

Global Arbitration Review

The Guide to Mining Arbitrations

Editors

Jason Fry and Louis-Alexis Bret

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Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Mining Arbitrations*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews; conferences; and handy workflow tools, to name just a few. Visit us at www.globalarbitrationreview.com to find out more.

Being at the centre of the international arbitration community, we regularly become aware of fertile ground for new books. Recently mining – and the disputes it throws up – emerged as one such topic.

One could assume mining is little different from energy – which is already covered by a GAR guide (*The Guide to Energy Arbitrations*). But as Jason Fry and Louis-Alexis Bret explain in their excellent Introduction, miners face other risks. More than energy companies, their projects depend on the blessing of the local population because they are visible and on people's doorsteps in a way that oil and gas projects are not. And there are other differences. It is easier to value an early-stage oil and gas asset than a mine, which has implications for damages. And different substantive principles apply. The *lex mineralia* is less influenced by decisions out of Texas and more by rulings in Australia and Canada.

The era of hydrocarbons is waning, while that of minerals and metals is heading the other way. Copper, cobalt, lithium, silicon, zinc and other precious resources are required for batteries, circuitry and solar panels – they are powering the growth of technology and clean energy.

For all these reasons, it seemed right to add mining disputes to the topics covered by the GAR Guides series.

The Guide to Mining Arbitrations is the result. It is a practical know-how text in three parts. Part I identifies the most salient issues in mining arbitration, which are identified by reference to the key business risks facing the mining and metals sector. Part II introduces select substantive principles applicable to mining arbitrations, while Part III introduces some regional perspectives on mining arbitration. The Guide ends with a brief conclusion.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to Mining Arbitrations*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A, and challenge and enforcement of awards in the same practical way. We also have books on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*).

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

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Part III

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Mining Arbitration in Latin America: Social and Environmental Issues in Investment Arbitration Cases

Arif Ali, Érica Franzetti, José Manuel García Represa and Eduardo Silva Romero¹

Introduction

Attracting foreign investment to explore for and exploit minerals and natural resources has long been a keystone for economic development, especially in economically developing nations. The number of mining projects has increased with every passing year.² However, mining projects require significant up-front investments during scoping, pre-feasibility, feasibility and development phases to reach the production stage, and most often several years of continued production are needed before they yield a positive return. During this period, mining projects are subject to risks such as volatile markets, cost variability (e.g., increased OPEX or higher costs for EPCM contracts), geological risks (e.g., ore grade variability), legal and regulatory changes (e.g., to the royalty regime, mining concessions and leases), and social and environmental challenges.

With the increase in the number of mining projects (prompted by bullish commodities' markets and low financing costs) and the resurgence of resource nationalism and geopolitical instability worldwide, the number of disputes involving mining projects has also been on the rise, particularly between foreign investors and host states. Since 1992 (when the first mining case under a treaty protecting foreign investment began), 95 cases involving investments in mining projects have been filed before institutions such as the International

1 Arif Ali, Érica Franzetti, José Manuel García Represa and Eduardo Silva Romero are partners at Dechert LLP.

2 See International Organizing Committee for the World Mining Congresses and Federal Ministry of Sustainability and Tourism of Austria. *World Mining Data 2018*, 2018. pp. 15–18. United Nations Industrial Development Organization. *World Statistics on Mining and Utilities*, 2018.

Centre for the Settlement of Investment Disputes (ICSID).³ Of these cases, 29 involve mining projects in Latin America.⁴

This chapter will discuss how two developments affecting the mining industry worldwide have impacted the protection of mining projects and companies in Latin America: (1) more stringent environmental protection, and (2) increased awareness of the need to protect local communities affected by mining projects.

For decades, these two developments have shaped international and domestic policies in the mining sector. In Latin America, key mining countries such as Peru,⁵ Chile,⁶ Bolivia,⁷ Colombia⁸ and Venezuela⁹ have adopted legislative, executive and judicial measures increasing the protection of the environment and the rights of local communities, especially indigenous peoples. For example, they have regulated the right of prior consultation of indigenous communities, in line with international standards such as the International Labour Organization's Indigenous and Tribal Peoples Convention No. 169,¹⁰ or the United Nations' Declaration on the Rights of Indigenous Peoples.¹¹ In the case of Ecuador, for example, the 2008 Constitution grants indigenous communities the right to mandatory prior consultation on any plans and projects that could have an environmental or cultural impact on their land, the right to partake in the benefits of said projects, as well as the right to obtain reparation for any social, cultural or environmental harm that may be caused by extractive projects.¹²

Internationally, the number of guidelines and guiding principles promoting corporate social responsibility, especially for transnational or multinational companies, have been in constant development. The Organisation for Economic Co-operation and Development (OECD) developed Guidelines for Multinational Enterprises in 2005, addressing corporate environmental performance and suggesting tools and approaches to implement better policies in companies.¹³ In 2014, the United Nations established a working group to draft a treaty on the protection of human rights by transnational enterprises. Currently, the working group has held four sessions, the latest of which focused on the discussion of the first draft of the treaty. Interstate discussions on this matter are ongoing.¹⁴ Private organisations

3 *Vacuum Salt Products Ltd v. Republic of Ghana*, ICSID Case No. ARB/92/1. See Annex 1.

4 See Annex 2.

5 See Peru. Ley No. 29785. 'Ley del derecho a la consulta previa de los pueblos indígenas u originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT)'.

6 See Chile. Tribunal Constitucional, Decision Rol 309, of 4 August 2000.

7 See Bolivia. Ley No. 535 of 28 May 2014. 'Ley de Minería y Metalurgia'. Articles 19, 40, 297–213.

8 See Colombia. 'Constitución Política de Colombia', Article 330; Corte Constitucional. Decision SU-123/18 of 15 November 2018.

9 See Venezuela. 'Constitución de la República Bolivariana de Venezuela'. Articles 119–126; 'Ley Orgánica de Pueblos y Comunidades Indígenas'. Articles 10–18.

10 International Labour Organization. Indigenous and Tribal Peoples Convention No. 169, 1989. 27 June 1989.

11 United Nations. United Nations Declaration on the Rights of Indigenous Peoples. A/61/L.67. 13 September 2007.

12 See Ecuador. 'Constitución del Ecuador', Article 57.

13 OECD. Environment and the OECD Guidelines for Multinational Enterprises (2005), available at www.oecd.org/env/34992954.pdf, last accessed on 1 March 2019.

