

Latest trends in mining disputes in Canada and Latin America

Wednesday, October 13, 2021
12 – 1 p.m. ET

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CARDENAS
& CARDENAS

Colombia

Hernán Rodríguez
Partner

Colombia



3rd largest population in LATAM
(Around 50 million people)

4th largest GDP in LATAM
(Around USD 271 billion)

Strategic Geo Location

(2 oceans and 3 main mountain ranges of the Andes).

Ranked 4th in the LATAM Doing Business index
issued by the World Bank

Colombian mining industry



- With the adoption of a new mining code in 2001 and the implementation of tougher security policies by the national government since 2002, the Colombian mining industry saw significant development and growth.
- In the recent years the sector has kept growing:
- **From 2014 to 2019 mining GDP increased in over thirty five percent (35%)**
- **2020 has been the best year for gold mining since 2016.** Exports of this metal amounted to almost three thousand (\$3,000) million dollars and production rose to ~1.7 million ounces, despite the pandemic.
- **Foreign Direct Investment in mining also increased from 2015 to 2019** when it amounted to over one and a half thousand (\$1,500) million dollars. Due to the pandemic this trend stagnated in 2020.
- However, the sector expects fifteen percent (**15%**) **growth** in 2021.
- Since 2018 the contribution of mining in Colombia's GDP has increased in more than half a point.
- More than eleven thousand (\$11,000) million dollars contributed in taxes and royalties from 2010 to 2020.
- According to the 2020 Annual Survey of Mining Companies by the Fraser Institute, Colombia ranks first (as country) in the investment attractiveness and best mineral practices index in Latin America and the Caribbean.

Colombian mining industry



Key player in LATAM:

- Producer: **1st** in Coal and Emeralds, **4th** in ferronickel and **6th** in copper and gold
- **3rd** country in LATAM to implement an international grade standard for the report of mineral resources and reserves of exploration works

NATIONAL MINING PRODUCTION (2020)



