

The Evolving Mining Legal Framework (*Lex Mineralia*) Shaped by International Arbitration and Its Role on the Governance of Critical Minerals

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1. Introduction

In the current geopolitical landscape, critical minerals have emerged as strategic assets essential for energy transition and technological innovation. From lithium and cobalt to rare earth elements, these resources underpin green technologies such as electric vehicles, wind turbines, and battery storage systems. As demand for these minerals surges, mining jurisdictions worldwide face increasing pressure to develop coherent, stable, and investor-friendly legal frameworks to govern their extraction.

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At the heart of this evolving legal architecture lies international arbitration—a key dispute resolution mechanism that has not only settled conflicts between investors and states but also contributed to shaping what some scholars refer to as *lex mineralia*: a body of emerging legal principles and precedents governing the mining sector globally.

This paper examines how international arbitral decisions have influenced mining governance and discusses the implications of this evolving framework for the regulation of critical minerals.

2. Defining *Lex Mineralia*

The term *lex mineralia* is an emerging concept that refers to the transnational legal framework specifically governing mining activities. It draws conceptual parallels with other transnational legal regimes such as *lex mercatoria* (the law of international commerce) and *lex petrolea* (the body of legal norms and arbitral practice surrounding the oil and gas sector).

Like these other fields, *lex mineralia* is not codified in a single treaty or statute but rather crystallizes through a constellation of legal sources: domestic mining legislation, international investment treaties, arbitral case law, contractual arrangements (e.g., mining development agreements, stabilization clauses), and soft law instruments.

2.1 Origins and Conceptual Basis

The notion of a transnational mining legal order gained scholarly attention in the early 21st century as mining investments increasingly became subject to arbitration under bilateral investment treaties (BITs) and international investment agreements (IIAs). Scholars such as Emmanuel Gaillard and Thomas Wälde have laid the groundwork for understanding how arbitral practice can shape sector-specific legal norms across jurisdictions. While *lex mineralia* has not yet reached the level of doctrinal consolidation as *lex petrolea*, there is growing recognition of its existence as a field of practice and theory.

According to Thomas Wälde, “[i]nvestment arbitration is producing a corpus of jurisprudence that increasingly serves as a source of law, especially in sectors with global commonalities, such as oil, gas, and mining.” (Wälde, “International Investment Arbitration: Transnational Ordering of Energy and Resources Law,” *Journal of World Energy Law and Business*, 2008).

International arbitration has become a cornerstone of dispute resolution in the mining sector, serving not only to adjudicate conflicts but also to influence how mineral-rich states regulate and govern mining activities. Through a growing body of arbitral decisions, certain legal standards—particularly around investor protection, state regulatory power, and the treatment of socio-environmental concerns—have emerged, shaping what can be recognized as *lex mineralia*.

Burnett and Bret, in their seminal work *Arbitration of International Mining Disputes: Law and Practice* (Oxford University Press, 2017), highlight the mining industry’s unique exposure to political, social, and regulatory risks. According to the authors, mining disputes are distinct in their intensity and complexity due to the “long-term nature of mining projects, their capital intensity, and their often controversial environmental and social impacts.” These factors make mining a sector particularly prone to arbitration under bilateral investment treaties (BITs), free trade agreements (FTAs), and investment contracts.

Importantly, Burnett and Bret underscore that the arbitral process has not only resolved individual investor-state disputes but has contributed to the articulation of norms specific to the mining sector. They argue that the jurisprudence arising from these cases has begun to coalesce into a body of principles that can guide future interactions between investors and host states—effectively forming the foundation of *lex mineralia*.

This transnational ordering is particularly relevant in mining because the sector involves long-term, capital-intensive projects that are highly susceptible to political risk and regulatory change. *Lex mineralia*, therefore, performs a harmonizing function: it identifies recurring legal principles and standards that apply across

jurisdictions and helps balance state regulatory powers with investors' legitimate expectations.