14 United Nations. 'Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights'. A/HRC/40/48.

have also adopted guidelines, such as the 2013 Equator Principles, which provide a benchmark to aid in the assessment of environmental and social risks (and measures to mitigate such risks). The Equator Principles have been adopted by 37 financial institutions worldwide, covering most of the international project finance debt within emerging markets.¹⁵

Conflicts over social and environmental issues related to mining projects have been a recurring theme in the case law arising out of mining disputes in Latin America. These issues may range from a straightforward permit denial to situations of acute social conflict compromising public order and safety. Often, less than harmonious relationships between the investors and the local communities have been at the root of the conflicts that arbitral tribunals have been called to decide upon. Recent developments confirm a new trend in which social and environmental issues play an important role in arbitral decisions, a trend that is likely to affect the outcome of arbitral proceedings in the future.

An overview

Sixteen arbitration awards involving mining investments in Latin America have been issued since 2004.¹⁶ Out of these, eight awards addressed the merits (the remainder were either dismissed on jurisdictional or other grounds, settled or discontinued).¹⁷ In seven of these cases, the investors were awarded monetary compensation; the eighth award rejected all of the investor's claims.¹⁸ Among these eight awards, environmental and social issues were relevant in five.¹⁹ This section considers these awards, which show the increasing impact of social and environmental issues on mining investment disputes.

As exemplified by some of the older cases, social and environmental issues were not always considered relevant by international tribunals.

The first award that touched upon these issues in the region was *Gold Reserve v. the Bolivarian Republic of Venezuela* of September 2014. After the government revoked a construction permit on grounds related to the project's impact on the environment and indigenous communities, the investor's concessions were not renewed. The tribunal ultimately

2 January 2019.

15 The equator principles (June 2013), available at <https://equator-principles.com/about/>, last accessed on 1 March 2019.

16 See Annex 2.

17 See Annex 2.

18 *Gold Reserve v. Venezuela, Quiborax and Non Metallic Minerals v. Bolivia, Copper Mesa v. Ecuador, Crystallex International v. Venezuela, Rusoro v. Venezuela, Bear Creek v. Peru, South American Silver v. Bolivia and Anglo American v. Venezuela* (in which all claims were dismissed). See Annex 2.

19 *Gold Reserve v. Venezuela, Quiborax and Non Metallic Minerals v. Bolivia, Copper Mesa v. Ecuador, Bear Creek v. Peru, South American Silver v. Bolivia*. See Annex 2. The *Crystallex International Corporation v. Bolivarian Republic of Venezuela* award of 4 April 2016 is not counted among these cases, but its exclusion merits an explanation. While the claims in this case arose from the governments' refusal to issue an environmental licence invoking environmental concerns, the tribunal concluded that the real reasons for the denial of the licence were essentially political in nature, and involved the highest authorities of the Venezuelan government. Therefore, despite pointing out that '[t]here is no question that Venezuela had the right (and the responsibility) to raise concerns relating to global warming, environmental issues in respect of the Imataca Reserve, biodiversity and other related issues' (Párr. 591), the tribunal concluded that the denial of the environmental licence 'was not based on legal standards but based on reasons that are different from those put forwards by the decision-maker' (Párr. 614).

decided that Venezuela had breached the fair and equitable treatment (FET) standard under the Canada–Venezuela bilateral investment treaty (BIT) of 1996, notwithstanding its finding that the investor had breached its obligation to start exploiting the concessions within the three years after they had been granted.²⁰

Social and environmental issues were not decisive in this case, although they were argued by the parties. Venezuela stated that it had grave concerns regarding the project from its inception, because it was located in ‘an ecologically and culturally sensitive area’.²¹ It raised issues concerning water resources management, socio-economic impacts (including the protection of indigenous people’s rights) and the company’s environmental management plan. For one of the concessions, the state claimed that the investor’s environmental and sociocultural impact studies were deficient in critical aspects.²²

The tribunal did not dwell on the topic, holding that the environmental and ecological protection studies presented by the investor were sufficient to comply with its concession-related obligations. Ultimately, the tribunal concluded that Venezuela’s responsibility for the protection of the environment and the local communities did not release it from its commitment to international investors.²³ Further, the tribunal awarded compensation for loss of profits using a discounted cash flow (DCF) valuation to calculate the fair market value of the investment (both parties had used a DCF as their primary case and the project was a development property).²⁴ Of the US\$1.7 billion claimed, the tribunal awarded US\$713 million.²⁵

Similarly, the *Quiborax et al v. the Plurinational State of Bolivia* award of September 2015 established that Bolivia had unlawfully expropriated mining concessions, violated the FET standard and adopted arbitrary and discriminatory measures against the foreign investor.²⁶ The concessions were located in the Salar de Uyuni, the world’s largest dry salt lake, an area where concessions could only be granted through special procedures since the region had become protected as a ‘fiscal reserve area’ in the 1960s. After a 1998 law reduced the size

20 *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1. Award of 22 September 2014, paras. 24–26, 403–404, 615.

21 *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1. Award of 22 September 2014, para. 333.

22 *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1. Award of 22 September 2014, paras. 333–334. The mining company argued that Venezuela had previously approved its studies regarding an open-pit exploration, only to later demand plans and studies for underground exploration. According to the state, the cumulative impact of the project, considering the context of other open-pit projects in the area, led to the requirement of a ‘Strategic Environment Evaluation’, with which the investor never complied. *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1. Award of 22 September 2014, para. 321, 335, 338.

23 *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1. Award of 22 September 2014, para. 406, 595.

24 It should be noted that Venezuela did not provide a calculation using another valuation method, limiting itself to critiquing and adjusting the DCF valuation presented by the investor. *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1. Award of 22 September 2014, para. 690.

25 See Annex 2.

26 While some of the authors of this article acted as counsel in this case, only public information is reported herein.

of the reserve, concessions were granted in plots that used to be part of the protected area. The claimant eventually acquired 11 of those concessions.²⁷

In June 2004, the granting of an environmental licence to one of the investor's concessions triggered a wave of protests from civic organisations, which included hunger strikes and the blockades of railways and roads in the region. These protests caused the suspension of all activities in the concessions. Subsequently, the investor's environmental licence was cancelled and its concessions revoked by virtue of a 2003 law that gave the executive branch the power to annul the mining concessions initially allowed by the 1998 bill. At the time of revocation, the project had already been at the production phase for almost two years.²⁸

Although none of the concessions had environmental licences at the time of the revocation, the tribunal did not consider this sufficient to justify the state's actions. In addition, the social issues and the local communities' fierce opposition to the project were not considered by the tribunal when it assessed the future profitability of the project. Thus, resting on the fact that the mining project was a going concern with a proven track record of profitability, the tribunal rejected the respondent's request that the fair market value of the concessions be established by reference to the net amount invested and applied the DCF method to award compensation to the foreign investor.²⁹ Of the US\$151 million claimed, the tribunal awarded US\$48.6 million.³⁰

The *Copper Mesa v. the Republic of Ecuador* award of March 2016 is the first mining case in Latin America confirming the emergence of a trend in which social and environmental issues are at the core of the debate. The investor alleged several breaches of the Canada–Ecuador BIT of 1996, including the expropriation of its main mining concessions (the Junín concessions),³¹ which faced social resistance from the moment the investment was announced.³²

27 *Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2. Award of 16 September 2015, para. 7, 10–12, 17, 19.

