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Contributing Editor:
Andrew Emrich
Holland & Hart LLP

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Brazil

WILLIAM FREIRE Advogados Associados

William Freire

1 Relevant Authorities and Legislation

1.1 What regulates mining law?

Mining in Brazil is regulated in the Federal Constitution (1988), in the Mining Code (Decree-Law 227/1967) and its Regulation (Decree 9.406/2018), and in laws that regulate the different legal regimes governing the development of mineral resources.

There are also a variety of legal rules issued by the Ministry of Mines and Energy (*Ministério de Minas e Energia*) ("**MME**") and by the National Mining Agency (*Agência Nacional de Mineração*) ("**ANM**").

The rules outlined below, not contained in the Mining Code, are worth highlighting.

Law 6.567, of 1978, deals with the development of mineral substances for immediate use in civil construction, natural and cladding rocks and calcium and magnesium carbonates used in different industries.

Law 7.805, of 1989, deals with mineral substances that are mined on a small scale, which fall under the system known as *Permissão de Lavra Garimpeira*.

There are special regulations that govern mineral activity conducted in border zone (Law 6.634/1979).

The National Congress is analysing the regulation of mining activity on indigenous lands.

Other laws regulate deposits of mineral substances that constitute a state monopoly, mineral or fossil substances of archaeological interest, and mineral or fossil specimens to be sent to museums and teaching institutions or studied for other scientific purposes.

Mineral waters also have their own Code (Decree-Law 7.841/1945).

The authority to legislate on deposits, mines and metallurgy belongs solely to the Union (federal level). The states, municipalities or indigenous communities do not have any normative authority in the area of mining law.

Mineral exploration can only be conducted by Brazilians (individual citizens, whether they have birthright citizenship or were naturalised); mining can only be done by legal entities, through a company established in accordance with Brazilian laws, with headquarters and administration in the country.

Mixed development regime

The legal regime for development of mineral substances in Brazil is mixed. It includes the "priority system" (first come, first served), "availabilities" (a bidding system that is specific for mining, with some differences from the general bidding regime under the Administrative Law) and the National Reserves (areas in which the Government can impose differentiated rules for the development of certain substances).

Core of the legal regime of mining

Independently of the rule applied to the development of the different mineral substances, there is a core set of rules and principles that apply to all the regimes:

i. Sovereignty of the Union over known or potential mineral resources.
ii. Mining managed by all stakeholders (private and public) in the national interest.
iii. Legal separation of real property from the mineral resources contained therein.
iv. Public utility of mining.
v. Guarantee that the Development (Exploitation) Concession will be granted to the explorer that invested, assumed risks, and identified the mineral reserve (or its successor).
vi. Guarantee of ownership of the product of mining to the holder of the mining right.
vii. Guarantee of the Right of Priority.
viii. Administrative-mining proceedings, formed by binding administrative acts.
ix. Mineral activity requires the consent of the Union (Federal Government).
x. Payment of a share of the mining results to the landowner in specific cases.
xi. Transmissibility of the mining right.
xii. Single holder for each mining right.
xiii. Right to prior and fair indemnification in the event of revocation of the mining right, or in cases in which Government measures hinder mineral development or render it unfeasible.
xiv. Specific form of acquisition, modification and termination (or loss) of the mining right.
xv. Environmentally sustainable mining.

There are several recognised mining law principles in Brazil:

i. Principle of legal certainty.
ii. Principle of sovereignty of the country over its mineral resources.
iii. Principle of conducting mining in the national interest.
iv. Principle of public utility of mining.
v. Principle of continuity of mining activity.
vi. Principle of environmentally sustainable mining.

Brazilian legal scholars are seeking to expand the scope of the concept of security of tenure to go beyond the simple certainty of holding the mining right. The goal is to include the right of miners to demand compliance with the rules and principles applicable to the administrative-mining proceedings, such as administrative efficiency.

