

THE MINING LAW  
REVIEW

TENTH EDITION

Editor  
Erik Richer La Flèche

THE LAWREVIEWS

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REVIEW

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# PREFACE

I am pleased to have participated in the preparation of the tenth edition of *The Mining Law Review*. The Review is designed to be a practical, business-focused ‘year in review’ analysis of recent changes, developments and their effects, and a look forward at expected trends.

This book gathers the views of leading mining practitioners from around the world and I warmly thank all the authors for their work and insights.

The first part of the book is divided into 13 chapters, each dealing with mining in a particular jurisdiction. These countries were selected because of the importance of mining to their economies and to ensure a 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 the book has three chapters that focus on financing.

The advantage of a comparative work is that knowledge of the law and developments and trends in one jurisdiction may assist those in other jurisdictions. Although the chapters are laid out uniformly for ease of comparison, each author had complete discretion as to content and emphasis.

At the time of writing, the covid-19 pandemic is unfortunately continuing. The economic impact of the pandemic since March 2020 has been surprisingly uneven with many sectors relatively unaffected while others, such as the travel, leisure and hospitality sectors, devastated.

At this time, the main issue in the mining sector is supply not demand. The pandemic has adversely affected production and exploration in many jurisdictions while the production of manufactured goods has recovered. As a result, the mining industry needs to return to pre-pandemic production as quickly as sanitary conditions permit and thereafter increase production to meet growing demand. In doing so, the industry will need to be mindful of the growing environmental and social obligations imposed on it as the world tries to mitigate the effects of climate change and growing income inequality.

Fortunately, the industry is in good financial shape, helped by relatively high commodity price as well as the managerial lessons and discipline learned during the Great Recession.

Also, due to geopolitical and environmental factors two sub-sectors are expected to see considerable new investment, both private and public in the medium and long term. The demand for minerals critical to the high technology and clean energy sectors is expected to grow manifold over the next decades. These minerals are strategic, and one can expect considerable international competition as well as active participation by states whether as investors, lenders or buyers. It will be the new ‘Oil Game’.

As you consult this book, you will find more on topics apposite to jurisdictions of specific interest to you, and I hope you will find the book useful and responsive.

**Erik Richer La Flèche**

Stikeman Elliott LLP

Montreal

August 2021



Part I

# MINING LAW

# BRAZIL

*Alexandre Sion*<sup>1</sup>

## I OVERVIEW

Mining has had a major role in Brazil's economic development since colonial occupation by the Portuguese in the early eighteenth century. According to official government statistics, the mining sector (which comprises both extractive and processing industries) contributed to 22 per cent of the country's exports in the first quarter of 2020, or approximately US\$11 billion, down 11.5 per cent comparing to first quarter of 2019.<sup>2</sup>

Brazil is a global major player and holds vast mineral wealth. In 2018, the country accounted for 19.35 per cent of the world's iron ore production, 9.5 per cent of the world's bauxite production and 11.56 per cent of the world's vermiculite production.<sup>3</sup> According to the World Mining Data 2020, Brazil was the eighth-largest ore producer in the world in 2018,<sup>4</sup> with the majority mined in the states of Minas Gerais and Pará (87 per cent of the total metallic mineral production in 2018).<sup>5</sup>

Despite its geological attractiveness, a survey conducted by the Fraser Institute in 2019 to establish how mining company executives perceive investment attractiveness around the world ranked Brazil 39th of 91 jurisdictions.<sup>6</sup> Brazil was the Latin American and Caribbean jurisdiction with the highest increase in its policy perception score since 2018. In 2019, miners expressed decreased concern over uncertainty regarding disputed land claims, environmental regulations and socioeconomic agreements and community development conditions.

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1 Alexandre Sion is a founding partner of Sion Advogados.

2 Available at [www.mme.gov.br/web/guest/secretarias/geologia-mineracao-e-transformacao-mineral/publicacoes/boletim-do-setor-mineral/-/document\\_library\\_display/1QNRVBzqkqip/view\\_file/1199239?\\_110\\_INSTANCE\\_1QNRVBzqkqip\\_redirect=http%3A%2F%2Fwww.mme.gov.br%2Fweb%2Fguest%2Fsecretarias%2Fgeologia-mineracao-e-transformacao-mineral%2Fpublicacoes%2Fboletim-do-setor-mineral%3Fp\\_p\\_id%3D110\\_INSTANCE\\_1QNRVBzqkqip%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-1%26p\\_p\\_col\\_count%3D1](http://www.mme.gov.br/web/guest/secretarias/geologia-mineracao-e-transformacao-mineral/publicacoes/boletim-do-setor-mineral/-/document_library_display/1QNRVBzqkqip/view_file/1199239?_110_INSTANCE_1QNRVBzqkqip_redirect=http%3A%2F%2Fwww.mme.gov.br%2Fweb%2Fguest%2Fsecretarias%2Fgeologia-mineracao-e-transformacao-mineral%2Fpublicacoes%2Fboletim-do-setor-mineral%3Fp_p_id%3D110_INSTANCE_1QNRVBzqkqip%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_count%3D1). Accessed on 28 July 2020.