28 *Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2. Award of 16 September 2015, paras. 17, 19, 26–27, 332.

29 *Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2. Award of 16 September 2015, paras. 220, 347.

30 See Annex 2.

31 The Copper Mesa Mining Corporation presented claims of expropriation and violations of the standards of fair and equitable treatment, full protection and security and national treatment (per the Canada–Ecuador BIT) related to the Junín, Chaucha and Telimbela concessions. The tribunal decided that there was an indirect expropriation of the Chaucha concession, rejecting the claim under the FET standard, and rejected all claims related to Telimbela, since the investor only held an option to acquire the concession. *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012–2. Award of 15 March 2016, paras. 6.123, 6.128–6.131.

32 *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012–2. Award of 15 March 2016, para. 4.68.

The first cases of violence and confrontation associated with the Junín concessions began only a few months later³³ and eventually escalated to violent episodes.³⁴ The investor's retaliatory violence worsened the relationship with the local populations to a point where it became very difficult for the investor to engage in any sort of consultative process with the affected communities about the planned mine development. This consultation was to be part of the Environmental Impact Study (EIS) required under Ecuadorian law as a condition precedent to the project's development. The Ministry of Mines would later reject the mining company's EIS because it found no evidence that some of the communities – those who most fiercely opposed the project – had been consulted. The Junín concessions were terminated in November 2008, without compensation to the mining company. At the time of the termination, the project was still at an early exploratory stage.³⁵

In its decision, the tribunal found that the state had unlawfully expropriated the Junín concessions and breached the FET obligation in the BIT.³⁶ However, as explained below, the tribunal found that the mining company's behaviour towards the local communities had exacerbated the conflict. This weighed heavily in the tribunal's reasoning: it found that the investor was partly liable for its own loss and significantly reduced the compensation amount it awarded.³⁷ Further, the tribunal relied on the early development stage of the project, the company's failure to complete the EIS and the social opposition to the project to support its decision rejecting an income-based valuation of the Junín concessions.³⁸ Ultimately, the tribunal only awarded compensation for sunk investments (i.e. a cost-based method) in the amount of US\$19.4 million, representing approximately one-third of the US\$69.7 million the investor claimed for the expropriated concessions.³⁹

The more recent *Bear Creek v. Peru* award, dated November 2017, followed a similar trend. The investor's claims related to the revocation of an executive decree that expressly enabled the claimant to own and exploit the Santa Ana mining concessions, located near the border with Bolivia. Because foreigners were not allowed to own mining rights in areas

33 *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, paras. 4.73, 4.86, 4.119 (the precise description of this violent incident is redacted in the publicised award), 4.130, 4.162, 4.165.

34 The investor employed (directly and through its contractors) armed men who fired shots, threw tear gas and mace at the population – most of these incidents took place in 2006. *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, para. 4.264.

35 *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, paras. 1.92, 1.93, 4.258, 6.55, 7.24.

36 *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, para. 6.85.

37 Ecuador had originally argued the unclean hands doctrine as a jurisdictional objection. The tribunal rejected it as such but appreciated it in the merits, more precisely, in its findings regarding liability. *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, para. 6.97.

38 The tribunal used the cost-based method to value both concessions that were found to be expropriated, on the basis that the concessions remained in an early exploratory stage with no actual mining activities, but it noted that 'particularly as regards the Junín concessions, . . . the Claimant's chances of moving beyond an exploratory stage were, by December 2006, slender.' *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, paras. 7.24 and 7.27.

39 See Annex 2.

within 50 kilometres from the border without the executive decree, it was impossible for the claimant to continue operating the mine.⁴⁰

The executive decree's revocation was prompted by severe social conflicts between the investor and the local Aymara indigenous communities, which vehemently opposed the Santa Ana project and mining activities in general, amid concerns about the project's potential impact on the region's drinking water sources and lands. Protests against mining activities by Bear Creek began in May 2008, and escalated to high levels of violence and disruption to the social order in the region. By May 2011, more than 15,000 people were actively taking part in protests, leading to food shortages and injuries. Road blocks, looting and burning of government building and shops were soon followed by violent clashes between protestors and the Peruvian police, which resulted in the deaths of at least six demonstrators. In an effort to quell the social conflict and re-establish public order in the region, the Peruvian government decided to revoke the executive decree that had permitted the Santa Ana mining project. At the time of the revocation, the project was still at a pre-feasibility stage, and it lacked many of the permits and environmental licences needed to proceed with the operation.⁴¹

As in *Copper Mesa*, the debate before the tribunal emphasised that the relationship with the local communities was crucial to the project's development. Bear Creek needed to secure several agreements with the communities to complete the Environmental and Social Impact Assessment required under Peruvian law.⁴² Notably, the tribunal asked the parties to address specifically '[w]hat is the standard by which the Tribunal is to determine whether Claimant sufficiently reached out to the relevant communities to obtain a Social License?' and 'what actions were legally required of Claimant in seeking to obtain a Social License, and did the claimant take these actions?'⁴³

In its award, the tribunal found that the revocation of the executive decree was not justified by the social conflict, since the government was aware of the claimant's social outreach activities and had expressly endorsed them. However, the magnitude of the social conflict was of such extent, that the tribunal was unable to conclude that the project was a viable venture, at least in the short term.⁴⁴ As we explain below, even though the claimant was not considered to be at fault in its approach to the local communities, its failure to secure community support for the project had a significant impact on its economic claim. Indeed, the tribunal's decision to limit compensation to sunk investments and to reject all claims based on the alleged future profitability of the project heavily relied on the fact that the investor 'had not received many of the government approvals and environmental permits it needed to proceed' and 'on the basis of the evidence before it, the Tribunal concludes that there was

40 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21. Award of 30 November 2017, para. 202.

41 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21. Award of 30 November 2017, paras. 152–173, 188–197, 201–203, 600–602.

42 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21. Award of 30 November 2017, paras. 201.

43 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21. Award of 30 November 2017, para. 217.

