

# Need For a New Amendment?

The elimination of certain provisions of Mining Law No. 3213 (the "Mining Law") regarding environmental permits by the Constitutional Court Decision of June 2010 has led to the suspension of certain environmental permits by the administrative authorities. In order to cover the gray areas and fill in the gaps caused by the Constitutional Court Decision, the government made substantial revisions to the Mining Law and enacted an amendment on 24 June 2010 (the "Amendment").

## DIFFICULTIES IN OBTAINING PERMITS

To clarify the vague provision of the Mining Law, the Amendment provided that operation permits shall be issued within three years after obtaining the surface rights and necessary environmental permits. The Amendment, on the other hand, provided only one year for operation licenses which have not been issued an operation permit or have only one year left for the termination of the three year period as of the date of the Amendment.

Although the Amendment intended to

speed up the permitting process and prevent the existence of idle licenses, the three year and one year (for old license holders) limitations posed a severe threat for operation license holders of losing their licenses due to the gap in communication between central and local public authorities and the thick bureaucracy of the government. Such a limitation alarmed license holders and especially foreign investors who are not familiar with the Turkish public authorities and their bureaucracy. Approximately 600 operation licenses issued prior to the Amendment were cancelled since the license holders failed to obtain the required permits within the envisaged one year period. With the three year period provided for new licenses coming to an end, license holders have started to question whether such period will be extended.

## OBTAINING FORESTRY PERMITS BECAME EVEN MORE DIFFICULT

On 16 June 2012, the Prime Ministry issued Circular No. 2012/15 which made all transactions relating to State-owned lands subject to the approval of the

Prime Ministry. Such Circular caused an ambiguity and the Ministries have refrained from taking any action in terms of permits.

Like all actions relating to State-owned lands, forestry permit applications were sent to the Prime Ministry for final approval. Pending the approval of the Prime Ministry, issuance of forestry permits, and accordingly operation permits, were suspended.

In addition to radically slowing down the approval of forestry permits, the Circular has been particularly criticized for the ambiguity in the Prime Ministry's scope of review on the applications. Despite heavy criticism from many sectors, there is still no clarity regarding the scope of review or the criterion to be followed during such procedure. The Prime Ministry has also been criticized for not having a special office with the technical knowledge required for the review of such applications.

Due to the fact that no threshold is being applied for such additional approval procedure, even forestry permits pertaining to very small areas of land, such as drilling holes, are made subject to the lengthy approval procedure. Such bureaucratic complication and ambiguity is unfortunately expected to discourage foreign investment in infrastructure projects in Turkey.

## FINANCIAL CAPABILITY

The Amendment brought a new concept: the "financial capability". Exploration license applicants must certify that they have financial capability equal to the amounts determined by the Mining Department which are considerably high amounts. Such capacity must be evidenced by the value of the compa-





ny's immovable assets, bank accounts (e.g., any type of cash deposited, loans obtained from banks, capital advances), share certificates, capital, machinery and equipment, etc.

This concept has also been criticized since it is not clear for which purpose the Mining Department needs to see the applicants' financial capability or how it contemplates to benefit from assets such as the cash in bank accounts or the machinery and equipment. The use of such requirement remains rather vague and appears to have a restrictive and discouraging effect on investors.

### UNPERMITTED PRODUCTION

The Amendment has extended the penalties applicable to unpermitted mine production and transportation. In addition to the imposition of an administrative fine, the license security of such license holder committing the unpermitted production shall be forfeited and the amount of license security shall be doubled.

An operation permit is required for each separate mine but not for any by-pro-

ucts. Accordingly, it is important to answer the following questions in order to define an unpermitted mine production:

*What is production?*

*What is a by-product?*

The Mining Legislation does not clearly define "production". Based on interpretation of the mining legislation and the established practice of the Mining Department, production means extraction of the mineral from soil where the operation license holder gains commercial benefit from the extracted mineral.

The volume of the secondary mineral is important in defining "by-product". If the secondary mineral to be produced is not



a considerable amount then it should be considered a by-product and should not be subject to a separate operation permit.

The determination of whether the license holder gains a commercial benefit from the extracted mineral or whether the amount of secondary mineral is considerable is at the discretion of the Mining Department. In practice, it has been observed that the Mining Department applies a very wide scope to "unpermitted production" so as to include by-products as well. Thus, an amendment needs to be made to clarify the definition of unpermitted production for the purposes of avoiding the application of unjust sanctions.

### CONCLUSION

This Amendment has not proven to be the solution for the needs of mining companies and investors have started to feel an urgent need for new amendments. In order to meet the investors' expectation for a simple and clear law there is still a need for further revision of the mining legislation. However, despite the needs and the increasing expectation in this regard, the Mining Department has not yet published a draft for an amendment. ●

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