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Whatever the reason, China's status as the world's largest consumer of soybean oil and the volume of Argentine exports of this product (around US\$1.5 billion in 2009) prompted a positive reaction by the Argentine Government to the Chinese concerns: in October 2010 both governments agreed to exchange information on anti-dumping cases before their formal initiation, so as to allow comments from the targeted country. As a result, the Chinese Government lifted restrictions imposed on Argentine soybean oil. In the months following said agreement,

the Argentine Government has adopted a more cautious attitude towards the opening of anti-dumping investigations involving China.

However, the main conflict – China's market economy status recognition – remains apparently unresolved. Considering that China's Protocol of Accession to the WTO allows other country members to consider China as a NME until the end of 2016, it is probable that in the near future the Argentinean Government will persist in its current position.

## Current mineral investment conditions in Argentina

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**A**rgentina has great geological potential and a very attractive regulatory framework that provides mining companies with important incentives, such as a 30-year fiscal stability period and several tax exemptions.

However, in 2010, the Argentine mining industry faced certain issues prompted by regulatory trends in order to address social, environmental, and economic concerns towards mining. Despite that situation, last year the mining activity continued developing significantly, and mining exports increased by more than 43 per cent.<sup>1</sup>

The purpose of this article is to: describe some of the regulatory approaches recently adopted by both the federal and provincial governments regarding mining; as well as discussing issues and courts' decisions in connection with said approaches. Within that context, this article intends to provide useful information to investors and companies on the current mineral investment situation in Argentina.

### Analysis

In 2010, the national and many provincial governments enacted legislation that had an impact on mining, such as land use laws 'sterilising' some lands from mining activity and stringent environmental regulations forbidding the mining activity under certain circumstances.<sup>2</sup>

Although these regulations have generated some issues for mineral development, the mining industry continued growing steadily in the country. Indeed, pursuant to the Mining Secretariat, the gross value of mining production increased by 63.8 per cent between 2008 and 2010.<sup>3</sup> Further, last year major mining projects such as Pascua-Lama in San Juan and Potasio Río Colorado in Mendoza started with their construction phases.

Despite this news, mineral investors shall focus their view on these new laws, and also on the court precedents derived from them, since they provide for new regulatory conditions for mining in Argentina. Below, there is a revision of some of the most recent developments in regulations and case law applicable to mining.

### *Environmental protection: regulation of glaciers*

In August 2010, the National Congress passed Law No 26,639 on Minimum Standards for Glaciers Protection (the 'Glaciers Law'). Among other things, the Glaciers Law provides for definitions of 'glaciers' and 'peri-glacier environments', prohibiting in such areas the development of any activities that may negatively affect their natural condition, including but not limited to mining exploration and exploitation activities. Regulatory details are yet to be seen in order to determine the actual impact of this legislation.

In the province of San Juan, the Glaciers Law was challenged by many participants engaged in the mining business (such as the Mining Labor Union, mining companies, and mining companies associations) on grounds that it would not only affect existing mining operations within the territory of San Juan, but that it would also threaten the development of new projects, in clear contradiction with several constitutional rights (ie, the right to work and to perform lawful industrial activities).<sup>4</sup> Plaintiffs also argued that the Glaciers Law created uncertainty regarding the powers of provinces to regulate all matters in connection with the exploitation of their mineral resources.

In this sense, in *AOMA et al v National Government* (2 November 2010),<sup>5</sup> the Federal Court No 1 of San Juan issued a precautionary measure in order to prevent the application of several sections of the Glaciers Law within said province. The Court found that, although the provinces had delegated to the National Congress the specific power to enact minimum standards legislation for environmental protection,<sup>6</sup> such power could not alter the faculty of provinces to regulate the exploitation of natural resources located in their territories. In this context, the court stated that this Law generated uncertainty to mining companies, since it would prima facie violate their rights to exercise a lawful industrial activity.

Furthermore, in similar decisions, the same court issued precautionary measures precluding the application of the Glaciers Law within the boundaries of the Veladero<sup>7</sup> and the Pascua-Lama<sup>8</sup> mining projects, both of them located in the province of San Juan.

It is important to note that before the National Congress passed the Glaciers Law, some provinces had already enacted provincial legislation towards the protection of glaciers located inside their geographic boundaries. In this sense, the Legislative Branch of San Juan passed Law No 8,144.<sup>9</sup> Moreover, the province of Jujuy enacted Law No 5,647.<sup>10</sup> Said laws, among other things, state that glaciers belong to Jujuy and San Juan and that, therefore, these provinces have the power to provide for the environmental protection of said glaciers.<sup>11</sup>

### *Land use regulations*

Two provinces, Santa Cruz and Buenos Aires, have recently enacted land use laws which ban the development of mining within

certain areas of their territories (mainly, areas designated for other priority uses and urbanised settings). What follows represents a brief description of these laws.

#### SANTA CRUZ

The province of Santa Cruz passed Law No 3,105,<sup>12</sup> which creates a special mining interest area (the 'mining interest area') within which holders of mineral rights can carry out mining activities, with some restrictions.