44 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21. Award of 30 November 2017, paras. 412, 599.

little prospect for the Project to obtain the necessary social license to allow it to proceed to operation, even assuming it had received all necessary environmental and other permits.⁴⁵ Of the US\$522.2 million claimed, the tribunal awarded US\$18.2 million to the investor.⁴⁶

Finally, the recent *South American Silver v. the Plurinational State of Bolivia* award of November 2018 emphasised the importance of social and environmental issues to decisions by international tribunals. In this case, the local Aymara and Quechua communities opposed further mining activities, alleging, in essence, that the mining company had been involved in a series of abuses and that the development of the mine risked causing severe environmental impacts (including to sacred lakes). The indigenous communities complained about violations of their collective rights. They essentially accused the claimant of deliberately dividing and sparking violent conflict between communities in an attempt to pursue the project.⁴⁷ These tensions soon escalated, leading to ‘the existence of a serious social conflict that grew until it resulted in grave acts of violence, divisiveness at the community level, marches, and attacks against life and personal integrity’.⁴⁸ Faced with kidnappings, rioting, looting, road blocks and violent clashes that resulted in the death of a person and injuries to many,⁴⁹ the Bolivian government entered into an agreement with the local communities to ‘pacify the area’.⁵⁰ This agreement included a commitment to cancel the claimant’s mining concessions in the region. At the time, the project was still at the exploration stage.⁵¹

In its decision, the tribunal found that the claimant had significantly contributed to aggravating the social conflict sparked by its mining activities, sowing further discord among the opposing indigenous factions. This proved to be the Achilles’ heel of the claimant’s case, since the tribunal determined that, in view of all circumstances, the state was justified in declaring the reversion of the mining concessions, which amounted to a lawful expropriation that satisfied a public purpose and entailed a social benefit. Along the same lines, the tribunal held that the FET standard had not been breached, since the social conflict was a supervening situation against which the state was compelled to take action. Ultimately, the only breach of the Bolivia–United Kingdom BIT of 1988 that the tribunal found was that Bolivia had failed to provide adequate compensation for the expropriation.⁵² However, in view of the ‘almost embryonic stage’ of the project, the tribunal limited damages to sunk

45 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21. Award of 30 November 2017, paras. 600, 604.

46 See Annex 2.

47 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013–15. Award of 22 November 2018, paras. 107, 115.

48 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013–15. Award of 22 November 2018, para. 562.

49 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013–15. Award of 22 November 2018, paras. 144, 160–161, 154, 162.

50 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013–15. Award of 22 November 2018, para. 163.

51 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013–15. Award of 22 November 2018, paras. 165, 857.

52 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013–15. Award of 22 November 2018, paras. 491, 499, 656, 857.

investments, and refused to compensate for the future profitability of the project.⁵³ Of the US\$385.7 million claimed, the tribunal awarded US\$18.7 million plus interest.⁵⁴

The impact of social and environmental issues on the outcome of mining investment arbitrations

Based on the above overview, certain general conclusions may be drawn as to how social and environmental risks may affect the international protection of investments in the mining sector.

While all of these awards reached the merits and quantum stages, social and environmental issues could affect an international tribunal's jurisdiction. Depending on the wording of the underlying treaty's 'legality' clause, the investment-hosting state could argue that the investment was made in breach of the states' social or environmental laws and regulations, and that such illegality deprives the investment of the protections afforded by the treaty.⁵⁵

In *Copper Mesa*, the state presented a jurisdictional objection arguing that the conduct of the claimant amounted to 'severe breaches of legal principles governing corporate social responsibility and [was] contrary to international public policy', making express reference to the OECD's Guidelines.⁵⁶ The tribunal rejected this jurisdictional objection, pointing out, among other reasons, that 'this is not a case where an essential part of the Claimant's claim is necessarily founded upon its own illegal acts or omissions.'⁵⁷ Along the same lines, in *South American Silver*, the state argued that the mining company's failure to comply with social and environmental regulations amounted to an illegality that deprived the tribunal of jurisdiction.⁵⁸ Even though the tribunal rejected the argument, pointing out that the 'violations [must] go to the essence of the investment such that it must be considered illegal',⁵⁹ it confirmed that jurisdiction would be lacking where 'the conduct alleged to be a breach has the effect of depriving the Claimant of its rights as a shareholder or, in general, its right over its investment . . . or that the investment *per se* ceases to exist due to illegality'.⁶⁰ So, while subjected to, arguably, a high standard of review, jurisdictional objections based on non-compliance with social or environmental laws and regulations could arise, for instance,

53 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013-15. Award of 22 November 2018, para. 857.

54 See Annex 2.

55 A parallel analysis may be found in the cases that have addressed '[i]nvestments that are forbidden, or dependent upon government approvals that were not in fact obtained, or which were effected by fraud or corruption'. *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability. Award of 29 December 2014, para. 199.

56 *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, para. 5.29.

57 *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, para. 5.66.

58 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013-15. Award of 22 November 2018, para. 454.

59 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013-15. Award of 22 November 2018, para. 470.

60 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013-15. Award of 22 November 2018, para. 462.

where the investor is alleged to have committed serious irregularities in obtaining the social and environmental licences to operate.

Further, an investor's failure to adequately and in a timely manner address social and environmental challenges may adversely affect its claims on the merits. For instance, in *Copper Mesa*, while the tribunal found that the state had unlawfully expropriated the investor's concessions and had breached the FET standard,⁶¹ it reduced the investor's compensation in light of its behaviour towards the local communities; ultimately, the tribunal determined that the damage had been caused both by the unlawful expropriation and the investor's own 'contributory negligent acts and omissions and unclean hands'.⁶² Moreover, the tribunal assessed the investor's contribution to its own injury at 30 per cent, pointing out that 'on the facts of this case, it could be no less'.⁶³

Similarly, in the *South American Silver* award, the claimant's actions in sparking and aggravating the social conflict weighed heavily in the tribunal's reasoning. The tribunal concluded that 'the actions [the claimant] took upon seeing the first seeds of the conflict contributed to the divisiveness and more profound clashes among the Indigenous Communities'.⁶⁴ Moreover, the tribunal was especially critical of the claimant's blatant disregard for the indigenous population's social norms and customs, holding that the way in which the mining company had sought to obtain majority support for the project had 'not only threatened a decision-making structure [of the indigenous communities] that the Claimant was aware of or should have been aware of [i.e., that the ancestral decision-making structure required consensus, not majority imposition], but it also undermined the recommendations of their own [social] advisors and decisively contributed to aggravating the conflict'.⁶⁵ As explained, this led the tribunal to conclude that the state was justified in declaring the reversion of the mining concessions, which amounted to a lawful expropriation.⁶⁶ The tribunal noted that '[h]aving established the existence of the conflict, as well as its severity and consequences, the Tribunal is unable to conclude that the measure adopted by Bolivia was unnecessary or disproportionate and, much less, to speculate without any evidence on other measures that could have been implemented to resolve [it]'.⁶⁷ By the same reasoning, the tribunal held that the social conflict to which the claimant had contributed was a supervening situation 'against which the State had to take action to restore

61 *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, para. 6.85.

