

**MANAGEMENT & ECONOMICS  
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# Transactional and Legal Trends in the Mining Industry

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# Transactional and Legal Trends in the Mining Industry

- Recent public M&A in the mining industry
  - Gold, copper and critical minerals consolidation
  - Royalty and metals streaming trends
  - Legal and transaction trends
  - ESG-driven transactions
  - Increased foreign investment scrutiny
- Indigenous consultation issues
- Increasing mining nationalism

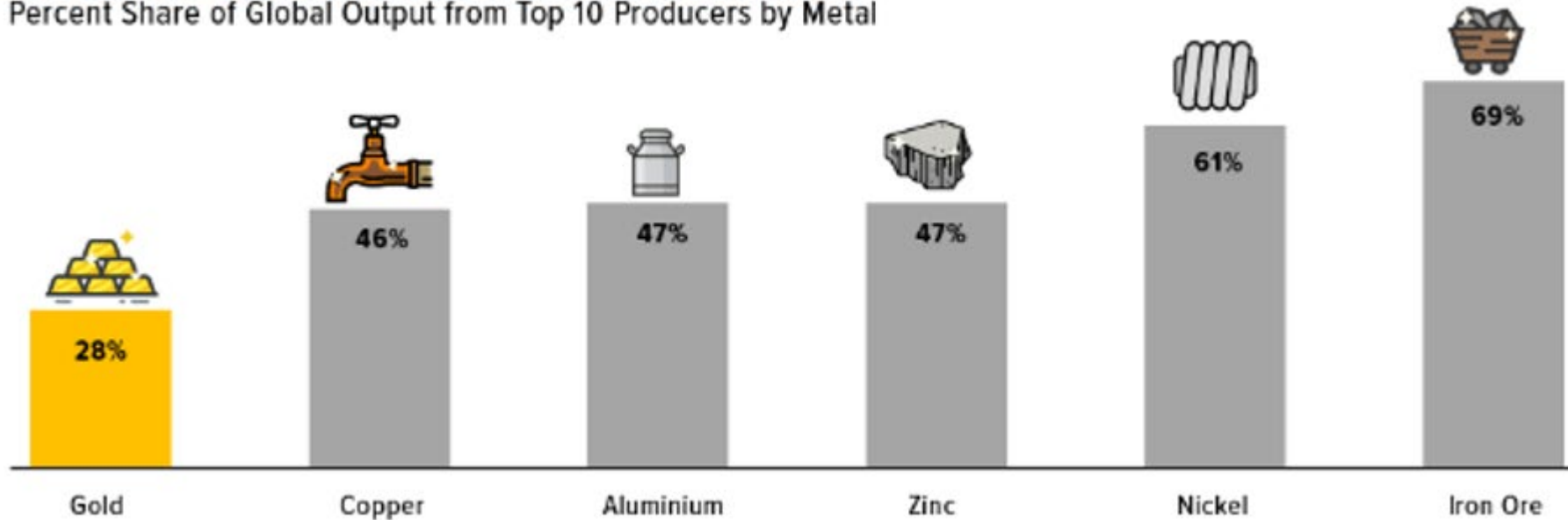
# Gold Industry Consolidation

- **2019:** Barrick's merger with Randgold
- Newmont's acquisition of Goldcorp
- Newcrest acquisition of 70% of the Red Chris copper-gold mine in BC from Imperial Metals
- **2022:** Newcrest acquisition of Pretium Resources
- Agnico Eagle and Kirkland Lake merger
- Goldfield's unsuccessful agreement to acquire Yamana
- **2023:** Pan American Silver and Agnico Eagle's successful topping bid for Yamana
- Newmont's initially hostile proposal to acquire Newcrest

# Consolidation in the Gold Industry

## Gold Industry Is in Need of Further Consolidation

Percent Share of Global Output from Top 10 Producers by Metal



Source: CRU, U.S. Global Investors

# Gold Industry Consolidation

- Achieving scale
- Geographical diversification (into safe or familiar geography)
- Diversifying commodities
- Replenishing project pipelines
- Reluctance to invest in major greenfields projects
- Stable gold prices
- Largely financed with equity, despite many acquirers having the balance sheets to finance with debt
- Premiums are back

# Gold Industry Consolidation

- Generally has not trickled down to junior issuers
- Mid-tiers which haven't engaged in larger transactions have acquired development or advanced exploration projects
- Spin-offs and rationalization of non-core assets by acquirers

# Copper Industry Consolidation

- In a reversal of a four-year trend, copper deals outpaced gold M&A in 2022, with US\$14.24 billion in value
- **2022:** BHP successful takeover of Australia's OZ Minerals
- Rio Tinto acquiring the 49 percent stake in Turquoise Hill Resources that it didn't own, giving it a 66 percent stake in Oyu Tolgoi
- Glencore selling its CSA mine in New South Wales, Australia, to Metals Acquisition
- **2023:** Glencore's multiple offers to acquire Teck Resources
- Lundin Mining's announced acquisition of a 51 percent interest in Chile's Caserones mine
- Hudbay Minerals announced acquisition of Copper Mountain Mining

