July 2008 Bulgaria adopted a national legislation that only partially implemented the Directive and, according to the European Commission, further regulations still need to be adopted in order to achieve full implementation.²⁹

The deadline for its implementation by Member States was 1 May 2008.³⁰ So far the Commission has not made an evaluation of any such implementation.³¹ A first report of the Member States on the implementation of this Directive is

foreseen three years after its entry into force and will have to be transmitted no later than the end of February 2012 to the Commission.

Notes

- 1 See parliamentary question of 29 July 2004 (E-1803/04) of Mr Giovanni Pittella; parliamentary question of 14 January 2005 (E-0176/05) of Mr Erik Meijer; parliamentary question of 17 May 2005 (H-0389/05) of Ms Marie Isler Béguin; parliamentary question of 17 August 2006 of Ms Gyula Hegyi.
- 2 See parliamentary question of 9 January 2009 (E-0132/09) of Mr Dimitrios Papadimoulis.
- 3 See parliamentary question of 12 April 2006 (E-1771/06) and of 25 March 2008 (E-1838/08) of Ms Elly de Groen-Kouwenhoven.
- 4 Official Journal, L 102, 11 April 2006, pp15-34.
- 5 Article 1 of the Directive.
- 6 As defined in Article 1 (a) of Directive 75/442/EEC.
- 7 Article 2, § 1 of the Directive.
- 8 Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (*Official Journal*, L 182, 16 July 1999, pp1-19).
- 9 Article 4 of the Directive.
- 10 Article 5 of the Directive.
- 11 As defined under Directive 91/689/EEC.
- 12 As defined under Directive 67/548/EEC and Directive 1999/45/EC.
- 13 Article 9 of the Directive. Category B includes all other installations.
- 14 Article 6 of the Directive.
- 15 Article 7 of the Directive.
- 16 Article 8 of the Directive.
- 17 Article 11 of the Directive.
- 18 Article 12 of the Directive.
- 19 Article 13 of the Directive.
- 20 Article 13, 6 of the Directive.
- 21 European Integrated Pollution Prevention and Control (IPPC) Bureau, "Reference document on Best Available Techniques for Tailings and Waste-Rock Management in Mining Activities", 2004, available on www.eippcb.jrc.es.
- 22 Article 14 of the Directive.
- 23 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (*Official Journal* L 143, 30/04/2004 pp56-75).
- 24 Article 15 of the Directive.
- 25 Article 8, 1 of Directive 2004/35/CE.
- 26 See Article 8.3 and 8.4 of Directive 2004/35/CE.
- 27 Article 19 of the Directive.
- 28 See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72006L0021:EN:NOT>.
- 29 See parliamentary question with reference E-0132/09EN of Mr Dimitrios Papadimoulis to the Commission and the written answer given on 10 March 2009 by Mr Dimas on behalf of the Commission.
- 30 Article 25 of the Directive.
- 31 See parliamentary question with reference E-0132/09EN, *op cit*.

A New Mining Law for Indonesia

Rahmat SS Soemadipradja, SH, LLM

Soemadipradja & Taher, Jakarta

rahmat_s@soemath.com

A newly introduced statutory law, Law No 4 of 2009 regarding Mineral and Coal Mining (New Mining Law), brings significant changes to the business environment in the mining sector. The well known and respected long-term concession agreement, the 'Contract of Work', for which Indonesia has been famous in the global mining industry, will no longer be issued. Instead, Indonesia will adopt the more commonly found permit system. The Mining Law, however, has introduced new measures that allow better governance of the mining sector in Indonesia.

Simplified permitting system

Until the introduction of the New Mining Law, the preferred vehicle for foreign investment in mining is made through the Coal Contract of Work (*Perjanjian Kerjasama Pengusahaan Pertambangan Batubara*) in respect of coal mining, and through the Contract of Work (*Kontrak Karya*) in respect of minerals mining. These contracts are made between the Government of the Republic of Indonesia and an Indonesian company established by foreign investors (with or without an Indonesian investor), and covers all the phases of mining activities from general survey to production. The contracts initially cover a large exploration area, which must gradually be reduced through a relinquishment process.

These contracts were initially not available to Indonesian nationals and businesses. Indonesian nationals and companies could, however, be granted a mining authority, that is, a permit to carry out a specific phase of mining, known as a *Kuasa Pertambangan* (KP). There are three phases of mining: general survey, exploration and exploitation. A KP must be obtained for each phase. Thus there is a KP for general survey. The holder of this KP may apply for and be granted in turn a KP for exploration and for exploitation, if certain regulatory and technical requirements are satisfied.