Coal
MTon
50.0



Iron
Ton
786,557



Nickel
Ton
36,094



Salt
Ton
359,559



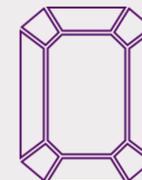
Gold
Kg
48,477



Silver
Kg
19,931



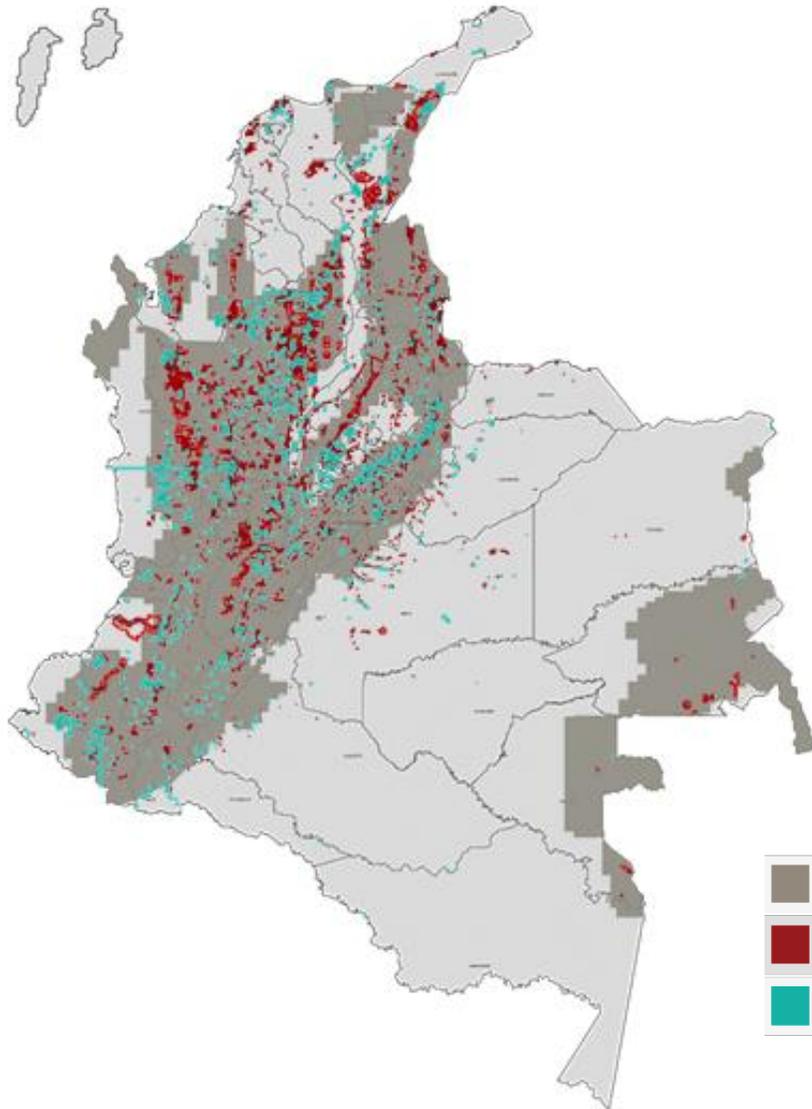
Platinum
Kg
414



Emeralds
Karat
4,721,024

A country to explore

Mineral potential



- Around seven thousand (7,000) mining titles with a total area of three and a half (3,5) million hectares (only 2.9% of the territory is under active mining titles). Of these, only 10% correspond to projects in the exploration phase
- Knowledge of the subsoil (2020):



73% Geological



50% Geophysical



50% Geochemical

- Colombia has vast unexplored territory and great potential for the development of new mining operations

Main challenges of the mining industry

The industry faces four main challenges that generate mining disputes:



1. Environmental and Zoning matters

Environmentally protected areas: Ample criteria for the delimitation of areas; too many protected areas (Forestry reserves - Law 02 of 1959, SINAP areas, POMCAs, POFs, DMIs). More than 50% of the Colombian territory is under some kind of environmental protection



2. Communities

Use of the judicial *Tutela*; prior consultation with ethnic communities; delimitation of ethnic territory.



3. Informal mining

Lack of judicial and/or administrative enforcement; formalization procedures take too long



4. Legal Certainty

Interpretation of mining concession agreements; Mining Authority is both party to the concession agreement and administrative authority of the mining sector.

Disputes in the mining sector

Internal



Judgments C-035/16; T-361 of 2017; SU-095 of 2018 on zoning



T-849 of 2014 (Línea Negra) and SU-123 of 2018 on prior consultation with ethnic communities



Judgements SU-133 / 2017; T-622 of 2016; Zandor Capital case v. Illegal Miners



Minera el Roble; Prodeco; Cerro Matoso.

External (Investment Arbitration)

Eco Oro, Galway, Red Eagle, Anglo American (v. The Republic of Colombia).

N/A

Gran Colombia Corp. v. The Republic of Colombia

Glencore International A.G and C.I Prodeco S.A; South 32 S.A. investments (v. The Republic of Colombia).

Investors protection

Colombia is a party to 18 Free Trade agreements (FTA) with 66 countries for the protection of foreign investment and long-term stability and legal certainty. It also has 12 double taxation agreements with 14 countries.

Under the investment protection offered by FTA's, several mining companies have raised claims against Colombia in connection to the aforementioned challenges for the mining industry.

In 2016, Colombia received its first investment arbitration claim from mining company Glencore International A.G and C.I Prodeco S.A. In the following years, 15 claims have been filed (8 of them by mining companies).

Conclusions

1. Colombian is an attractive jurisdiction for investors:

- Colombia is an attractive jurisdiction for mining investment and activities: growth and development in the mining sector over the last decades, geological potential, unexplored territory, investment protection and guarantees under international treaties.
- Colombia ranks first in the investment attractiveness and best mineral practices index in Latin America and the Caribbean, according to the Fraser Institute 2020 annual survey.

2. Progress of the mining industry in Colombia has come with new legal challenges.

3. Many of these legal challenges have resulted in domestic and international disputes within the framework of investment arbitration.