62 *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, para. 6.97.

63 *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, para. 6.85.

64 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013-15. Award of 22 November 2018, para. 491.

65 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013-15. Award of 22 November 2018, para. 499.

66 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013-15. Award of 22 November 2018, paras. 577-578, 586.

67 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013-15. Award of 22 November 2018, para. 577.

public order and thus protect the life and integrity of the population in the area and [the claimant's] employees',⁶⁸ thus dismissing the breach of the FET standard.

This approach evidences a significant shift from older cases such as *Quiborax*, where the tribunal gave minimal attention to the social conflict and the environmental concerns that had led up to the revocation of the claimant's concession, without attaching any significant weight to them in its award.⁶⁹ This evolution suggests that arbitral tribunals may be more open to considering the interplay between social and environmental concerns and international investment protection, holding investors to a higher standard of behaviour when it comes to their handling of these issues.

Finally, turning to quantum, the above-mentioned cases demonstrate that the likelihood or lack thereof of a project obtaining all necessary social and environmental licences to operate are key in assessing the viability of a mining project that has not yet reached production and, hence, the certainty required by international tribunals to project and quantify future profits through income-based methodologies (such as DCFs).

Interestingly enough, whether the investor is free from fault and whether the state is likely to grant the required permits do not suffice. An international tribunal may choose to conduct its own objective assessment of the viability of a given mining project, as illustrated by *Bear Creek*. There, the tribunal determined that the claimant was not at fault in its relations with the local communities, since 'all outreach activities [to the local communities] by Claimant were known to Respondent's authorities and were conducted with their approval, support and endorsement'.⁷⁰ Thus, the claimant 'could take it for granted to have complied with all legal requirements with regard to its outreach to the local communities'.⁷¹ However, despite having complied with the applicable regulations, the fact that the claimant had failed to secure the support of the communities for the project had a significant impact on the tribunal's assessment of the viability of the project and, hence, on the compensation awarded. In the tribunal's own words, '[g]iven the extent of the opposition, and the reasons for it, the Tribunal doubts that the Project could, in the short term at least, be considered to be viable'⁷² and 'there was little prospect for the Project to obtain the necessary social license to allow it to proceed to operation, even assuming it had received

68 *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013-15. Award of 22 November 2018, para. 656.

69 While the tribunal pointed out that it accepted that Bolivia 'may have had a legitimate interest in protecting the Gran Salar de Uyuni Fiscal Reserve' the tribunal did not dwell on the issue, and – having decided that the revocation had not been carried out in accordance with Bolivian law 'whether as a matter of substance or procedure' – concluded that the expropriation was unlawful. *Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2. Award of 16 September 2015, para. 245.

70 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21. Award of 30 November 2017, para. 412.

71 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21. Award of 30 November 2017, para. 412.

72 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21. Award of 30 November 2017, para. 599.

all necessary environmental and other permits.⁷³ It is on this basis that the tribunal denied compensation for loss of future profits, and instead limited damages to sunk costs.⁷⁴

Finally, failure to abide by applicable social and environmental norms may also affect the quantum of an award in the event that a tribunal finds that this failure amounts to contributory fault. This was evident in the *Copper Mesa* award, where, as explained, the tribunal assessed the claimant's contribution to its own injury at 30 per cent of its damage⁷⁵ and considered the company's failure to complete the EIS and the social opposition to the project as warranting a further reduction in the compensation owed by the state. Certainly, the *Copper Mesa* tribunal's reasoning was heavily influenced by the early stage of development of the project, but also by the social challenges affecting its advancement in relation to the Junín concessions, pointing out that 'the [c]laimant's concessions remained in an early exploratory stage with no actual mining activities, still less any track record as an actual mining business; and, particularly as regards the Junín concessions, that the [c]laimant's chances of moving beyond an exploratory stage were, by December 2006, slender.'⁷⁶

As a final note, these issues will most certainly reappear in future mining investment arbitrations in Latin America. Indeed, several of the pending mining arbitrations in the region have brought up environmental and social issues that will have to be addressed by tribunals, such as the *Kappes, Casiday and Associates (KCA) and Daniel W Kappes v. Guatemala* case, the *Red Eagle Exploration Limited v. Republic of Colombia* case or the *Eco Oro Minerals Corp v. Republic of Colombia* case. In view of the emerging trend we have described, environmental and social issues may well play a significant role in the outcome of these proceedings.

Conclusions

The approach of arbitral tribunals to social and environmental issues in investment mining arbitrations in Latin America has evolved in recent years. While issues of this type were raised by the parties in the cases brought by Gold Reserve and Quiborax, the respective arbitral tribunals did not dwell on those issues and, accordingly, they seemingly had no impact on the outcome of the awards.

Starting with the *Copper Mesa* award, however, arbitral tribunals appear to have placed greater emphasis on social and environmental issues, especially when the relevant mining projects have sparked significant opposition from the local communities or have resulted in social conflicts. As we have pointed out, these issues can have a decisive impact on all aspects of an arbitration dispute: jurisdiction, merits and quantum.

This trend has important consequences for all relevant actors in mining investment arbitration disputes.

73 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21. Award of 30 November 2017, para. 600.

74 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21. Award of 30 November 2017, para. 604.

75 *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, para. 6.102.

76 *Copper Mesa Mining Corporation v. The Republic of Ecuador*. PCA Case No. 2012-2. Award of 15 March 2016, para. 7.24.

For the investors, the growing importance of social and environmental concerns in arbitration is a call to attention, making it clear that a failure to adequately address these issues can not only undermine the viability of their projects but also seriously harm their cases in eventual arbitrations. While mining companies, especially junior, have a clear economic incentive to advance through the exploration and feasibility stages as quickly and cost-efficiently as possible, it is growing increasingly clear that cutting corners to reduce costs and delays with regard to social and environmental issues may eventually impair a claimant's access to international investment protection. Moreover, the outcome of the recent holdings discussed above suggest that investors should devote significant efforts to their social outreach activities in order to obtain the support of the local communities for their projects, making genuine efforts to foster legitimacy, trust and consent among the communities that will be affected by the mining operations.⁷⁷ Potential investors in mining projects in Latin America and their financiers should be aware of the implications of these recent holdings, factoring them into their risk assessments when structuring their investments.