3 World Mining Data, available at [www.google.com.br/url?sa=t&trct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiXw-qfvvPqAhXsLLkGHZ1IDx0QFjAAegQIAhAB&url=http%3A%2F%2Fwww.world-mining-data.info%2Fwmd%2Fdownloads%2FPDF%2FWMD2020.pdf&usg=AOvVaw2pHndOHml5j6\\_LrKsItFn6](http://www.google.com.br/url?sa=t&trct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiXw-qfvvPqAhXsLLkGHZ1IDx0QFjAAegQIAhAB&url=http%3A%2F%2Fwww.world-mining-data.info%2Fwmd%2Fdownloads%2FPDF%2FWMD2020.pdf&usg=AOvVaw2pHndOHml5j6_LrKsItFn6). Accessed on 29 July 2020.

4 *ibid.*

5 Available at [www.anm.gov.br/dnpm/publicacoes/serie-estatisticas-e-economia-mineral/informe-mineral/publicacoes-nacionais/informe-mineral-2018-2o-semester-1](http://www.anm.gov.br/dnpm/publicacoes/serie-estatisticas-e-economia-mineral/informe-mineral/publicacoes-nacionais/informe-mineral-2018-2o-semester-1). Accessed on 29 July 2020.

6 Fraser Institute Annual Survey of Mining Companies: 2019, available at [www.fraserinstitute.org/sites/default/files/annual-survey-of-mining-companies-2019.pdf](http://www.fraserinstitute.org/sites/default/files/annual-survey-of-mining-companies-2019.pdf). Accessed on 28 July 2020. The Investment Attractiveness Index takes both mineral and policy perception into consideration.

In 2018, after several years of discussion and expectation, the government launched the Federal Decree No. 9,406/2018, which regulates the Brazilian Mining Code, bringing an update to the industry's legal framework and attracting more investment.

Moreover, in October 2020, Federal Law No. 14,066 was published, changing important aspects of the National Dam Safety Policy.

## **II LEGAL FRAMEWORK**

### **i Constitutional framework and general overview of Brazilian mining law**

Brazil is a federal republic and its Federal Constitution (CF/88) considers mining as a national policy matter, which must be developed in the national interest. Therefore, the federal government has exclusive jurisdiction and power over legislation within the sector. For the same reason, the CF/88 states that all mines and mineral resources are owned by the federal state (the Federation)<sup>7</sup> and are separated from the land's ownership. Conversely, the mining right-holder owns the product from the mining, although the landowner is entitled to receive a share of it.

The Federation controls the exercise of prospecting and mining operations under a system of concessions, licences, permits and authorisations in which it has the power to grant mining titles to private holders, who must be Brazilian citizens or companies incorporated under Brazilian laws, with headquarters and management offices in the country.

The CF/88 also deals with issues relating to environmental liabilities, mining in indigenous or bordering areas, among others.

### **ii Main mining legislation and recent changes**

In addition to the CF/88, the mining industry is mainly regulated by the Brazilian Mining Code, which dates from 1967. The government and mining companies have agreed that mining legislation needs amendments to bring it in line with the current context of the market and technological development. Opinions differ on whether the amendments should be limited to specific aspects or involve more detailed modifications.

After several years of discussion in Brazilian legislative houses and new Mining Code bills, the former federal government launched the Mineral Industry Revitalisation Programme in July 2017, enacting Law No. 13,540/2017 and Law No. 13,575/2017, which provide for modifications to the mining royalties legal framework and the creation of the National Mining Agency (ANM), respectively.

The federal government issued Decree No. 9,406/2018 revoking the previous Mining Code Regulation (Decree No. 62,934/1968) and approving a new one, with substantial amendments concerning regulatory matters.

Besides the Brazilian Mining Code and its recently amended Regulation, there are various pieces of legislation and regulatory provisions governing the sector, including, but not limited to:

- a* Law No. 13,575/2017, which abolished the National Department of Mineral Production (DNPM) and created the ANM;

---

<sup>7</sup> The Brazilian Constitution expressly provides that the Federation holds the ownership of mines and mineral resources. Nevertheless, it is a matter of controversy whether it refers to a real ownership status or a sovereignty relationship.