4. Case law derived from these disputes will be key for Colombia to overcome its legal challenges.

Chile

Enrique Benítez
Partner

Chile: a mining country

STATISTICS & FACTS



- Chile covers an area of 291,930 sq. mi. and stretches over 2,670 mi N to S.
- Its population is estimated in 18.4 million as of 2017.
- GDP US\$ 252.9 billion. (4th in South America).
- GDP Per Capita: US\$ 14,837 (highest in South America).



- Chile's trade balance is quite stable; China and the United States are Chile's most important trade partners for both imports and exports.



- The mining sector in Chile is one of the pillars of Chile's economy and copper exports alone stands for more than one third of government income. (Codelco)
- Mining accounts for 10% of the GDP.



- In 1870 Chile positions itself as # 1 exporter of copper in the World.
- Today, Chile is the world's largest producer of copper, iodine and rhenium; the second largest producer of lithium and molybdenum; the sixth largest producer of silver; the seventh largest of salt, etc.



- 8% of the world's metal explorations are carried out in Chile.



Risks to the industry

Constitutional Reform

There is some concern that the constitutional reform process may change the economic fundamentals and political landscape that has allowed much of the economic progress Chile has made over the past three decades: Nationalization of mining projects.

Greater empowerment of local communities and NGO's

The major conflicts in which the mining companies have been involved are mainly linked to environmental impacts, territorial disputes, human rights violations as well as a lack of compliance with the Corporate Social Responsibility Policies: Pascua Lama (Barrick Gold); Codelco Tailings in Chañaral; Cerro Colorado (BHP Billiton).

Reform to Chile's Water Code

The proposal seeks to establish the essential right to water, giving legal security to the exercise of the human right of access to drinking water and sanitation, and reaffirm the nature of water as a national asset of public use. Likewise, one of its goals is to establish new regulations for the concession, use and suspension of water rights and to provide protection for preservation of inland ecosystems.

New environmental institutions and legislation

Environmental Courts and Superintendency of the Environment. There is greater and strict control over environmental issues, especially over cases of environmental damage, and seeking for environmental responsibility of companies, such as in the case of water contamination.

New mining Royalty

A royalty that is based on gross sales or on the amount of mineral extracted. Its main characteristic is that companies have to pay a royalty regardless of their results.

How is this driving litigation (Trends)

Litigation is at the origin of mining projects

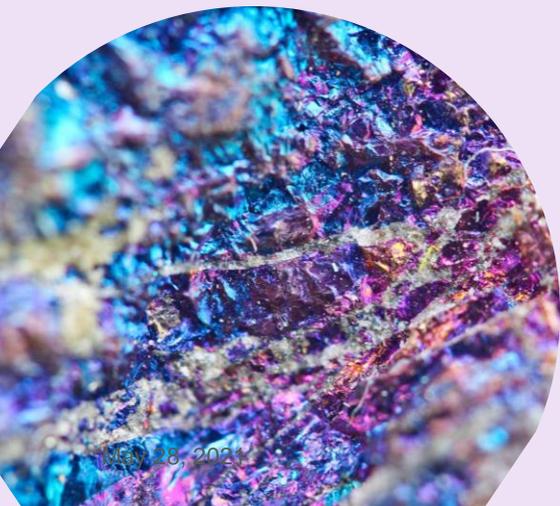
- Mining exploration and exploitation rights (concessions) are granted through a judicial procedure, in which third parties have the right to oppose. The same happens with the constitution of mining easements.

Increase in litigations related to environmental and water issues

- We foresee an increase in environmental litigation initiated by the respective authorities for the purpose of enforcing environmental obligations (seeking for environmental responsibilities) and in relation to issues related to access to water and its contamination.

More international litigation

- Every day there is greater opposition to mining projects from local communities, which initiates litigations, both in Chile and abroad (IA Court HR), in order to try to stop them.
- Depending on how the constitutional reform process and/or the regulation of the new royalty ends, could considerably increase litigation by mining investors before foreign courts (ICSID – ICSID), seeking for compensation.



Bolivia

Jorge Inchauste
Partner

Introduction

- Bolivia is located in South America, it borders with Brazil to the northeast, with Paraguay and Argentina to the south, and Chile and Peru to the west.
- Bolivia's economy is based in the extraction and exportation of minerals and gas. The major minerals in Bolivia are tin, silver, copper, iron and gold.
- The Salar de Uyuni (Uyuni salt flats) is not only a natural wonder but also one of the world's biggest reserves of potassium and lithium.
- The Mutún is also a huge iron ore deposit, among the largest in the world.