With regard to the states, it is clear that they are increasingly expected by the public to promote social and environmental protection over the protection of international investments, having due consideration for the concerns of local communities over the potential impact of mining projects on the environment and their livelihoods. Further, to ensure that mining projects succeed and generate the expected social and economic benefits of foreign investment, states should take an active role in the social outreach activities of investors, cooperating closely with them to ensure that their projects are socially accepted by the communities. In this connection, states should strive to resolve any emerging conflicts in an efficient manner, mediating between the parties to foster dialogue and compromises over contentious issues. As the case law on mining investment arbitration in Latin America suggests, failing to address conflicts over social or environmental issues can seriously undermine the viability of mining projects and harm the interests of both states and investors in international arbitration.

⁷⁷ See for instance John Morrison, *The Social License: How to Keep your Organization Legitimate*. Palgrave Macmillan, 2014.

Annex 1 – Global mining investment arbitration cases

Concluded cases

Year	Case No.	Venue	Claimant	Respondent	Outcome	Claimed (\$mm)	Settlement or award (\$mm) ⁷⁸
1992	ARB/92/1	ICSID	Vacuum Salt Products	Ghana	Dismissed: lack of jurisdiction	n/a	
1995	ARB/95/3	ICSID	Goetz	Burundi	Settlement: public	\$175	\$3
1997	ARB/97/1	ICSID	SIREXM	Burkina Faso	Dismissed: basis for claim	n/a	n/a
1998	ARB/98/7	ICSID	Banro American Resources	DRC	Dismissed: lack of jurisdiction	n/a	n/a
2001	ARB/01/2	ICSID	Goetz	Burundi	Award: public	\$3	\$1
2001	ARB/01/5	ICSID	Société d'Exploitation des Mines d'Or de Sadiola	Mali	Award: non-public	n/a	n/a
2003	ARB/03/11	ICSID	Joy Mining Machinery	Egypt	Dismissed: lack of jurisdiction	\$5	n/a
2004	ARB(AF)/04/6	ICSID	Vannessa Ventures	Venezuela	Dismissed: basis for claim	\$1,045	n/a
2007	ARB(AF)/07/1	ICSID	Piero Foresti	South Africa	Discontinued	\$375	n/a
2007	ARB/07/3	ICSID	Government of the Province of East Kalimantan ⁷⁹	PT Kaltim Prima Coal	Dismissed: lack of jurisdiction	\$469	n/a
2009	ARB(AF)/09/1	ICSID	Gold Reserve	Venezuela	Award: public	\$1,735	\$713
2009	ARB/09/12	ICSID	Pac Rim Cayman	El Salvador	Dismissed: lack of jurisdiction	\$314	n/a
2009	ARB/09/17	ICSID	Commerce Group & San Sebastian Gold Mines	El Salvador	Dismissed: lack of jurisdiction	\$100	n/a
2011	ARB(AF)/11/1	ICSID	Nova Scotia Power	Venezuela	Dismissed: lack of jurisdiction	\$180	n/a

78 Does not incorporate legal or tribunal costs.

79 East Kalimantan is an Indonesian province on the island of Borneo.

Year	Case No.	Venue	Claimant	Respondent	Outcome	Claimed (\$mm)	Settlement or award (\$mm) ⁷⁸
2011	ARB(AF)/11/2	ICSID	Crystallex	Venezuela	Award: public	\$3,160	\$1,202
2011	ARB/11/33	ICSID	Adel A Hamadi Al Tamini	Oman	Dismissed: basis for claim	\$560	n/a
2012	2012-02	PCA	Copper Mesa Mining Corporation	Ecuador	Award: public	\$70	\$19
2012	2012-29	PCA	St Mary VCNA	Canada	Settlement: public	\$275	n/a
2012	ARB(AF)/12/5	ICSID	Rusoro	Venezuela	Award: public	\$2,319	\$968
2012	ARB/12/14 & /40	ICSID	Churchill Mining & Planet Mining	Indonesia	Dismissed: lack of jurisdiction	\$1,315	n/a
2013	UNCT/13/1	ICSID	The Renco Group Inc	Peru	Dismissed: lack of jurisdiction	\$800	n/a
2014	ARB/14/21	ICSID	Bear Creek Mining Corporation	Peru	Award: public	\$522.2	\$18.2
2016	ARB/16/15	ICSID	AngloGold Ashanti (Ghana) Limited	Ghana	Settlement: non-public	n/a	n/a
2013	ARB(AF)/13/1	ICSID	Consolidated Exploration Holdings Ltd	Kyrgyz Republic	Settlement: non-public	\$500	n/a
2013	ARB/13/16	ICSID	Société des Mines de Loulo SA	Mali	Award: non-public	n/a	n/a
2013	ARB/13/33	ICSID	PNG Sustainable Development Ltd.	Papua New Guinea	Dismissed: lack of jurisdiction	n/a	n/a
2014	ARB(AF)/14/3	ICSID	Corona Materials	Dominican Republic	Dismissed: lack of jurisdiction	\$100	n/a
2004	ARB/04/11	ICSID	Russell Resources International Limited and others	Democratic Republic of the Congo	Discontinued	n/a	n/a
2003	ARB/03/14	ICSID	Ilunga Jean Mukendi (US), John Dormer Tyson (US), Miminco LLC (US)	Democratic Republic of the Congo	Settlement: non-public	n/a	n/a

Year	Case No.	Venue	Claimant	Respondent	Outcome	Claimed (\$mm)	Settlement or award (\$mm) ⁷⁸
2010	ARB/10/21	ICSID	International Quantum Resources Limited, Frontier SPRL and Compagnie Minière de Sakania SPRL	Democratic Republic of the Congo	Settlement: non-public	n/a	n/a
1996	ARB/96/2	ICSID	Misima Mines Pty Ltd	Independent State of Papua New Guinea	Discontinued	n/a	n/a
2000	ARB/00/8	ICSID	Ridgepointe Overseas Developments, Ltd	Democratic Republic of the Congo and Générale des Carrières et des Mines	Discontinued	n/a	n/a
2015	ARB/15/46	ICSID	BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL	Republic of Guinea	Settlement: non-public	n/a	n/a
2006	ARB/06/20	ICSID	Newmont USA Limited	Uzbekistan	Settlement: non-public	n/a	n/a
2007	ARB/07/1	ICSID	Fondel Metal Participations	Azerbaijan	Settlement: non-public	n/a	n/a
2006	ARB/06/2	ICSID	Quiborax and Non-Metallic Minerals	Bolivia	Award: public	\$66	\$48.6
2014	ARB/14/23	ICSID	Tamagot Bumi SA	Mauritania	Dismissed: lack of jurisdiction	n/a	n/a
2007	ARB/07/7	ICSID	Global Gold Mining LLC	Armenia	Settlement: non-public	n/a	n/a
2011	ARB/11/14	ICSID	Diamond Fields Liberia Inc	Liberia	Settlement: non-public	n/a	n/a
2014	ARB/14/8	ICSID	CEAC Holdings Limited	Montenegro	Dismissed: lack of jurisdiction	\$832	n/a
2010	ARB/10/3	ICSID	Metal-Tech Ltd	Uzbekistan	Dismissed: lack of jurisdiction	\$174	n/a