- b* Law No. 7,990/1989, Law No. 8,001/1990, Decree No. 01/1991 and Law No. 13,540/2017, dealing with matters related to mining royalties – Financial Compensation for the Mineral Resources Exploration (CFEM);
- c* Law No. 6,567/1978 concerning the mineral licensing regime;
- d* Law No. 7,805/1989 concerning small-scale mining consent;
- e* Law No. 12,334/2010, which establishes the National Dams Safety Policy;
- f* Law No. 8,176/1991 criminalising illegal mining; and
- g* Law No. 7,766/1989, which provides for gold, financial assets and its tax treatment.

Since the creation of the ANM, it has been possible to observe the publication of several normative acts seeking to modernise and promote the mining sector.

The ANM has published the Ordinance No. 22/2020, which aims to speed up the regulatory agency's analysis of mining matters. This rule regulates Articles 11 and 18 of the Federal Decree No. 10,178/2018 in relation to a time limit to be fixed to indicate tacit approval of public acts, reflecting the change brought by the Federal Law No. 13,874/2019 (the Economic Freedom Law).

Furthermore, the ANM has published Ordinance No. 24/2020, which deals with the availability procedure in exempt areas, as established by Articles 26, 32 and 65, Section 1 of the Decree-Law No. 227/1967 and Article 2, VII of the Federal Law No. 13,575/2017. The purpose of the rule is to regulate the offer of areas returned, abandoned or lost by operators in the mining sector, re-establishing the possibility of mining in these areas.

On 8 June 2020, the ANM published the Ordinance ANM No. 37/2020, changing Articles 102 to 122 of former DNPM Ordinance No. 155/2016, which addresses the application of the User Guide, a provisional mining authorisation. In this respect, the environmental licensing proceeding is no longer a precedent condition for the issuance of the User Guide, but only conditions its effectiveness, which leads to less bureaucracy and greater agility to the procedure.

Recently, the ANM published Ordinance No. 68/2021, which provides the Mining Decommissioning Plan and the MME Ordinance No. 2/2021, which defines the list of strategic minerals for Brazil in accordance with the Federal Decree No. 10,657/2021. MME Ordinance No. 2/2021 establishes the Policy for Supporting the Environmental Licensing of Investment Projects for the Production of Strategic Minerals – Strategic Pro-Minerals, provides for their qualification under the Investment Partnership Program (PPI) and establishes the Interministerial Committee for the Analysis of Projects of Strategic Minerals.

It is also possible to observe many normative changes on dam safety, both at the federal level and at the state level. The state of Minas Gerais, historically one of the most important states to the mineral sector, enacted the Law No. 23,291/2019, which establishes the Minas Gerais State Policy for Dams Safety (PESB). The PESB broadens up the cases of application of dams safety norms. Although the National Dams Safety Policy (PNSB) – Federal Law No. 12,334 from 2010 – applies to tailings with a height of 15 metres or above and volume of 3 million cubic metres or above, the PESB applies to dams with a height of 10 meters or above and volume of 1 million cubic metres or above. The PESB brings important changes in the regulations respecting tailings dams in the state of Minas Gerais.

Furthermore, Minas Gerais state has enacted the Minas Gerais State Law No. 23,795/2021, which establishes the Minas Gerais State Policy for Dam-Affected People

(PEAB). The PEAB aims to provide social assistance to those affected by dams, before, during and after the installation and maintenance of these structures, including the moment of decommissioning.

At the federal level, many changes were triggered by the rupture of the Brumadinho dam. Also in 2019, the ANM published Resolution No. 4, later revoked by Resolution No. 13, prohibiting tailings dams built or heightened using an upstream method. In October 2020, Federal Law No. 14,066 promoted significant changes in the National Dam Safety Policy. Federal Law No. 14,066:

- a* expressly prohibits mining tailings dams built or raised using the upstream method;
- b* determines that all upstream mining dams must be uncharacterised by 25 February 2022;
- c* prohibits the implementation of mining dams whose failure scenarios identify downstream communities; and
- d* establishes the possibility for the ANM to demand a bond to repair environmental damages (among several other predictions).

As a result of the changes in the National Dam Safety Policy, the ANM opened Public Consultation No. 03, with the purpose of collecting contributions to the draft resolution that seeks to update and consolidate the norms related to the safety of mining dams within the scope of the agency.

It is important to highlight that mining activities are subject to a huge range of administrative rules, ordinances and regulations, mostly issued by the ANM and by the Ministry of Mines and Energy (MME), which complement mining legislation.

Apart from that, specific rules regulate the exploration and exploitation of particular mineral resources, such as petroleum, gas, nuclear minerals, mineral waters and fossil substances of archaeological interest.

Moreover, mining activities may be significantly affected by other related legislation concerning the environment, labour rights, the acquisition of real estate and landholding regularisation.

