

## An Analysis of the Rate for Controlling, Monitoring and Supervision of Exploration and Mining Activities of Mineral Resources (TFRM)

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### Camila Cardoso Takano

Advogada

Pós-graduada em Direito e Processo do Trabalho  
pela Universidade Cândido Mendes  
Belo Horizonte – MG – Brasil  
[camilatacano@yahoo.com.br](mailto:camilatacano@yahoo.com.br)

### Jose Cruz do Carmo Flores

Professor Adjunto

Universidade Federal de Ouro Preto – UFOP  
Escola de Minas  
Departamento de Engenharia de Minas  
Ouro Preto – Minas Gerais – Brasil  
[jcruzflores@demin.ufop.br](mailto:jcruzflores@demin.ufop.br)

### Hernani Mota de Lima

Professor Associado,

Universidade Federal de Ouro Preto – UFOP  
Escola de Minas  
Departamento de Engenharia de Minas  
Ouro Preto – Minas Gerais – Brasil  
[hernani.lima@ufop.br](mailto:hernani.lima@ufop.br)

### Abstract

Recently, the Brazilian media reported the withdrawal of the rate on profit from mining of coal and iron ore by the government of Australia. In Australia this rate was created in 2012 to finance social programs. However, due to the drop in the value of mineral commodities, the government has reversed this trend and seeks to quash the law that created such a rate, while keeping its social program financial support. One can observe the opposite in Brazil, where the states of Minas Gerais, Pará, Amapá and Mato Grosso do Sul, created the Rate for Controlling, Monitoring and Supervision of Exploration and Mining Activities of Mineral Resources (TFRM). These states' rates have been grounds for numerous political, economic, administrative and legal discussions. This paper presents an analysis of state laws that created the TFRM, examines the ways taken by mining companies to question the constitutionality of these laws and concludes that the levy of TFRM breaks the principle of equality, penalizes mining, violates the precept contained in article 152 the Federal Constitution of 1988 and helps reduce the competitiveness of Brazilian mining.

**keywords:** mining rates, constitutionality, mining law.

### 1. Introduction

The TFRM was instituted in four of the Brazilian states: Minas Gerais, through Law nº 19,976, of December 27, 2011; Pará, with Law nº 7,591, of December 28, 2011; Amapá, by Law nº 1,613, of December 29, 2011; and in 2012, the State of Mato Grosso do Sul, by Law nº 4,301, of December 30, 2012. The new rates were ground for numerous political, economic and administrative disputes. And currently, TFRM is the focus of legal discussions coming to the Supreme Federal Court (STF). Table 1 presents a summary of the instituting laws of the new rate in states that have adopted them.

The meaning of the acronym "TFRM" has small differences from one state to another, but the analysis of legal texts shows more similarities than differ-

ences between the laws that established the TFRM in the aforementioned states. However, the Law nº 19,976/2011, which was established in the state of Minas Gerais, unlike the laws of other states, provides in article 5th the occurrence of triggering fact.

The creation of TFRM was seen at the time of its establishment as an indication that these State Governments wished to take greater advantage of the mining activity, which was in a growth stage, by increasing the rate burden that falls on it. In addition, the current distribution of the Financial Compensation for Exploiting Mineral Resources (CFEM) disagrees with the Federal Government, since the highest percentage of CFEM goes to the municipalities where mining occurs.

The legal way found by mining

companies – with recalcitrant establishment and collection of that rate – to attack TFRM in the courts was to question its constitutionality, based on the reasons exposed by the Federal Government to justify its creation. In November 2012, a large mining company located in the state of Pará challenged in court the charge of the rate on the grounds of its unconstitutionality, since it is the exclusive competence of the Federal Government to supervise mining activities throughout the Brazilian territory, according to the Federal Constitution.