Year	Case No.	Venue	Claimant	Respondent	Outcome	Claimed (\$mm)	Settlement or award (\$mm) ⁷⁸
2014	ARB/14/10	ICSID	Highbury and Ramstein (see ARB/11/11 in 'pending annulment proceedings')	Venezuela	Discontinued for lack of payment of required advances	\$209.7	n/a
2013	2013-15	PCA	South American Silver	Bolivia	Award: public	\$385	\$18.7
2005	-	Ad hoc	Mytilineos	Serbia	Award: non-public	\$31.3	n/a
2013	2014-30	PCA	Mytilineos (<i>Mytilineos v. Serbia II</i>)	Serbia	Award: non-public	\$100	n/a
2011	2011-09	PCA	Khan Resources Inc.	Mongolia	Award: public	\$358	\$80
2007	2007-01	PCA	Centerra Gold Inc.	Kyrgyz Republic	Settlement: non-public	n/a	n/a
2012	2013-19	PCA	Swissbourn	Lesotho	Award: non-public Set aside in its entirety	n/a	\$0
2011	-	Ad hoc	Oxus Gold plc	Uzbekistan	Award: public	\$1,250.5	\$10.3
2006	-	LCIA	Oxus Gold plc.	Kyrgyz Republic	Settlement: non-public	\$600	n/a
2008	-	Ad hoc	Traco	Poland	Award: non-public	\$10.5	
2003	-	Ad hoc	Glamis Gold Ltd	USA	Dismissed: basis for claim	\$50	n/a
1998	ARB/98/6	ICSID	Compagnie Minière	Peru	Settlement: non-public	n/a	n/a
2013	-	MCCI	Stans Energy and Kutasay (I) (see PCA 2015-32 in 'pending cases')	Kyrgyz Republic	Award: public Set aside in its entirety	\$117.8	\$117.8

Year	Case No.	Venue	Claimant	Respondent	Outcome	Claimed (\$mm)	Settlement or award (\$mm) ⁷⁸
2014	ARB(AF)/14/1	ICSID	Anglo American PLC	Venezuela	Award: public All claims rejected	\$600	0

Ongoing annulment proceedings or cases under review in domestic courts

Year	Case No.	Venue	Claimant	Respondent	Outcome	Claimed (\$mm)
2014	ARB/14/14	ICSID	EuroGas and Belmont	Slovakia	Dismissed: Lack of jurisdiction	n/a
2011	ARB/11/11	ICSID	Highbury and Ramstein	Venezuela	Dismissed: Lack of jurisdiction	\$633
2010	2010-20	PCA	Beijing Shougang and others	Mongolia	Dismissed: Lack of jurisdiction	n/a
2009	ARB/09/19	ICSID	Carnegie Minerals Limited (Gambian)	Gambia	Award: not public	n/a

Ongoing cases

Year	Case No.	Venue	Claimant	Respondent	Claimed (\$mm)
2015	2015-40	PCA	Indian Metals & Ferro Alloys Limited (India)	Indonesia	\$559
2015	2015-32	PCA	Stans Energy Corp and Kutsay Mining LLC (II)	Kyrgyz Republic	n/a
2016	ARB/16/13	ICSID	Dominion Minerals Corp	Panama	\$264
2015	ARB/15/29	ICSID	Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited	Kenya	n/a
2016	ARB/16/12	ICSID	Alhambra Resources Ltd and Alhambra Coöperatief UA	Kazakhstan	n/a
2014	ARB/14/22	ICSID	BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL	Guinea	n/a
2016	ARB/16/6	ICSID	Glencore International AG and CI Prodeco SA	Colombia	n/a
2015	ARB/15/31	ICSID	Gabriel Resources Ltd and Gabriel Resources (Jersey)	Romania	n/a
2016	ARB/16/41	ICSID	Eco Oro Minerals Corp.	Colombia	n/a
2016	2016-21	PCA	Josias Van Zyl	Lesotho	n/a

<i>Year</i>	<i>Case No.</i>	<i>Venue</i>	<i>Claimant</i>	<i>Respondent</i>	<i>Claimed (\$mm)</i>
2012	ARB/12/1	ICSID	Tethyan Copper Company Pty Limited	Islamic Republic of Pakistan	n/a
2014	ARB/14/5	ICSID	Infinito Gold Ltd	Costa Rica	n/a
2008	2009-04	PCA	Bilcon of Delaware	Canada	\$101
2016	2016-39	PCA	Glencore Finance Ltd	Bolivia	n/a
2007	-	Ad hoc	Sergei Paushok CJSC Golden East Company and CJSC Vostokneftegaz Company	Mongolia	\$1,000
2013	-	Ad hoc	World Wide Minerals	Kazakhstan	n/a
2016	2016-23	PCA	Gold Pool LLP	Kazakhstan	n/a
2011	-	Ad hoc	Zamora Gold Corporation	Ecuador	n/a
2010	-	Ad hoc	RSM Production Corporation	Ecuador	n/a
2011	2012-07	PCA	Mohamed Abdel Raouf Bahgat	Egypt	\$200
2015	-	Ad hoc	Sergei Viktorovich Pugachev	Russia	\$12000
2015	-	Ad hoc	Lumina Copper	Poland	\$100
2016	-	ICC	Pan African Minerals	Burkina Faso	n/a
2016	2017-07	PCA	Oleg Deripaska	Montenegro	n/a
2016	-	Ad hoc	Cosigo Resources	Colombia	\$16511
2016	2016-26	PCA	Corcoesto SA	Spain	n/a
2017	-	Ad hoc	Kingsgate Consolidated Ltd	Thailand	n/a
2017	2017-26	PCA	ICL Europe Coöperatief UA	Ethiopia	\$200
2017	ARB/17/46	ICSID	Cunico Resources NV	Macedonia	n/a
2017	2018-04	PCA	Prenay Agarwal, Vinita Agarwal and Ritika Mehta	Uruguay	n/a

