Inter-American Law

JOHN ROONEY*

For 1998, the report of the Inter-American Law Committee focuses on the related topics of power generation and natural resources. Rather than opt for a series of short reports for a number of countries, we have provided more in-depth coverage of the subject matter for three countries in the region: Brazil, Peru, and Venezuela. In addition, the structure and content of the country reports differ among themselves. The report on Brazil, prepared by Isabel Franco of the New York office of the law firm Demarest & Alemeida, discusses recent developments in the privatization of the petroluem and power generating sectors in that country. The Peruvian report, prepared by Rosa Bueno of the Lima law firm Estudio Rosselló, discusses the procedure for the granting of a mining concession in that country. The report on Venezuela, prepared by Neher and Luis Rengifo of the Caracas law firm Neher, von Seigmund, Rengifo & Diquez, summarizes the legislative and administrative history of the mining sector in Venezuela. In each case, the coverage of the topic takes into account recent legislative and regulatory developments.

I. Recent Developments in Brazil in The Petroleum and Power Generation Sectors

ISABEL FRANCO, ESQ.**

A. GENERAL OVERVIEW

Most of the energy generated in Brazil comes from two primary sources: petroleum and hydroelectricity. Petroleum meets most of the demand for fuels and hydroelectricity accounts for ninety-five percent of the total electricity consumed in Brazil. Although not widely used in the present, coal, nuclear and especially gas generation are expected to increase significantly in the coming ten years.

The use of hydroelectricity as the major source for electrical power generation is easily understandable because Brazil has the most extensive river system of any country in the

*John Rooney is an attorney with Rice Fowler in Coral Gables, Florida, an Adjunct Professor at University of Miami School of Law, and Co-chair of the Inter-American Law Committee.

**Isabel Franco, Esq., who authored the Section on Brazil, is with Demarest & Alameida, New York, New York.

world. The system flows through the rough topography of the Brazilian Central Plateau and creates the largest hydraulic capacity on the globe. Brazilian electric energy consumption is expected to grow at a rate of 3,500 megawatts per year.

The use of other sources for electrical generation, such as natural gas and coal, are presently restricted due to the lack of substantial reserves. The construction of a gas pipeline from Bolivia to Brazil, a new project made possible in part by private investments, may change this scenario. With the construction of this pipeline, the share of natural gas in Brazil's total energy consumption is expected to increase from 2.5 percent to 11.3 percent.

Following the example of electricity consumption, oil consumption in Brazil is also growing significantly at a rate of 3.5 percent a year. Since the country is not self-sufficient in oil production, it is a priority to minimize the costs and the external dependence caused by such consumption increase.

The production of oil in Brazil has increased from 167,000 barrels in 1970 to more than one million barrels by the end of 1997. Brazilian oil reserves are 16.9 billion barrels, mostly located offshore. Petrobrás, the state-owned company that until recently held a monopoly on the prospecting and exploration of oil, has developed unique expertise in offshore drilling through vast investment and discovery of new oil fields. The Brazilian production target for the year 2000 is 1.5 million barrels a day, which will only furnish seventy-five percent of the entire Brazilian consumption.

Thus, the search for new and alternative sources of energy and the correction of the inadequate infrastructure are crucial to the development of the nation.

B. Legal Aspects

1. *Oil Production and Fuel Generation*

In the past few years, the Brazilian economy has gone through a total transformation. What was considered one of the most closed economies in the world has opened its doors to foreign investments and thus exposed its huge market to all sorts of imported goods. Brazil has also launched a successful privatization process. The opening of the oil market became inevitable.

The opening of the oil industry to private enterprise brought about the admission of new participants to the Brazilian oil market, thus challenging Petrobrás with new competition. Petrobrás has not been privatized and until very recently there was no expectation that it would be. However, the recent turmoil in Brazil's economy may change that orientation. As a result of the imminent opening of the Brazilian oil market, Petrobrás' market position is bound to shift significantly.

This new direction in the oil industry has been established through a Constitutional Amendment and the Oil Act. Through this legal framework, activities related to exploration, marketing, refining, and transportation of oil, its by-products and natural gas are still monitored by the Federal Government. Nevertheless, these activities may be contracted out to either state or private enterprises, subject to the applicable legal provisions.

The Oil Act provides a framework within which interested companies can contract for some or all of the activities formerly conducted solely by Petrobrás. The Act created two public agencies responsible for the direction, regulation and inspection of the Brazilian oil industry: the National Council for Power Policy, *Conselho Nacional de Política Energética* (CNPE), and the National Oil Agency, *Agéncia Nacional do Petróleo* (ANP). It was also determined that the Federal Government would keep a controlling stake in Petrobrás by

owning and holding no less than fifty percent plus one share of Petrobrás' voting stock. Petrobrás' subsidiaries may associate with other enterprises, in a majority or a minority position. Petrobrás and its subsidiaries are allowed to form consortia with national or foreign enterprises, whether or not as leader, with a view to expanding its activities, collecting technologies and improving investments in the oil industry.