The holder of an exploitation KP would need to hold separate KPs for transportation of the mining commodities, for processing and refining the mining commodities, and for marketing and selling the mining commodities. There are regulatory and technical requirements that must be satisfied in order to obtain each of these KPs.

Initially, KPs were issued by the Central Government. However, the political reforms in 1998 immediately caused the introduction of a Regional Governance Law, Law No 22 of 1999 (that has been replaced by Law No 32 of 2004 on Regional Government), which granted the authority to issue KPs to the regions. This has caused the regional governments to issue KPs and similar permits, without coordination with the Central Government.

This has also caused uncertainty over which government has the authority to grant a Coal Contract of Work or a Contract of Work: the regional government, the provincial government, or the Central Government?

The New Mining Law brings more clarity

The Coal Contract of Work and Contract of Work are no longer available to foreign investment. A simplified permitting system is made available to both foreign investment and to Indonesian nationals and companies. There will only be two kinds of permit (Izin Usaha Pertambangan, IUP): (i) a permit to carry out exploration; (ii) a permit to carry out production. A holder of an exploration permit is guaranteed to be given priority to be issued with a production permit for the relevant mining commodity in the designated area.

One permit is applicable for one of the five categories of mining commodities: (i) metallic minerals; (ii) non-metallic minerals; (iii) specific non-metallic minerals; (iv) rocks; and (v) coal.

The holder of a permit for one category of mining commodity has the right to be given a permit for another category of commodity if the latter is found in the same area.

A permit for metallic minerals and that for coal could be obtained only through an auction process, and a permit for non-metallic minerals and for rocks could be obtained through application, on a first-come-first-served basis. The auction requirement will be applicable to permits newly issued under the New Mining Law and would not be applicable to existing KPs and Contracts of Work.

Exploration permit

The authority to issue the exploration permit continues to be vested with the region, that is, the *Kabupaten* (regency) of which there are 399 or the *Kota* (municipality) of which there are 98 in Indonesia.

If the relevant area is located in two regions but within one *Propinsi* (province), the authority to issue the exploration permit is vested with the province (of which there are 33 in Indonesia); and if the area is located in two provinces, the exploration permit is issued by the Central Government, that is, the Minister of Energy and Mineral Resources.

Greater clarity is now achieved because the mapping of an area comes under the authority of the Central Government. The New Mining Law grants the Central Government the authority to map the mining areas within Indonesia. Once mapped, the Central Government will presumably notify the regional government, that an area has been mapped, and allow the regional government to decide whether it wishes to

issue exploration permits in respect of the area.

An exploration permit grants the holder the right to carry out general survey, exploration and feasibility activities.

The area and the period of time granted in respect of an exploration permit depends on the category of mining commodity (see Table 1). Note that the mining of radioactive minerals is subject to a specific law and is not the subject of the New Mining Law.

Production permit

A production permit grants the holder the right to carry out construction, exploitation, processing and refining, transportation and sale activities.

The area and the period of time granted in respect of a production permit depends on the category of mining commodity (see Table 2).

State reserve areas

The Central Government's authority to map mining areas within Indonesia also grants the Central Government the authority to designate specific areas as 'state reserve areas' (*Wilayah Pencadangan Negara, WPN*). These are areas that are reserved for the mining of specific mining commodities and are to be maintained as conservation areas.

These areas may be the subject of mineral or coal exploitation if certain requirements are satisfied and a certain procedure has been completed. For such a purpose a special permit is issued (*Izin Usaha Pertambangan Khusus, IUPK*). Priority is given to state owned enterprises and regional owned enterprises to be issued with the special permit. If such enterprises are not interested, then private companies (including those having foreign shareholders) may obtain the special permit through an auction process (see Table 3).

The holder of a production special permit is required to pay a bonus tax of 10 per cent of its net profit, commencing from production.

Foreign ownership

The New Mining Law seems to indicate that it would apply equal treatment to domestically owned companies and companies with foreign shareholders.

However, companies with foreign shareholders are required to divest an as yet unspecified percentage of shares to the Central Government, the regional government, state owned companies, regional government owned companies or national private enterprises after five years of commencing production.

Additional highlights of the New Mining Law

Companies will be required to meet certain administrative, technical, and environmental requirements, which will be specified in an implementing Government Regulation, which among other things are as outlined in Table 4.

Status of the existing KPs, Contracts of Work and Coal Contracts of Work

The New Mining Law confirms that existing Contracts of Work and Coal Contracts of Work will continue to be honoured and remain valid until their expiry. These contracts must, however, be adjusted to comply with the New Mining Law within one year. However, it is unclear how this adjustment process will be implemented.