2.2 Components of *Lex Mineralia*

Several key elements constitute the evolving *lex mineralia*:

- 1. Domestic Legal Frameworks:** While national mining codes (e.g., South Africa's Mineral and Petroleum Resources Development Act, Chile's Mining Code, or the Mining Law of the Democratic Republic of Congo) remain the primary source of mining regulation, their interaction with international standards increasingly informs their application. These domestic laws are often shaped by global best practices and harmonized through regional instruments (e.g., SADC Mining Protocol) or model laws (e.g., IGF Mining Policy Framework).
- 2. International Investment Law:** BITs and IIAs provide mining investors with substantive protections—such as fair and equitable treatment (FET), protection from expropriation without compensation, and national treatment—and access to investor-state dispute settlement (ISDS). These protections are frequently invoked in mining disputes and have formed a significant body of arbitral jurisprudence specific to the sector.
- 3. Arbitral Precedents:** Investment arbitration has produced a growing corpus of mining-specific case law, where tribunals have interpreted treaty standards in the context of mineral exploration, licensing, community conflict, environmental regulation, and sovereign wealth redistribution. These decisions, while not binding precedent in the common law sense, have a persuasive and cumulative authority that contributes to the formation of *lex mineralia*.
- 4. Stabilization Clauses and Mining Contracts:** Large-scale mining projects often involve contracts with stabilization mechanisms, tax agreements, and dispute resolution clauses. These instruments reflect negotiated legal frameworks that seek to insulate investments from regulatory shifts. The

practice surrounding these contracts informs *lex mineralia* by setting standards of predictability, consent, and mutual obligations.

5. **Soft Law and ESG Norms:** The extractive industry is increasingly governed by environmental, social, and governance (ESG) standards. Instruments like the Extractive Industries Transparency Initiative (EITI), UN Guiding Principles on Business and Human Rights (UNGPs), the International Finance Corporation's (IFC) Performance Standards, and the OECD Guidelines for Multinational Enterprises have become important in shaping expectations around responsible mining. Although these norms are not binding, they influence tribunal reasoning, especially in cases involving social license to operate (SLO) and environmental legitimacy.
6. **Customary Practices and Comparative Law:** Over time, customary commercial practices in the mining industry—such as the principle of free, prior, and informed consent (FPIC) in relation to indigenous peoples—have informed both contract drafting and tribunal reasoning, adding to the normative depth of *lex mineralia*.

2.3 The Role of Tribunals in Shaping *Lex Mineralia* and Critical Perspectives

Investment tribunals act as *de facto* lawmakers in this space by articulating principles that are subsequently cited in future cases or adopted in state practice. For example, the requirement of transparency in the licensing process, as emphasized in **Tethyan Copper v. Pakistan**, or the integration of social legitimacy in the assessment of indirect expropriation, as seen in **Bear Creek v. Peru**, are now frequently referenced in similar disputes.

The repetitive adjudication of mining disputes under international law thus creates an evolving set of norms—what some have termed “sectoral jurisprudence constante.” This gradual process contributes to *lex mineralia* as a dynamic, living legal order that reflects the realities of the global mining industry.

As the awards demonstrate, international arbitration is no longer a purely remedial mechanism—it can be argued that it has become a norm-generating forum. The

cumulative impact of arbitral decisions is influencing how host states design their mining policies, draft investment agreements, and implement regulations.

Burnett and Bret argue that tribunals have become “custodians of a delicate balance” between investor protection and sovereign regulatory space. Through consistent reasoning and reference to past decisions, they contribute to a form of *jurisprudence constante* that is particularly visible in mining disputes due to their frequency and public importance.

This evolution suggests that *lex mineralia* is not simply a reflection of investor-state relations but a dynamic framework informed by both economic realities and social imperatives. The interpretative authority exercised by arbitral tribunals—particularly in the mining context—is gradually solidifying principles such as legitimate expectations, proportionality, due process, and transparency into an emerging body of mining governance norms with transnational relevance.

Despite its utility, the notion of *lex mineralia* is not without criticism. Some scholars argue that this framework may reinforce asymmetries between developed-state investors and developing-state hosts, especially when arbitral decisions are perceived as curtailing states’ ability to regulate in public interest. Others highlight the lack of democratic legitimacy and transparency in ISDS mechanisms that give rise to such a body of law.

3. International Arbitration and the Development of Mineral Governance Precedents

This section explores landmark arbitration cases from the past decade, focusing on their legal reasoning, treaty interpretations, and implications for mineral governance.

Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia (ICSID Case Nos. ARB/12/14 and ARB/12/40, Award, 6 December 2016)

This case concerned a coal mining project in East Kutai, Indonesia, where Churchill and Planet Mining alleged unlawful expropriation after local authorities annulled their mining licenses.

The tribunal, however, found that key documents provided by the claimants—specifically mining licenses—had been forged. Consequently, the tribunal dismissed the claims, ruling that fraudulent conduct in the acquisition of rights precludes access to protection under bilateral investment treaties (BITs).

This case underscores the fundamental principle that investment protections are contingent upon lawful and transparent conduct, reinforcing that host states have no obligation to protect rights tainted by fraud. It contributes to the global legal order by affirming that the legitimacy of investment origins is central to legal certainty in the mining sector.

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

South American Silver alleged expropriation after Bolivia revoked its mining concessions following social unrest and opposition by indigenous communities. While the tribunal recognized the public interest behind the expropriation, it also held that Bolivia failed to provide due process and adequate compensation.

This case demonstrates the complexity of balancing state sovereignty, indigenous rights, and investor protections. It affirms that even legitimate expropriations must meet procedural and compensatory standards to uphold legal predictability in the mining sector.

Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan (ICSID Case No. ARB/12/1, Award, 12 July 2019)

Tethyan Copper had invested in the Reko Diq copper and gold project in Pakistan's Balochistan province. The tribunal found that Pakistan's refusal to grant a mining lease—after years of procedural engagement—constituted a breach of FET and indirect expropriation.

The award emphasized Pakistan's inconsistent and opaque regulatory conduct. This case highlights how administrative arbitrariness and denial of due process erode investor confidence, underlining the need for coherent and transparent decision-making processes in host states.

Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016)

Crystallex pursued a gold mining project in Venezuela that was abruptly terminated without a clear legal basis. The tribunal found that Venezuela failed to provide transparency or just cause, amounting to a breach of the FET standard and an indirect expropriation under the Canada–Venezuela BIT.

This decision reinforces the idea that states must act in good faith and offer clear reasoning when modifying or revoking mining rights, contributing to international norms that safeguard legal certainty in high-risk jurisdictions.

Bear Creek Mining Corporation v. Republic of Peru (ICSID Case No. ARB/14/21, Award, 30 November 2017)

The Canadian investor obtained a license for a silver project, which Peru later revoked in response to social unrest and environmental protests. Although Peru cited public order and environmental concerns, the tribunal held that the revocation lacked procedural transparency and violated the FET obligation.

The case signals that while states can address environmental and social tensions, they must do so through processes that respect investor rights, promoting a global expectation of due process in managing ESG-related risks.

Westwater Resources Inc. v. Republic of Turkey (ICSID Case No. ARB/18/46, Award, 10 March 2023)

Westwater's uranium exploration licenses were arbitrarily revoked by Turkish authorities after years of investment. The tribunal found that Turkey's actions lacked transparency, predictability, and violated the FET standard. Damages were awarded to the claimant.

This case underscores that administrative discretion must be bounded by legal norms, reinforcing the importance of regulatory consistency and transparency in jurisdictions developing strategic minerals.

Gabriel Resources Ltd. v. Romania (ICSID Case No. ARB/15/31, Award, 8 March 2024)

This high-profile case centered on Romania's denial of permits for the Rosia Montana gold project, largely influenced by environmental and cultural heritage concerns. While the tribunal ultimately dismissed the claim, the proceedings raised important questions about the balance between public interest and investor protection under BITs.

Though unsuccessful for the claimant, the case reflects the growing need to reconcile ESG imperatives with investor rights, shaping global jurisprudence on the boundaries of state regulatory powers in mining projects.

Energy Transition Minerals Ltd v. Greenland (Pending, 2025)

The dispute arises from Greenland's policy shift banning uranium mining, affecting a rare earth project with uranium by-products. Energy Transition Minerals claims that the abrupt change violates its investment rights under the Denmark–Greenland BIT.

This pending case will likely test the limits of environmental sovereignty in the context of critical mineral development, with implications for treaty interpretation in energy transition-era disputes.