1.2 Which Government body/ies administer the mining industry?

Mining activity is managed by the Ministry of Mines and Energy ("MME") and by the National Mining Agency ("ANM").

According to the Mining Code Regulation (Federal Decree 9.406/2018), mineral activity includes exploration, mining, mine development, the use of tailings or waste, and mine closure.

Importance of mining for Brazil

Brazil is a global player in niobium, iron ore, tantalite, bauxite, graphite and vermiculite.

It is an exporter of gold, nickel, tin, manganese, chromium, copper, vanadium, kaolin, magnesite and ornamental stones.

Brazil produces approximately 50 mineral substances.

There are around 7,000 mining companies, which account for approximately 4% of the Gross Domestic Product and a relevant share of the Trade Balance and job creation.

The mining sector accounted for 63.8% of Brazil's trade balance in 2020.

1.3 Describe any other sources of law affecting the mining industry.

In addition to the regulation and monitoring by the MME and ANM, mining is subject to environmental, fiscal, labour, corporate regulations, etc., as are all areas of economic activity. However, there are some specific characteristics that apply only to mining activities.

Many of the safety standards, especially in regard to tailings dams and environmental protection, were amended recently.

2 Recent Political Developments

2.1 Are there any recent political developments affecting the mining industry?

Since early 2019, Brazil has experienced a period of political and economic stability.

Under the current Government, there is an intense political drive to modernise the economy in order to create a business-friendly environment that is favourable to investors.

Brazil is now moving forward with a focus on liberalisation of the economy, legal certainty and eliminating unnecessary bureaucracy.

2.2 Are there any specific steps the mining industry is taking in light of these developments?

There is visible economic dynamism in the country. Below are some factors that will influence the development of the Brazilian mining industry at the moment:

i. the Government, with a liberal and developmental outlook, who are aware of the need to ensure the compliance of contracts and to preserve legal certainty for investors;
ii. the creation of the ANM, which replaced the former National Department of Mineral Production; and
iii. a significant alteration in economic policy, with a clear perception of mining as a strategic sector for the country.

The current Government has included mining among its priority projects. There is an awareness that if the country does not develop its mining, it will become weakened and dependent on external sources for raw mineral materials. The ability to meet its own mineral needs is related to maintaining national sovereignty and security.

The intensive and efficient work by the MME and the ANM, which began in 2019, constitutes a determining factor to move the development of mining forward in the country.

3 Mechanics of Acquisition of Rights

3.1 What rights are required to conduct reconnaissance?

Mineral activity can begin with geological recognition through aerial prospecting, provided that the company shows it has the technical capacity for this work.

The land exploration phase begins with the exploration application at the ANM.

3.2 What rights are required to conduct exploration?

Mineral exploration is part of the administrative-mining proceedings known as authorisation-concession.

Nevertheless, in Brazilian mining law, the terms "authorisation" and "concession" do not have the same meaning as they have under classic administrative law. In mining law, exploration authorisations are not considered discretionary or precarious administrative acts. They are binding administrative acts, which can be defined simply as administrative consent to perform mineral exploration.

The priority system (first come, first served) is the general rule in effect in Brazil.

The right to conduct mineral exploration can be applied for and granted to individuals (Brazilians with birthright citizenship or naturalised) or Brazilian legal entities. With the priority exploration application, the following rights are created for miners:

i. the exclusive priority right to undertake administrative-mineral proceedings;
ii. the exclusive right to conduct mineral activity in the area, for all substances existing within the polygon of that mineral right. Even if the initial application only refers to one substance, the others may be added to the mining title later; and
iii. if the exploration is successful and mineral resources are found, the holder of the mining right will be entitled to the Development (Exploitation) Concession and to the product of the mining if he complies with the legal obligations.

3.3 What rights are required to conduct mining?

The concession regime is the natural consequence of successful exploration.

The authorisation-concession regime can only be used by legal entities founded under Brazilian laws, and these entities must have their headquarters and management in Brazil.