The New Mining Law is silent on the status of existing KPs. However, the Director General of Mineral Coal and Geothermal has recently issued a Circular to the heads of the provincial and regional governments providing guidance relating to the status of the existing KPs. Under the Circular, all existing KPs will remain valid but must be converted into the permits under the New Mining Law within one year.

Implementing regulations

The New Mining Law has introduced fundamental changes and clarity to public governance of mining activities. There are 22 references in the New Mining Law to stipulations in greater detail by Government Regulation. The changes, however, will be better understood and be able to be implemented at the local level when the necessary implementing regulations have been introduced. It is expected that these regulations will be issued within the next few months.

NEW MINING LEGISLATION

Table 1

Mining commodity	Area (Hectares, minimum and maximum)	Period of time (Years, maximum)
Metallic minerals	Min: 5,000 Max: 100,000	8
Non-metallic minerals	Min: 500 Max: 25,000	3
Specific non-metallic minerals (lime stone, diamonds and precious stones)	Min: 500 Max: 25,000	7
Rocks	Min: 5 Max: 5,000	3
Coal	Min: 5,000 Max: 50,000	7

Table 2

Mining commodity	Minimum area (Hectares)	Period of time (Years, maximum plus possible maximum extensions)
Metallic minerals	25,000	20 (+ 2x 10)
Non-metallic minerals	5,000	10 (+ 2 x 5)
Specific non-metallic minerals	5,000	20 (+ 2x 10)
Rocks	1,000	5 (+ 2x 5)
Coal	15,000	20 (+ 2x 10)

Table 3

Special permit – exploration	Maximum area (Hectares)	Period of time (Years, maximum)
Metallic minerals	100,000	8
Coal	50,000	7

Special permit – production	Maximum area (Hectares)	Period of time (Years maximum plus possible maximum extensions)
Metallic minerals	25,000	20 (+ 2x 10)
Coal	50,000	20 (+ 2x 10)

Table 4

Requirements	Terms
Transfer of shares	The shares of a company that holds a permit or a special permit may only be transferred on the Indonesia Stock Exchange after certain exploration phase activities have been completed.
Domestic market obligation	The Central Government is given the authority to determine production levels for each mining commodity in a province based on the needs of that province.
Domestic processing and refinery	The holder of a permit or special permit for production is required to carry out processing and refining of the mining commodity in-country.
Sales price of coal	The Central Government may determine a minimum sale price of coal, using an index.
Post-mining	A permit or special permit holder must deliver a reclamation plan and post-mining plan when submitting an application for a production permit or a production special permit. Guarantee funds (deposit) are required.
Restriction on utilising an affiliated mining services company	A permit or special permit holder may not engage the service of an affiliated mining contractor company without the approval of the Minister.
Heavier penalties for illegal mining and illegal possession of mining commodities	Any person who carries out mining or possesses mining commodities without the proper permit may be subject to a penalty of imprisonment of a maximum of 10 years and fines of a maximum of Rp.10,000,000,000 (approximately US\$1,000,000).
Penalties for illegal issuance of permit	As a deterrence against the regional government issuing a permit without complying with the procedures and requirements of the New Mining Law, there is a penalty of a maximum of two years' imprisonment and a fine of a maximum of Rp.200,000,000.
Quiet enjoyment of mining	Any person who obstructs or disturbs the mining activities of a permit or a special permit holder may be subject to a penalty of a maximum one year's imprisonment and a fine of a maximum of Rp.100,000,000.
Dispute resolutions	Under the new Mining Law, any dispute arising out from the implementation of a permit or a special permit must be resolved by a domestic court and domestic arbitration, as further stipulated by regulations.

Current state of Ecuador's mining industry

Jorge Paz Durini

Pazhorowitz Abogados
jpaz@pazhorowitz.com
creeves@pazhorowitz.com

Charles Reeves

Introduction

Despite its rhetoric against foreign companies and sporadic battles with indigenous groups and NGOs opposed to large-scale mining, Ecuador's current government, led by President Rafael Correa, has pressed ahead with its plans to encourage 'responsible mining [in line] with the highest international standards [for the] environment and communities'.¹

The Ecuadorian Government estimates that the country's four major groups of concessions (presently held by Aurelian/Kinross, Corriente Resources, IMC and IAMGold) have 22 million ounces of gold reserves and 30 million ounces of silver.² It also projects copper reserves of 26.5 billion pounds.³

Restructuring of legal and business structure

Since taking office two years ago, Correa has taken various steps to restructure the legal and business framework governing the country's mining industry. In a controversial move, the Constituent Assembly issued a Mining Mandate in April 2008 that suspended all mining activities and revoked an overwhelming majority of the concessions that had been granted by previous governments.