AVZ Minerals Ltd v. Democratic Republic of Congo (ICC Arbitration, Partial Award, 2024)

The Australian miner challenged the DRC and its state-owned enterprise for violating joint venture agreements over the Manono lithium project. The tribunal found that the opaque conduct and denial of development rights warranted compensation.

This case illustrates the risks of state-backed joint ventures in high-potential mineral zones and reinforces the need for enforceable governance structures to ensure investor security.

First Quantum Minerals v. Republic of Panama (Pending, 2024)

Following intense public protests and a constitutional ruling, Panama shut down the Cobre Panamá copper project. The Canadian investor initiated arbitration, arguing that the closure lacked due process and ignored stabilization commitments.

This case is poised to define the outer boundaries of state police powers when faced with domestic opposition to large-scale mining projects, influencing the future of community engagement and legal stability in mining-hosting states.

Collectively, these cases illustrate the evolving *lex mineralia*—a transnational legal framework that is emerging to govern mining investments amid growing tensions between sovereignty, community rights, environmental imperatives, and investor protections. They reveal that while states retain the right to regulate in the public interest, such power must be exercised transparently, predictably, and in accordance with international legal standards to ensure legal certainty and attract long-term, responsible mining investments.

4. Critical Minerals, the New Wave of Resource Nationalism and Legal Disputes

The global transition towards renewable energy and advanced technologies has intensified the demand for critical minerals—such as lithium, cobalt, and rare earth elements—integral to manufacturing batteries, wind turbines, and electronic devices. This surge in demand has precipitated a resurgence of resource nationalism, wherein nations assert greater control over their natural resources to maximize economic benefits and safeguard strategic interests.

Their strategic importance has led countries to prioritize securing reliable supplies, often resulting in geopolitical maneuvering and competition. For instance, China's dominance in rare earth element production has raised concerns among other nations about supply vulnerabilities, prompting efforts to diversify sources and develop domestic capabilities.

This section examines the manifestations of resource nationalism in the context of critical minerals, highlighting specific cases and their implications for global supply chains.

4.1 Understanding Resource Nationalism

Resource nationalism refers to policies and actions by governments aimed at asserting control over natural resources located within their territories. These measures can include increasing taxation, mandating local ownership, restricting exports, and renegotiating contracts with foreign investors.

While such policies aim to ensure that a nation's populace benefits from its natural wealth, they can also lead to tensions with foreign investors and disrupt global supply chains.

The cyclical nature of commodity prices often influences the intensity of resource nationalism, with higher prices prompting stricter controls as governments seek a larger share of windfall profits.

4.2 Manifestations of Resource Nationalism in Critical Mineral-Rich Countries

Indonesia's Nickel Export Ban

Indonesia, home to one of the world's largest nickel reserves, implemented a ban on the export of unprocessed nickel ore in 2020 to encourage domestic value-added processing. The policy aims to foster local smelting and battery manufacturing industries, attracting substantial foreign investment, particularly from China. While the move has disrupted global nickel supply chains, it has also led to legal disputes.

In 2022, the European Union won a WTO case against Indonesia, but the country has appealed and continues to uphold the ban, framing it as essential to its national development strategy and energy transition goals.

b. Democratic Republic of Congo's (DRC) Mining Code Revision

In 2018, the Democratic Republic of Congo (DRC), the world's leading cobalt producer, revised its mining code to increase government revenues from mineral exports. The new legislation introduced higher royalties and taxes, and designated certain minerals, including cobalt, as "strategic," subject to a 10% royalty rate.

While the reform aimed to ensure a fairer share of resource wealth for the country, it sparked strong opposition from international mining companies concerned about contractual stability. Since then, tensions have persisted as the DRC government

has sought to review key mining contracts and improve transparency, especially in light of growing global demand for responsibly sourced critical minerals.

c. China's Export Restrictions on Rare Earth Elements

In the early 2010s, China imposed export restrictions on rare earth elements, citing environmental concerns and resource conservation. These measures led to sharp price increases and global supply shortages, prompting legal challenges at the World Trade Organization (WTO). In 2014, the WTO ruled against China, and export quotas were removed in 2015.

