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PRESS

BRAZILIAN MINING PROJECTS AND INDIGENOUS AND TRADITIONAL COMMUNITIES. THE CHALLENGE OF COEXISTENCE

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Several suits have been brought before Brazilian courts for challenging the environmental licensing of infrastructure projects on the grounds that such enterprises have not respected the right of indigenous and traditional communities'to their land and culture.

Most of the suits have focused on hydroelectric power plant projects of high social and environmental impact under development in the northern region of Brazil. Nonetheless, Brazilian mining projects have also been the target of claims filed by the Public Prosecuto's Office. One of the major concerns that has emerged in the Brazilian mining projects is the proper consultation of local communities, which can be potentially affected by the development and implementation of such projects.

Despite the scepticism and the fact that is rarely reported, it is important to highlight that the Brazilian legislation widely protects indigenous and traditional communities from potential impacts of mining activities. The purpose of this article is to present a comprehensive view of the impacts of the already existing Brazilian social protecting law on the development of mining projects aiming to empower investors for timely identifying the potential risks of having a mining project challenged before a Brazilian court and minimising such risks whenever possible.

Consultation to indigenous people and traditional communities

The Brazilian Constitution protects indigenous people's social organisation, practices, languages, beliefs and traditions, as well as their original right on lands they have traditionally occupied (section 231). Additionally, the Brazilian Constitution also protects the cultural heritage of indigenous and afro-descendent people, as well as other traditional communities (sections 215 and 216).

Federal Decree No 4,887/2003 states the procedures by means which an area shall be recognised and protected as a 'quilombo' (ie, an area occupied by a reminiscent community of descendents from slavery refugees) and, as such, be protected under the cultural heritage regulation.

In this context, the Brazilian Constitution sets forth that the National Congress shall approve the economical exploitation of natural resources situated in indigenous lands and that the indigenous people shall be consulted in this regard (paragraph 3, section 231 of the Brazilian Constitution). Also pursuant to the Brazilian Constitution, both the authorization and the communities hearing, which are some of the existing instruments to grant that the rights of indigenous people and traditional communities are preserved, shall take place before the start of prospection and exploitation of the mineral resources. Accordingly, the affected communities shall receive a part of the mineral exploitation's outcome. In this regard, currently a community's landowners receive equivalent to 50 per cent of the mining royalties – the CFEM.

It is important to bear in mind that the Brazilian Constitution recognises as 'indigenous' land where indigenous people live permanently, where they practice their activities and which preserves environmental resources that are indispensable for their welfare and their physical and cultural reproduction, according to their uses, behaviour and traditions.

The right of consultation of the indigenous people was emphasised and extended to any tribal peoples within the Brazilian territory after the ratification of the International Labor Organization Convention No 169 on Indigenous

and Tribal Convention (the 'ILO Convention'), by means of the Federal Decree No 5.051/2004.

The ILO Convention sets forth that governments should consult the people concerned, by means of appropriate procedures and in particular by means of their respective representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly (section 6 of the ILO Convention).

It is also important to note, however, that the ILO Convention did not establish a veto right for the people potentially affected by a project. The consultation shall be conducted with a view to attaining an agreement or consent to the proposed measures in good faith (but it does not entitle the consulted people with decision making powers).

Specifically regarding the exploitation of mineral resources, the ILO Convention is in line with the dispositions of the Brazilian Constitution. Accordingly, before undertaking or permitting any exploration of mineral resources within the indigenous people's lands, governments shall establish or maintain procedures through which they shall consult these people, with a view to ascertaining whether and to what degree their interests would be damaged. The ILO Convention also provides that the affected people shall, wherever possible, participate in the benefit of such activities, receiving fair compensation for any damages which they may sustain as a result of the conduction of the intervening activities (section 15 of ILO Convention).

Whenever relocation is considered necessary, it can only take place after the free and informed consent of people to be relocated. Where their consent cannot be obtained, the relocation can only be conducted by means of appropriate procedures established by domestic laws and regulations, providing the opportunity for effective representation of the people concerned (section 16 of ILO Convention).

The consultation of indigenous people and traditional communities often takes place during the licensing process of a potentially pollutant project that may impact such indigenous people and/or traditional communities. Once the entrepreneur files for the preliminary licence, which is the first of a three-phase licensing process, the environmental authority should be informed as to whether the project may affect indigenous people or traditional communities. In an affirmative case, the relevant protecting entity shall take part in every step of the environmental licensing process.

The National Indigenous Foundation (Fundação Nacional do Índio - FUNAI) is the entity responsible for the establishment and implementation of Brazilian indigenous rights, as set forth by the Brazilian Constitution. FUNAI was created by the Federal Law No 5,371 of 1967 and is an entity of private law, which has its own assets. Since its creation, FUNAI has developed a relevant role as the indigenous peoples' legal representative.

Palmares Cultural Foundation (Fundação Cultural Palmares) is the legal entity established for protecting the rights of the quilombo communities, which are composed of afro-descendents from slavery refugees. Created by the Federal Law No 7,688 of 1988, it promotes the preservation of the cultural, social and economic values that resulted from the African influence in the building of the Brazilian society. Furthermore, Palmares Cultural Foundation is well-known for its battle for an egalitarian and inclusive cultural policy, which aims to increase the appreciation of the afro-brazilian cultural and its artistic expressions as national patrimony.