Regulatory intervention

- Migration from concessions to Administrative Mining Agreements.
- AJAM - Comibol
- Special Transitory Authorizations (ATEs in its acronym in Spanish)
- Payment of Patents for mining areas

Investment treaty arbitration – Nationalization

- Termination of all BITs
- Bolivian seat mandatory for arbitration.
- ***Quiborax vs. Bolivia*** – Expropriation of non-metallic mineral mining concessions
- ***South American Silver vs. Plurinational State of Bolivia*** - Malkho Khota nationalized concession.

Litigation

- Revocation and Hierarchical Appeal, Administrative Dispute Process
- International arbitration and domestic litigation resulting from contracts among private parties
- Constitutional Claims (*Amparo Constitucional*)

Ecuador

Leyre Suárez

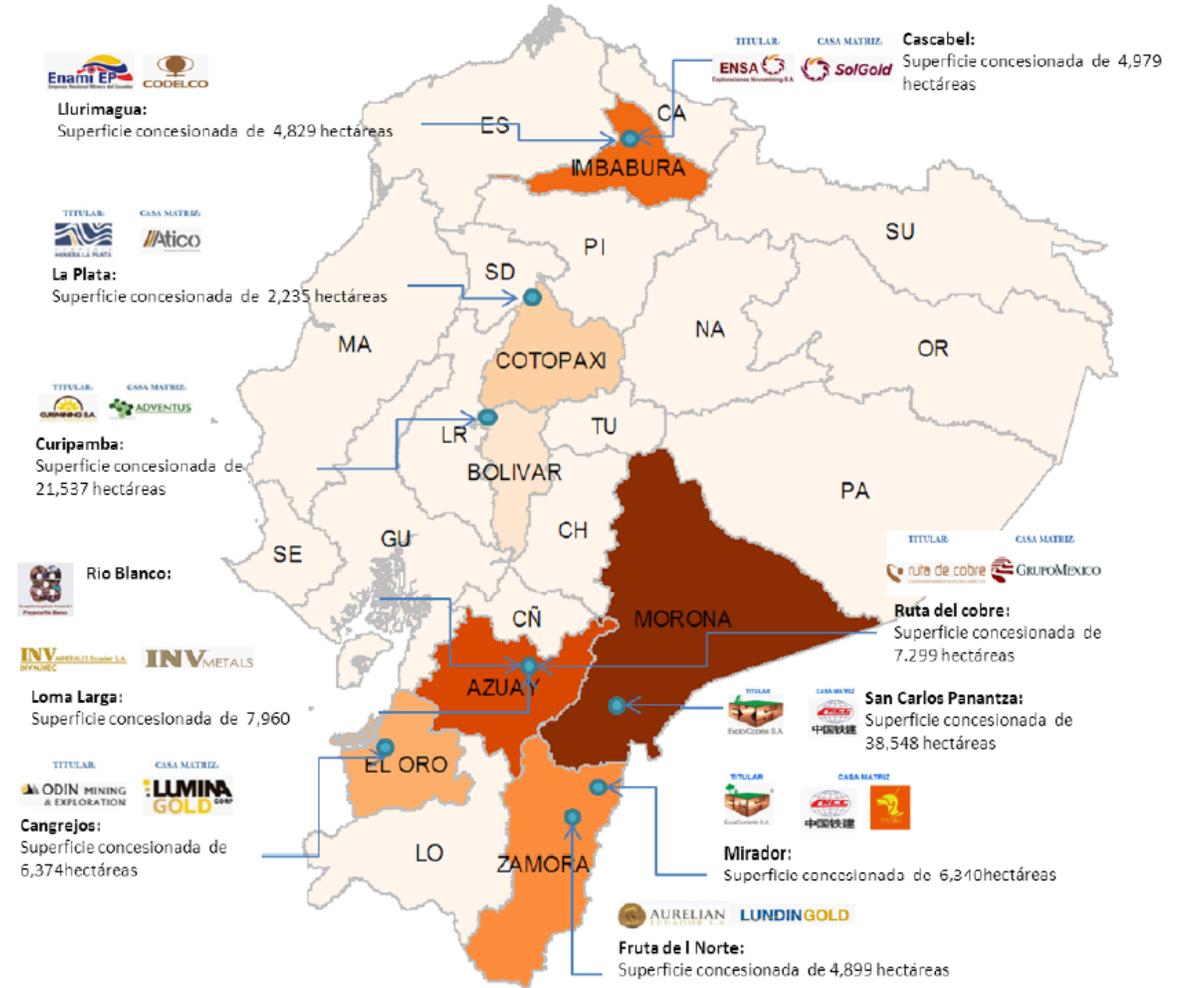
Legal Director

Ecuador mining landscape

Mining products 5.93% of all Ecuador's exportation, the 4th product (oil, bananas, plantain and shrimps) 127% more than last year

Strategic projects: Loma Larga, San Carlos Panantza, Río Blanco Cascabel, Cangrejos, Curipamba, La Plata, Llorimagua and Ruta de Cobre

Enami has 4 projects searching investment: non-metallic Unacota, Isimanchi, La Tronera and one metallic mining Sigchos.



Risks

Environment



- No precedent in Mining industry