<i>Year</i>	<i>Case No.</i>	<i>Venue</i>	<i>Claimant</i>	<i>Respondent</i>	<i>Claimed (\$mm)</i>
2018	ARB/18/13	ICSID	Galway Gold Inc	Colombia	\$31.10
2018	ARB/18/12	ICSID	Red Eagle Exploration Limited	Colombia	n/a
2018	n/a	SCC	Mohammed Munshi	Mongolia	\$145
2018	ARB/18/23	ICSID	Gran Colombia Gold Corp	Colombia	\$700
2018	ARB/18/22	ICSID	Emerge Gaming Ltd and Tantalum International Ltd	Egypt	n/a
2018	ARB/18/21	ICSID	Bay View Group LLC and The Spalena Company LLC	Rwanda	n/a

Annex 2 – Latin American mining investment arbitration cases

Overview of social and environmental issues

Case No.	Venue	Claimant	Applicable IIA	Respondent	Outcome	Mention of social/ environmental issues	Claimed (\$mm)	Settlement or award (\$mm) ⁸⁰
ARB(AF)/04/6	ICSID	Vannessa Ventures	-	Venezuela	Dismissed: basis for claim	No	\$1,045	n/a
ARB(AF)/09/1	ICSID	Gold Reserve (Canada)	Canada-Venezuela BIT (1996)	Venezuela	Award: public	Yes	\$1,735	\$713
ARB/09/12	ICSID	Pac Rim Cayman	-	El Salvador	Dismissed: basis for claim	No	\$314	n/a
ARB/09/17	ICSID	Commerce Group & San Sebastian Gold Mines	-	El Salvador	Dismissed: lack of jurisdiction	No	\$100	n/a
ARB(AF)/11/1	ICSID	Nova Scotia Power	-	Venezuela	Dismissed: lack of jurisdiction	Award not public	\$180	n/a
ARB(AF)/11/2	ICSID	Crystallex (Canada)	Canada-Venezuela BIT (1996)	Venezuela	Award: public	No	\$3,800	\$1,202
2012-02	PCA	Copper Mesa Mining Corporation (Canada)	Canada-Ecuador BIT (1996)	Ecuador	Award: public	Yes	\$69.7	\$19.4
ARB(AF)/12/5	ICSID	Rusoro	-	Venezuela	Award: public	No	\$2,319	\$968
UNCT/13/1	ICSID	The Renco Group Inc	-	Peru	Dismissed: lack of jurisdiction	No	\$800	n/a
ARB/14/21	ICSID	Bear Creek Mining Corporation (Canada)	Canada-Peru FTA	Peru	Award: public	Yes	\$522.2	\$18.2
ARB(AF)/14/3	ICSID	Corona Materials	-	Dominican Republic	Dismissed: lack of jurisdiction	No	\$100	n/a
ARB/06/2	ICSID	Quiborax and Non-Metallic Minerals (Chile)	Bolivia-Chile BIT (1994)	Bolivia	Award: public	Yes	\$66	\$48.6

80 Does not incorporate legal or tribunal costs.

Case No.	Venue	Claimant	Applicable IIA	Respondent	Outcome	Mention of social/ environmental issues	Claimed (\$mm)	Settlement or award (\$mm) ⁸⁰
ARB/14/10	ICSID	Highbury and Ramstein See ARB/11/11 in 'pending annulment proceedings'	-	Venezuela	Discontinued for lack of payment of required advances	No	\$209.7	n/a
2013-15	PCA	South American Silver (Bermuda)	Bolivia-United Kingdom BIT (1988)	Bolivia	Award: public	Yes	\$385.7	\$18.7
ARB/98/6	ICSID	Compagnie Minière	-	Peru	Settlement: non-public	Award not public	n/a	n/a
ARB(AF)/14/1	ICSID	Anglo American PLC	UK-Venezuela	Venezuela	Award: public (all claims rejected)	No	\$235.4	0

Appendix 1

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Arif H Ali is co-chair of Dechert's global international arbitration practice. He is considered by peers and clients alike as one of the world's most experienced international arbitration trial counsel. He has served as lead attorney in international commercial and investor-state arbitrations under the procedural rules of all of the major arbitral institutions, including ICSID, UNCITRAL, ICC, LCIA and the ICDR, and in a broad range of industry sectors. He is particularly acclaimed for his advocacy and strategic advice in disputes under bilateral and multilateral investment treaties, investment agreements, and foreign investment laws.

Mr Ali's industry and sector expertise includes mining, oil and gas, precious metals, life sciences, telecommunications, hospitality, textiles and retail, among others. He frequently sits as an arbitrator and has arbitrated disputes as sole, party-appointed and presiding arbitrator under the rules of all of the major arbitral institutions.

Érica Franzetti

Dechert LLP

Érica Franzetti concentrates her practice on international commercial and investor-state arbitration matters across multiple industry sectors, including energy and natural resources, life sciences, financial services, hospitality and internet governance. Ms Franzetti has extensive experience advising clients in cases involving multiple procedural rules and has appeared before ICSID, ICC, ICDR and UNCITRAL arbitral tribunals.

Prior to practising international arbitration, Ms Franzetti practised law at a leading Brazil-based law firm, where she represented clients in complex commercial litigation proceedings before the Brazilian courts.

Ms Franzetti also serves as arbitrator on commercial arbitrations conducted under the auspices of the American Arbitration Association and teaches a course in investor-state arbitration as an adjunct professor at Georgetown Law.

José Manuel García Represa

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José Manuel García Represa is a partner at Dechert's Paris office. He is a specialist in international commercial and investment arbitration, with a particular focus on cases involving Europe and Latin America. He has represented parties in disputes arising out of contracts and investments in the electricity sector (generation and distribution), construction, oil and gas, mining, post-M&A purchase price adjustments, joint ventures, telecommunications, insurance and risk coverage, sales and distribution contracts, and investment disputes. Mr García Represa also serves as arbitrator.

He has experience in cases involving multiple jurisdictions and procedural rules and has appeared before the ICC, ICSID and *ad hoc* UNCITRAL arbitral tribunals.

Eduardo Silva Romero

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Eduardo Silva Romero, co-chair of Dechert's international arbitration global practice, focuses his practice on arbitration matters, particularly disputes involving states and state entities.

An acknowledged expert in international arbitration, Mr Silva Romero has supervised numerous proceedings before arbitration panels worldwide. Former Deputy Secretary General of the ICC International Court of Arbitration, Mr Silva Romero has far-reaching experience in all areas of international arbitration, including international sales and distribution contracts, construction, telecommunication, mining, oil and gas, and electricity-related disputes. He advises on arbitration matters conducted under the auspices of the ICC, ICSID, AAA and the SCC, as well as in *ad hoc* proceedings under the UNCITRAL and EDF arbitration rules. As an arbitrator, Mr Silva Romero has acted in more than 100 arbitrations.

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