Finally, the federal government has enacted several rules as a result of the covid-19 pandemic, such as the Federal Law No. 13,979/2020, which establishes the measures for public health emergency confrontation. This rule is regulated by the Federal Decree No. 10,282/2020, amended by the Federal Decree No. 10,329/2020, which has defined public services and essential activities as being the ones that are indispensable for the pressing needs of society, such as (1) monitoring of constructions and dams, which may result in risks to safety; and (2) mining extraction, processing, production, trading, production flow and supply. In accordance with the Federal Decree No. 10,282/2020, the MME has published the Ordinance MME No. 135/2020, considering as essential activities: (1) mineral resources research and extraction; (2) mineral goods beneficiation; (3) mineral transformation; (4) trading and production flow of the goods generated in the mineral supply chain; as well as (5) transportation and delivery of supply chain loads. On 28 July 2021, the ANM has published the general guidelines and procedures to be adopted for face-to-face return at ANM facilities throughout the national territory, gradually and with the adoption of safety measures recommended by health agencies.

After the declaration of the covid-19 pandemic, Minas Gerais state enacted the State Decree No. 4,7886/2020, providing emergency prevention measures.

### **iii Administrative competence and regulatory bodies**

In general, the MME and the ANM, which extinguished the former DNPM, share most of the administrative competences regarding the Brazilian mining sector.

The MME is a public administration body directly subordinated to the federal government. It is the highest authority in mining matters, although there is no real relationship of subordination or hierarchy between the MME's and the ANM's agents or authorities. The Ministry represents the interests of the federal government by formulating mining policies and supervising their implementation. It is also the competent body for granting mining concessions,<sup>8</sup> granting prior consent for assignments and transfers of mining concessions and claim-stake mines,<sup>9</sup> and for declaring the extinction or invalidity of mining concessions and claim-stake mines subject to its competence.

The ANM is a federal authority. The regulatory agency, which is associated with the MME, assumes the powers previously attributed to the DNPM, and is responsible for the management, regulation and supervision of mining activities in the country. It is also incumbent upon the ANM to implement mineral policy, to establish rules and standards for the use of mineral resources, to apply sanctions to regulated agents, to grant exploration licences and other mining titles that do not fall within the competence of the MME, among others.

In addition to the powers previously attributed to the DNPM, the ANM is responsible for declaring public utility for the purpose of establishing mineral easements or expropriation of properties, and for the promotion of competition among economic agents. The Brazilian Geological Service, a federal authority associated with the MME, is responsible for subsidising the formulation of mineral and geological policies, cooperating with public and private entities to carry out research and studies aimed at the exploitation of mineral resources in the country, among other things.

## **III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS**

### **i Title**

According to the CF/88, deposits and mineral resources belong to the Federation. Thus, the exploration and mining of mineral resources are carried out, by means of either 'authorisation' or 'concession', by Brazilians or companies incorporated under Brazilian law and having their registered office and administration in the country.<sup>10</sup>

Because they are assets that belong to the Federation, the economic exploitation of mineral resources without the corresponding authorisation constitutes a crime against economic policy, without prejudice to applicable administrative and criminal sanctions, including environmental sanctions.

Mining rights are unilateral administrative acts, granted by the federal government through the ANM or the MME, depending on their respective competencies. In spite of the recent reform, which culminated in a new edition of the Mining Code Regulation, the granting of mining rights remains unilateral, without the existence of contracts for concessions of mining rights in Brazil.

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8 Except for those under the mineral licensing regime (see Section III.ii).

9 See Section III.ii.

10 Article 176 of the Constitution of the Federative Republic of Brazil.

There is no deadline for granting mining rights defined by law. Administrative granting processes are often time-consuming owing to the lack of ANM and MME resources, which may be aggravated in cases when environmental permits or licences are required, as the environmental agencies in Brazil also face the same problem. However, on 30 January 2020 the ANM enacted the Ordinance No. 22/2020, which regulates Articles 11 and 18 of Federal Decree No. 10,178/2019, establishing deadlines for the tacit approval of economic activities, such as the granting of mining rights. For instance, the ANM has a 120-day term for the analysis of an Application for Mining Research. After this period, the absence of ANM manifestation will imply the tacit approval of the exercise of the economic activity. According to the Mining Code, the use of mineral resources occurs through different regimes, as will be seen below, and observes the principle of priority. Thus, Brazil adopts the first-come, first-served principle, which determines that the first individual to apply for an area will have priority in obtaining the mining right, as long as the legal requirements are met. Thus, areas that have not yet been requested and are not subject to mining rights already granted to third parties (unrestricted areas) are subject to the priority right.

In general terms, the acquisition of mineral rights can take place in a primary or secondary form. A primary acquisition takes place upon submission of an application by an individual, expressing to the ANM his or her interest in an unrestricted area, with the consequent initiation of an administrative proceeding and subsequent granting of the mining right.