- Chevron infamous case
- Counterclaims in ICSID arbitrations

Social



- Community prior Consultation – interference

Political



- no BITs
- change in laws
- constitutional referendums

Good news

- We are back to **ICSID**
- **More freedom to agree on arbitration:** Ecuador Attorney General's authorization, enforcement of foreign arbitral awards
- Dispute resolution clauses in Investment Contracts or Administrative Contracts



Litigation Trends

1

One of the most sued countries in investment arbitration.

2

Copper Mesa vs. Ecuador

Claims arising out of the alleged termination by the Government of mining concessions in the Ecuadorian areas of Junín, Chaucha and Telinbela.

Claimed by investor 69.70 mln USD
Awarded by tribunal: 19.40 mln USD.
Contribution to damage 30%.

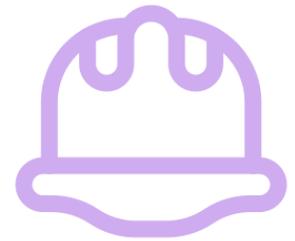
3

Codelco vs. Ecuador

Codelco filed the notice to arbitration arguing that Ecuador and the state-owned company ENAMI breached the agreements previously reached by the parties in relation to creating a company to develop the Project Llurimagua and the Shareholders Agreement.

What about Canada?

- **Cooper Mesa** is Canadian
- **Chaparralo Gold vs. Junefields:**
 - commercial arbitration between a Canadian and Chinese Corporation for the breach of contract that has a seat Canada.