Both FUNAI and Palmares Cultural Foundation are requested by the environmental authority to participate in the environmental licensing of activities that may affect the communities protected by them.

It worth pointing out that, when it comes down to infrastructure projects, specifically - mining projects - the entrepreneur shall pay special attention to the observation of the disposition of the Brazilian Constitution in relation to the mandatory hearing of indigenous people. As a rule, the prospection for mineral resources (for the execution of work related to the definition of the resources, the evaluation and determination of the mining project production feasibility) does not depend on the issuance of an environmental licence; in most cases a simpler authorisation from the environmental authority will suffice for the development of this preliminary phase of such a project.

Nonetheless, the Brazilian Constitution sets forth that the prospection of mineral resources in indigenous land shall be preceded by the authorisation of the Brazilian National Congress and a hearing in the community affected. It means that, regardless of being in an initial prospection phase, FUNAI shall be involved in the development of the mining project even before the environmental licensing process starts as they aim to insure that the proper consultation to the indigenous people potentially affected by the prospection of mineral resources is followed.

Regulatory perspective

Pursuant to the terms of the current Brazilian Constitution, all mineral resources within the domestic territory constitute ownership detached from that of soil and shall belong to the Brazilian Federal Government (the 'Federal Union').

The Mining Code (Decree Law No 227/1967, as amended), despite having been enacted years before the current Brazilian Constitution, was recognised by the government and judicial authorities as the main law within the legal framework for the performance of mining activities in Brazil. Pursuant to the latter, the exploration of mineral resources depends on the issuance of due environmental licensing process. Therefore, the mining exploration activity shall only be conducted once the due mining title (such as the mining concession, the mining licensing and the mine manifest),1 by means of the approval of the Ministry of Mines and Energy and/or of the National Department of Mineral Production (Departamento Nacional de Produção Mineral – 'DNPM'), as applicable, is granted and the respective environmental licensing is duly obtained.

The mining title will depend on the nature and usage of the mineral resource to be exploited, as well as on the capacity of the mining project. In this respect, exploitation of certain minerals, such as sand, crushed rock and some gravel for immediate use in civil construction to the extent that the project area belongs to the one who

intends to exploit it and it does not comprise areas greater than 50 hectares, are subject to the mining licensing. Projects aiming to exploit the same minerals but that comprise larger areas are subject to the mining concession, which is the most common type of mining title and applicable for other very common minerals such as iron ore, gold, cooper, rare earth, niobium, manganese, among others.

Despite the existing vast regulatory legislation about the conduction of mining activities and the respective environmental legislation regarding the licensing procedures, it is important to point out that with the exception of the legislation pursuant to the exploration and exploitation of mineral water, there is no joint ruling of the environmental and mining competent authorities ruling together on the process of obtaining both the project environmental licences.

Towards common ground

Much has been said, and many debates had, about the necessity (or not) of a new mining code and rules that are somehow more integrated in order to better govern the aforementioned cases, giving clearer, objective and straightforward rules for investors in order to allow them to effectively measure, in a timely fashion, the potential risks and costs and to avoid the (usual) delays in such infrastructure projects that could result in additional costs and even sometimes in the suspension and definitive interruption of the project.

Among the suggested and intended changes, the already presented bill of laws comprises the modernisation of the normative parameters of the current Brazilian mining legislation. In this sense, it is possible to see that efforts were made to adapt the socio-environmental and technological context to current economic needs, including matters such as sustainability.

Changes in regards the relationship between the companies that explore mineral assets and the surface-right owners who hold the ownership of the soil on which such activities are developed are also discussed in the recently presented bill of laws.2 In the context of the current regulation, the exploration companies owe the equivalent of 50 per cent of the amount paid as CFEM to surface-right owners, which would also be reverted to the indigenous and traditional communities whenever a mining project is feasible and will be implemented in their areas. Note, however, that the current wording of the bill of laws under discussion provides that this percentage would be adjusted to 20 per cent.3

Regardless of the foregoing, there is no further proposal towards a factual integration of the existing rules or the proposition of rules that could somehow minimise part of the common problems and questions that investors face when facing a licensing process of mining projects located at or nearby such areas. It is not rare that the risk pursuant to the existence of a quilombola or an indigenous community be only discovered at an advanced phase of the project.

For the reasons above, it is important that an effective due diligence process be carried out. It is also relevant that developers, stakeholders and civil society demand more public official information regarding the indigenous and traditional communities to be easier accessed by investors since the start-up phase of a mining project - certainly a considerable amount of money and time would be saved and more socio-environmental protection would be provided.

Notes

1 Before 1937, the surface and soil properties were not considered as a detached property from the subsoil and therefore, previous to the Mining Code of 1937, those would remain in the title of the landowner as a civil property: the 'Mine Manifest', as the title that represents domain over the actual mine (and not only the mining right). The mines under a Mine Manifest are real estate properties that may be sold, mortgaged, leased or transferred under the terms of the Brazilian Civil Code.

2 Such as the Bill of Law No 5,807 ('PL 5807') that was officially presented by President Dilma Rousseff and later modified by the Commission created to evaluate and propose a consolidated new bill of law pursuant to the New Mining Code.

3 Please note that despite the proposal for the reduction of the actual percentage, the bill of laws also comprise an enlargement of the actual taxable basis.

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