

Legislative aspects at national and international level regarding the exploitation of gold-silver deposits

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Abstract. In Romania, mining is a historical, traditional occupation, attested since antiquity, when the Romans came here to extract gold and other base metals from the underground mines in our mountains. The exploitation of gold and silver deposits is still important for the economic and social development of the country. Generally, these ores are essential for modern life, so their exploitation must be regulated so as to respond effectively to these needs. Legislation in this field has an important role in promoting and supporting the exploitation of gold and silver deposits. Nationally, the mining activity is regulated by the Mining Law no. 85/2003, a law which, from my point of view, does not effectively ensure the mechanisms on the basis of which the capitalization of mineral resources should be done as smoothly as possible. At European Union level, the legislation contains a wide range of obligations and rights regarding the mining of natural resources and deposits, which the competent public authorities in the Member States must enforce. In countries with tradition in the field of gold-silver mining, the laws referring to the extractive sectors are developed in accordance with the interests of the citizens. This system provides sufficient opportunities for civil society participation in decision-making. This paper identifies the main legislative aspects that can be improved to create a fair legal framework for the exploitation and capitalization of precious metal deposits in Romania.

1 Introduction

Romania has some of the most important gold deposits in Europe. In Romania, mining is a historical, traditional occupation, attested since antiquity, when the Romans came here to extract gold and base metals from underground mines in our mountains. Mining, ore extraction and gold and silver deposits are important for the economic and social development of the country. In general, ores are essential for modern living.

The exploitation of natural resources that are exhaustible as they are extracted has often been considered a contradiction. Even though no emphasis is placed on the physical side of resources, mining has been considered an unsustainable activity by its nature, as it causes, by definition and through possible improper management, a number of significant

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environmental, social or economic impacts. Nonetheless the exploitation of mineral resources presents criticisms, challenges and risks from the perspective of environmental protection but also the social problems presented by mining, generating more and more conflicts between mining companies and local communities. This may not be in the public interest. These effects are exacerbated by certain irresponsible practices. Some companies have been associated with corruption and human rights violations [1].

Another series of repercussions are those of an economic nature. The effective contribution of mining to economic development has been intensely discussed in recent years, with a question mark rising from several points of view: First of all, the long-held belief that the exploitation of gold and silver deposits in Romania generates wealth, suggesting an inverse link between mining and economic growth [2], as well as the non-renewable nature of mineral resources and the impoverishment of the local population after they have been depleted of resources have been strong arguments to indicate that this activity cannot contribute to sustainable development [3].

In the context of sustainable development, mining must integrate all environmental, social and economic dimensions in all stages of the mining project, from prospecting to development, exploitation and extraction, closure and even post-closure. The integration of the closure and post-closure stages in the mining life cycle implies a significant reorientation of the approach.

The usual practice is to abandon the mine as soon as the production cycle ends, thus transferring the burden of damage to the environment and society to the communities where mining projects took place and to future generations (or in other cases the closure of mining cities simultaneously with the closure of mines) [4].

2 The role of legislation and regulations

From a legal point of view, legislation has an important role in promoting and supporting the exploitation of gold and silver deposits. The processing of mineral resources is an area of maximum interest for the national economy.

The elaboration and implementation of clear and efficient laws and policies to support the extractive sector, in accordance with the principles of good governance, as well as the creation of conditions for the proper resolution of problems, is practically the essence of the concept of exploitation of natural resources concerns at different levels at the international, European, national and local levels, of the various decision-makers involved (governmental and non-governmental) and of the various dimensions (environmental, social, economic) related to the process and consequences of field exploitation. The concept does not ignore the tensions between resource exploitation, environmental protection, social participation and economic development [5].

The process of harmonizing the national legislation with the European environmental legislation, had a major impact due to the lack of experience, as well as the difficulties of such an approach; the specifics of Romanian policy have generated a difficult regulatory process, with a very large number of texts, scattered, many contradictory, with obvious overlaps, very complicated and consequently, difficult to apply and inefficient, generating a substantial change in national environmental legislation. Thus, there are now a multitude of laws, ordinances, governmental decisions, Ministerial orders), to which are added dozens of ratified international conventions, gathered in a massive, unstructured, disordered and inefficient corpus. The remedy to this phenomenon can be represented, in the form of a normative act with superior legal force, as comprehensive as possible with regard to the legal regulations regarding the environment.

At national level, the mining activity is regulated by the Mining Law no. 85/2003. The normative framework of mining is also shaped by international law, including treaties, laws

and standards on human rights, conventions and environmental treaties. The legal basis for the exploration of mineral resources, development and production is usually established in the constitution and in the mining law.

The Constitution, the Mining Law and other domestic laws explicitly establish who manages mineral resources including provisions relevant to the exploitation of natural resources, such as land, health and labour law, property and access to justice, and civil and criminal legal proceedings. However, the constitution does not contain details on the governance of the mining sector; these details are specified in the mining law and other regulations.