Secondary acquisition concerns the assignment or transfer of an existing mining right by its owner to a third party. These acts, however, are subject to prior approval by the ANM or the MME, depending on the type of mining right.

Finally, in exceptional cases of loss or waiver of a mining right by its holder, it is possible to acquire it by means of bidding procedures (availabilities).

## **ii Surface and mining rights**

Soil and subsoil (deposits and mineral resources) properties are separated in administrative terms. Thus, while the Federation owns the deposits and mineral resources, the land is regarded as private property. Therefore, even if the owner of a property discovers that there are mineral resources on his or her property, that person can only explore them and extract them if the state grants the respective mining right. On the other hand, the holder of a mining right may exploit the mineral resources regardless of who owns the property, although the landowner is entitled to a share of the mineral production.

Private agreements between landowners and mining right-holders regulate the access to land. In the event that it is not possible to reach an agreement, the Mining Code provides for a specific judicial proceeding to allow access to the area, guaranteeing payment of compensation to the property owner. The difficulty of negotiating with the owner to enter an area is a factor that often affects or delays the start of activities by the miner.

### ***Claim-stake mines***

Claim-stake mines are an exception in Brazilian mining law and result from a transition rule. According to the 1891 Federal Constitution, the ownership of land included ownership of mineral resources, allowing those owners to exploit mineral resources without the need for authorisation or concession by the Federation.

However, the 1934 Federal Constitution established the current system for separation of land and mineral resources, the latter being transferred to the Federation. Thus, to safeguard

the rights of those who already had consolidated legal positions, those mines that were registered during the transitional period were considered, exceptionally, as private property. In spite of this, mine manifests are also subject to the regulatory rules of the sector, preserving the peculiarities inherent in the title.

### ***Exploration permit and mining concession***

The exploration permit and mining concession regime is a double-title system, divided into two phases, each with a different title.

#### *Phase I: Exploration*

An exploration permit guarantees to the owner, individual or legal entity the power and duty to carry out research work in the entitled area. The title is applicable to all mineral substances regulated by the Mining Code and is valid for one to three years. According to the new rules established by Article 21 of the Federal Decree No. 9,406/2018, an exploration permit may be extended only once, except in cases where it is not possible to access the area to start activities or there has been a failure to obtain the necessary environmental permit or licence, provided that the title-holder proves not to have contributed to this situation and has attended to all environmental agency requests.

An exploration permit does not grant the holder the right to extract mineral substances. During the research work, extraction will only be allowed in exceptional circumstances, with a specific title issued by the ANM.<sup>11</sup> The extraction of mineral substances during the research phase, without the corresponding mining title, constitutes illegal production and subjects the agent to criminal, civil and administrative liabilities.

At the end of the research stage, the holder of the mining right must present a Final Exploration Report (RFP) with the results obtained from the work, under penalty of losing the mining right with the consequent declaration of availability of the area for mineral research.

In addition, during the effective term of the exploration permit, the holder is subject to a series of obligations. Non-compliance with these obligations may be subject to sanctions ranging from warnings, fines and even loss of the mining right.

#### *Phase II: Exploitation*

The mining concession guarantees to the owner the power and duty to explore the deposit until its exhaustion, without a definite term, and is applicable to all mineral substances regulated by the Mining Code. The title may only be acquired by mining companies, after undertaking the authorised exploration through an exploration permit and subsequent approval of the RFP. After the approval of the mentioned Report, the holder must request the mining concession within 1 year, which can be extended for an equal period, in the cases provided by law.

One of the essential documents for requesting a mining concession is the Plan for Economic Development (PAE), which must demonstrate the technical and economic viability of the project and indicate, among other information, the method of mining, the description of the mineral processing units, the scale of production initially planned, the indication of the mineral reserve and the mine closure plan.

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<sup>11</sup> This title is known as a User Guide. Exploitation without the proper environmental licence or equivalent title, even with the User Guide, constitutes illegal exploitation.



A mining concession allows the holder to extract only the substance or substances indicated in the title. Thus, if the holder verifies the occurrence of another substance and has an interest in taking advantage of it economically, the title-holder should follow the specific administrative procedure, adding the new substance to the mining title. In addition, the miner will be subject to a series of obligations, including complying with the plan and the requirements occasionally formulated by the ANM. Failure to comply may be subject to sanctions including warnings, fines and even the loss of mining rights.

### ***Mineral licence***

A mineral licence is applicable to specific substances, such as those for immediate use in civil construction, as provided for in Law No. 6,567/1978, and is restricted to a maximum area of 50 hectares. As a rule, this system grants the holder the right to mineral extraction regardless of previous research, owing to the nature, spatial limit and economic use of the mineral substances.