Canada

Rachel Howie
Partner

Canada – Key Trends

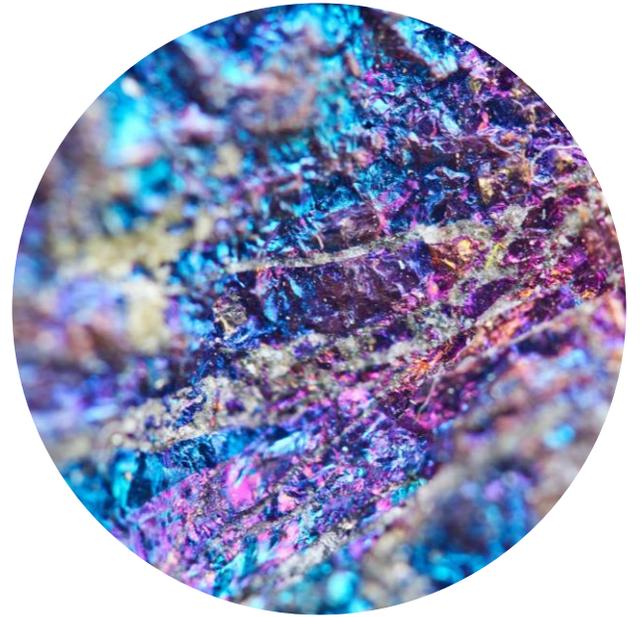
1. Expansion

- New resources
- New areas

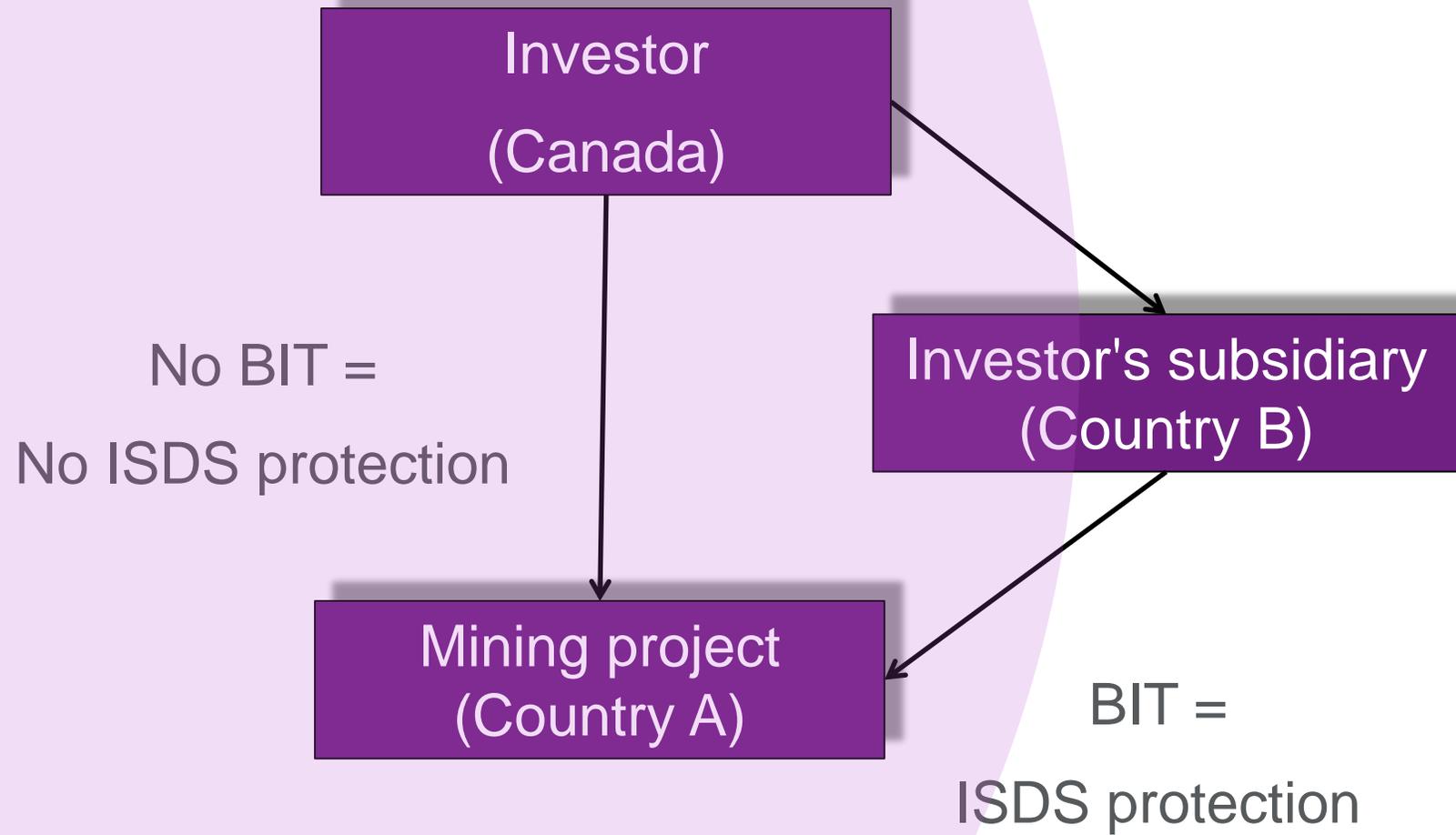
2. Increase in Disputes

- Investor-State Disputes
- International Commercial Arbitration

3. ESG: Environmental, Social and Corporate Governance



Structuring a mining investment: example



Thank you