THE 1988 CONSTITUTION AND THE MINERAL SECTOR

Alfredo Ruy Barbosa

Associate Professor, Catholic
University of Rio de Janeiro (PUC-RJ)

INTRODUCTION

Today mining occupies an important place in the legal world, and mineral law is one of the branches of law most influenced by technical, political and social developments. The basic conditions of human existence depend more and more upon the use of mineral resources, which contribute the fuels necessary for generating heat, light and energy. Mines are also the source of materials for the manufacture of machinery, weapons, vehicles, work and scientific instruments, domestic utensils, *objets d'art* and decorative objects. Mining has become a basic industry in a great many countries.

Recognizing the importance of the rational utilization of their mineral riches, governments have legislated on this subject for many years, seeking to oversee the right of access to these riches, in order to preserve their mineral patrimony. Knowing that subsoil resources are not renewable, countries have been adopting restrictive legislation since the 1970s. At the same time, they have tried to remain sensitive to the need to foster mining within their territory.

In Brazil, the legal regime governing mineral rights has undergone profound transformations throughout the country's history. Each of these transformations has reflected the prevailing political and economic trends of the era. In order to understand the changes made by the 1988 Constitution, a brief review of the developments of several periods of Brazilian mineral legislation is necessary.

LEGAL REGIMES OF MINERAL EXPLOITATION

Ownership of mineral rights in Brazil has been governed by four different systems: (1) the regal system; (2) the public domain system; (3) the landed or accession system; and (4) the concession system.

THE REGAL SYSTEM

The regal system (*sistema regaliano*) was in effect during the colonial period. It can be found in the Portuguese compilation of legislation in force at the

beginning of the colonization of Brazil, the *Ordenações Manuelinas*. In this regime, the subsoil was regarded as property distinct from the soil and belonged to the Portuguese Crown. The Crown could either extract minerals directly or cede the rights of exploitation to others, who were obliged to pay the King compensation. This regime was based upon the idea that since private individuals had contributed nothing to the existence of the deposit, it belonged to the monarch, as did all other unknown property within the territorial limits.

THE PUBLIC DOMAIN SYSTEM

The public domain system (*sistema dominical*), which was in force during Brazil's Imperial period, was based upon the principle that mines belonged neither to the sovereign (the Emperor) nor to individuals, but were rather integral parts of the patrimony of the State. Even though exploitation depended upon an Imperial concession, mining objectives had to be attuned to the highest interests of the Nation. This concept was vigorously disputed by several jurists, who argued that the 1824 Constitution (the First Brazilian Constitution, promulgated soon after its Declaration of Independence) guaranteed the full right of ownership, which meant total dominion over all property existing on or under the soil. The opposing faction maintained that the Constitution was unclear on the extent of the right of ownership, *i.e.*, whether that right included only the surface, or the subsoil as well. The public domain system prevailed, however, preserving the rights of the State over mines.

THE LANDED OR ACCESSION SYSTEM

The landed or accession system (*sistema fundiário ou de acessão*) began with the 1891 Constitution (the first Republican Constitution) and remained in effect until 1934, when the First Republic ended. This system conferred ownership of accessory rights to land upon the owner of the principal rights. Under the landed system, the owner of the soil was also the owner of all minerals under the soil. This system derived from the concept of the absolute right of property, based upon the formula "*usque ad coelum et ad inferos*", an individualistic notion accepted in England and, with some adaptation, in the United States.

THE CONCESSION SYSTEM

The concession system (*sistema de concessão*), inaugurated in 1934, enshrined the principle that the State had dominion over all discovered minerals. Prior to the granting of a concession, mineral deposits were deemed to be *choses* ("*res*") and not property. Only after discovery, when they became the patrimony of the Nation, did they acquire the characteristic of property. Unknown mineral deposits were considered "*res nullius*" (things belonging to no one). Once discovered, exploitation of the deposit was conditioned upon the granting of a permit or concession by the State to the discoverer. The State acted as the representative of the collective public interest, setting out the rules and conditions for carrying out mining activities.

Brazilian law on mines developed, therefore, from the regal system of the Crown into the concession system, which is still in effect in the Brazil, but with the modifications made by the 1988 Constitution.

BRAZILIAN CONSTITUTIONS AND THE MINING SECTOR

From 1889, the year of the proclamation of the Republic, until the present day, Brazil has had six Constitutions, each of which has given a different configuration to mining legislation. The follwing is a summary of the principal guidelines set out by these Constitutions for the mining sector.