ANP is a governmental agency having the status of a public corporation answerable to the Ministry of Mining and Energy. ANP's main functions are the regulation, contracting out and inspection of the economic activities pertinent to the oil industry, playing a key role in the opening process of the oil industry to the private enterprise. The ANP is responsible for preparing each invitation to bid, which must contain the area's object of concession (blocks), the requirements to be met by competitors and the compensation payable to the federal government as a remuneration for concession. The necessary regulations have been enacted to start the bidding process to grant private companies concessions to exploit new areas. The public bid is in progress and will determine the first twenty new oil areas that will structure the concession model. The ANP's aim is to sign the first concession agreements before April 1999.

2. *Electricity Generation*

The current structure of the Brazilian electrical sector is undergoing several changes in order to absorb huge amounts of private investment. The objective of this restructuring process is to modernize the regulatory legislation adjunctively by expanding the generating facilities and transmission systems. To cope with this modernization process, the Ministry of Mining and Energy created the National Agency for Electrical Energy, *Agência Nacional de Energia Elétrica* (ANEEL) in 1996. Shortly before that, another important federal regulation had been enacted, which defined the role of the Independent Power Producer (IPP).

According to such regulations, the IPP may be a corporate entity or an association of enterprises as in a consortium, which has the concession or authorization to produce electric energy at its own account and risk. The IPP aims at selling all or part (self-generating) of the electric energy that it produces although co-generation is also permitted. In order to install electric energy generation facilities, the IPP is required to submit its project to ANEEL in order to qualify.

The public service of electrical energy is regulated by the Brazilian Constitution, which permits its provision either directly by the state, or under concession or permit granted by the state. In 1995, a law came into force regulating the concession and the conditions for rendering these services. The rules for granting and extending the concessions for public services were also established. Following these rules, the proceedings for the extension of the concessions were defined.

Additionally, through the creation of the National System of Transmission of Electrical Energy, *Sistema Nacional de Transmissão de Energia Elétrica* (SINTREL), the access to the national grid was completely opened, promoting competition in the field of electrical energy generation.

Future purchase and sales of energy has also been regulated. According to these rules, the electric companies will have to join the Wholesale Market of Electrical Energy, *Mercado Atacadista de Energia Elétrica* (MAE), to comply with agreements that have already been executed by most of the generating and distribution companies. The market will be offering energy at a certain spot price calculated upon the parameters determined by offer and demand.

3. *Conclusion*

The potential for energy generation in Brazil is enormous. Until recently, this potential was mostly unexplored.

With new legislation, the situation is expected to change. Reforms in the sector will not only improve the existing structure, but will also establish a consistent cash flow for the Federal Government. By opening the oil sector, the government is expected to receive investments of up to 8.5 billion dollars by 2001. In terms of electricity generation, the scenario is even better. For the time being, more than twelve state-owned companies in the electrical sector have been privatized, apportioning an earning to Federal and State Governments of sixteen billion dollars. Federal and State Governments also predict that the whole process of privatization may escalate to more than thirty billion dollars in this sector alone.

II. Procedure for Obtaining Mining Concessions in Peru

Rosa Bueno*

The administration of mining concessions in Peru is becoming more and more reliable, thanks to the legal advances represented by the reform of the mining concession procedure and the Law of the Mining Register. In effect, the present regime for granting concessions in Peru was approved in 1991 through the modification of the General Mining Law, having been approved between 1992 and 1994, the principal regulations of the same. This law has divided the territory of Peru into quadrants of 100 hectacres each, established in UTM coordinates, which through a significantly simplified administrative procedure, permits one to obtain a mining concession from the State in approximately six months.

A single company or person can request as many of the concessions as he desires, provided that each of the concessions does not exceed 1,000 hectacres. Foreign companies are also permitted to apply for and receive concessions within fifty kilometers of the international border, subject to authorization by the Executive Branch. Concessions are not subject to time limits, but continue for as long as the owner complies with the obligations contemplated in the law.

A. The State in Mining Activity

The current Political Constitution of Peru restricts the business activities of the state. Consequently, many productive units and mining projects that pertained to the state have been transferred to the private sector in what is considered to be an irreversible process of privatization.

The Ministry of Energy and Mines, headed by a Minister, is the principal regulator of mining activity. The Vice-Minister of Mines is responsible for all matters in the mining subsector. Also, the principal function of General Direction of Mining is to supervise mining activities, and the General Direction of Environmental Matters establishes the environmental norms. Each reports to the Vice-Minister.