Mining law and other internal regulations define the responsibilities of mining operators related to all aspects of mining - operations, taxation, health and safety, environmental protection, including environmental impact assessment and mine closure.

The legislation in force does not effectively ensure the mechanisms under which the recovery of mineral resources is as easy as possible.

Ore deposits may be located on publicly, privately or jointly owned land, used for other activities or purposes, or may be of ecological importance. Gaps between companies and local communities can significantly impede the process of understanding and adopting consensus solutions.

Therefore, regulatory gaps may arise, generating blockages in the mining extraction sector in Romania, the process of carrying out mining activities being difficult, uncertain and long. In this way, mining is virtually blocked indefinitely, leaving room for bureaucratic or judicial proceedings and lacking effective concession contracts.

Equally, mining production is significantly affected, leading to considerable financial losses both for the Romanian state, which does not benefit from the payment of the royalty until the start of production by the licensee and for concessionaires, which make investments impossible to recover in a reasonable time interval.

Regarding the development of expropriation procedures based on Law no. 33/1994 on the exposure for the cause of public utility, it is extremely long, which leads in practice to affect the safety of mining deposits and the blocking of works prior to safe mining, of equipment, personnel and deposit.

Blockage situations are also encountered in the case of lands which are necessary to be removed from the forest fund according to the provisions of the Forestry Code, involving a particularly difficult procedure. The conditions required for the land offered in compensation in these cases are extremely difficult to meet and for this reason the procedure becomes unfeasible in the case of mining projects.

Regarding administrative control procedures, the granting of environmental permits ('regulatory acts') remains too complicated and bureaucratic, often overly dispersed regulations are not followed because they are not known.

Extractive sector policies are practically reflections of specific legislation, mainly on some issues such as increased bureaucracy regarding the natural resources regime, lack of transparency on the part of governments regarding the granting, maintenance or cancellation of mining rights to exploitation and capitalization, accentuated restrictions to the access of private companies to mining land, flows of rediscovery and rediscovery between the state (government) and investors.

From the perspective of these considerations, the most appropriate option for Romania can be chosen: the solution of these problems must be undertaken through the amendment of the Mining Law no. 85/2003.

I assert that one of the biggest challenges in the mining sector is to work towards effective governance in order to develop a legislative system that promotes supports and sustains the contribution of the exploitation of gold and silver deposits to socio-economic

development. This requires a certain redefinition of roles and responsibilities and the introduction of new legislative instruments.

The role of "good governance" in mining is a potential source of wealth. The government and institutions establish the necessary framework conditions for the interrelationship of public sector entities, citizens and private sector companies, which in turn affect citizens' attitudes towards the development of deposits and mining in general.

This depends on the credibility of the government and its trust in its institutions and laws. I stand firm that mining can only make a full contribution to development if government structures and institutions work well.

A distinctive feature of the normative framework of mining activities in the context of sustainable development is that laws with binding effect or "hard law" merge with "a series of processes and practices that have the normative force but do not operate primarily or not at all with the formal mechanism of traditional command and control legal institutions". This phenomenon thus reflects "a deviation from the monopoly of traditional political and legal institutions" and the involvement of other participants (such as corporate participants and civil society) [6].

Normative standards include "soft law" or non-binding laws embodied in a range of acts that do not have the status of traditional sources of legislation (in international law, they include treaties, customs and general principles), but are relevant for the establishment of standards and as precedents for official legislation.

3 Improving legislation to create an effective legal framework

In many rich countries, especially those with gold and silver mineral resources, mining contracts with large investors are also another key element of the legal and regulatory framework for the exploitation of mineral resources. Mining contracts denote agreements between the government and the investor for the purpose of mining. Depending on the importance of mining contracts, as a form of authority contracts can be concluded based on a regime of laws and legal regulations, this regime is mainly based on laws and regulations, applied uniformly in mining to companies in the country, or a contract-based regime - a regime that is mainly based on contracts between mining companies and the government. Under this scheme, most of the obligations of mining companies, such as taxes, environmental and social requirements, contributions are defined by contracts.

Rather than using mining contracts to fill laws and legislative loopholes, it is preferable to improve the legal framework for the extractive sector and ensure it as a reasonable stability for both government and investors. However, there may be good reasons for governments to enter into contracts with mining companies for purposes other than filling legal and regulatory gaps. Mining contracts address project-specific issues, such as building infrastructure, mitigating the impact on the environment, and direct government participation in a mining project.

The process of legislative reform should contribute to creating a healthy environment that ensures the broad participation of all stakeholders, in accordance with the principle of public participation. This is also required in the case of policy formulation and implementation processes, as well as at the project level. A wide participation would contribute to the assembly of all the interested parties in order to obtain a consensus on the extractive sector of precious metals of gold and silver as well as of the great mining projects.