Unlike the exploration permit and mining concession systems, this licensing system depends, in addition to its registration before ANM, on the granting of a specific licence issued by the competent administrative authority of the municipality where the area is located. Moreover, the mineral licence shall be granted only to the owner of the land or to whoever holds his or her express authorisation, except in the case of real estate belonging to the state.

### ***Small-scale mining permit***

A small-scale mining permit allows the immediate use of the mineral substance, including non-compacted material, exclusively in the alluvial, eluvial and colluvial forms. Similarly to the mineral licence, the small-scale mining permit generally allows mineral exploitation without the need for previous research, taking into consideration the nature, spatial limit, location and economic use of the mineral substances included in the system.

A small-scale mining permit is valid for five years and may be renewed successively.

### **iii Additional permits and licences**

The above-mentioned mineral research and exploitation are also subject to environmental legislation. For this reason, depending on the hypothesis, it will be necessary to obtain the requisite environmental licences and permits for research or mining,<sup>12</sup> including those related to suppression of vegetation and intervention in specially protected areas or natural cavities, among others.

In addition, the Mining Code deals with two further exceptional cases.

### ***Mineral extraction records***

The direct public administration bodies and autonomous institutions are entitled to apply for an extraction permit. It sets up the possibility of extracting certain substances for immediate use in civil construction, exclusively for use in public works, but prohibits any sale, mining by third parties or transfer to private companies. The title is limited to a maximum area of five hectares and will be valid for up to five years, allowing a single extension.

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<sup>12</sup> Mineral exploitation will always depend on a valid environmental licence, issued by the competent environmental agency.

### ***Borrow pits***

In the event of a real need for earth-moving and dismantling of in natura materials for the purpose of opening up transport routes, general earthworks and buildings, the Mining Code exceptionally allows the use of these materials. The execution of the mentioned works does not depend on the granting of a mining title. However, this is an exceptional hypothesis and two mandatory requirements must be met:

- a* the real need to carry out earth-moving work and dismantling of in natura materials for the purpose of opening up transport routes, general earthworks and buildings; and
- b* prohibition of the commercialisation of the material.

In the event of non-compliance with these requirements, the work will be considered as illegal mining by the ANM.

### ***Mining on borders***

The country's border area is considered indispensable to national security and constitutes an internal area that is 150 kilometres wide, parallel to the terrestrial line dividing the national territory, under the terms of Law No. 6,634/1979.

Therefore, any research, mining, exploration or exploitation of mineral resources in the country's border area will necessarily be dependent on prior approval by the National Security Council. This rule applies even if the company establishes itself in such an area.

In addition, mining companies wishing to operate or settle in the border area should meet the following requirements:

- a* at least 51 per cent of the capital must belong to Brazilians;
- b* at least two-thirds of the workers must be Brazilians; and
- c* the administration or management should, for the most part, be Brazilians, and they should hold the predominant administrative powers.

## **iv Closure and remediation of mining projects**

The CF/88 expressly provides that the exploitation of mineral resources subjects the agent to the recovery of the damaged environment, 'according to a technical solution required by the competent public agency'.

Thus, a miner in Brazil is subject to compliance with mining and environmental obligations in relation to mine closure and affected area recovery. In the case of mining concession requirements, for example, the company is required to submit a mine closure plan as well as an economic development plan. As regards the environmental aspects, the miner must present a recovery plan for the damaged area.

Several bills foresee the implementation of an insurance obligation to guarantee the necessary closure of the mine. The Policy for Safety of Dams in the State of Minas Gerais provides for the need to implement an environmental guarantee, so that the miner obtains the operating licence for the tailings dam. The National Dam Safety Policy provides that the ANM may require the miner to present a bond for the repair of damage to human life, the environment and public property. However, no specific regulations on surety have yet been edited.

## **IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS**

### **i Environmental, health and safety regulations**

According to the Federal Constitution, the Federation, the states and the Federal District have concurrent legislative competence in environmental matters. In addition, it is the responsibility of municipalities to legislate on matters of local interest and, complementarily, of environmental protection. Therefore, Brazilian environmental legislation has an enormous diversity of laws and administrative acts, which affect mining activity, among other things.

In particular, we list the following main environmental laws:

- a* Law No. 6,938/1981, which provides for the National Environmental Policy (PNMA);
- b* Law No. 9,605/1998, which deals with crimes and environmental administrative offences;
- c* Law No. 12,305/2010, which provides for the National Policy on Solid Waste (PNRS);
- d* Law No. 9,985/2000, which deals with the National System of Conservation Units (environmentally protected areas) (SNUC); and
- e* Complementary Law No. 140/2011, which provides for administrative competence in environmental matters.

In this regard, the concurrent legislative competence among the federation's environmental bodies creates different scenarios depending on the location of the mining project. Thus, the degree of complexity in obtaining an environmental licence and the associated requirements and obligations – and the time it will take to obtain the necessary environmental authorisations and licences – may vary according to the Brazilian state in which the project is located.

