

Kluwer Arbitration Blog

Hot Topics in Critical Minerals Mining: ITA's Toronto 2025 Third Conference in the Mining Sector

Emilie McConaughy (Lalive) · Saturday, April 19th, 2025 · Institute for Transnational Arbitration (ITA)

The Institute of Transnational Arbitration (“ITA”) recently convened its [Third Conference on International Arbitration in the Mining Sector](#) on 5-6 March 2025 in Toronto, Canada. This year’s edition centered on the mining of minerals essential for the energy transition, including lithium, copper, rare earths, and nickel. These minerals are pivotal in developing technologies for telecommunications, energy storage and the electrification of transportation and other sectors. The conference featured several inspiring panels that explored the risks and opportunities associated with critical minerals strategies, as well as the social, environmental, and legal challenges that arise in commercial and investment arbitrations involving the mining of these minerals.

The event was led by [Thomas \(T.L.\) Cubbage](#) (ITA / Center for American and International Law) and [Prof. Charles H. \(Chip\) Brower II](#) (Miller Canfield/Wayne State University). In their remarks, they emphasized the timeliness of the topic considering the efforts of States to secure access to and supply of these critical minerals, often through protectionist measures. Such measures are likely to result in an increase of mining disputes. The discussions, held in the aptly named Sovereign Ballroom of the Omni King Edward Hotel, were significantly influenced by the troubling geopolitical developments in the United States, including political statements that undermine global peace and the rule of law, as well as the outlook of the imposition of tariffs.

The first day of the conference was dedicated to the Young Lawyers’ Roundtable, presented by Young ITA and co-chaired by [Ruxandra Irina Esanu](#) (Wordstone Dispute Resolution) and [Ryan Lax](#) (Torys). The second day, co-chaired by [Simon Greenberg](#) (Clifford Chance), [Santiago Montt](#) (Los Andes Copper Ltd.) and [Martin J. Valasek](#) (Bennett Jones), featured five insightful and thought-provoking panels.

Risks and Opportunities of the Energy Transition – An Evolving Geopolitical Landscape Affecting Mining Disputes

The Young Lawyers’ Roundtable’s first panel, moderated by Ryan Lax, compared and contrasted policies and regulatory approaches to mining critical minerals, with a focus on the role of governments. [Isabella Chan](#) (Natural Resources Canada) presented the Canadian perspective, [Ana María Ordóñez](#) (Martinez Quintero Mendoza Gonzalez Laguado & De La Rosa) provided insights

on Latin America, and [Simon N. Batifort](#) (Curtis, Mallet-Prevost, Colt & Mosle) discussed the African context.

Building on this foundation, [Paola Cifuentes](#) (Anglo American Chile) moderated a panel featuring [Frank Nikolic](#) (CRU Group) and [Macarena Vargas](#) (CODELCO). They explained how the supply of minerals such as copper, lithium, nickel, and cobalt is crucial for technologies driving the world's transition towards new climate goals and a low-carbon future. These minerals are essential for renewable energies and decarbonizing the transportation sector through electrification, including for electric vehicles. Noting China's dominance in the supply chains of critical minerals, including battery supply chains, the panelists unpacked the risks and opportunities arising as the world accelerates the energy transition. Mining companies must navigate a host of legal, political, technical and commercial challenges, including aging deposits, scarce water resources, market volatility, and community engagement. The panelists also highlighted the growing regulatory scrutiny aimed at addressing environmental and social concerns through stricter permitting processes. The shifting geopolitical landscape was emphasized, as governments may resort to resource nationalism by characterizing critical minerals as essential for their national security. To overcome these obstacles and mitigate related risks, the panel noted the importance of comprehensively understanding the environmental, social, and geopolitical factors involved. This will allow mining companies to craft long-term strategies, ensure business viability and adaptability, through strong partnerships with governments, communities, and key players in the field.

Another panel, moderated by Martin J. Valasek and composed of [Prof. Andrea K. Bjorklund](#) (McGill University Faculty of Law), [Gaela K. Gehring Flores](#) (Hugues Hubbard & Reed) and [Ben Love](#) (Baker Botts) addressed the impact of protectionist measures taken by States when implementing new and competing critical mineral strategies. This discussion resonated particularly strongly in the current geopolitical context of the protectionist approach taken by the Trump administration in the United States, which has triggered the application of tariffs and the adoption of countermeasures around the world. These developments are likely to impact mining projects globally and affect the stability of the international legal order, while also casting doubt on the ability of investment arbitration to offer solutions. Investment tribunals are expected to increasingly address disputes arising out of politically motivated measures, for which they will face jurisdictional hurdles and have to consider previously rarely used provisions of investment treaties, such as national security clauses, or necessity and emergency provisions.