A revised law strengthens the objective of the Romanian mining sector, in the context of a rule of law environment; it should also explain the role of various actors (state, private sector, civil society) in supporting the contribution of the gold-silver mining sector to sustainable development. There is a need to assess the contribution of development

partnerships and strengthen the supportive role that the state can play in creating responsible mining practices. Achieving and maintaining a strong will and political commitment to the gold and silver precious metals mining sector is very important for the success of national results.

Actions to be implemented:

Revision of the law in such a way that the general Romanian legislation transposes the community directives accordingly. A revised law should set out clear provisions for the sustainable management of mineral resources, which can be further developed through implementing rules. A revised mining law could have a coordinating role over other areas of legislation related to sustainable development, actions aimed at increasing transparency, contractual regime and implementing regulations, eliminating legislative inconsistencies and current blockages that burden mining projects.

A law on mines that can strengthen the role of civil society through information and meaningful participation, a law on mines that requires raising awareness of environmental issues, strengthening the capacity of public authorities to monitor the environmental duties of mining companies.

From my point of view, the provision of the Mining Law which refers to the scope of the stabilization clause introduced in Article 21 (2) of the Mining Law must be rectified. This article seems to immunize the holder of the concession title against any future regulatory changes.

At European level, European legislation creates a wide range of obligations regarding the extraction of natural resources and deposits as well as their exploitation that the competent public authorities of the Member States have to fulfill, emphasizing that Community law is a distinct and autonomous legal order, while recognizing the procedural autonomy of the Member States. Mandatory European and international legislation imposing mining obligations, including environmental legislation and human rights treaties, as well as documents are aimed at increasing transparency and promoting public participation.

In democratic countries as well as within the EU, laws referring to the extractive sectors are drafted in line with the interests of citizens, arguing that this system provides sufficient opportunities for civil society participation in decision-making. From a human rights perspective, I argue that international law provides additional opportunities for citizens to participate directly in decision-making that affect them. For example, art. 21 (1) of the United Nations Declaration of Human Rights stipulates that citizens have the right to participate directly in decision-making at the national level, as well as through representatives.

Although many countries have laws that provide access to information, in reality, obtaining relevant information is often hampered by a "culture of secrets" from government agencies [7].

Therefore, access to the legislation on participation is less common than the legislation on the right to information, especially when it comes to participating in the drafting of national legislation. In this context, only a quarter of the countries that make up the European Community have well-founded legislation that supports participatory processes in drafting national legislation [8].

In more than half of these, the public did not have enough time to influence policy decision-making processes. An even smaller amount of information was provided on the opportunities for the public to participate in drafting laws, let alone the results of consultations [8].

In Eastern Europe, the existing legislative framework guaranteeing the right to public participation is relatively weak. Laws in these countries provide for participatory rights by

guaranteeing elections, freedom of expression and the right to request information from government officials through petitions.

In the face of these new realities, some countries, such as Poland and the Czech Republic, have opted for the formula for drawing up and adopting environmental codes. In fact, for some of the reasons mentioned above - the level of development and trends in environmental law - other Western European countries such as France, Sweden, the Netherlands and Finland have resorted to such a solution. In others, in the first stage, the form of codes was chosen as an exclusively technical systematization (Italy, for example) [9].

Based on the findings of this research, it is clear that the transformation of the wealth of mineral resources into long-term development depends to a very large extent on the historical, political and institutional context of each country. There are no quick fixes or simple answers that can be applied in all situations.

Generally, all countries should promote sustainable development at the national level, *inter alia*, by legislating and implementing clear and effective laws that support the extractive sector of gold and silver deposits. All countries should strengthen their government institutions, providing a politically, socially and economically attractive climate to investors, along with ensuring the necessary infrastructure and promoting transparency, accountability and fair administrative and legal institutions.

4 Does Romania have an adequate legal framework to support the process of developing a modern mining industry, which would contribute to the sustainable development of this country?

It is important for Romania to offer an attractive political, social and economic climate for investors. This can take the form of a fair tax regime, but low taxes should not be the only competitive advantage a country can offer. Other factors that may attract investors include a stable economic and political climate, the existence of infrastructure, sound fiscal policies, clear and stable property rights regimes, as well as fair trade regimes [10].

Most investors prefer countries where the government offers legislative stability, a government that proves to be very responsible. The Mining Law 85/2003 applicable in Romania provides concession conditions for investors who want to explore and extract mineral resources in this country. The law also defines royalties, fees and taxes to be paid by concessionaires, property rights over mineral deposits, as well as the need to obtain environmental and cultural permits.

In Romania, a framework concession agreement is used, which includes elements of a traditional royalty tax application regime. The royalty is defined in the current legislation on the mining industry, and the profit tax law contains certain provisions specific to ores.