The Law prohibits the development of mining activities outside the mining interest area. It also forbids activities within the mining interest area on surfaces that are:

- less than ten kilometres away from the limits of urban zones;
- less than 4,000 meters away from the coastlines of lakes;
- preservation areas that have been declared cultural heritage; or
- areas below sea level (the 'excluded areas').

Likewise, pursuant to this Law, no new mining rights will be granted outside the mining interest area or in excluded areas. In addition, those mining rights that were in the process of being granted, but had not yet been approved when the Law entered into force, will be considered void.

#### BUENOS AIRES

The province of Buenos Aires enacted Law No 14,126<sup>13</sup> which creates a protected landscape of provincial interest (the 'protected zone') in the area known as *la poligonal*, located in the district of Tandil and shaped by the intersection of National Route 226 and Provincial Routes 74 and 30.

Pursuant to this Law, the Provincial Mining Authority cannot grant any new mining concessions within the protected zone. Also, owners of mining concessions already granted must agree on restructuring plans with the Provincial Mining Authority within one year after the Law's regulations.

### *Case law: taxation to companies with the fiscal stability benefit*

Under the Mining Investment Law No 24,196 (the 'Mining Investment Law'), mining companies are encouraged to submit feasibility studies to the National Mining Secretariat for approval, and the government is precluded for 30 years from raising the

tax burden on companies who obtain these approvals. The 30-year term is triggered when the beneficiary submits the feasibility study before the National Mining Secretariat.

As suggested above, the Argentinean Government cannot apply new taxes to mining companies that have obtained fiscal stability certificates.<sup>14</sup> However, in 2007 the Commerce Secretariat and the Mining Secretariat issued Resolutions No 288 and 130 (the 'Resolutions'), requiring the National Customs Office to collect export duties from mining companies that had already obtained the fiscal stability benefit before the Ministry of Economy issued Resolution No 11/02, pursuant to which the minerals export would pay duties of between five to ten per cent of the FOB value of the exported minerals.

Several companies that were already enjoying the Tec Stability (after the filing of a given feasibility study) have challenged the validity of such Resolutions. In *Andacollo Gold v National Government* (8 June 2010), the Federal Court No 1 of the province of Neuquén rejected the federal government's intention to levy federal export taxes against mining projects protected by the fiscal stability regime created by the Mining Investment Law. This decision found that the export taxes created by the Resolutions were inapplicable to the plaintiff's project because said Resolutions were passed after the company had obtained the fiscal stability benefit created by the Mining Investment Law.

The *Andacollo* decision was in line with the spirit of the Supreme Court's leading case *Cerro Vanguardia v DGI*.<sup>15</sup> The *Cerro Vanguardia* case arose when the Federal Tax Authority ('AFIP') tried to impose the equalisation tax (*Impuesto de Igualación*)<sup>16</sup> on dividends distributed by Cerro Vanguardia, even though the company had already obtained the fiscal stability benefit. The Supreme Court decided that the application of the equalisation tax on shareholders' dividends was not compatible with the fiscal stability benefit created by the Mining Investment Law, since the effect of the equalisation tax was similar to an increase in the nominal rate of income tax.<sup>17</sup>

### *Sustainable development policies: towards economic development*

The fundamental premise of sustainable mining is the idea that development should be '...compatible with both current and intergenerational social and environmental

well-being'.<sup>18</sup> Mineral policies throughout the world are embracing the concept of 'sustainable development', which is based on principles of economic growth, environmental health, social justice, and a high quality of life for current and future generations.<sup>19</sup>

In Argentina, the last few years have seen regulatory approaches in order to balance mineral development with economic objectives and environmental matters. As part of this effort, some provinces have enacted legislation creating mining trusts funded with contributions from mining companies, for the purpose of financing infrastructure that will benefit the mining projects' areas of influence.

In this sense, by means of Law No 7,957,<sup>20</sup> the province of San Juan created the 'Gualcamayo Project Infrastructure Trust Fund' in order to finance the construction of infrastructure for local communities affected by the Gualcamayo project. Pursuant to this Law:

- the trust is funded with revenues from the Gualcamayo project;
  - the trust holders are both the provincial government and Minas Argentinas SA (owner of the Gualcamayo project); and
  - the trustee may be any financial entity authorised by the Argentine Central Bank.
- Furthermore, as recent as in December 2010, the Legislative Branch of San Juan enacted Law No 8,185,<sup>21</sup> which created the 'Casposo Project Infrastructure Trust Fund' (funded with revenues from the Casposo project), for the purpose of financing infrastructure works towards the sustainable development of local communities affected by said project.

### **Conclusion**

Despite the fact that the federal and the provincial governments have enacted regulations that could somehow restrict mining activities both directly and indirectly, in this author's view this trend has not had a significant negative impact in the industry, which has continued to gradually grow.