After a year in which the entire industry was kept in limbo – forcing most mining companies to lay off all or significant parts of its workforce – the Assembly enacted the New Mining Law⁴ on 29 January 2009.

Ecuador's New Mining Law

Increased control guarantees that state receives majority of mining benefits

The New Mining Law increases governmental control over the industry and guarantees the State a majority of mining profits through: (1) royalties;⁵ (2) taxes (12 per cent VAT;⁶ 15 per cent employee profit-sharing obligation;⁷ 25 per cent income tax; and, 70 per cent windfall tax⁸ on extraordinary profits); (3) conservation patents;⁹ and, (4) state participation in mining projects through a new National Mining Company.

Creation of New National Mining Company

The law orders the creation of the National Mining Company (NMC), which will have priority rights to conduct mining activities in the 'special areas' that the government declares to have high mining development potential. The law allows

the NMC to act directly (as an operator) or indirectly (as a shareholder in projects operated by other concessionaires.)

Nature of mining rights: Government authorisation needed to transfer concessions

The New Mining Law stipulates that interests in mining concessions are no longer property rights, but rather personal rights. As a practical matter, this means that mining titles will be considered to be personal contracts that may not be encumbered or freely alienated. All concession transfers must be previously authorised by the Ministry of Mines and Petroleum. The Government has the power to deny the transfer or refuse to qualify the assignee.

Regularisation of surviving concessions

The concessions that were not revoked by the Mining Mandate have 120 days (from the enactment of the Regulations to the New Mining Law¹⁰) to comply with the new rules. This requires that they obtain updated permits and file new environmental impact studies.

New concessions

Mining companies may no longer petition for certain mining areas. The new law requires a bidding process to be carried out for all new mining concessions. At this time, however, it is unclear how the bidding process will be conducted or how a prospective concessionaire can request to participate in the process. The regulations must clarify this question.

Duration of new titles

The law determines that mining titles will be issued for a 25-year period. These titles may be renewed for another 25 years, but renewal will not be automatic. There is thus a risk that some mining operations will not have enough time to recoup their investments if renewal is denied.

The new framework contemplates four separate mining phases: (i) an initial four-year exploration phase; (ii) an advanced exploration phase that may not exceed four years; (iii) an economic evaluation phase – not to exceed two years; and (iv) an exploitation phase for the remaining time of the concession's term.

Model contracts

The law allows the Government to enter into service or extraction agreements with concessionaires based on model contracts to be drafted by the state. The government seeks to have these mining contracts 'guarantee a balance between the interest[s] of the country and the company'¹¹. Contract negotiations shall take place during the economic evaluation period. Mining authorities have indicated that they would prefer extraction deals.¹²

Minimum investment levels

While the new mining code does not explicitly set minimum annual investment amounts for each concession, it does make reference to the fact that minimum investments will be required. It is expected that the Regulations will establish them.

Environmental permits

The Ministry of the Environment will regulate and control environmental issues. Environmental licenses must be obtained before any mining activity is performed. Governmental approval of the respective environmental impact study is a prerequisite to the Ministry's issuance of an environmental license.

Dissemination and community participation process

The government will now be responsible for conducting the dissemination and community participation process at its own costs. The Regulations should define the requirements and procedure for the process.

Cancellation of concessions

Concessions may be cancelled on the following grounds: (i) non-payment of annual patents, royalties or applicable taxes; (ii) failure to comply with exploitation reporting requirements; (iii) failure to report production; (iv) initiation of operational phases without prior authorisation; (v) environmental damages; (vi) damage to cultural heritage sites; and (vii) human rights violations.

Concessionaires shall have 30 days to demonstrate that they have not breached the law or that they have remedied all breaches. In the latter case, the concessionaire must pay a US\$5,450 fine for each violation.

Concerns

The new law raises several concerns and issues that we expect the government will address when drafting the corresponding regulations.

Firstly, the law does not include a mechanism for defining base sales prices for calculating royalties and windfall taxes. The government has indicated that it will negotiate the base sales prices in the individual extraction contracts to be signed with the concessionaires. Given the current government's history of aggressive negotiations with the oil and construction industries, there is a risk that the government could use its 'take it or leave it' tactics to pressure mining companies into

paying higher royalty and windfall rates than those that are applied in other South American countries.

Secondly, regardless of individual negotiations, Ecuador's new tax and royalty package on mining activities will impose a higher overall burden than those in neighbouring Colombia and Peru.

