



# ICLG

The International Comparative Legal Guide to:

## **Mining Law 2019**

**6th Edition**

A practical cross-border insight into mining law

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# Peru



Rebaza, Alcazar & De Las Casas

Luis Miguel Elias

## 1 Relevant Authorities and Legislation

### 1.1 What regulates mining law?

The General Mining Law is the primary national law that regulates the mining industry in Peru. Said law, its regulations and ancillary rules apply in light of the Peruvian Constitution in a civil law-based system.

### 1.2 Which Government body/ies administer the mining industry?

The Ministry of Energy and Mines (MINEM) is the main government body that administers the mining industry. Other relevant bodies include the Geological, Mining and Metallurgical Institute (INGEMMET), the Ministry of Environment (MINAM), the National Environmental Certification Authority (SENACE), the Supervisory Agency for Investment in Energy and Mining (OSINERGMIN) and the Agency for Environmental Assessment and Enforcement (OEFA).

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

In addition to the General Mining Law, other sources of law affecting the mining industry include, among others:

- The Peruvian Constitution.
- The Peruvian Civil Code.
- The General Environmental Law.
- The Law that Regulates Environmental Liabilities for Mining.
- The Hydric Resources Law.
- The General Law of Local Communities.
- The General Corporations Law.
- The General Law of the Public Registries.

## 2 Mechanics of Acquisition of Rights

### 2.1 What rights are required to conduct reconnaissance?

All natural resources within the Peruvian territory are owned by the Peruvian State, which has sovereignty on the use and deployment of such resources. In respect of mineral resources, the General Mining Law regulates a system based on mining concessions. The Peruvian

State retains the ownership of all mineral resources; however, the ownership of extracted minerals is vested in the holders of mining concessions.

Any person (including individuals and entities) is entitled to request before INGEMMET the granting of mining concession rights. These rights are independent from surface and real estate property rights located over the premises of such mining concessions. INGEMMET is the government body that consolidates a nationwide publicly available database with all mining concessions for metallic and non-metallic minerals.

Mining concessions are granted on a “first come, first served” basis. If simultaneous requests are made, an auction among the interested parties settles such requests. A mining concession provides its holder with the exclusive right to undertake mining activity within a determined area.

All holders of mining concessions are required to pay good standing fees, called validity fees. These fees are calculated based on the concession area and paid on an annual basis to INGEMMET. Reduced fees apply for artisanal and small mining producers. Failure to pay validity fees for two years will result in the cancellation of the mining concession.

### 2.2 What rights are required to conduct exploration?

All holders of mining concessions have the right to perform exploration and conduct mining activities. Hence, no proceeding to convert the exploration rights into operation rights applies. The same mining concession is valid for exploration and to conduct mining activity in Peru.

### 2.3 What rights are required to conduct mining?

The following mining rights, as applicable, are required to conduct mining operations:

Mining Rights	Scope
Mining concession	Performance of exploration and conduct of metallic or non-metallic mining activities in a determined area.
Beneficiation concession	Performance of physical and/or chemical procedures required for extraction, concentration, smelting and/or refining.
General works concession	Auxiliary activities or complementary services, such as ventilation, drainage, lifting or extraction for two or more mining concessions.

Mining Rights	Scope
Mineral transport concession	Required for massive and continuous transportation of minerals via unconventional methods, such as conveyor belts, pipelines or aerial tramways.

All holders of mining concessions are required under the General Mining Law to move into production and comply with the applicable minimum annual production thresholds. As of 2019, the minimum annual production threshold is of one Peruvian tax unit (approximately USD 1,260.00) per hectare of the mining concession.

Failure to meet the minimum annual production threshold after 10 years from when the concession was granted will result in the application of penalty fees each year up to the 30<sup>th</sup> anniversary of the date when the concession was granted. Nonetheless, the penalty will not apply if the investment made is 10 times more than the penalties incurred. Upon the 30<sup>th</sup> anniversary and if the holder cannot reach the minimum annual production threshold, the mining concession will automatically lapse and expire.

Other rights required to conduct mining activities in Peru include the acquisition of surface and access rights to the area of interest (see section 7), environmental certification and permitting (see section 8), and, as applicable, authorisations, permits and licences for the construction of facilities, use of explosives, use of water resources, use of controlled substances and chemicals, fuel storage, management and disposal of waste or hazardous materials, among others.