The Public Mining Registry is an autonomous entity that is supervised by the Ministry of Energy and Mines. The Registry performs three principal functions: (1) its Office of Mining Concessions handles the requests for concessions in the entire country, for which it has a

*Rosa Bueno, who authored the Section on Peru, is with Estudio Rosselló, in Lima, Perú

Technical Area and a Legal Area; (2) its Office of Mining Register maintains the inventory of concessions in the Country; and (3) its Registry Area undertakes the registration of the concessions, companies, powers-of-attorney, encumbrances, and related matters. The entire procedure of the mining concession takes place before the Public Mining Registry.

B. Summary of the Procedure

The first step toward obtaining a mining concession is the presentation of the application, which requires completion of forms provided by the authorities. Two payments must be attached to the application, one in the amount of two dollars (U.S.) for each hectacre requested, which must also be paid annually, and the second in an amount equivalent to eighty-three dollars (U.S.), as a processing fee that is paid only once. Each application can include up to 1,000 hectacres, being based in quadrants previously established of 100 hectacres each. The applicant identifies the area of interest in UTM coordinates, indicating the geographic zone to which it pertains and the information on the company.

In theory, the mining authority has seven working days in which to review the filed documentation and to verify that the area requested is available, after which the notices that must be published in the newspapers are delivered to the interested party. The mining authority generates a technical report and a legal report as part of the approval process.

The notices must be published by the interested party in El Peruano, official gazette of Peru, and in a newspaper of the locality within a period of thirty working days, plus sixty days to deliver the publications. If no local newspaper exists, the notice should be taken to the Registry Office of the Public Mining Registry for posting.

Thirty days after the presentation of the publications previously mentioned, a second final technical and legal report is issued. If the procedure reveals no basis for denying the concession, (e.g., oppositions or encroachments) a resolution is issued approving the title of the mining concession. This is a synthesis of the simplest procedure for the titling of a concession.

C. Analysis of the Procedure

1. *Surface Land*

Permission from the owners of the surface land is not necessary in order to request and obtain a mining concession. Natural resources are the state's property, and only the state can grant rights to take advantage of those resources, including mineral deposits. Once the concession has been obtained, its owner must negotiate with the owner of the surface the terms for consent to mining activity on his property. These agreements might consist of purchases of land or the constitution of servitudes, usufructs, or any other modality by which the owner authorizes the mining activity within its territory.

2. *Urban Zones*

Mining rights will not be granted within cities. In the areas surrounding cities, concessions are granted for five- or ten-year renewable periods, the only case in which the concession is not indefinite. Concessions close to cities require the authorization of the municipality.

3. *First Technical Report—Requirements*

The first technical report establishes whether the UTM coordinates that have been assigned comply with the requirements of the system of quadrants established in the law. This system

of quadrants indicates that the request must include between one and ten quadrants that have at least one common side, in such a manner that they form, in the criteria of the interested party, a rectangle or closed polygon. Failure to comply with this fundamental technical requirement by indicating more than ten quadrants or indicating or omitting a line that, for example, is formed of a perpendicular line and not squared, constitutes grounds to declare the application inadmissible, based on noncompliance with the system of quadrants.

4. *The Cases of Occupied Areas*

The second aspect that the technical report determines is whether the area, in accordance with the information that the Public Mining Registry counts, is totally or partially occupied by other proprietary mineral rights, or if it is concerned with a free area. If the area is free, the request will continue to be processed without delay and will probably be titled in a very short period of time.

Not all requests are formulated in a free area, enabling the land to be partially superplaced to third parties, in which case there are two possibilities:

- That the superposition occurs with respect to another request, in which case the older request will prevail over the more recent, ordering to this last one the reduction in those quadrants that superimpose on the prior request; or
- That the superposition occurs with respect to a right granted prior to the current law. In this case, the processing of the most recent request continues, with the proviso to respect the area of the prior rights. This situation is communicated to the owner of the right prior to the current law, so that he is aware that a request has been presented on the area of his right, even when it is not going to affect it.

If the superposition of the other priority right is complete, the cancellation of the most recent request will be ordered, on the basis of the technical and legal reports that support such a resolution.

5. *Division of the Area*

Upon the request of the interested party, and in certain other cases that we will consider, the fractioning or division of the request is appropriate. The fractioning is produced obligatorily when the totality of the quadrants that conform to the presented request is interrupted in some aspect of its continuity by another request that is discovered. In this case, the fractioning of the request is ordered, two independent files are formed, one for each one of the areas in which the request is fractioned, and, as a consequence, the procedure for each of these areas in independent form is continued. A request for voluntary fractioning of the concession is possible, but only after approval—a request for fractioning is not admissible while an application for a mining concession is still in process.

6. *First Legal Report*

In addition to the opinion that the Technical Area of the Office of Mining Concessions makes, with the possible results that we explored in the previous paragraphs, the first legal opinion or report must be issued and it must evaluate certain relevant matters.