The Social License to Operate a Mining Project and Other ESG and Compliance Considerations

The second panel of the Young Lawyers' Roundtable, moderated by Ruxandra Irina Esanu, featured two debates focusing on the social license to operate a mining project. [Laura Sinisterra](#) (Debevoise & Plimpton) and [Natalia Zibibbo](#) (Freshfields) debated whether the social license was relevant to a tribunal's analysis of State liability. Drawing on various cases, they explained how States and investors had sought to rely on the concept either as a shield or a sword. [Diego Romero](#) (De Gaulle Fleurance & Associés) and [Emilie McConaughy](#) (LALIVE) then considered a practical case study to debate whether the concept was too amorphous to be adjudicated on an evidentiary basis. While the contours of the social license concept remain vague, the debates and subsequent discussions with the audience showed that tribunals will closely consider how mining

companies engage with stakeholders and manage conflicts when assessing both the relevant factual matrix and the merits of a case.

The panel moderated by Simon Greenberg and composed of [Stephen Edward Crozier](#) (Wyloo), [Nicole Duclos](#) (Covington & Burling) and [Aleem Ladak](#) (PowerCo Canada) took a forward-looking view of the evolution of ESG issues in the context of international commercial arbitration. Having initially started as aspirational goals, ESG provisions are now an essential component of modern commercial contracts, including supply contracts. As manufacturers become more directly involved in the sourcing of critical minerals, they are demanding stricter compliance with ESG standards from their suppliers, for example when mapping and auditing supply chains or publicly disclosing how responsible mining initiatives are implemented. The panel noted that ESG obligations can be found throughout the contractual framework, such as in the pre-investment due diligence phase, representations and warranties, and conditions precedent. Available remedies in case of breach include fines, contract termination and compensation for reputational damages. While bad optics can have severe consequences in the court of public opinion, international tribunals have also awarded significant damages in cases of breach of representations and warranties or inadequate due diligence. In conclusion, with the European Union leading the regulation of ESG criteria and their increased prevalence in contracts, ESG clauses are expected to become more sophisticated and stringent in the coming years.

The role of technical and quantum experts in international arbitration proceedings involving mining disputes was the topic of the panel moderated by [Jonathan C. Hamilton](#) (Paul Hastings), which included [Andrew A. Brodkey](#) (Idaho Copper Corp.), [William L. Goodfellow Jr](#) (Exponent), and [Ian Weir](#) (SLR Consulting). Experts may assist international tribunals in understanding the geotechnical, social and environmental features of each specific phase of a mining project, from the limited knowledge at the development stage to the more refined understanding gained as the project evolves. This also forms the backdrop for investors' risk-assessment of a project. The panelists then explored how ESG factors may impact mining projects. Through a presentation of case studies in Latin America, it was shown that ESG measures could give rise to expropriations, although not always compensable. The panelists further discussed how evidentiary challenges may arise from inadequate feasibility studies or baseline reports, which experts can help contextualize, as well as the suitability of various valuation methods at different stages of a mining project.

The final panel of the conference, titled "Playing by the Rules: Applicable Law in Arbitrations Involving Critical Minerals", was moderated by [Diora Ziyaeva](#) (Dentons US), and featured [Nathan Eastwood](#) (Watson Farley & Williams), [Monique Sasson](#) (Arbitra) and [Audley Sheppard KC](#) (Twenty Essex). They explored the sources of applicable domestic and international laws, as well as soft law instruments relevant to resolving mining disputes. They also discussed how these sources interplay, particularly as regards their mandatory components, including national and international public policy. The panel discussed a wide range of issues, including the scope of international tribunals' review of domestic measures and the public interest they may embody. The panel also examined how parent companies can be held liable for the actions of their subsidiaries, especially in the context of ESG-related issues such as environmental damage, human rights abuses, and disclosure obligations, as well as corruption. Additionally, the panel highlighted current technical and regulatory developments in deep seabed mining, an emerging sector with significant potential for growth, but also disputes.

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