THE RIGHT TO SAY NO

FEBRUARY 2023

A LEGAL TOOLBOX FOR COMMUNITIES AFFECTED BY MINING IN THE EU

EEB
European Environmental Bureau

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Environmental
Bureau

We are Europe's largest network of environmental citizens' organisations. We bring together over 160 civil society organisations from more than 35 European countries. Together, we work for a better future where people and nature thrive together.

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Life

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PREVENTION

Right to say no

Free, Prior and Informed Consent (FPIC)

Right to a healthy environment

Precautionary principle in environmental law

Legislation Gap - Legal need for a Right to Say No

Keep governments accountable

EXPLORATION

Permitting

Permitting procedures

Prevention Principle

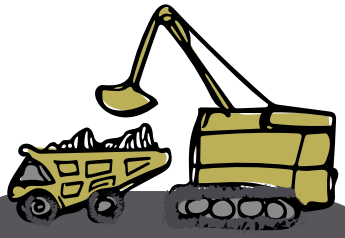
Strategic Environmental Assessment

Zoning laws

NATURA 2000

Environmental Impact Assessments

Extractive Waste Directive



DEVELOPMENT

Aarhus Convention rights

Seveso III Directive

OPERATION / EXPLOITATION

NATURA 2000

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Polluter pays principle

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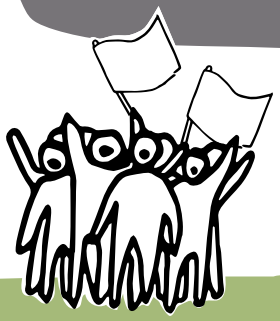

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INTRODUCTION

All local communities affected by mining projects should have the right to have a say on whether mining activities will start or continue in their backyard. This belief in community involvement in political, economic, and environmental decision-making is epitomised in a **Right to Say No (RTSN)**, which is the inalienable and collective right of a community to say no (or yes) to extractive projects on the territories/lands they are living within.

Currently, there is no real 'Right' to Say No outside of iterations of the indigenous right to free, prior and informed consent (FPIC) — it is a right we are asserting, not something we can yet claim. This toolbox will elaborate on the rights local communities already have and those rights that still need to be recognised and enforced, including the **Right to Say No.**

The sections of the toolbox are structured according to different stages in the mining process — from the early exploration up until the reclamation of mining sites. Each section lays out a set of different concepts which are interlinked with each other.

The toolbox also includes one living table (open to updates) of relevant case examples that may be helpful to anyone opposing mining operations.

We encourage you to explore the toolbox according to your interests and needs rather than reading it front to back. We ask you to add your experience in the living table so that your struggle may help inform and empower others.

For the production of this handbook we drew inspiration from different local communities, their struggles, and organisations working on the ground. We thank these communities for their case examples (found most prominently in the table of cases) and support them in their fight for their rights, including the **Right to Say No**.

STAGES OF MINING

There are different stages involved with mining: Exploration, Development, Operation, and Closure & Reclamation. Concerned communities need to take the particularities of the different stages into account and advocacy strategies need to be adjusted to each mining stage.

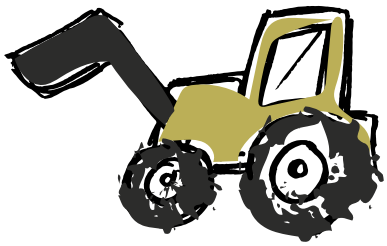
Read more on mining stages from this Guidebook for evaluating mining project EIAs and from this study on the Social and environmental impacts of mining activities in the EU.

1. Exploration

Mining projects can only be started after establishing the commercial value of mineral ore deposits. The exploration phase is necessary to understand the extent and value of the mineral ore deposit. This stage contains surveys, field studies, and drilling test boreholes and other exploratory excavations. Wide tracts of vegetation may need to be cleared (usually in lines) to make room for large vehicles mounted with drilling rigs. Because the effects of the exploratory phase of a mining project can be so significant and because there may not be any future phases of mining if exploration does not yield enough high-grade mineral ore deposits, many nations demand a separate Environmental Impact Assessment (EIA) for this phase. It is obligatory in the EU to submit an EIA prior to receiving an exploration permit.