7. *Opportunity of Presentation*

The first of these matters is to determine if the request is presented at the appropriate time. It is impossible to request a concession for the area of another extinguished concession, before notice of free denouncability is published. While one request is in process, the

same area cannot be requested by another, not even to be taken into account in the future. In the case of extinguished concessions, these should first be published, which is done three times each year. A request submitted before such publication would be premature and inadmissible.

8. *Right of Efficacy*

The second aspect that the Report of the Legal Area of the Office of Mining Concessions must evaluate is if the Right of Efficacy (*Derecho de Vigencia*), which is two dollars (U.S.) per hectacre, has been paid correctly. Less than full payment of the Right of Efficacy is considered an obligation not satisfied, and as a result, the request will be rejected. This would provide grounds for the posterior publication of the quadrants requested as redenunciables as of the month in which the inadequate payment occurs.

9. *Common Power-of-Attorney*

When two or more persons agree to present a request jointly, the Legal Report of the Office of Mining Concessions has to evaluate whether they have indicated a common attorney-in-fact, because the mining authority will only interact with the attorney. Only the common representative can present recourses; for example, only a common representative can change domicile. The concession applicants can only communicate the change of a common attorney-in-fact through a writing signed by all of them.

10. *Companies*

The registration data of juridical persons is an additional element that the first legal report must evaluate, since a company must be recorded in the Public Mining Registry before it may formulate a mining request. An exception exists that a request can be formulated by a company that is not recorded in the Registry, on the condition that the registration of the company has been requested. Proof that an application has been presented, in the form of a copy of the ticket of presentation of the application of registration of the company, is adequate to meet the exception. If the applying company is not registered or if it does not finally obtain its registration, the mining authority will reject the mining request.

11. *Simultaneous Requests*

Two or more requests on the same area could be presented simultaneously. In this case, an auction of the superplaced quadrants, including all or part of those specified in the request presented, will be conducted. The area of conflict is adjudicated to the applicant who offers and pays the greater sum.

12. *Publications*

Once these first obstacles have been overcome, assuming no incurable flaw of the kinds that have been referred to, the interested party is notified of the status of the land so that it can effect the publications. These publications must occur within a period of thirty days, with an additional sixty days for the publication to be delivered. After the presentation of the application, this is the only step that depends on the applicant. Failure to complete this step conduces abandonment of the procedure.

13. *Second Technical and Legal Report*

Once the publications are delivered, the file passes to a new technical and legal evaluation that must confirm: (i) that all which has been indicated previously has been completed in a

satisfactory manner; (ii) that no other mining right on the area has appeared which must be respected; and (iii) that the periods and procedures have been complied with in the eventuality that some curative requirement has been noticed, given that the problems may be cured by the interested party.

14. *Approval of the Concession*

Based on the reports, a resolution is issued that approves the title of the concession, which cannot be granted until thirty days after the last publication. With the title of approved concession, the Public Mining Registry will make a publication. This publication is of great importance, because as of the day of publication, those who wish to question the title of concession have fifteen days to interpose the administrative recourse of revision before The Mining Council.

On the other hand, as of this publication, the period begins to run for the concession to obtain the quality of firm title, which is three months. A concession with firm title cannot be contested administratively, nor by judicial power. There is no existing authority with power to review or revoke the concession. It is only subject to the owner's compliance with the obligations contemplated in the mining law.

15. *Registration of the Concession*

Once the procedure is concluded, the concession is recorded. Recording is a voluntary act that is only necessary when the owner wishes to enter into a contract with respect to the concession. If the title remains firm after the passage of the publication period, and its owner has not entered into nor plans to enter into any contract regarding the mining right, there is no necessity to record it.

D. Mining Registry List

The Mining Registry List that is under the charge of the Public Mining Registry serves an important function in the administration of mining rights in Peru by not only carrying information to the authority and to interested parties, but also providing juridical security to the economic participants. The Mining Registry List is comprised of the concessions processed under the current legislation, the subject matter of the present report requested in the UTM coordinates, and through special norms, the ancient mining rights, some of up to 150 years in force. This system of listing mining rights permits companies to obtain from the Public Mining Registry official plans of a determined zone, or of the entire country if it is so requested, in a specific scale with all of the current mining rights indicated in the selected area. These plans can be superimposed on topographic maps of Peru that are designed with the same system of UTM coordinates, with which information valuable to the exploration of mineralized areas can be obtained. In addition, by entering into a contract with the Public Mining Registry, a company can have the Registry install in its office the listing plans of Peru, which the Registry updates periodically.