The development (exploitation) concession is granted for an undetermined period of time, and it is only linked to the exhaustion of the deposit.

The interested party must show financial capacity to implement the Economic Development Plan proposed to the Government.

Mineral concessions have a legal nature and attributes that are specific to mining law and are not to be confused with the classic concessions of administrative law. In Brazil, mining concessions are granted for an undetermined period of time (linked to exhaustion of the deposit); they do not depend on bidding (as a result of the regime of priority of exploration authorisation) and are not

formalised by an administrative contract. They are recognised as legally valid upon publication of an administrative act – the mineral concession – in the Official Gazette.

The holder of a Development Concession will have the full right to the product of mining, in accordance with the Constitution (Art. 176, heading).

3.4 Are different procedures applicable to different minerals and on different types of land?

There are various administrative procedures, depending on the mineral substance and its intended use.

There is no differentiation in the legal regime of mining as a result of different types of real property or location, except in relation to environmental issues.

Around 95% of Brazilian mineral production has its origin in the authorisation-concession regime. However, there are three other regimes that are worth mentioning:

Regime of Mineral Licensing

This applies to the sands, gravel, rocks and clay for immediate use in civil construction, in the preparation of aggregate materials and mortar (provided that they are not submitted to industrial beneficiation processes or intended for use as a raw material for industry), natural and cladding rocks, and calcium and magnesium carbonates used in different industries.

It has the characteristic of not requiring prior exploration works to be reported to the National Mining Agency.

Those same substances can also be developed under the authorisation-concession regime.

Regime of Small-scale Mining Consent (*Permissão de Lavra Garimpeira*)

Some minerals that occur in the alluvial, eluvial and colluvial forms are subject to prospecting. This regime also has the characteristic of not requiring prior exploration works to be reported to the ANM.

Those same substances can also be developed under the authorisation-concession regime.

Claim-stake Mines

There are still some mining rights in effect that are called Claim-stake Mines. These are remnants of an old access regime, which was in effect from 1891 to 1934, during which time the owner of the real property was also the owner of the mineral substances contained therein. From 1934 onwards, the mineral resources stopped being linked to the ownership of real property.

Claim-stake Mines are becoming extinct, since this regime has not been applied to any new discoveries since 1934.

Extraction Registration

There is a type of administrative consent which does not rise to the level of a mineral development regime for substances for immediate use in civil construction, known as Extraction Registration, which may be requested by political entities (Union, Federal District, States and Municipalities) for public works. This registration is limited to five hectares and must comply with the rights of priority existing over the area.

3.5 Are different procedures applicable to natural oil and gas?

The oil and gas industry is regulated outside the Mining Code, with different legislation and procedures.

4 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

4.1 What types of entity can own reconnaissance, exploration and mining rights?

Mining can be conducted by individuals (with birthright citizenship or naturalised) or by legal entities established under Brazilian laws, with headquarters and administration in the country. There are no restrictions with regard to capital.

All individuals and legal entities must be registered at the National Mining Agency and mining must be one of the company purposes listed in their Articles of Incorporation or Bylaws.

4.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Neither foreign individuals nor foreign companies can hold mining rights in Brazil.

However, there are no restrictions on direct or indirect control, providing that the company that holds the mineral rights is a Brazilian company.

There are special restrictions on the acquisition of rural real estate by foreign companies, or Brazilian companies controlled by foreign companies, and mining development, in the border zone.

4.3 Are there any change of control restrictions applicable?

There are no restrictions in regard to changes in control of companies, provided that the status as a Brazilian company is maintained.

Mining companies must keep the ANM updated regarding their statutory conditions by updating the Registry and filing their articles of incorporation/organisation and amendments at the ANM.

4.4 Are there requirements for ownership by indigenous persons or entities?

There are no specific rules governing mineral activity by indigenous peoples or entities that represent them.

According to the Federal Constitution (Art. 176, §1), the National Congress shall establish, by law, rules governing mineral activities on indigenous lands.