Two doctrinal currents oppose the courts' position: in the first group are federated States which defend its constitutionality in respect of the exercise by them of the power of police to monitor and promote mining activities in their

territories; in the second group are the tax lawyers, who defend the unconstitutionality of TFRM. Since a final decision has not yet been issued, the controversy

regarding the new rate still remains.

This article discusses the issues, arguments and reasonable underlies the arguments put forward by two opposing

currents regarding the constitutionality of TFRM, instituted by some States of the federation where mining stands out as a source of rate collection.

Table 1 – Main differences between the instituting laws of TFRM

State	MAIN PARTICULARS OF TFRM			
	Triggering fact	Rate payer	Levy	Calculation basis
Minas Gerais (Law n° 19.976/2011)	Regular exercise of police power conferred to the state on the activity of research, mining, exploration or exploitation, held at the State of the following mining resources: bauxite, metallurgical or refractory, rare earth, minerals or ores that are source, primary or secondary, direct or indirect, immediate or mediate, alone or in combination with other chemicals, lead, copper, tin, iron, lithium, manganese, nickel, tantalum, titanium, zinc and zirconium (Art. 1 <sup>st</sup> ) <sup>1</sup>	Physical or legal person, which is in any designation authorized to conduct research, mining, exploration or exploitation of mining resources in the State (Art. 4 <sup>th</sup> )	The TFRM will be calculated monthly and collected until the last business day of the month following the issuing of a proof of the mining output resource property of the ratepayer, in the event of sale or transfer of property to the same owner located in another unit of the Federation (Art. 9 <sup>th</sup> )	The value of TFRM corresponds to 1 (one) existing Ufemg on the due date of the rate per ton of mineral extracted or raw ore mined (Art. 8 <sup>th</sup> )
Pará (Law n° 7.591/2011)	Regular exercise of police power conferred to the state on the activity of research, mining, exploration or exploitation, held at the State, of mining resources (Art. 2 <sup>nd</sup> )	Physical or legal, person, which is in any designation authorized to conduct research, mining, exploration or exploitation of mining resources in the State (Art. 5 <sup>th</sup> )	The TFRM will be calculated monthly and collected until the last business day of the month following the extraction of the mining resource (Art. 7 <sup>th</sup> )	The value of TFRM corresponds to 3 (three) Standard Units Fiscal State of Pará - UPF-PA, effective on the date of payment per ton of ore mined (Art 6 <sup>th</sup> )
Amapá (Law n° 1.613/2011)	Regular exercise of police power conferred to the state on the activity of research, mining, exploration or exploitation, held at the State, of mining resources (Art. 2 <sup>nd</sup> )	Physical or legal, person, which is in any designation authorized to conduct research, mining, exploration or exploitation of mining resources in the State (Art. 5 <sup>th</sup> )	The TFRM will be calculated monthly and collected until the last business day of the month following the extraction of the mining resource (Art. 7 <sup>th</sup> )	The value of TFRM corresponds to 3 (three) Standard Units Fiscal State of Amapá - UPF-AP, effective on the date of payment per ton of ore mined (Art 6 <sup>th</sup> )
Mato Grosso do Sul (Law n° 4.301/2012)	Regular exercise of police power conferred to the state on the activity of research, mining, exploration or exploitation, held at the State, of mining resources, performed in the State of Mato Grosso do Sul (Art. 2 <sup>nd</sup> )	Physical or legal, person, which is in any designation authorized to conduct research, mining, exploration or exploitation of mining resources in the State (Art. 5 <sup>th</sup> )	The TFRM will be calculated monthly and collected until the last business day of the month following the extraction of the mining resource, by Paper State Collection (DAEMS) (Art. 8 <sup>th</sup> )	The value of TFRM corresponds to 11,5% of the value of Fiscal Reference Unit State of Mato Grosso do Sul (UFERMS), effective on the date of payment per ton of ore mined (Art. 6 <sup>th</sup> )

<sup>1</sup> Article 5<sup>th</sup> of the Law of Minas Gerais, unlike the laws of other States, predicts the occurrence of the triggering fact: Art. 5<sup>th</sup>. The triggering fact of TFRM is considered to be the time of sale or transfer between establishments belonging to the same owner of the mineral or ore mined.