THE 1891 CONSTITUTION

In 1889, the Republic, along with a federal system, was installed. The first Republican Constitution, promulgated in 1891, adopted the accession system for the mining sector. The Constitution granted ownership of the subsoil to the owner of the soil. In 1915, the so-called "Calógeras Law" sought to mitigate the principle of accession, setting out certain cases where the mine could be exploited by third parties who did not own the land. This effort, however, was nullified by the advent of the Civil Code of 1916, which re-established the accession system in its entirety. Although it functioned successfully in the United States and in England, the accession system did not have the desired result in Brazil. In fact, the accession system represented a step backward for the Brazilian mining industry. Ever since the Industrial Revolution, the United States and England have been dedicated to the use of technology, which has resulted in the invention of various machines and tools. In Brazil, our Portuguese roots directed us more towards commercial and agricultural pursuits.

THE 1934 CONSTITUTION

The 1934 Constitution brought about a veritable revolution in the mining sector. It provided that mines and mineral deposits were property different from that of land, finally interring the accession system. In this period, the National Department of Mineral Production (DNPM) was founded. To this day, this agency is responsible for carrying out Brazilian mineral policies and legislation. The changes produced by the 1934 Constitution reflected the spirit prevailing after the 1930 Revolution. The agrarian economy, profoundly weakened, began to come under fire from the movement started by young Army officers (known as "the Lieutenants"), who dreamed of endowing the country with a more modern economic and social structure, albeit under an authoritarian regime. The first codified mining law dates from this period. The Code of Mines, adopted on July 10, 1934, was approved by the Federal Congress under the political leadership of Minister Juarez Tavora, one of the most active "lieutenants" of that movement.

The 1934 Charter eliminated the restrictions upon foreign investment in mineral exploitation introduced in 1926 by a constitutional reform. The 1934

Constitution also provided for the gradual nationalization of mines and deposits deemed essential to the economic or military defense of the country.

THE 1937 CONSTITUTION

The 1937 Charter accentuated nationalistic control over mineral resources, providing for the dominion (absolute ownership) of the Federal Government or the States over undiscovered mines and deposits located on government lands. Not only did it require that all companies engaged in mining activities be Brazilian, but it also required that the shareholders of mining companies be Brazilian citizens.

THE 1946 CONSTITUTION

The liberal ideas that inspired redemocratization of Brazil in the post-World War II period were also conducive to the reopening of Brazilian borders to foreign capital. The 1946 Constitution revoked all legislation restricting participation of foreigners as partners or shareholders in mining companies. The 1946 Charter left intact the principle of the separation of soil and subsoil property rights, but it granted the landowner a preferential right to exploit the mineral resources. The solution was clearly conciliatory since the landowner could not claim any compensation if he choose not to exercise his preferential right. In such cases, the government could grant third parties the right to explore deposits located on his land. This preferential right, however, also brought adverse consequences to Brazilian mining and was abolished by the Charter of 1967.

THE 1967 CONSTITUTION

The 1967 Constitution resulted from a military movement took power in Brazil in 1964. This Charter abolished the landowner's preferential right but granted him compensation equivalent to 10% of the tax imposed upon mineral exploitation (the Sole Tax on Minerals-IUM). The preference was replaced by *priority*, which became the predominant criterion for the concession of mineral rights. Priority is defined as precedence in filing for registration of the deposit at DNPM, the agency responsible for issuing mining permits. This represents the romantic side of mining: the deposit belongs to the first person to register. The priority system has one exception. In certain cases, the government offers the opportunity to the public through competitive bidding to exploit the deposit. In such cases, the time of filing is irrelevant. The winning bid will be that which, in the judgment of the government, best attends the interests of the mining sector.

In the interregnum between the Constitutions of 1946 and 1967, two important alterations of mining legislation occurred. The first created a government monopoly over the exploration, extraction, refining and transport of petroleum. The second extended this monopoly to nuclear minerals. One month after the promulgation of the 1967 Constitution, the Mining Code (Decree-Law 227 of February 28, 1967) was enacted, and is still in force today.

THE 1988 CONSTITUTION

Having traced the general lines of mineral legislation and its development in Brazil, this article will next examine the guidelines adopted for this sector by the Constitution promulgated on October 5, 1988.

(1) *Legislative Powers*. Brazil is a federal republic, made up of three types of entities — the Federal Government, the States and Counties. The new Constitution conferred exclusive powers to the Federal Government to legislate with respect to mineral resources, as well as to national systems of statistics, mapping and geology.[1] It granted concurrent powers to the Federal Government, States and Counties to register, monitor and supervise concessions of rights to explore and exploit hydraulic and mineral resources within their territories.[2] The Constitution also determined that the Federal Government, the States and Counties shall have concurrent powers to legislate on forests, hunting, fishing, fauna, preservation of nature, defense of the soil and natural resources, protection of the environment and pollution control.[3]

(2) *Royalties*. As a form of financial compensation for utilization of the mineral deposits,[4] States and Counties were granted the right to share in the proceeds of mineral exploitation within their boundaries by means of royalties, a concept utilized in a number of countries.