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

The same procedures to request and obtain mining rights apply to all metallic and non-metallic concessions. Land-based mining concessions are granted in areas that range from 100 hectares to 1,000 hectares per concession. In marine zones, the concession may reach an area of up to 10,000 hectares.

#### 2.5 Are different procedures applicable to natural oil and gas?

Yes, different procedures and specific legislation applies for such activities.

### 3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

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

Individuals and entities, whether national or foreign, are entitled to apply for and hold mining rights. The latter is based on the Peruvian Constitution, which acknowledges the same rights to all national and foreign individuals and entities.

The foregoing general rule is subject to an exception. Foreigners are restricted to acquire property rights over real estate and/or mining concessions located 50km within Peru's country boundaries, unless prior authorisation is obtained via a Supreme Decree.

Public officers and officials, such as the President, Congress, judges, ministers, prosecutors, among others, cannot participate in mining while holding office.

#### 3.2 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?

Any foreign entity or foreign-owned entity, whether direct or indirect, is entitled to request and hold mining rights in Peru. No special rules apply for foreign applicants, save for the restriction on acquisition of rights within 50km of the country's borders (refer to question 3.1 above).

#### 3.3 Are there any change of control restrictions applicable?

No legal or regulatory change of control restrictions apply in Peru.

#### 3.4 Are there requirements for ownership by indigenous persons or entities?

There are no requirements for ownership of mining rights by indigenous persons, groups or entities.

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

The Peruvian State does not have free carry rights or options to acquire shareholdings in mining companies or other entities that conduct mining in Peru.

The Peruvian Constitution provides for the government to have a promotional role for the development of private investment. The government may participate in any business only in a subsidiary manner, provided that, however, a special law is issued and approved by Congress.

### 4 Processing, Refining, Beneficiation and Export

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

The General Mining Law and its regulations include special provisions for beneficiation rights and related processing and refining procedures. The law defines beneficiation as the conjunction of physical, chemical and/or chemical-physical processes required for extraction or concentration in order to purify, smelt or refine minerals. Beneficiation includes the following stages:

1. Mechanical preparation process, whereby a mineral is downsized, classified and cleansed.
2. Metallurgy, whereby chemical and/or physical processes are performed to concentrate and extract minerals or their valuable compounds.
3. Refining process to purify the mineral products from prior metallurgical processes.

A holder of a beneficiation concession has the right to perform extraction and/or concentration processes to purify, smelt and/or refine metals.

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

In general, commercialisation of minerals in Peru is unrestricted.



There are no restrictions on the export of minerals. Mining producers may freely export their production and no authorisation or licence is required for such purposes. In the case of gold, all individuals and entities that trade and/or refine such metal are required to be registered in the Special Registry of Gold Traders and Producers.

## 5 Transfer and Encumbrance

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

There are no restrictions on the transfer of mining rights in Peru. Mining rights may be freely transferred among parties via agreements and no authorisation or consent is required from government bodies.

The transfer, encumbrance or other disposition of mining rights agreed among parties or pursued by creditors (such as injunctions) against holders of such mining rights, are all acts that may be registered before the Public Registries. Registration provides publicity to the holder of such rights and enforceability priority of such rights against third parties.

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

Mining rights are capable of being mortgaged, encumbered or otherwise granted as collateral to secure obligations, whether financial or other. In case of mortgages, said security interests are constituted upon their registration in the Public Registries.

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

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

The holder of a mining concession is entitled to file a subdivision request before INGEMMET to separate the mining concession into two or more concessions. If the mining concession is mortgaged or encumbered, the authorisation and consent of the creditor or holder of any such creditor rights is required.

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

A mining concession may be held by multiple parties or holders in undivided interests or shares. The undivided interests of multiple holders to a mining concession are of similar legal nature to the rights held by multiple owners of a single real estate property. When multiple parties hold rights to a mining concession, they must appoint a common representative.

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

Mining concessions grant the right to explore for or mine metallic or non-metallic minerals. Hence, a mining concession granted for metallic minerals allows the holder of rights to explore for or mine primary and secondary metallic minerals.