In relation to labour laws, which provide for occupational safety and health conditions, the legislative competence is federal. Thus, there are no major discrepancies between the rules applicable to workers on projects located in different states.

With regard to the rules applicable specifically to occupational health and safety in mining, we point out Regulatory Rule No. 22 – Occupational Health and Safety in Mining, issued by the Ministry of Labour and Employment (MTE), and Ordinance No. 237/2001, issued by the DNPM (current ANM), which approves the Mining Regulatory Standards.

Regulatory Rule No. 22 provides for the responsibilities of the employer and the employee, and deals with aspects related to the transport of people and mining materials, safety and ventilation systems in underground activities, among other things.

The Mining Regulatory Standards set out provisions for the protection of workers, workplace organisation, emergency operations and the need for training.

### **ii Environmental compliance**

Any activities that involve environmental resources or are considered as effectively or potentially polluting, or those that may cause environmental degradation, are subject to environmental licensing. To obtain the relevant environmental licence, it may be necessary to prepare environmental studies, which may be less or more complex, depending on the case. Administrative powers concerning environmental matters are regulated by the CF/88 and Complementary Law No. 140/2011, which establishes that the competence for environmental licensing will depend on the predominance of the interest, which may be municipal, state or federal. As a rule, mining is licensed by state environmental agencies, but exceptionally may be licensed by the federal environmental agency or by municipal environmental agencies, in accordance with the laws in force.

Other permits or licences may be necessary, such as those required for intervention in preservation units (environmentally protected spaces) and natural cavities, the suppression of vegetation, among others.

The procedures for obtaining permits and authorisations vary according to the competent environmental agency. In addition, different procedures and types of licences may be applied to different projects, depending on the size and the actual or potential impacts caused. Thus, it is not possible to indicate a specific term or procedure for obtaining an environmental licence and any additional permits or authorisations. However, in general, environmental agencies throughout Brazil face operational difficulties owing to the lack of structure, a factor that usually negatively influences the deadlines for issuance of these licences and authorisations.<sup>13</sup>

### **iii Third-party rights**

In the first place, it is important to highlight that the Federal Constitution does not prohibit but only sets forth specific conditions concerning the exploration of natural resources within indigenous areas, which must be regulated by Law. However, these conditions have not yet been implemented, consequently, mineral activities in indigenous areas are still not possible. Despite that, the country faces a high level of illegal mining in indigenous protected areas.

Pursuant to Article 231 of the CF/88, mineral exploration and exploitation in indigenous areas is dependent on authorisation from the National Congress, the enacting of a law regulating the activity and conducting public consultations or inquiries that involve participation by the local communities.<sup>14</sup>

## **V OPERATIONS, PROCESSING AND SALE OF MINERALS**

### **i Processing and operations**

Mining processing and beneficiation of mined minerals are subject to a legal framework and regulations, especially the Mining Regulatory Standards. Other than that, these activities require environmental licences granted by the competent environmental body.

There are no specific rules concerning the use of foreign labour in mining,<sup>15</sup> except for those concerning activities developed in frontier areas (i.e., at least two-thirds of the workers must be Brazilians and most of the administration or management positions must be held by Brazilians, who must hold the predominant administrative powers).

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13 In addition, civil society participation in environmental licensing procedures and frequent prosecution involving these procedures are factors that may delay the granting of an environmental licence.

14 Article 231 also establishes that indigenous people are entitled to a share of the product of mining activities held on the lands they live.

Brazil is a signatory to Convention No. 169 of the International Labour Organization, which also provides for the requirement of a public inquiry in which indigenous and local communities are represented.

15 However, foreigners may obtain work visas to work in Brazil.

## **ii Foreign investment**

The Brazilian legal framework does not make a distinction between foreign and national investors, although the Profit Remittance Law<sup>16</sup> states that foreign direct investment and certain financial transactions are subject to prior registration by the Central Bank of Brazil (BACEN). BACEN is responsible for registering any foreign capital, which shall also be registered by the receiving party in their accounting statements.

In general, Brazil does not have restrictions on foreign investments. However, for national security reasons, some activities are subject to special conditions. This is the case for mining in frontier areas, and for the acquisition, rural lease or other rights over real estate properties located within frontier areas (150 kilometres), which require prior approval by the National Security Council.

It is important to highlight that the acquisition of rural lands by foreign companies, or Brazilian companies controlled by foreigners or with the majority of its capital controlled by foreigners or foreign companies, is subject to specific legal requirements and certain legal restrictions.<sup>17</sup> The Bill No. 296/2019 is under analysis by the Brazilian House of Representatives and aims to facilitate the purchase, ownership and lease of rural properties in Brazil by foreign individuals or companies. The proposal exempts the need for authorisation of licence for the acquisition and possession by foreigners in case of rural properties with areas not exceeding 15 fiscal modules (in Brazil, the value of the fiscal module is fixed by INCRA and ranges from 5 to 110 hectares, depending on the municipality).