More than 33 years after the promulgation of the Constitution, this law has still not been drafted. As a result, mining on indigenous lands is not currently allowed.

There is a consensus that many indigenous lands were demarcated without the proper technical criteria, thus burying important mineral deposits, some of which may have the potential to become world-class deposits.

Many of these improper demarcations must be re-examined.

4.5 Does the State have free carry rights or options to acquire shareholdings?

The Government does not have the right to opt to acquire shareholding in mining companies.

Funds linked to publicly owned companies may purchase shares in mining companies on the market, without any benefit or preference.

5 Processing, Refining, Beneficiation and Export

5.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

There are no specific regulations on the processing, beneficiation or industrialisation of mineral substances, except in regard to the exploration, mining, enrichment, reprocessing, industrialisation and sale of nuclear minerals and their by-products.

5.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

There are only special provisions regarding the export of mineral substances from ores and nuclear minerals and their by-products.

6 Transfer and Encumbrance

6.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

There are no restrictions on the transfer or assignment of mining rights. The only requirement is that the acquiring, assigning or leasing party meet the necessary legal conditions to receive the mining title.

Assignments or leases of mining rights can be partial or total.

Assignment, lease and encumbrances of mining rights must be recorded at the ANM.

6.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Brazilian legislation establishes the possibility of giving mining rights to guarantee financing and for obligations in general.

Contracts establishing encumbrances on mining rights must be registered at the ANM.

7 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

7.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Mining rights can be divided. The requirement is that each part must be technically, economically and environmentally feasible.

Divisions must be applied for and be processed by the ANM.

7.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

In Brazil, the general system of unicity of the holder of the mining right is in effect.

In some cases of specific bidding for mining rights, it is possible for consortia to participate, but only one company will be responsible for the legal obligations.

7.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The holder of a mining right is entitled to develop all the mineral substances contained within the polygon of his mining right.

The requirement is that prior to developing the second substance, the mining company must register the mining right for this new substance and must also obtain prior environmental licensing for developing the second substance.

7.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The holder of a mining right is the owner and is responsible for the waste and tailings that are generated.

The waste and tailings may be later used if there is technical and economic viability for the development of useful mineral substances still contained therein.

7.5 Are there any special rules relating to offshore exploration and mining?

There are no specific rules in the Mining Code governing the development of mineral resources in the Atlantic Ocean.

To conduct offshore mining, miners must not only comply with the Mining Code, but also with the United Nations Convention on the Law of the Sea, which the Brazilian Government has ratified, and the rules of the different entities related to the development of natural ocean resources.

Brazilian companies explore the ocean floor and below the seabed in the Exclusive Economic Zone.

With technical support from its National Geological Service ("**CPRM**"), Brazil participates in the South Atlantic Geology Project, designed to be conducted under the general coordination of the International Seabed Authority and in cooperation with different institutions. The objective is to collect, bring together, integrate and provide all the data and information available about the geology and mineral resources in the South Atlantic Ocean.

As of 2021, there was no extraction of mineral substances on and below the ocean floor, outside the limits of Brazilian jurisdiction (in the "Area").

There are high expectations in regard to the potential development of mineral substances contained in the oceans. The principal foci of interest at this time in the Exclusive Economic Zone are phosphorites, coal, evaporites, and polymetallic nodules and crusts. Among the mineral resources in the ocean for which mining is already operational are bioclastic and siliciclastic granular deposits and potassium salts.

There are currently around 600 mining rights in effect across the Brazilian continental platform.

8 Rights to Use Surface of Land

8.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

Miners do not have the *automatic* right to enter the real property of third parties to perform mineral activity.

Just as the legislation protects mineral activity, the Constitution protects the right of property.

However, mining is considered an activity of public interest (Decree-Law 3.365/1941), so the public interest has priority over the landowner's private interest.