III. Legal Framework for Mining in Venezuela

Jorge A. Neher and Luis Rengifo Röh*

In this report, we discuss the general legal framework for the granting of concessions and contracts for exploration and development of minerals in Venezuela. Laws and regu-

*Jorge A. Neher and Luis Rengifo Röh, who authored the Section on Venezuela, are with Neher von Siegmund Rengifo & Diquez, in Caracas, Venezuela.

lations in addition to those discussed below, such as environmental and tax laws, may also be relevant to exploration and development, but are not within the scope of this report.

Mining activities in Venezuela are regulated by the Mining Law, which was last amended in 1945. However, numerous Presidential Decrees have been issued by various administrations since the date of the last amendment, with the effect of creating a type of parallel regulatory framework that has left the Mining Law inoperative in several important respects.

The provisions of the Mining Law must be interpreted in the context of new regulations issued in related fields, such as the management of territory, the environmental impact of mining activities, and others pertaining to specific minerals, such as the nationalization of iron ore mining and the transfer of administrative powers over non-metallic minerals from the national government to the states. In this report, we have identified what we believe to be the most relevant aspects of Venezuela's mining legislation, both from the standpoint of the state, which is usually the sovereign owner of all mineral resources, and that of industry, which requires competitive, stable and clear rules to engage a high risk, long-term venture like mining exploration and development. We have also determined the extent to which those elements are present in our current mining legislation and how effectively they are regulated.

A. General Mining Regulations

1. *Exploration and Staking*

The Mining Law establishes a general regime of free exploration and staking. Through the provisions of the law, the Federal Government will award mining concessions to those that have validly filed a staked claim before a local real estate registry office. The law permits the Federal Government to create reserved areas for exploration and mining of certain minerals. Exploration and development of minerals in reserved areas can only be undertaken through an exploration and subsequent exploitation concession, both of which are granted at the discretion of the Federal Government.

Decree No. 580 reserved to the federal government on an exclusive basis the exploration and mining of iron ore in the entire country.[1,2,3,] ··· Existing concessions of foreign and domestic companies were terminated and their assets expropriated. Since the effective date for the Decree, the exploration for and mining of iron ore has been carried out exclusively by the *Corporación Venezolana de Guayana* (CVG), an autonomous corporation of the Federal Government, and its commercial corporate subsidiary, *CVG-Ferrominera del Orinoco, C.A.* Under the present regime, no private investor may be awarded a concession for exploration for or mining of iron ore in Venezuela.

Decree No. 2039 declared the entire country reserved with respect to all its minerals.[2] By force of this decree, the reserve regime provided for in the Mining Law as an extraordinary procedure was converted into the ordinary or general regime. The decree eliminated free exploration and staking, and since its effective date, all concessions, including those for exploration, have been and continue to be awarded at the discretion of the federal government.

1. Paragraph Decree No. 580, O.G., Dec. 16, 1974.
2. Decree No. 2039, O.G., Feb. 15, 1977.

The Resolution of the Ministry of Energy and Mines (MEM) No. 115 provides the following interpretation of the Mining Law:

> Article 92 of the Mining Law permits applicants for concessions to offer "special advantages for the nation", more favorable than those provided for in the law, in order to encourage the Government to grant a concession in a reserved area Examples of "special advantages" are the payment of higher taxes, bringing the concession into production sooner than required by law, providing technological assistance to the country, and establishing or contributing to local schools and medical centers. Resolution No. 115 set forth the "minimum" special advantages to be offered by applicants for concessions, which the Ministry would consider for the purposes of granting mining concessions. Resolution No. 115 requires as special advantages the "offering" for payment of surface taxes of from 30 to 120 times those provided for in the Mining Law, as well as twice to six times the exploitation royalties provided for in the Law, and others as well. Resolution No. 115 is the last and current of a series of MEM resolutions since 1977 regulating "minimum" special advantages.[3]

MEM Resolution No. 115 also eliminated the regime of prospection permits that had been established in Ministry resolutions issued after Decree No. 2039. The prospection permit allowed preliminary exploration in reserved areas. The following interpretation was provided regarding mining regulations of the States:

> By way of the Organic Law of Decentralization, Delimitation and Transfer of Public Powers,[4] the States were permitted to take over all administrative and regulatory powers regarding non-metallic minerals, save for coal and precious stones, located within their borders.[5] A state was required to pass a law regulating the activities, and most states have now passed the necessary legislation.

2. *Institutional Framework*

The MEM awards mining concessions, collects mining taxes, supervises and controls mining activities, and executes master government policies for the mining sector. The Office For Geological and Mining Services, Servigeomin, a division of MEM, is responsible for the gathering of all general geological information in the country, the issuing of regional geological maps, the promotion and development of general geological studies, the creation and provision to the public of general cartographic, mineral and geological information and related functions.