## 2. The constitutionality of TFRM

The Deputy Secretary of Treasury of Minas Gerais State, Pedro Meneguetti, in the Newsletter of the Association of Mineral Industry of the State of Minas Gerais (Sindiextra), defends the constitutionality of Law n° 19,976/2011, arguing that under the 1988 Federal Constitution the registry, monitoring and oversight of mineral exploitation grants and mining rights are the com-

mon responsibility of the Union, States, Federal District and Municipalities (SINDIEXTRA, 2011). In the absence of income for the State to offset expenses arising from the exercise of the powers assigned to it by the Federal Constitution, the Bill of Law n° 2,445/2011, the Legislative Assembly of Minas Gerais (ALMG) justifies the TFRM as a source of these appeals required by the State

(SANTOS, 2013). Similar arguments were adopted by other states to justify the imposition and collection of the rate in their respective territories.

According to Souza Miranda (2011), the creation of the TFRM, clearly expresses the disagreement of the Federal States with the percentage distribution of CFEM and their respective values, considered low by mining states.

### 3. The unconstitutionality of TFRM

Coelho *et al.* (2012) defend the unconstitutionality of the creation of that rate by the State of Minas Gerais, thus stating their position:

a. lack of jurisdiction of the State for TFRM's institution [...];

b. unfeasibility, even by raising such factors generating activities that, or already give rise to other rates (such as environmental monitoring), or have no nature of power of police;

c. unfeasibility, moreover, by offending the art. 145, § 2<sup>nd</sup>, of the Federal Constitution [...];

d. unconstitutionality, finally, because the offense to the principles of non-confiscation of reasonableness and proportionality [...].

The Federal Constitution established a form of division of powers between the federal entities in order to avoid conflict between them and prevent excessive apportionment. This division is comprised of two topics: the first relates to official payments correlated to actions of the State (rates and special assessment) and the second relates to official payments totally unrelated to state performances (taxes).

Government may establish rates based on their administrative authority to pay the power of police or to perform some public service, which will be granted to the ratepayer or placed at his disposal. Regarding improvement charges, the same may be imposed by jurists, which enjoy administrative capacity to undertake a public work generating real estate valuation (MORAES, 2011).

For the taxes, it should not speak on State action as a triggering fact for its creation. This official payment is bound privately to each particular one, in other words, "triggering fact is an independent situation of any particular state activity in favor of the taxpayer or on it" (MORAES, 2011).

To analyze the creation of TFRM in the State of Minas Gerais (Law n° 19.976/2011), one realizes that the basis of calculation of the rate is established on the tonnage of ore mined. Thus, the basis of calculation does not have any connection with the state action, but rather with the actions of the ratepayer characterizing this official payment as tax, but not as rate. In other words, the basis of calculation established for TFRM is grounded on an activity exerted by the private sector – in this case, by the mining company – not

keeping any relationship with the state action. Soon, their legal nature is not rate, but tax. And its unconstitutionality is present in contempt of constitutional principle contained in article 145, paragraph 2<sup>nd</sup>, of the Federal Constitution, which prohibits the establishment of rates that have as base triggering fact of taxes.

This prohibition expressed in the Federal Constitution was set to prevent the abusive creation of rates, harming the ratepayer, and judged clearly to reflect the position of the Supreme Court of Brazil, which, in cases that are part of the law, has declared as unconstitutional the "exchange" that has a base for tax rate.

Article 154, paragraph I, of the Brazilian Constitution eliminates any chance of competence of the States, Federal District and municipalities to grant a new tax rate, only reserving the power to the Union for imposing it, by calling residual jurisdiction. By establishing the TFRM under the name of "rate", those states of the Federation committed serious addition competence – incurable – to create "tax" that only the Union shall have competence to do so. And so, violated the constitutional provision contained in Article 154 of the Constitution.