However, China continues to exert strategic control over the rare earths supply chain through domestic regulations, production quotas, and export licensing. More recently, export restrictions have shifted towards limiting access to rare earth processing technologies, especially amid rising geopolitical tensions.

d. Greenland's Uranium Mining Ban

In 2021, Greenland's newly elected government imposed a ban on uranium mining, effectively halting the controversial Kvanefjeld project, which also contains one of the world's largest rare earth deposits. The ban was driven by environmental and social concerns, particularly among Indigenous communities. It marked a significant policy shift, reflecting broader tensions between local opposition to radioactive materials and global interest in critical minerals.

The affected company, Greenland Minerals Ltd., has challenged the decision, and the case has raised broader questions about resource nationalism, regulatory stability, and the limits of foreign investment protection in sensitive sectors.

5. The Emerging Legal Backbone of Critical Minerals: *Lex Mineralia* and Its Global Significance

The growing global demand for critical minerals, driven by the energy transition, digital transformation, and geopolitical competition, has catalyzed a profound transformation in the legal governance of the mining sector. In this context, international arbitration has emerged not merely as a mechanism for resolving disputes, but as a forum actively shaping the contours of what can now be

recognized as an evolving body of *lex mineralia*—a transnational legal framework specific to mining.

Over the past decade, arbitral tribunals have contributed to the crystallization of legal standards that transcend national boundaries and establish normative expectations for both states and investors. The jurisprudence arising from landmark cases—such as *Tethyan Copper v. Pakistan*, *Bear Creek v. Peru*, *Crystallex v. Venezuela*, and *South American Silver v. Bolivia*—has consistently addressed the tension between investor rights and host state regulatory autonomy. These cases demonstrate that while states retain sovereignty over their natural resources, the exercise of that sovereignty must conform to principles of international law, including transparency, good faith, proportionality, and the obligation to provide compensation in cases of expropriation.

Simultaneously, the governance of critical minerals has become a focal point in a new wave of resource nationalism. From Indonesia's export bans to Greenland's uranium moratorium and the Democratic Republic of Congo's mining code reform, states are increasingly asserting strategic control over mineral wealth. While these measures are often politically and economically motivated, they can also give rise to legal uncertainties and disputes under international investment agreements.

The arbitration proceedings initiated in response to these measures—notably *AVZ Minerals v. DRC*, *Energy Transition Minerals v. Greenland*, and *First Quantum v. Panama*—signal a new era of litigation where the boundaries of permissible resource nationalism will be tested and, ultimately, clarified.

The emergence of *lex mineralia* is therefore not just a theoretical construct but a practical necessity. As the mining sector globalizes and becomes more interconnected with energy, climate, and industrial policies, stakeholders require a shared set of legal principles that ensure predictability, fairness, and legitimacy. International arbitration plays a vital role in this process by generating precedent, promoting legal reasoning that balances commercial interests and public policy, and providing remedies when rights are breached.

At the same time, the future development of *lex mineralia* must incorporate the evolving standards of environmental, social, and governance (ESG) responsibility. Tribunals are increasingly engaging with issues such as indigenous rights, environmental impact, and the concept of a social license to operate. The jurisprudential shift seen in cases like *Bear Creek* and *South American Silver* illustrates that the legitimacy of mining investments today depends not only on legal titles and economic metrics but also on their social and ecological footprint.

In conclusion, the interplay between international arbitration and resource nationalism in the era of critical minerals is shaping a new legal frontier. The challenge ahead lies in constructing a stable, transparent, and equitable governance regime that accommodates the legitimate aspirations of mineral-rich states while upholding the rights of investors and the global imperative for secure, sustainable supply chains. The consolidation of *lex mineralia*, forged through arbitral jurisprudence and treaty interpretation, may serve as the legal backbone for this emerging order.

As global attention increasingly turns to critical minerals as strategic assets, the role of international legal institutions—and the principles they develop—will be decisive in determining whether the race for these resources unfolds through cooperation and predictability, or through confrontation and legal fragmentation. The time has come for states, investors, and international adjudicators to co-create a governance system that not only reflects the economic value of mining, but its profound social, environmental, and geopolitical significance in the 21st century.

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