Regional Development Corporations are autonomous institutes of the Federal Government in charge of fostering the development of each of the administrative regions of the country. Most of these corporations have been granted mining rights, by way of mining concessions or by assignment of mining rights in order to develop exploration activities or simply to contract such development with private investors. These corporations have no regulatory or administrative powers, save when expressly delegated by the government.

The Ministry of Environment and Renewable Natural Resources (MARNR) is in charge of the application of environmental regulations, including the issuance of authorizations related to mining activities. MARNR issues authorizations for the occupation of territory through its Environmental Management and Planning Direction (POA) and the National

3. Resolution of the Ministry of Energy and Mines No. 115, O.G., Apr. 16, 1990 [hereinafter Resolution No. 115].

4. Organic Law of Decentralization, Delimitation and Transfer of Public Powers, O.G., Dec. 28, 1989.

5. *Id.* arts. 2, 11.

Forestry Service (Seforven), depending on the location of the exploration or mining activities. The authorizations for actually affecting renewable natural resources for exploration and mining are granted by the regional offices of the MARNR.

3. *Procedures for Granting of Mining Rights*

The Mining Law provides six different procedures for granting mining rights: (i) concessions derived from staked claims (no longer in force); (ii) concessions in areas of extinguished concessions; (iii) concessions for exploration and subsequent exploitation in reserved areas; (iv) concessions of exploitation on reserved areas; (v) concessions in reserved areas handed back by holders of exploration and subsequent exploitation concessions; and (vi) mining contracts for non-metallic minerals. Note that non-metallic minerals, except for coal and precious stones, located in private lands can be mined freely by the owner of the land.

All such procedures require an application to the MEM. All are subject to the availability of the applied area and the running of the opposition period following publication of the application without claims from third parties, or in case of claims, the dismissal of the same by the MEM. On the average, such procedures do not take more than four months.

In addition to the above requirements, Resolution of the Ministry of Energy and Mines No. 115 provides that the technical and economic capability of the applicant and a description of an exploration program are applied to the evidence.[6] Related mining regulations of the States are provided as follows:

> Each State that has assumed jurisdiction over the mining of non-metallic minerals has its own set of regulations. Some states provide for concessions similar to those of the Mining Law and for licenses, in cases of mineral deposits located in private lands. Others provide for mining by the municipalities and the State and others provide for concessions granted through public auctions.

4. *Mining Titles*

The Mining Law provides for two types of mining titles: concessions and, in the case of non-metallic minerals, mining contracts. The law allows the Republic, through the federal government and as the owner of all mineral resources, to conduct exploration and mining activities directly without a concession. Any individual or body corporate, private or state-owned and distinct from the Republic, can only engage in exploration and mining activities through a concession granted by the Republic, the latter being the owner of the resources.

By way of Decrees No. 1046, 1047 and 1048, the federal government instructed the MEM to exercise direct exploration and mining activities for gold in several areas of the Bolivar State, some of them for the organization of small miners, only for alluvial deposits, and others for their development by the CVG, through its mining subsidiary CVG-Minerven, C.A., for hard rock deposits.[7] Pursuant to these decrees, some of these areas were assigned to CVG, and CVG granted mining contracts to individuals and corporations for exploration and mining in such areas. With these decrees, the government allowed for the first time, through the formula of direct exercise of mining activities, that individuals and entities other than the Republic were awarded mining rights by different means than a concession.

6. Resolution No. 115, *supra* note 3.

7. Decrees No. 1046–48, O.G., Mar. 31, 1986.

Decree No. 1409 instructed the MEM to exercise the direct exploration and mining activities of alluvial and hard rock gold throughout the Guayana Region (the States of Bolivar and Amazonas and part of the State of Delta Amacuro).[8] It had further instructions to assign such direct exploration and mining rights to the CVG. The CVG, in turn, was empowered to award mining contracts to individuals and corporations for exploration and mining within specific areas. Notwithstanding the foregoing, Decree No. 1409 expressly clarified that: (i) concessions granted by the MEM before the enactment of Decree No. 1409, that is, before January 1991, remained valid and enforceable in Venezuela; and (ii) the powers for granting concessions for gold and diamonds in Guayana, which had not been already granted, but for which applications had already been filed and published before Decree No. 1409 came into force, remained within the MEM. Decree No. 1409, as well as its predecessors, Decrees Nos. 1046, 1047 and 1048, were enacted on weak legal grounds for the following reasons, inter alia: (a) the direct exploitation regime, as provided for in the Mining Law, could not support the assignment of mining rights to a corporation or any other entity, even state-owned, other than the Republic, through the MEM, and much less if it included powers to contract with individuals and corporations; (b) it allowed individuals and corporations to acquire mining rights through contracts and not through concessions, which is the only legally regulated way to acquire mining rights in Venezuela; and (c) it granted mining rights to CVG for an unlimited time and for a massive area, all in contravention of the basic principles of the Mining Law, which states that mining rights can only be granted for a limited period of time and for a limited area.