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

Mining concessions are independent and differ from all surface rights, facilities or residue deposits on the land concerned. In order to exercise surface rights, access rights or other rights over the area of interest, the holder of the mining concession is required to acquire or obtain such rights or authorisation from their owners or holders. See section 7.

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

The General Mining Law and its regulations do not impose special rules for offshore exploration and mining.

## 7 Rights to Use Surface of Land

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

Mining rights are independent from surface rights located on the same premises of land. Hence, the holders of mining rights may be different parties to those holders or owners of the lands where such mining rights are confined.

There is no restriction for mining concession holders to acquire or purchase lands, real estate properties, easements, rights of way and/or other surface rights owned or held by third parties.

If the owner of such properties is the government, then a regulated acquisition process would need to be initiated by the mining concession holder before the National Agency of State-owned Properties.

If the owner or holder of such properties or rights is a local community, then such community's approval is required and, generally, an agreement must be negotiated and agreed with the community addressing their expectative in respect of the mining investment.

Only in case of mining concessions granted over unclaimed and unoccupied lands, shall the holder of the mining rights automatically have the right to use the surface for mining purposes, without additional authorisation and free of charge.

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

The holder of a mining concession has to respect the landowner's property or rights of an occupier. A holder of mining rights cannot trespass such property or use surface lands without the landowner's or occupier's consent.

### 7.3 What rights of expropriation exist?

Expropriation rights of the government are limited to events of national security, or in case of public interest and necessity, as specifically declared by law. In case of expropriation, the Peruvian State is required to make a compensation payment to the former owner based on fair valuation of the expropriated property.

## 8 Environmental

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

The following environmental certification and related authorisations are required, as applicable, for mining:

- A statement of environmental impact is required for projects or activities that have no or a minor impact on the environment.
- A semi-detailed environmental impact study is required for projects or activities that have a moderate adverse impact on the environment.
- A detailed environmental impact study is required for projects or activities that have a significant adverse impact on the environment.
- Water permits, which may include the licence to use certain hydric resources, authorisation to discharge wastewaters or authorisation to reuse and/or treat water.
- Certification on the absence of archaeological remains and construction authorisation required for construction and implementation of the project's facilities.
- Authorisation to use explosives for construction and mining.
- Registry and authorisation for the use of controlled substances and chemicals.
- Approval of the Mining Plan.
- Mining Operation Certificate.
- Approval of the Mine Closure Plan and related guaranty to the benefit of MINEM.

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

Peruvian regulation imposes certain restrictions and obligations for the storage of tailings and other waste products. Among others, policies for the control and management of emissions, hazardous materials and reagents are required to be implemented. On an ongoing basis, OEFA monitors compliance with the applicable regulation, environmental certifications and authorisations. OEFA is entitled to carry on inspections and pursue investigations to audit compliance of environmental regulation and for the prevention of environmental risk and/or liabilities.

The plan for the closure of a mine is subject to the approval of MINEM. The holder of the mining concession is required to put in place a guaranty to secure its obligations before MINEM, as approved under the mine closure plan.

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

The mine closure plan sets forth all actions, studies and obligations to be conducted by the holder of mining rights in order to mitigate, reduce and/or eliminate the adverse effects that the mining operations may have on the environment, including the local population and ecosystems within the area of interest. The plan needs to address the technical and legal obligations to be performed progressively during the life of the mine.

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

Mining rights are not subject to specific zoning or planning requirements; however, such rights will not be available or granted on the premises of protected areas or other restricted and regulated areas.

## 9 Native Title and Land Rights

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

The government of Peru ratified the International Labor Organization Convention No. 169 and adopted its principles into domestic legislation. Hence, prior consultation to native or indigenous communities is required for new projects within an area of interest.

In case of a negative response from native communities, such event does not cancel or terminate the mining rights. As mentioned in section 7, mining rights are independent and differ from surface rights or other rights to land, such as native titles or others.

## 10 Health and Safety

### 10.1 What legislation governs health and safety in mining?

Health and safety in mining is governed by the following main laws and regulations:

- General Mining Law and its regulations.
- Law of Safety and Health in Employment.
- Regulations for Occupational Health and Safety for Mining.
- Law of Productivity and Competitiveness and its regulations.