Mineral resources are property of the Union (Federal Constitution, Art. 20<sup>th</sup>, IX). Therefore, it is restricted to the Union the right to set taxes on mineral exploration and mining. Likewise, Article 22 of the Constitution provides in section XII, exclusive competence of the Union to legislate on mineral deposits, mines and other mineral resources and metallurgy.

According to Article 23 of the Constitution, to monitor and supervise the granting of rights for exploration and exploitation of water and mineral resources within their territories is the common responsibility among the three jurisdictions (CF, Art. 23, XI). Furthermore, Law N°. 8,876 of May 2, 1994 authorized the Ministry of Mines and Energy (MME) to establish the National Department of Mineral Production (DNPM) as its Executive Branch. In Article 3, this Law establishes that DNPM has the objective of planning and fostering the exploration and exploitation of mineral resources, and supervising the geological prospection and mineral technology research as well as ensuring, monitoring and supervising the practice of mining activities throughout the national territory as stated by the

Mining Code (BRAZIL, 1994).

The Law 8,876/94 quotes that the Union, through the DNPM, exercises oversight on mining activity throughout the national territory. There would be a matter that required inspection by any other entity. The only exception would be if a supplementary law was created that withdraws such function from DNPM, attributing it to other entities, as provided for in the sole paragraph of Article 23 of the Federal Constitution. Until now, this supplementary law does not exist. The Brazilian mining activities are regulated by the Mining Code and the overseeing of that is DNPM's responsibility.

According to Coelho *et al.* (2012), there is not any portion of administrative power to be exercised by the states or the municipalities, since only the Union has the power to prescribe rules for the mining industry and compete with DNPM to grant licenses for exploitation of mineral resources, conceive mining grants and exercise oversight of mining activities, throughout the national territory.

What is taken into account to determine whether an official payment is a rate or a tax is solely the triggering fact of its obligation. Although TFRM is designated by law as rate, it seems to be a disguised tax, under that name.

The Brazilian Tax Code (CTN, Portuguese acronym), article 77, states that generating rates have as a triggering event, besides the regular exercise of the power of police, the actual or potential use of specific and divisible public service provided to the ratepayer or placed at your disposal. The rates payable by regular exercise of the power of police have a distinct legal regulation of service charges. While these can be legally charged for the actual or potential use of public services, the rates due to the exercise of the power of police may only be required in cases where the inspection occurs effectively, according to the article 145, item II of the Constitution and Article 77 of the CTN.

The legislative texts, which established TFRM claim it is generating exercise of the power of police conferred upon the State, on the activities of mineral exploration and exploitation of mineral resources. But the Law 19,976/2011 of Minas Gerais carries several devices without any connection to the concept of power of police, such as Article 3, I, "the" II "b" and III – one of the biggest

problems that reaches the legal text. According to Coelho *et al.* (2012) through the enactment of Law No. 20,414/12, some controversial articles of the preceding text were reissued in order to calm the criticism, but not all errors were resolved.

The Federal Constitution provides in its article 23 the joint competence of the Union, States, Federal District and municipalities to "protect the environment and combat pollution in any of its forms" (item VI) and to "preserve forests fauna and flora" (section VII). Based on these assumptions, the Federal Government created the Rate Control and Environmental Monitoring – (TCFA, Portuguese acronym), charged by the Brazilian Institute of Environment and Renewable Natural Resources – IBAMA; the same way that some states have created the Rate Control and Environmental Surveillance State.

Therefore, if the TCFA and the state rates are due consideration to the Union and the states due to the activity of "protecting the environment and combating pollution in any of its forms", the justifications for the institution of the State Laws that created TFRM, claiming the defense of natural resources and soil, have no foundation required. If admitted, charging a new rate on the grounds of the need for monitoring, control/monitoring and supervision of research/exploration, mining/extraction and utilization of mineral resources activities, in order to remunerate the power of police of the State for the defense of natural resources and soil, would allow double allocation for the same taxpayer, generating the so-called *bis in idem*, as in this case, the particular mining activity had already been rated by the TCFA and the state rate.