Decree No. 1409 also created a great deal of conflict between the CVG and the MEM, mainly in the areas of applications for concessions that fell within the powers of CVG in that no preferences were given to the original applicants before the MEM. In view of this, two different legal proceedings were initiated: (a) Decree No. 1409 was challenged on grounds of illegality before the Political and Administrative Chamber of the Venezuelan Supreme Court of Justice, basically on the grounds described in the precedent paragraph; and (b) CVG filed a legal action against the MEM for alleged violations of Decree No. 1409, by granting new concessions in the Guayana region over the areas of lapsed concessions, which the MEM interpreted did not fall within the scope of Decree No. 1409, after it came into force.

Finally, CVG and MEM agreed to amendments to Decree No. 1409, resulting in Decree No. 3281 recognizing the authority of the MEM (a) to grant mining rights over lapsed concessions; (b) to grant vein rights over areas where alluvial rights were granted or vice-versa; and clarifying that the authority of CVG to contract the exercise of mining rights for gold and diamonds in the Guayana Region was granted to it by the government according to the direct exploitation regime.[9] Notwithstanding the foregoing, Decree No. 3281 created other areas of potential conflict between CVG and MEM.

The legal basis for the challenge to Decree No. 1409 would appear to be equally applicable to Decree No. 3281, but the parties to the dispute have not shown an interest in pursuing litigation. Generally, the Supreme Court will not continue to review a case in which the respective parties have not shown further interest or have expressly renounced their right of action.

8. Decree No. 1409, O.G., Jan. 3, 1991.
9. Decree No. 3281, O.G., June 26, 1996.

On July 15, 1996, the government enacted Decree No. 1384, which repealed Decree No. 3281.[10] Decree No. 1384 eliminated the assignment of mining rights to CVG, thus revoking the authority of CVG to grant mining contracts for the exploration, development and exploitation of gold, diamonds and bauxite over the Guayana region. As a result of the decree: (i) as of July 15, 1996, the CVG has not been authorized to grant new contracts, authorizations or permits based in Decree No. 3281; (ii) all contracts, authorizations and permits granted by the CVG as of July 15, 1996, under Decrees Nos. 1409 and 3281 remain valid, enforceable and binding according to the terms upon which such contracts were granted; and (iii) all applications for mining contracts submitted before the CVG under Decrees Nos. 1409 and 3281 were grandfathered by the MEM in the form of applications for mining concessions, pursuant to the procedure established in Decree No. 1384.

As mentioned above, Decrees Nos. 1409 and 3281 were enacted on doubtful legal grounds. However, the Decrees were valid and remained in full force and effect until amended or repealed, respectively. Furthermore, the mining contracts for gold and diamonds granted by CVG to individuals and corporations under the decrees survived the decrees, are currently valid and binding documents, and are in full force and effect pursuant to their terms and conditions.

But even if the decrees had been declared illegal and nullified by the Supreme Court of Justice, the mining contracts entered into between CVG and individuals or corporations while these decrees were in force would not have been affected unless the Court had expressly ruled in its discretion that such decision had retroactive effects. In similar cases, the Supreme Court, when nullifying an act of the government, has usually declared the effects of such annulment to apply solely in the future and has rarely ruled that any of its decisions are retroactive.

The theoretical possibility still exists that an individual with the necessary legal standing could apply for judicial review of Decrees Nos. 1409 and 3281, seeking their annulment with retroactive effects and having all CVG mining contracts annulled, even if the decrees are no longer in force. We think that such an applicant's case would be a difficult one and that the Supreme Court would be reluctant to hear it.

In any case, the retroactive annulment of any and all effects of the aforementioned decrees would entail the termination of more than 500 mining contracts granted by CVG between 1991 and 1994 and executed in good faith by the parties. This would be both politically and economically untenable for the government, due to its liability. We think that the government would pursue every effort to prevent this from happening. Even if the retroactive annulment occurred, the government would seek a formula for granting concessions to the former contract holders with a fast-track procedure.

Finally, the general opinion, both of the MEM and industry, and even of Congress, is that all CVG mining contracts should be converted into mining concessions under the terms of the Mining Law. However, the conversion would require the passage of a new law.

Decree No. 1263 is similar to Decree No. 1409, but for bauxite.[11] The MEM was instructed to assign to CVG the direct exploitation rights to bauxite in the entire Guayana Region. This decree was also repealed by Decree No. 1384.

Decree No. 1045 reserved the exploitation of coal in all the territory of the Republic.[12] Resolution of the Ministry of Energy and Mines No. 451 instructed the MEM to assign

10. Decree No. 1384, O.G., July 15, 1996.
11. Decree No. 1263, O.G., Nov. 16, 1990.
12. Decree No. 1045, O.G., July 26, 1972.

the direct exploitation rights to the Regional Development Corporation of the State of Falcón (*Corpofalcón*), with powers to grant mining contracts to private investors.[13] Both the decree and resolution are still in force.