What should I know at this stage?

- Permitting
- Prevention Principle
- Zoning laws
- Environmental Impact Assessments
- Strategic Environmental Assessment
- NATURA 2000
- Extractive Waste Directive



2. Development

The project proponent may start making plans for the mine's development if the mineral ore exploration phase demonstrates that there is a commercially viable mineral ore deposit. There are several main elements in this stage of the mining project which can be collected into two larger categories.

2.a. Mine site design and planning

Companies evaluate different options for the site and design of the mine with multiple plans in order to identify the most economically "viable". For example, a company could make a plan of 50 years to mine the same deposit that another company would like to do in 10 years; all depending on the mining technologies and work plans proposed. The miners have to present a project with an EIA that shows a safe, environmentally sound, economically viable and socially responsible manner. In this stage, the permitting authority plays a crucial role and it can reject proposals a Social Impacts of Mining nd request adaptations of all kinds for the proposed project in order to meet regulations related to environmental, mining-metallurgical technical or social criteria.

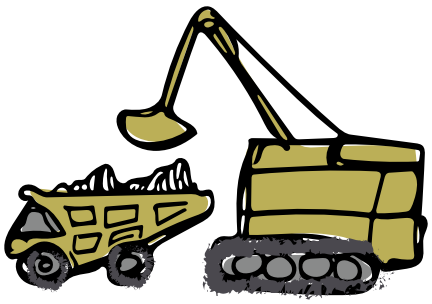
2.b. Construction of access roads and mining infrastructure, site preparation and clearing

After obtaining the different permits, the company starts the construction of access roads, either to provide heavy equipment and supplies to the mine site or to ship out processed metals and ores. It can have substantial environmental impacts on nature and living beings.

If a mine site is situated in a remote, uninhabited area, the project's promoter might have to start preparing the ground to build infrastructure where mining staff would work — and likely reside — and their equipment will be stored.

What should I know at this stage?

- Environmental Impact Assessments
- Strategic Environmental Assessment
- Aarhus Convention rights
- Extractive Waste Directive
- Seveso III Directive



3. Operation

3.a. Disposal of overburden and waste rock

The "strip ratio" — the ratio of overburden to mineral ore — is typically higher than one and may even be much higher. It means that, normally, mining companies need to remove a quantity of soil above the desired mineral deposit that can be even bigger than the quantity of mineral they will process later on when the company is exploiting the deposit.

These large amounts of waste rock, which can occasionally contain high levels of dangerous compounds, are typically dumped on the spot, either in surface mounds, as backfill for open pits, or in subterranean mines. Therefore, the management choices and related effects of overburden disposal must be carefully evaluated in the EIA for a proposed mining project in the development stage.

- Environmental Impact Assessments
- Strategic Environmental Assessment
- NATURA 2000

3.b. Ore extraction and processing/beneficiation:

Once the overburden has been removed, a mining operation can start extracting the mineral ore using specialised heavy machinery and equipment, such as loaders, haulers, and dump trucks that convey the ore along haul roads to processing facilities. This operation generates a distinct set of environmental impacts, including fugitive dust emissions from haul highways, that an Environmental Impact Assessment for a proposed mining project should evaluate independently. Many of these impacts are related to Industrial Emissions.

Techniques for physical and/or chemical separation used in beneficiation include leaching, precipitation, electrowinning, solvent extraction, magnetic separation, electrostatic separation, and amalgamation (often involving the use of mercury). Rock waste dumps, tailings, heap leach materials, and dump leach materials are among the by-products of these processes (for gold, silver and copper leach operations).

