



## The Mining Law Review - Edition 4



*"The Mining Law Review is designed to be a practical, business-focused 'year in review' analysis of recent changes and developments, their effects and a look forward at expected trends.*

*The first part of the book deals with mining in a particular jurisdiction. Countries were selected because of the importance of mining to their economies and to ensure broad geographical representation. Mining is global but the business of financing mining exploration, development and – to a lesser extent – production is concentrated in a few countries, Canada and the United Kingdom being dominant. As a result, the second part of this book contains country chapters focused on financing.*

*The mining sector is facing uncertain times. Commodity prices are lower and continue to be soft. Demand growth from China, the world's largest consumer of commodities, has slowed considerably, while new markets such as India are not picking up the slack. Operating costs in certain markets exploded during the good years and must now be reined in and traditional lenders to the industry are more highly regulated, having less flexibility to assist companies during this difficult time.*

*While times are tough, we know that mining is cyclical and that continued world population and economic growth as well as the depletion of current resources mean that growth in the mining sector will resume. The only question is when."*

- Mining Law - Brazil  
William Freire - **William Freire Advogados Associados**

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### I - OVERVIEW



Brazil offers considerable geological diversity and is one of the greatest mineral powerhouses in the world. The country is a major player, being globally ranked as follows as a producer of:

1. niobium: first;
2. iron ore: second;
3. manganese: second;
4. tantalite: second;
5. graphite: third;
6. bauxite: second; and
7. ornamental stones: fourth.

Brazil exports nickel, magnesite, kaolin, tin, vermiculite, chromium and gold. It is self-sufficient in limestone, industrial diamonds, talc, titanium and tungsten, and it produces and imports copper, diatomite, phosphate and zinc.

The trade balance for mining is always larger than the country's overall trade balance. In 2013, the trade balance for mining (US\$31.967 billion) was at least 12.5 times greater than the overall trade balance (US\$2.56 billion).

Despite such geological and economic potential, Brazilian mineral production has been systematically falling. It stood at US\$53 billion in 2011, US\$48 billion in

2012, US\$44 billion in 2013, and the forecast for 2014 is US\$43 billion, due to the absence of a mineral or environmental policy for the country, allied with the improper handling of the proposal to alter the legal framework for mining.

## II - LEGAL FRAMEWORK

As a result of the paramount role mining plays in Brazil, the essential structure of the legal regime governing mining is defined in the Federal Constitution.<sup>3</sup> Brazil is a federal republic composed of 26 states and the Federal District, but the power to enact laws on mining<sup>4</sup> is exclusively held by the Union.

Administrative competency with regard to mining (grants, monitoring and sanctions) is exercised by the Ministry of Mines and Energy and by the National Department of Mineral Production, a federal quasi-government agency. There is mineral administrative competency only for the purposes of inspection for individual states, but this is not exercised in practice.

The legal regime governing mining in Brazil is spread among different levels of regulation: the rules are established in the Federal Constitution, in the Mining Code (a law in the strict sense of the word), in the laws that govern some classes of mining rights, and in various regulations, principally those issued by the Ministry of Mines and Energy and the National Department of Mineral Production. There are other regulations that can also indirectly apply to mining, such as foreign trade, tax and sanitation rules related to mineral water, and the rules governing the purchase of land by foreign-owned companies.

The regime is a mixed system and covers the acquisition of mining rights through the (1) priority regime, (2) a separate bidding system for mining,<sup>5</sup> and (3) activities in strategic areas called national reserves.<sup>6</sup> Within this system, the following form the core of the legal regime:



1. the Union has a sovereign right over mineral resources and deposits and controls all stages of their development;
  2. mining must be carried out in the national interest;
  3. there is legal separation between ownership of the land and the mineral wealth contained in it;
  4. mining is a public utility activity;
  5. only Brazilians or companies founded in accordance with Brazilian laws, with headquarters and management in Brazil, can mine;
  6. the Union has the power to grant licences, and to monitor and sanction;
  7. the grant of the mining concession is a natural consequence of a valid application in a unrestricted area with a positive final exploration report;
  8. mining companies are guaranteed ownership of the product of the mining;
  9. there will be a charge for occupation during the exploration phase;
  10. there must be a commitment to performance of the Economic Development Plan;
  11. environmental sustainability is one of the attributes of the mine; mineral resources extracted with technical, economic and environmental feasibility; and
  12. landowners will receive a share of the product of the mining.
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