According to a study by the National Confederation of Industry – (CNI Portuguese acronym) considering data from the Brazilian Mineral Yearbook 2007-2009, the projections of the Secretary of State for Economic Development of Minas Gerais to the year 2010, the mineral production average and taking into account the Fiscal Unit of the State of Minas Gerais for 2012 (UFEMG, Portuguese acronym), the state would have collected in the period, approximately R\$570 million with TFRM if the rate was already being required (CNI, 2014).

The expense incurred in 2010, for the State Secretariat for Science, Technology and Higher Education was R\$34,991,461.47; then, for the State Secretariat of Environment and

Sustainable Development, it reached R\$57,972,801.16; and for the State Department of Economic Development, it came to R\$65,164,757.59. Therefore, the entire expenditure of the three departments was R\$158,129,020.22.

For allegedly funding the power of police exercised through the three departments of the State of Minas Gerais, TFRM would increase, in 2010, R\$508 Million, and the entire expenditure of the three departments was only R\$158 Million. This clearly demonstrates the exorbitant amounts that would be collected under supervision of mining activities in the State of Minas Gerais. The real intention of the state is to increase its tax collection capacity by creating a new rate imposed on mining, based on alleged inspection activity that is exerted, in fact, by DNPM nationwide.

In the States of Pará and Amapá, calculations and predictions such as those described above were carried out and the same controversial result was obtained. The studies were conducted in the context of Direct Actions Unconstitutional – ADIN'S 4,786 and 4,787, both of the Supreme Court.

With reference to the rate established by the State of Mato Grosso do Sul, there are few studies about the disparity in the amount collected by TFRM. But based on studies conducted in other states, it is expected that, in this case, there also contains such abusive features and is a risky claim otherwise.

Therefore, as suggested by Coelho *et al.* (2012), the charges in question have a confiscatory nature, abusively exceed the actual cost of inspection, and infringe the Article 150, item IV of the Constitution, which prohibits the Union, the States, the Federal District and Municipalities to use an official payment for the purpose of confiscation.

CNI filed three Direct Unconstitutionality Action in the Supreme Court asking on a preliminary basis, the suspension of the effects of Minas Gerais state laws (Law 19,976/2011), and that Pará (Law 7,591/2011) and Amapá (Law 1,613/2011) up these charges in question in the respective states. The main points were defendants in these actions:

a) offense to Article 5, LIV; Article 20, § 1 and IX; Article 22, XII; Article 23, XI; Article 145, § 2, and II; Article 146, II; and Articles 152 and 176, all of the Federal Constitution;

b) invasion of states over constitu-

tional powers granted to the Union to legislate on mineral resources, having no ownership nor power enabled police to authorize the creation of TFRM;

c) the basis for calculating the rate is established on ton of ore mined, not featuring any link with the state action, but rather with the actions of the ratepayer, and thus a disguised tax;

d) the amount to be raised by states upon payment of the new rates disproportionately exceeds the limits for the collection of rates;

e) finally, the existence of a double apportionment aimed at the same ratepayer, generating the so-called *bis in idem*, as the holder of particular mining activity already suffered rate under the same focus.

The Direct Action of Unconstitutionality 4,785 (MG), 4,786 (PA), 4,787 (AP) were filed on May 31, 2012, and to date still pending. In the state of Mato Grosso do Sul, the legal protection of a cement plant gathering TFRM was granted. Judge Alexandre Tsuyoshi Ito, 4<sup>th</sup> Court of Exchequer of Campo Grande, issued the ruling arguing that the state would allocate more than 90% of the collection with the rate for the Fund for the Development of the State Highway System, revolves around basically to fund the enforcement of mining and environmental protection. According to the Magistrate, the lack of connection between the rate activity and the application of collected values is one of unconstitutionality for the rate (CBPM, 2013).