Decree No. 465 is similar to Decree No. 1409, except that it does not apply to quartz and the entire Guayana region, but concerns specific areas within the region.[14] The MEM was instructed to assign to CVG the direct exploitation rights of bauxite in specific areas within the Guayana Region. The decree was repealed by the issuance of the Law on Metallic Minerals Law of the State of Bolivar in 1996.

The governmental corporations for regional development such as CVG, *Corporación de Desarrollo del Zulia* (*Corpozulia*), *Corporación para el Desarrollo del Estado Falcón* (*Corpofalcón*), *Corporación para el Desarrollo de los Andes*" (*Corpoandes*), among others, have also applied for and have been granted, exploration and mining concessions for several minerals. These concessions have been leased to private companies or individuals by the corporations. Lease of concessions is permitted by article 106 of the Mining Law, requiring only notice to the MEM.

5. Exploration and Exploitation Terms

The Mining Law requires, in general terms, that the concession holder bring the property into production in three years in the case of alluvial concessions and five years in the case of hard-rock concessions. Also, for concessions of exploration and subsequent exploitation, the law requires the concession holder, in a term of two years plus a possible one year extension, to decide whether to return to the state at least half of the original area granted for exploration, keeping a maximum of half of the area for mining purposes.

Exploitation terms vary according to the type of concession. Concessions derived from staking have a fifty-year term, with the right to one fifty-year extension. Concessions for exploitation or for exploration and subsequent exploitation have an aggregate duration of forty years with the possibility of extensions at the discretion of MEM.

Notwithstanding the above, under special advantages to the nation—some included in the process of issuing mining titles by the MEM and others set forth in Resolution No. 115 and therefore included in applications for mining titles—concession holders are bound to present a feasibility study within the eighteen months following the granting of an alluvial concession and within thirty-six months after the granting of a hard-rock concession. In other cases, some mining titles specify shorter exploration and pre-production terms.

With respect to the exploitation term, Resolution No. 115 provides as a minimum offering by the applicant for a concession, reduction of the exploitation term to twenty years with possible ten-year extensions at the discretion of the MEM, up to a maximum aggregate of forty years. Some mining titles provide different terms that are shorter in duration. For mining contracts awarded by CVG and other regional corporations, the terms have been stipulated in a manner similar to the provisions of Resolution No. 115.

B. Commercialization of Minerals

The Mining Law provides for free commercialization of minerals and does not include any restrictions on or prohibitions of international import and export of minerals. However, commercialization and transport of minerals within the country and exports of min-

13. Resolution of the Ministry of Energy and Mines No. 451, O.G., Nov. 17, 1989.
14. Decree No. 465, O.G., Dec. 21, 1994.

erals are subject to inspection by the Federal Government under article 12 of the Mining Law and articles 142 to 147 of its regulations by way of a transport and circulation document called *guía.*

In the particular case of gold, Article 90 of the Law of the Central Bank of Venezuela empowers the Central Bank to regulate everything related to gold operations, both domestically and internationally, regarding exports or imports of the metal.

Venezuelan Central Bank Resolution No. 96–12–02 provides for the possibility, with prior authorization from the Central Bank, of exporting up to eighty-five percent of the gold produced or existing in the country on a case-by-case basis.[15] Before 1995, gold exports were not allowed and from 1995 to 1997 they were limited to sixty percent of the produced or existing gold in the country.

C. Mining Rights Vs. Surface Rights

The Mining Law provides the holders of mining rights with complete access to vacant lands for purposes of exploration, development and mining. Free access for general exploration was also provided before Decree No. 2039, which was described previously. Holders of mining rights might agree with the owners of the land on rights of way, servitude rights or leases of land for exploration. In cases where agreement is impossible, the law provides for a temporary occupation of the land for exploration purposes, which is decreed by the governor of the respective state. For the construction and mining stage, the law also encourages agreements between miners and landowners, but in cases of deadlock the holder of mining rights can request from the MEM the expropriation of the land necessary to develop an identified project.

The Expropriation Law regulates the temporary occupation and expropriation procedures, well as the formula for calculating fair compensation for the landowners. In cases of temporary occupations, such compensation is limited to any damages suffered by the landowner due to the exploration activities. In cases of expropriation of land there is the possibility of receiving an immediate occupation authorization from the court. Then, the price of the land subject to expropriation will be calculated, taking into account its declared value found in the tax returns of the landowner and the declared value of sales of similar land in the preceding six months, in addition to other factors.

15. Venezuelan Central Bank Resolution No. 96–12–02, O.G., Jan. 13, 1997.