# Copper Industry Consolidation

- Central role in the green energy transition
- Replenishing project pipelines
- Structural deficit
- Strong copper prices



# Lithium M&A and Supply Transactions

- **2022:** Lontown Resources entered into supply transactions with Tesla, Ford and LG Energy Solutions
- **2023:** Albemarle launched a hostile takeover for Australia's Lontown Resources, although it was rejected
- Livent and Allken agreed to an all-stock merger of equals
- Lithium Americas lithium supply deal with General Motors to develop the Thacker Pass mine in Nevada
- Ford's deals with Albemarle, Chile's SQM and Canada's Nemaska Lithium to secure supply

# Critical Minerals Consolidation

- Central role in the green energy transition
- Onshoring of lithium processing
- *Inflation Reduction Act* incentives
- Softening of lithium prices since 2022, but demand expected to increase

# Royalty and Streaming Trends

- Consolidation in 2022
  - Triple Flag's acquisition of Maverix
  - Sandstorm's acquisition of Nomad
  - Royal Gold's acquisition of Great Bear Royalty
  - Gold Royalty's hostile bid for Elemental was unsuccessful
- Increasing acceptance of royalties and streaming as an integral component of project financing
- Competition for quality, cash-flowing assets
- Participation of royalty companies in connection with acquisitions

# Legal and Transaction Trends from Consolidation

- Seller's market
- Pressure on due diligence and exclusivity
- Seller friendly representations, warranties and covenants
- Integration challenges
- Bandwidth issues
- Syndicated acquisitions
- Hostile transactions
- Topping bids
- M&A activism

# Legal and Transaction Trends from Consolidation

- Importance of shareholder engagement
- “Force the vote” mechanisms
- Addressing “settle” of acquirer’s stock
- Dusting off defensive playbooks
  - Shareholder rights plans
  - Advance notice bylaws
  - White Knight / strategic review processes
  - Strategic investments / private placements
  - Litigation
  - Commercial impediments
  - National Policy 62-202

# ESG Driven Transactions

- In his 2020 letter to CEOs, BlackRock CEO Larry Fink asserted his view that climate change risk is investment risk; as such, he predicts investors will begin to allocate their capital towards sustainable investing, rely more heavily on disclosure to determine the degree to which companies are addressing climate risk, *and exercise their voting rights accordingly*
- In 2021, Blackrock's voting on ESG-related issues shifted significantly:
  - voted against 255 directors in 2021 for climate-related concerns vs. only 55 a year earlier
  - supported nearly two-thirds of environmental proposals in 2021 vs. 11% a year earlier

# ESG Driven Transactions

- Teck Resources Limited's proposed spin out of its coal assets
- Glencore's proposals to Teck and its own proposal to spin out its coal assets
- Vale's split of its base metal operations from its iron ore operations
- Kinross' sale of its Russia assets to the Highland Gold Mining group
- Pan American Silver's acquisition of Tahoe Resources, following the court ordered shut down of the Escobal mine in Guatemala to permit indigenous consultation

# Increased foreign investment scrutiny

- In April 2020, the federal government announced it would be using the *Investment Canada Act (ICA)* to “subject certain foreign investments into Canada to enhanced scrutiny”
- From April 1, 2020 to March 31, 2021, 23 notices of potential national security reviews (NSRs) — almost as many as the four previous years combined
- Canada has implemented policy and legislative changes targeting sensitive sector investments — particularly critical minerals and investments by foreign state-owned or influenced investors (SOEs) — that increases scrutiny on foreign investment
- Other statements and publicly revealed NSRs have identified critical infrastructure, sensitive personal information or data, artificial intelligence and the transfer of significant intellectual property as other areas of interest



# Increased foreign investment scrutiny

- NSRs are largely shrouded in secrecy, with very little transparency into what types of deals can withstand government scrutiny
- NSRs may consider
  - the country in which a potential counterparty is located and whether it is considered an “unfriendly” jurisdiction
  - whether the actions of a certain jurisdiction are aligned with Canadian ethical standards
  - even the nature of the customers the deal will be serving, if those customers could somehow be perceived to endanger national security
- Foreign investments in sensitive sectors will need to be notified in advance of implementation, giving the Minister the opportunity to assess whether an NSR will be required

# Increased foreign investment scrutiny

- If an NSR is initiated, the Minister will be able to unilaterally impose conditions on a transaction while the NSR is underway if the Minister, in consultation with the Minister of Public Safety, determines that they are necessary to prevent injury to national security that could take place during the review
- These changes bring increased timing risk to covered investments. Currently, the minimum waiting period is 45 days, however, if a national security review is ordered, the timing can be up to 200 days, or in some cases more
- Given the opaqueness of the NSR process, it can be helpful to consider NSR issues early on in a transaction