In the event the owner or possessor of the real property resists, there are legal mechanisms that allow the miner to enter the real property after depositing a guarantee for indemnification of possible damages, and payment of income for occupying the land. The instruments available for this purpose are mineral easements and expropriation.

Exploration work conducted exclusively with drones does not create a right to indemnification to the owner of the real property.

In general, resistance by landowners or possessors is easily surmounted through a court-ordered mineral easement due to the public utility of mining, recognised by law.

8.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

If there is no specific agreement, the obligations of the holder of the mining right to the landowner or possessor are generally: (i) to provide a guarantee to cover any possible damage caused to the real estate; (ii) to pay income for occupation of the land during the exploration and exploitation work; (iii) not to cause pollution in the land, beyond anything that is inherent to the mineral activity, and within the legal limits of tolerability; and (iv) to recover the land after the end of the mineral activity.

8.3 What rights of expropriation exist?

The right of expropriation in favour of mining was included in legislation passed in 2017.

9 Environmental

9.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Any mining activity must be preceded by environmental licensing.

The Brazilian environmental licensing system is generally tri-phasic, and is composed of the prior licence, installation licence and operating licence.

In some cases, these licences can be requested at the same time, facilitating the process to obtain the environmental licence.

An environmental problem that Brazil faces is that environmental conservation units are created without appropriate technical criteria, often creating restrictions on the development of important mineral deposits. The new Government is aware of this problem.

9.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Environmental legislation establishes specific licences for waste piles and tailing dams. In all cases, a Mine Closing Plan is required, which must be periodically updated.

Recently, legislation was passed prohibiting the use of the upstream method of construction. Dams built using the upstream method are due to be deactivated.

9.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

Mining companies must implement their Mine Closing Plans before ending their mining work. One of the principal obligations is to recover the area where the work occurred and to exercise special care with facilities, piles and dams that will require monitoring.

9.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Mineral activity must comply with a Municipal Master Plan.

In general, the Municipal Master Plans establish rules governing mineral activity within the limits of the municipality and environmental zoning.

10 Native Title and Land Rights

10.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

The Constitution recognises the need for special rules for mining on indigenous land. In addition, areas occupied by *quilombola* communities (constituted in part by descendants of African slaves) require specific analysis before mining rights are granted.

11 Health and Safety

11.1 What legislation governs health and safety in mining?

In addition to the general rules governing health and occupational safety, mining is subject to its own specific regulations established in the mineral legislation.

11.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

There are strict occupational health and safety requirements that companies must follow. Rules of governance and environmental compliance cover not only owners, but also directors, managers and employees.

11.3 Are there any unique requirements affecting the mining industry in light of the coronavirus (COVID-19) pandemic?

Naturally, some restrictions were imposed on mineral exploration due to the need for isolation.

However, the Government has included mining development among the activities it deems essential. As a result, the pandemic has had a negative, but limited, effect.

In 2020, the Brazilian mining sector made up USD 209.82 billion worth of exports and contributed 63.8% (USD 32.45 billion) of the Brazilian trade balance (USD 50.89 billion).

12 Administrative Aspects

12.1 Is there a central titles registration office?

All mining rights are registered at the ANM, which is headquartered in the capital, Brasília, with state regional representation offices and smaller offices in some cities that are located in important mining hubs.

All systems are computerised.

12.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

The legal regime of mining establishes the possibility of filing appeals, as well as the dual system of administrative jurisdiction.

In addition to the appeals defined in the Mining Code, there is a general law (Law 9.784/1999) that governs all federal administrative proceedings, and it requires that the Public Administration comply with certain principles, including legality, purpose, grounds, reasonableness, proportionality, morality, broad defence, adversarial system, legal certainty, public interest and efficiency.

Miners can also turn to the judiciary if they do not agree with the decision in the administrative sphere.

Administrative mining acts are binding administrative acts and there is no margin for discretionary decisions.

13 Constitutional Law

13.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

Brazil follows the civil law system, and many areas of law are codified.