Finally, only Brazilian citizens or companies incorporated under Brazilian laws, with headquarters and management offices in the country, are allowed to mine in Brazil.

## **VI CHARGES**

### **i Royalties**

Mining right holders are required to pay the CFEM a non-tax nature charge resulting from the activity of mining and due in the event of sales, consumption, transformation, use, exportation and public auctions of mineral resources. Rates vary from 1 per cent to 3.5 per cent, depending on the mineral exploited.

The mining royalty legal framework underwent major changes after the enactment of Law No. 13,540/2017, which changed the CFEM tax basis, rates and its transfer percentages to states and municipalities, among other things.

On 16 June 2021, ANM enacted the Ordinance No. 790/2021, which establishes the guidelines and procedures to be observed by the signatory entities in the inspection of the CFEM.

### **ii Duties**

#### ***Landowners***

Pursuant to Brazilian legislation, landowners are entitled to receive various payments during mineral exploration and exploitations. In general, mining right-holders must pay revenues for the occupation and use of the area, and compensation for the damage caused to the

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<sup>16</sup> Law No. 4,131/1962.

<sup>17</sup> Business transactions that result in direct or indirect transfer of rural lands are subject to the same restrictions.

landowner's property. The amounts to be paid must be negotiated between the landowner and the mining right-holder and may be subject to a specific lawsuit procedure in the absence of an agreement.

The landowner is also entitled to a share of the results of the mining, the value of which cannot be less than 50 per cent of the amount paid as a royalty. Therefore, a landowner's participation will vary depending on the mineral exploited.

### **iii Other fees**

#### ***Annual fee per hectare***

Exploration permit holders are required to pay a fixed amount per square kilometre of the titled area. The annual fee per hectare is levied annually until the final exploration report is filed and is payable either in January or July, depending on the exploration permit's publication date.

### **iv Environmental compensation**

Environmental compensation may be due, depending on the size of the business and degradation potential, the location of the titled area and its specific environmental assets.

For instance, pursuant to Law No. 9,985/2000, which provides for environmentally protected areas (conservation units), in the event of environmental licensing of enterprises with significant environmental impact, the entrepreneur is obliged to support the deployment and maintenance of a conservation unit.

Other environmental compensations may be due, depending on the scale of the project and the existence of negative impacts in especially protected areas. There are specific legislation providing for the compensation of the environmental impacts, which may vary according to the affected area. Amongst others, we mention:

- a* Federal Law No. 11,428/2006: Atlantic Forest; and
- b* Federal Decree No. 99,556/1990: Natural Underground Caves.

## **VII OUTLOOK AND TRENDS**

Considering the public and governmental commotion in general caused by cases of dam failures in Brazil, mining tailings dams built or altered by the upstream method were prohibited and the de-characterisation of these structures must occur by 25 February 2022. Because of recent legislative changes, there is an expectation that the ANM will issue a new resolution to consolidate the resolutions on the matter.

Another relevant fact refers to the Mining Plan adopted by the ANM to foster the mining sector activities to overcome the impacts brought about by the covid-19 pandemic. Environmental licensing passed from being a previous condition to the issuance of a provisional mining authorisation and became a condition only of its effectiveness. There were also amendments in the proceedings of provisional mining authorisation issuance to make it easier and faster.

Among other measures, the Mining Plan also aims at fostering the mining activities by simplifying procedures in the mining processes. The intention of the ANM is to unlink mining to the environmental licensing processes. Despite being processed separately, both mining and environmental licensing processes will still be needed for the operation of the mine.

Furthermore, many measures are being taken to foster and stimulate the mining sector, which shows a governmental effort and will to boost the mining industry, such as the Federal Decree No. 10,657/2021, which establishes the Policy for Supporting the Environmental Licensing of Investment Projects for the Production of Strategic Minerals, as well the concern with dam safety measures. In this regard, the Brazilian government has enacted important regulations such as the ANM Ordinance No. 68/2021, which provides the Mining Decommissioning Plan.

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Alexandre Sion is the founding partner of Sion Advogados. He is a postdoctoral candidate at the University of Salamanca, Spain (title pending PhD completion), and a PhD candidate at Universidade Autónoma de Lisboa, Portugal (credits completed). He has an LL.M. in international commercial law (University of California), specialising in constitutional law, postgraduate degrees in civil law and civil procedure law from FGV, Brazil, and bachelor degrees in law and in business administration. Alexandre Sion was a legal counsel at several large mining companies.

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