Royalties are *ad valorem* (according to production volume) and are calculated according to the market price of ores in the reporting period. The profit tax has a single share of 16% on the income generated in Romania (for foreign investors), for which the income is registered based on the principles of accrual accounting. Exploration and development costs are amortized over five years using the straight-line method. Finally, there is no surplus tax or a system of taxing income from renting resources.

Three aspects of the fiscal regime in Romania are important. First, there is a significant state participation in the mining sector. This participation is, in part, a legacy of the past, from the time when the state owned most of the means of production and, on the other hand, is due to the fact that the transition to a market economy has not yet ended, at least in the mining sector. Most active licenses are held by state-owned companies. The fiscal effect

of state ownership and participation depends on both the revenues of state-owned companies and the way in which these enterprises are taxed. Secondly, it is not clear from the Mining Law whether the generally applicable tax regime applies to all mining concessions.

The Mining Law stipulates that the responsible state agency and any private mining company will establish a contractual relationship, but no restrictions (or stipulations) related to the generally applicable law are mentioned. Obviously, however, dealers are required to pay royalties. Thirdly, the participation of the state in private concessions can be found, as an example, the state enterprise Minvest Deva SA holds a percentage of 19.3% of the Roşia Montană concession using the profit sharing method. The state could benefit from three types of revenues in this case: a payment for mineral resources, applicable general taxes and income from equity participations in a company that extracts mineral resources. The profit sharing method is a method of financing the participation in the company's capital.

In this case, the private investor also covers the capital invested by the state. In fact, the private investor lends the state the necessary funds to invest in shares. An interest rate is set on this loan and, in general, the loan is amortized by the state before any dividends or capital gains are paid until the principal and interest are paid in full.

Tax revenues from the mineral resource mining industry (taxes, royalties and other payments) is one of the most important reasons why the government needs to promote the growth of this sector.

The Romanian Government should consider revising this law to determine whether its provisions are sufficient to ensure that the extractive mining sector on the exploitation of gold and silver deposits really contributes to the sustainable development of the country. In particular, the experts suggested that the government reconsider the state's capital participation in mining projects; also ensure that royalties, fees, taxes and other charges are clearly and consistently defined; to take into account the unexpected profit tax; and publicly disclose the terms and conditions of contracts signed in the mining sector, as well as how revenue is collected and managed in the mining sector [11].

Ensuring that mining contributes to the sustainable development of the country also involves avoiding, minimizing and reducing environmental damage. The Mining Law could be revised to ensure that environmental liability according to the "polluter pays" principle has also been included in the text of the law, not only to ensure that fines levied for environmental infringements adequately cover the costs of environmental pollution, but also that the law clearly defines the parameters for mine closure and that it establishes appropriate mechanisms for recovering funds in the event of a company going bankrupt (ie requiring a company to record in cash securities).

5 Conclusions

Romania has come a long way in restructuring the sector and privatizing viable mines, closing down unprofitable ones, carrying out macroeconomic reforms and laying the groundwork for establishing attractive conditions for private investment.

At present, the challenge is to increase the legal and institutional conditions for policies to support the operation of a vibrant mining industry in the context of the exploitation of gold and silver deposits integrated to bring about change in legislative, social and economic aspects.

At national level, the legislation seems to be rather inefficient. At the heart of the challenges seems to be the difficult but fundamental issue of how to exploit the precious metals of gold and silver as well as the responsible institutions that determine good governance. The paper offers some preliminary suggestions regarding the actions to be

taken in this direction. They are, by no means, intended to be exhaustive, but to represent a point of view for further discussions, in which the Romanian Government and the Parliament could elaborate a truly progressive mining legislation.

Beyond these aspects of national legislation on the exploitation of deposits, the process of improving legislation should include the preparation of specific studies focused on social, economic and environmental issues addressing very specific issues, such as contract transparency, stabilization clauses, instruments for community empowerment, integrated land use regimes, taxation of the mining industry, and economic development planning in mining areas.

Romania should consider how it capitalizes on its mineral resources, a clear understanding of current trends in the exploitation of gold and silver mineral resources, and the identification of Romania's competitive advantage in a global economy. The extractive sector can bring significant economic benefits to the country by generating tax and export revenues, eliminating investment constraints, stimulating economic growth and job creation, as well as contributing to the physical construction of infrastructure. However, realizing and increasing these benefits requires action, primarily from the government.

Basically, the elimination of legislative inconsistencies would reorder the environmental legislation but I do not agree with a simple compilation of the normative acts in force, but support a coherent systematization of the provisions by verifying, eliminating, avoiding overlaps, parallels and contradictions, which unfortunately are found in the current environmental legislation in Romania.

In conclusion, this aspect of modernizing the legislation would help to form a healthy mining policy that would develop the sustainable management of gold and silver mining operations in Romania and its contribution to the general development.

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