# Indigenous consultation issues

- The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is an aspirational, international document intended to reflect “the minimum standards” of Indigenous rights around the world and to serve as a guide and a benchmark in the review of a country’s Indigenous rights performance. It was adopted by the UN General Assembly on September 13, 2007.
- In November 2019, British Columbia became the first Canadian jurisdiction to incorporate UNDRIP into law
- In June 2021, the federal government followed suit by passing its own legislation intended to affirm UNDRIP’s application in Canadian law and to provide a framework for implementation UNDRIP

# Indigenous consultation issues

- UNDRIP contains 46 articles. The articles are intended to have governments respect a number of significant principles, including that Indigenous groups have rights to self-determination, which is broader than self-government, and rights to redress, which is broader than simply compensation
- Arguably, the most debated principle in UNDRIP involves the “free, prior and informed consent” (often called FPIC) of Indigenous groups in situations where a government is contemplating actions that might adversely affect Indigenous groups
- In June 2023, the federal UN Declaration Act Action Plan was released, which provides a roadmap of 181 actions Canada needs to take from 2023-2028 to implement the principles and rights set out in UNDRIP and further advance reconciliation

# Indigenous consultation issues

- Early statements from the federal government suggest it is taking a limited view of the effect that UNDRIP would have on consultation
  - “If passed, this legislation would not change Canada’s existing duty to consult Indigenous groups, or other consultation and participation requirements set out in other legislation like the new Impact Assessment Act. What it would do is inform how the Government approaches the implementation of its legal duties going forward. Additionally, it would do so in a way that provides greater clarity and creates greater certainty over time for Indigenous groups and all Canadians.”

# Indigenous consultation issues

- Lower courts in Canada have acknowledged conflicts between UNDRIP and Canadian common law, particularly in the context of asserting and proving Aboriginal title, and are leaving it to the Supreme Court of Canada to determine what effect, if any, UNDRIP legislation has on the common law
- However, lower courts have acknowledged that “[e]ven if [UNDRIP legislation] is simply a statement of future intent, ... it is one that supports a robust interpretation of Aboriginal rights.” *Thomas and Saik’uz First Nation v. Rio Tinto Alcan Inc.* 2022 BCSC 15

# Indigenous consultation issues

- In 2017 Guatemala's constitutional court overturned the operating license for Tahoe Resources' Escobal mine in Guatemala, on grounds that local Xinca indigenous communities were not consulted – a requirement of ILO convention 169, to which Guatemala is a signatory
- Guatemala's energy and mines ministry is undertaking a court-ordered consultation needed to restore the license
- In 2022, Mexico's Supreme Court of Justice ruled that the Ministry of the Economy should have undertaken consultation with indigenous communities prior to granting Almaden Minerals exploration concessions and ordered the Ministry of the Economy to declare Almaden's mineral titles ineffective and to re-issue them following the Ministry's compliance with its obligation to carry out consultation with indigenous communities

# Indigenous consultation issues

- In 2023, Mexico's Ministry of the Economy has sought to cancel Almaden Minerals exploration concessions rather than carry out consultation with indigenous communities



# Increasing mining nationalism

- On May 8, 2023, Mexico enacted comprehensive changes to its mining and water laws, which:
  - reserve most new mineral exploration activities in Mexico to the Mexican state
  - require all new mining concessions to be granted pursuant to a public tendering process
  - reduce the duration of mining concessions
  - impose new indigenous consultation requirements and new environmental safeguards
  - create new closure bonding requirements

# Increasing mining nationalism

- eliminate legal procedures allowing miners to access surface properties
- contains new standards for the revocation of concessions, including after two years if no work is completed
- No new mining concessions have been issued in Mexico since the Morena party under President Andres Manuel Lopez Obrador (AMLO) was elected in 2018
- In April 2023, Mexico nationalized its lithium sector (although it has no producing mines).
- On April 20, 2023, Chile's President Gabriel Boric announced he would nationalize the country's lithium industry, the world's second largest producer

# Increasing mining nationalism

- In February 2023, First Quantum halted processing copper at its Cobre Panama mine, after the Panamanian government blocked it from loading metal at a port in the country amid a dispute in reaching a new tax agreement
- In March 2023, First Quantum reached an agreement with the government of Panama, under which First Quantum will make a payment of US\$375 million plus an additional US\$20 million to cover taxes and royalties up to the end of 2022. Starting in 2023, the deal provides for a minimum of US\$375 million a year in government income, including corporate taxes, withholding taxes and a profit-based mineral royalty of 12 to 16 per cent

# Increasing mining nationalism

- Indonesia continues its ban on the export of raw materials, notwithstanding the WTO's acceptance of a formal EU complaint against the ban in 2022. A full ban on the export of nickel ore has been in place since January 2020 and a bauxite and cobalt ban came into effect in June 2023. A ban on the export of copper, iron ore, lead, zinc and anode mud from copper concentrates has been delayed until May next year



Questions?

# Thank You

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