The Brazilian Constitution contains several provisions dedicated to mining in Art. 176, which contains the master guidelines for its legal regime. Among the most relevant principles are that of sovereignty of the country over its mineral resources, the performance of mining in the national interest, the principle of administrative efficiency and the principle of legal certainty.

The Brazilian Constitution contains a provision that is not found in foreign legislation: a small sharing in the mining results by the landowner.

This means that even without contributing with any investment, and even receiving remuneration for the easement over his real property, the landowner will be entitled to a small share in the mining results. This is a leftover protection that the landowner has, which goes back to the 1940s.

13.2 Are there any State investment treaties which are applicable?

There are no specific treaties governing mining investments. However, there are non-specific treaties that apply to economic activities in general, which have ramifications for mining, such as Convention 169 of the International Labour Organization.

14 Taxes and Royalties

14.1 Are there any special rules applicable to taxation of exploration and mining entities?

Mining companies are subject to the general rules governing taxation, with certain applicable specific rules.

14.2 Are there royalties payable to the State over and above any taxes?

In Brazil there is a fee called Financial Compensation for Development of Mineral Resources ("**CFEM**"), the percentage of which varies according to the mineral substance. These rates apply to a specific calculation base and are defined in accordance with the substances:

- 1% for rock, sand, gravel, clay and other mineral substances when they are for immediate use in civil construction; ornamental stones; mineral and thermal waters.
- 1.5% for gold.
- 3% for bauxite, manganese, niobium and rock salt.
- 3.5% for iron ore.
- 2% for other mineral substances.
- There is an occupation fee during the exploration phase.
- There is no occupation fee during the mining phase.

15 Regional and Local Rules and Laws

15.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Although the authority to legislate on geology, mines and metallurgy belongs exclusively to the Union (federal level), there are a variety of regulations that must be complied with. These are rules related to municipal standards, environmental zoning, etc.

15.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

There are no specific regional agreements, protocols, conventions or international laws that apply exclusively to mining.

Brazil is a signatory to several international agreements with consequences on the mineral industry, such as the United Nations Convention on the Law of the Sea.

16 Cancellation, Abandonment and Relinquishment

16.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

When the miner receives the mining right, he acquires and submits to a variety of rights and obligations. Among these is the obligation not to abandon the mine.

Mining rights can be waived, upon compliance with all the mining and environmental obligations owed up to the point of the waiver.

16.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

There is no obligation to relinquish areas and there is no limit on the number of areas each company can have.

16.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Miners that violate the Mining Code and its complementary regulations are subject to a variety of sanctions, ranging from a warning to forfeiture of the mining right.

In all cases, due legal process is respected, as is the right to a broad defence.

William Freire is an attorney, professor of mining law and the author of several books on mining law and environmental law as it applies to mining, including *Brazilian Environmental Law*, *Annotated Mining Code*, *Comments on the Mining Code*, *Environmental Law Applied to Mining*, *Legal Nature of Consent for Mineral Exploration*, *Consent for Mining and the Claim Stake in Brazilian Law*, *Fundamentals of Mining Law* (in English), *Crisis Management and Environmental Negotiations*, *Legal Risks of Mining* and *Mining Law: access to third-party property for exploration and mining*. He has published over one hundred articles and given more than a hundred presentations, some in other countries. William is an Arbitrator at the Chamber of Business Mediation and Arbitration of Brazil ("**CAMARB**") and a Director of the Department of Mining Law of the Institute of Attorneys of Minas Gerais. He is the founder of the Brazilian Institute of Mining Law ("**IBDM**"). He has been considered one of the most respected consultants in the field of mining law, by several institutes for many years.

WILLIAM FREIRE Advogados Associados
Av. Angélica, 2.491, 16th Floor
Higienópolis
São Paulo, SP, 01227-200
Brazil

Tel: +55 11 3294 6044
Email: william@williamfreire.com.br
URL: www.williamfreire.com.br

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