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

Health and safety regulations in mining impose general and specific obligations to all stakeholders, including holders of mining rights, employers, managers and employees. Among others, the following main obligations apply:

- Specific safety requirements for construction, operation and other mining activities.
- Medical exams are required for occupational safety and health.
- Minimum salary regulations are in place for mining employees.
- Special holiday is acknowledged for mining employees.
- Special retirement law and regulations for mining employees.
- Contractual obligations under collective bargaining agreements or other agreements with mining employees may address additional health and safety rights and obligations.

MINEM, OSINERGMIN, the Ministry of Labor and Employment, and the Agency of Labor Inspection (SUNAFIL) are the regulatory bodies that supervise compliance with health and safety obligations in mining.

## 11 Administrative Aspects

### 11.1 Is there a central titles registration office?

Mining rights are registered before the Mining Registry of the Peruvian Public Registries and recorded before INGEMMET in a public nationwide database that reflects the regulatory status on validity fee payments.

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

Peruvian law provides that all administrative decisions, whether related to mining or not, are to be subject to a dual administrative instance. A decision from a first instance may be appealed for review by the second administrative instance which is of a higher level. Further, a decision of the second administrative instance may be challenged in a judicial process before Peruvian courts and tribunals.

## 12 Constitutional Law

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

The Constitution acknowledges the ownership of the Peruvian State over natural resources and provides that concessions grant their holders real rights in a civil law system and subject to their applicable laws. Likewise, the Constitution acknowledges that property is an inviolable right.

### 12.2 Are there any State investment treaties which are applicable?

The government of Peru promotes foreign investment and has more than 30 bilateral agreements with countries from the Americas, Asia and Europe. Further, Peru is signatory to:

- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- The International Centre for Settlement of Investment Disputes, a World Bank group international arbitration institution for dispute resolution between international investors.
- The Multilateral Investment Guarantee Agency, a World Bank group organisation which offers political risk insurance and credit enhancement guarantees.

## 13 Taxes and Royalties

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

The following special taxation rules apply:

- Mining royalties levy the quarterly sales revenues from metallic and non-metallic mineral resources at a minimum rate of 1% and up to 12%.
- Special mining tax levies the operating profit of metallic resources at a tax rate that ranges from 2% to 8.4%.
- Special mining contribution applies to entities that have entered into tax stability agreements with the government. This contribution is calculated over and ranges between 4% to 13.12% of the operating profit of metallic mineral resources.

All payments of mining royalties, special mining taxes and special mining contributions are deductible expenses for income tax purposes.

Further, as an incentive for mining investment, an early recovery regime of VAT applies for mining entities in the exploration stage, as well as special tax depreciation for all mining companies with a stability agreement or in general for mining equipment and machinery.

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

See question 13.1.

## 14 Regional and Local Rules and Laws

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

National legislation prevails over local provincial or municipal regulation. Local provincial and municipal rules cannot go against the Constitution, and laws are required to be issued subject to the national legal framework.

### 14.2 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?

International treaties and conventions that Peru is party to are adopted by and apply as domestic legislation. Peru has ratified:

- The ILO Convention 169 (see question 9.1).
- The International Covenant on Economic, Social and Cultural Rights.
- The Convention of Technical Cooperation with the Inter-American Development Bank.
- The International Technical Law ISO 2,600 providing guidelines on social responsibility.

See question 12.2.

## 15 Cancellation, Abandonment and Relinquishment

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

The General Mining Law provides that petitions for mining rights shall fall in an abandonment event if the petitioner does not comply with the obligations and requirements to be filed within the applicable request proceeding.

In case a holder of a mining right fails to pay the validity fees and/or penalties (for not reaching the minimum annual production threshold) for two years, whether consecutive or not, such mining right will lapse and expire.

### 15.2 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?

Mining concessions are irrevocable so long as all legal obligations to maintain such rights are being met by its holder. Only if such

holder fails to meet its obligations (refer to the second paragraph of question 15.1) or expressly files a request for the extinction of such right, may such person relinquish their mining right.

**15.3 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?**

Refer to question 15.2. Further, the Peruvian State may cancel mining rights in the following cases:

- if the mining concession overlaps with other rights having statutory preference or priority;
- if the mining rights are inaccessible; or
- if they are declared null and void due to restrictions of the holder of such rights.



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## Rebaza, Alcázar & De Las Casas

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