(3) *Mining on Indian Lands*. The Federal Congress has the power to authorize, on a case-by-case basis, the exploitation of mineral resources on Indian lands.[5]

(4) *Taxation*. In the area of taxation, the new Charter abolished the IUM, which had been imposed since 1965, and replaced it with the Tax on the Circulation of Merchandise and Rendering of Services (ICMS). The exclusive nature of this tax on mining operations was preserved, however, except for import and export duties.[6]

(5) *Form of Access to Minerals*. The concession system, whereby exploration for and extraction of mineral resources could only be carried out through authorization or concession by the Union, was preserved.[7]

(6) *Ownership of Minerals*. In this area the new Constitution was innovative, instituting the principle that the Federal Government owns all mineral deposits, whether being worked or not, as well as other mineral resources. The mining

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1 Const. of 1988, art. 22 (XII) and (XVIII).

2 *Id.*, art. 23 (XI).

3 *Id.*, art. 24 (VI).

4 *Id.*, art. 20 § 1.

5 *Id.*, art. 231 § 3.

6 *Id.*, art. 155 § 3.

7 *Id.*, art. 176 § 1.

concessionaire is, however, guaranteed ownership of the results of extraction. The principle of separate ownership of soil and subsoil was maintained.[8]

(7) *Participation of the Owner of the Land.* The owner of the soil is assured a share in the results of extraction.[9] This participation has been granted ever since the Constitution of 1967, when the landowners lost their preferential right granted by prior Constitutions. Its logic is based more upon a form of compensation for the natural disturbances caused by the mining than upon the extraction of the mineral itself, since the deposit belongs to the Federal Government. This participation has always been important in the resolution of conflicting interests between mining companies and the owner of the soil.

(8) *The Environment.* Recognizing the aggressive nature of mining activity, the Constitution set out several conditions for its conduct. One is that mining companies must submit prior environmental impact studies to secure permission to carry out any activity potentially causing environmental degradation. These studies must be published so that civic bodies and the public in general may contest performance of any activities harmful to the environment.[10] Two is restoration of the environment degraded by the mining, in accordance with technical solutions required by the appropriate governmental agency.[11] Modern legislation considers it impermissible that harm to the environment should continue to be a public burden; instead the burden must fall upon the mining company that has caused the harm.

(9) *Period for Exploration and Extraction.* Prior Constitutions had never dealt with this topic. The present one contains a provision that establishes that a period for exploration activities should be fixed by statute. Extraction, however, may continue for an indefinite period.[12]

(10) *Monopoly.* The new Constitution provides that the Federal Government has a monopoly on the following:

I — prospecting and exploitation of deposits of petroleum, natural gas and other fluid hydrocarbons;

II — refining of national or foreign petroleum;

III — importation or exportation of products and basic derivatives resulting from the activities provided for in the prior subparagraphs;

IV — maritime transportation of crude oil of national origin or of basic petroleum derivatives produced in the Country, as well as the pipeline transportation of crude oil, its derivatives and natural gas of whatever origin;

[8] *Id.*, art. 176 *caput.*

[9] *Id.*, art. 176 § 2.

[10] *Id.*, art. 225 § 1 (IV).

[11] *Id.*, art. 225 § 2.

[12] *Id.*, art. 176 § 3.

V — prospecting, mining, enrichment, reprocessing, industrialization or commerce in ores, nuclear minerals and their derivatives.[13]

Ever since the 1946 Constitution, the monopolization of certain industries or economic activities has been provided for in special laws. The new Constitution simply ratified monopolies already in force under the prior Constitution with respect to petroleum, natural gas and nuclear minerals.

(11) *Foreign Capital.* The restrictions on the investment in mining activity by foreign capital is one of the most debated innovations of the 1988 Constitution. This restriction, however, is not absolute, since a foreign investor can have a minority interest in a mining company. The Constitution created the concept of the *Brazilian company with domestic capital*, defining it as one "whose effective control is permanently held, either directly or indirectly, by individuals domiciled and resident in the Country or by entities of domestic public law, understanding by effective control of the company ownership of a majority of its voting capital and the exercise, both in fact and in law, of the decision-making power to manage its activities".[14] Mining activities (both exploration and extraction) were reserved to Brazilian companies with domestic capital, as defined in the Constitution.[15] This concept is also found in the legislation of other countries, which also restrict foreign investment in mining activity (See France, Canada, the United States, Australia, Mexico and others).

CONCLUSION

This has been an attempt to portray an overall panorama, albeit in summary form, of Brazilian mining legislation and its development through the present day. We can sum up by stating that the legislation today reflects a nationalistic trend, but not a xenophobic one; rather, it follows the experience gained by other countries with substantial mineral deposits. Mining in Brazil offers excellent business opportunities for investors from the entire world, taking into consideration that the country can today count upon a more stable legislative framework, and an economy that is recovering rapidly. The Brazilian subsoil is one of the richest in the world, and holds agreeable surprises for those who believe in its potential and in its varied possibilities.

[13] *Id.*, 177.

[14] *Id.*, 171 (II).

[15] *Id.*, art. 176 § 1.