As a consequence, we understand that these regulatory approaches from the authorities should not represent a risk that might discourage new or existing mineral investments in the country. This is supported by the fact that so far courts' decisions have generally been favourable to the developers' interests and for the stability of the existing conditions that govern mining in Argentina.

## Notes

- 1 Pursuant to the independent agency Investigaciones Económicas Sectoriales ('IES'), in 2010 mining exports reached an amount of US\$4,520,000. For more information on this matter, see: [www.ies.net.ar](http://www.ies.net.ar).
- 2 These laws are in line with existing provincial regulations banning mining activity, such as laws prohibiting the use of cyanide in these kinds of developments in the provinces of Chubut, Río Negro, Mendoza, San Luis, Córdoba, Mendoza, Tucumán and La Pampa.
- 3 According to information recently released by the Argentine Mining Secretariat, in 2010 mining production reached an amount of AR\$27,286,000 (an historical record in production in Argentina). For more information, see the Mining Secretariat's website at: [www.mineria.gov.ar/index.htm](http://www.mineria.gov.ar/index.htm).
- 4 See the Argentine Constitution, section 14.
- 5 File No 33,339.
- 6 See the Argentine Constitution, section 41.
- 7 Federal Court No 1 (San Juan), *Minera Argentina Gold SA v National Government* (File No 20,899).
- 8 Court on Federal Matters No 1 (San Juan), *Barrick Exploraciones Argentina et al v National Government* (File No 20,900).
- 9 Published in the *Provincial Official Gazette* on 15 July 2010.
- 10 Published in the *Provincial Official Gazette* on 14 July 2010.
- 11 It shall be pointed out that these laws were part of an effort from several mining provinces to protect their environment, which began with a meeting that took place on 6 July 2010 between governors and the Secretary of Mining, named the *Declaración de las Provincias Cordilleranas sobre Normativa en Materia Ambiental*.
- 12 Published in the *Provincial Official Gazette* on 22 December 2009.
- 13 Published in the *Provincial Official Gazette* on 15 April 2010.
- 14 This would constitute a violation to the Mining Investment Law provisions.
- 15 Corte Suprema de Justicia [CSJN], 30 June 2009, *Cerro Vanguardia v DGI, La Ley* [LL] (2009 C 3378 XLII) (Arg).
- 16 In 1998, Congress passed Law 25,063, which amended the Profit Tax Law creating a withholding tax on dividends of shareholders under certain circumstances. See Law No 25,063, *National Official Gazette*, 30 December 1998, available at: [www.infoleg.gov.ar/infolegInternet/anexos/55000-59999/55190/norma.htm](http://www.infoleg.gov.ar/infolegInternet/anexos/55000-59999/55190/norma.htm) (last accessed 10 February 2011).
- 17 The following decisions are in line with the *Andacollo* and the *Vanguardia* cases: Court in Federal Matters No 2 of Rosario, 12 March 2008, *Mineral Alumbrera Ltd v Dirección Nacional de Aduanas*; and Federal Court of Appeals of Salta, 13 August 2009, *Mineral del Altiplano SA v National Government*.
- 18 See MMSD (Minerals and Sustainable Development), *Breaking New Ground* (London, 2002), available at: [www.wbcsd.org/DocRoot/ev8jEjvTiMYd4mJhGGHQ/finalmmsdreport.pdf](http://www.wbcsd.org/DocRoot/ev8jEjvTiMYd4mJhGGHQ/finalmmsdreport.pdf) (last accessed 21 January 2010).
- 19 Jonathan Lash, 'Toward a sustainable future', *Natural Resources and Environment* (1997), p 2.
- 20 Published in the *Provincial Official Gazette* on 3 March 2009.
- 21 Published in the *Provincial Official Gazette* on 5 January 2011.

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## Infrastructure financing in Brazil – recent legal developments

On 30 December 2010, the Brazilian President enacted Provisional Measure (*Medida Provisória*) No 517 ('MP 517' or 'MP').

In Brazil, a *Medida Provisória* is a normative instrument with legal force used by the president in case of relevance and urgency. An MP is effective as from its enactment. Congress approval is not required for the effectiveness of an MP, but shall be obtained within 60 days.

MP 517 provides important legal developments for Brazil to the extent it aims at incentivising long-term financing. Brazil still depends heavily on long-term investments, mainly in infrastructure, which analysts say is where the bottleneck is (energy, telecommunications, ports and airports, railways and sanitation). Long-term financing in Brazil

has traditionally only been provided to Brazilian companies by the Brazilian Development Bank (*Banco Nacional de Desenvolvimento Econômico e Social* – 'BNDES'), while domestic banks have limited their activities to short-term and medium-term loans. Needless to say, however, that meeting this financial demand is essential for the country's 193 million people to effectively enjoy the benefits of long-lasting economic prosperity.

A study recently carried out by the BNDES supports that Brazil demands investments of over R\$1 trillion until 2013. In order to reach that amount, no doubt the involvement of private investors is essential. Capital markets are still resilient, presenting a primary fund raising of 2.5 per cent of the GDP, concentrated on short and medium-term debt and indexed by short-term interest rates.