Thirdly, now that the law no longer considers mining interests to be property rights, miners will not be able to mortgage or pledge their concessions in order to raise investment capital for the development of their projects. As a practical matter, this will hamper grassroots mining and small- and medium-sized exploration companies. Similarly, the new transfer restrictions (which the government has imposed in order to curb speculators) could effectively hinder optimal exploration and exploitation practices.

Fourthly, there is a risk that the concessionaire may not reach an agreement with the Government after it has made its exploration investments and carried out the respective feasibility studies. In that case, the concessionaire's title would automatically be cancelled and the government, and presumably the NMC, would have the right to retain (free of charge) all technical, environmental and economic studies that the concessionaire has conducted.

Lastly, the new law did not explicitly revoke the Mining Mandate. Thus there is some confusion as to the status of those concessions that fell within the grounds of the Mandate's cancellation provisions but for which the respective administrative cancellation procedure has not been conducted. Arguably, the Ministry of Mines and Petroleum could continue to issue cancellation and extinguishment notices pursuant to the terms of the Mandate. But this would conflict with the express terms of the new Mining Law, which establishes that a cancellation resolution is required in order to revoke a mining title. Again, the Regulations should address this issue. In our opinion, concessionaires should obtain a clear resolution from the mining authorities for each of their concessions indicating that the concessions are valid and authorising them to reinstate mining activities.

Conclusion

While it is still too early to judge the new law (and notwithstanding the possibility that the government and industry representatives may seek future changes to adapt its provisions to eventual realities), it is fair to conclude that President Correa and the Ministry of Mines and Petroleum have made real efforts to create conditions that will encourage responsible large-scale modern mining in Ecuador.¹³

Likewise, although there are still uncertainties regarding the industry's legal and economic framework, the new mining rules are generally in line with those of other South American countries. This should make the Ecuadorian mining industry more competitive and encourage foreign mining companies and investors (who have largely been waiting on the sidelines until the new mining law was issued) to take another look at the country.

Importantly, the new mining regulations together with outreach programmes by the Government and various mining companies, have lowered opposition to mining and improved the overall socio-political climate for the industry.

Finally, Ecuador's recent lifting of the mining ban on Aurelian/Kinross and Corriente signals that the Government (whose income from oil exports has been drastically reduced as a consequence of the global economic downturn) is willing to work with foreign companies in order to rapidly re-start mining activities and stem budgetary shortfalls. This, in addition to a clearer regulatory framework, is long-awaited good news for the industry.

Notes

- 1 Ecuador: Mining Present and Future (PowerPoint presentation given by Deputy Mining Minister Jose Serrano in Toronto, March 2009.)
- 2 *Ibid*
- 3 *Ibid*
- 4 Published in Official Register No. 517.
- 5 Royalties are to be fixed at a minimum of five per cent on actual sales prices of minerals. Royalties shall be paid twice a year in March and September.
- 6 Not refundable if the minerals are exported.
- 7 Workers are set to receive three per cent of profit-sharing payments while the remaining 12 per cent will go to the government to distribute for social welfare projects.
- 8 The law does not set the base price for windfall taxes.
- 9 Annual conservation patents are linked to the minimum basic salary (MBS) that the government periodically sets. In the exploration phase, the conservation patent is equivalent to 2.5 per cent of MBS for each mining hectare. It is five per cent of MBS in the advanced exploration and economic evaluation stages. Ten per cent of MBS will be due in the exploitation phase.
- 10 The Regulations must be issued by 30 April 2009.
- 11 *Ecuador: Mining Present and Future*, supra note 1.
- 12 Alonso Soto, *Ecuador Lifts Ban on Miners, Sees Them as Priority*, Reuters Article, 10 March 2009.
- 13 The new regulations have not addressed grassroots mining.



ROCKY MOUNTAIN MINERAL LAW
FOUNDATION

INTERNATIONAL
BAR ASSOCIATION



International Mining and Oil & Gas Law, Development, and Investment | **Derecho Internacional de los Recursos Naturales y Energía, Desarrollo e Inversiones**

co-sponsored with the
Section on Energy, Environment, Natural Resources and Infrastructure Law
International Bar Association

Hotel Intercontinental
April 20-22, 2009 • Buenos Aires, Argentina

Topics include:

- Resource Development: The Key Role of Law and Institutions
- Allocation of Profits to Communities from Mining and Oil and Gas Operations
- Recent Trends and New Developments in Latin American Mine Project Finance
 - Partnering with National Oil Companies
 - Joint Venture Agreements and Related Arrangements
 - Energy Dispute Resolution in Latin America

For further information, please contact:

Rocky Mountain Mineral Law Foundation

9191 Sheridan Blvd., Suite 203

Westminster, CO 80031 USA

(303) 321-8100 / Fax (303) 321-7657 or info@rmmlf.org