On the other hand, there are already some decisions favorable to the creation of TFRM. In Minas Gerais and Pará some mining companies have resorted to an injunction to suspend recovery of TFRM, but courts denied the requests and kept collecting rates.

The Supreme Court of Minas Gerais confirmed (JUSBRASIL, 2013) the constitutionality of that rate by the 6<sup>th</sup> Civil Chamber of the Court of Minas Gerais, dismissing the appeal no. 1706642-02.2012.8.13.0024 (GENERAL COURT OF MINES, 2013) unanimously.

In the State of Pará, the Prosecutor's Office for Constitutional Treasury Shares and the Public Ministry declared favorable to the creation of TFRM through advocate of Justice Oirama Brabo's opinion. The opinion (PROSECUTOR OF THE STATE OF PARA, 2012) was drawn up in the records of the Injunction No. 001.2012.913.781-4 lawsuit, filed by the companies Vale



SA, Solobo Metals and Mina Valley Blue S/A, which refused to pay the rate, claiming that as unconstitutional.

The Union General Attorney (AGU, Portuguese acronyms) has ar-

gued in the Supreme Court of Amapá the law that created the TFRM as article published on the internet JUSBRASIL (JUSBRASIL, 2013) website, declaring favorable to the Law 1613,

of December 30, 2011, recognizing the State of Amapá jurisdiction to review the activities listed in the law and charge rates for the exercise of the power of police.

#### 4. Final considerations

The charge based on the amount of mineral produced discourages production and breaks the principle of equality, as more burdens to the ratepayer who produces a lot, but that does not necessarily demand more inspection activity by the state.

The law penalizes the miners that extract mineral resources for industrialization in other States or even to export, excusing from payment of TFRM only the miners that promote the industrialization of mineral resources in the State of Minas Gerais (art. 7, Law No. 19,976/2011). It establishes a differentiation of goods by the State of Minas Gerais, due to the origin or destination of the mineral resource, in clear violation of the provision contained in Article 152 of the Federal Constitution of 1988.

Under Law No. 19,976 /2011 (Article 3), the collection of the new rate will fund general expenses of the State of Minas Gerais and not the exercise

of state efforts directed to the person of the ratepayer – effort that, in reality, is exercised by DNPM throughout the national territory.

So far, only one company in the state of Mato Grosso do Sul obtained a preliminary order for no payment of rate. The decisions of the courts of Minas Gerais and Pará denied appeals with an injunction to suspend recovery of TFRM. The direct actions of unconstitutionality filed in the states of Minas Gerais, Pará and Amapá are still pending. The Prosecutor's Office of Constitutional Treasury Shares and the Public Ministry of the State of Pará gave its acceptance to the creation of TFRM in a sanction suit brought on by Solobo and Azul mines of Vale, which sought to declare the TFRM as unconstitutional. The Attorney General's Office argued in the Supreme Court of Amapá state law establishing the TFRM, acknowledging that the State of Amapá has jurisdiction to review the activity and charge the TFRM.

Therefore, there occurs by a drift statement in court about the legality of the rate established by the States that have already adopted it, as well as other States seeking to introduce it, such as the well-known tax lawyers in the State of Minas Gerais, that based on legal reason and rate, they argue, clearly and forcefully, the TFRM unconstitutionality hoping to see its thesis approved by the Supreme Court.

While the Australia government took out the rate on profit from mining of coal and iron ore, in order to keep jobs and the world competitiveness of the mining industry, in Brazil one can observe the opposite, since the states of Minas Gerais (MG), Pará (PA), Amapá (AP) and Mato Grosso do Sul (MS), created the TFRM. These rates represent a breakdown in the principle of equality, violates the precept contained in article 152 the Federal Constitution of 1988, penalizes mining and contributes to reduce the competitiveness of Brazilian mining.

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