Active mining

The extraction and concentration (or beneficiation) of a metal from the soil is a common feature of all active mining types. The suggested process for extracting and concentrating the metallic ore varies significantly between proposed mining projects. Metallic ores are almost always covered by a layer of common soil or rock (referred to as “overburden” or “waste rock”) that needs to be moved or excavated in order to get access to the ore deposit. The process of moving or digging the overburden is where prospective mining projects first diverge. The most popular techniques are briefly described in the sections that follow.

Types of mining:

- Open-pit mining

- Underground mining
- Reworking of inactive or abandoned mines and tailings

3.c. Tailings disposal:

Even high-grade mineral ores are amalgamated with hazardous metals as unwanted byproducts (such as cadmium, lead and arsenic) and are almost entirely composed of non-metallic elements (such as silicon, the second most abundant element in Earth's crust). Mining tailings are the leftover material from an ore after it has been processed, and the required metals have been removed. They are produced in large quantities during the beneficiation process. Tailings exist wherever there is mining (estimates of tailing dams are as high as 3500 globally) and are a major source of pollution globally.

4. Closure & Reclamation

Plans for mine reclamation and closure must go into sufficient detail to demonstrate how the mining company will seek to return the mined site to its pre-mining environmental state, stop toxic contaminants from leaking from different mine facilities (like abandoned open pits and tailings sites), and ensure there are funds to cover the costs of reclamation and closure.

It is very important in the earlier phases of a mining operation to check if the EIA fully explains how the company plans to restore the area, and to guarantee that the company deposits enough money, independent of the company's finances, to cover these costs. Otherwise, a company might go bankrupt before starting the closure stage and leave a huge environmental disaster on site for the local authorities and communities to deal with.

What else should I know at this stage?

Polluter pays principle

Tools for all stages: Right to Say No as a tool

- Context
- Petitioning
- Public participation
- Why is mining a problem?

WHY CAN MINING BE A PROBLEM?

The global appetite for resources does not match their limited supply on Earth or justify the disastrous impacts of extracting them. While we are

overconsuming a whole range of resources, those that we dig up out of the ground are often the most limited, slowest to regenerate, and most polluting to extract. Gold, silver, and copper have been mined for centuries but materials such as coltan, nickel, lithium, graphite and neodymium are increasingly demanded for products associated with modern lifestyles.

Mining exacerbates climate change, pollution, habitat destruction and biodiversity loss but it also has direct economic and socio-cultural impacts on local communities. We have divided the impacts into environmental, social impacts, and human rights violations.

The effects of mining are well researched and documented. For further background we recommend the following sources:

- Harmful impacts of mining
- Specifically on the EU: social and environmental impacts on mining in the EU
- Green mining is a myth
- Right to Say No: Learning From Global Struggles Webinar

Mining in Europe is becoming increasingly attractive for companies (see for example the resources impacts of the war in Ukraine). We are faced with mining for raw materials used in the production of electronics and batteries. Although most of Europe's mining activities are still run – and have impacts – in the Global South, the mining rush is now coming back home as well: hoping to secure the future supply chain, reduce dependency on 'third countries' and promote 'responsible' sourcing of metals and minerals, the European Commission released last year its action plan on critical raw materials, which involves bringing back the sort of extraction that EU countries have largely outsourced. You can find more detail on the challenges of mining in the EU here.

MINING IN THE EU

The Action Plan on Critical Raw Materials stresses that "the EU must also obtain raw materials from its sources in the long term and develop forward-looking development strategies". The EU and its European Green Deal should not be incentivised by and supporting mining expansion (read more on this subject here).

This is an urgent sign for local communities in the EU that a mining boom is happening on the European Union's soil. The Committee on Petitions (Euro-

pean Parliament) has already received a significant number of petitions from the citizens of several Member States concerned about the lack of legislation on public participation and transparency in the mining sector in the EU.

Strengthened legislation on access to information and public participation in the decision-making process for local communities in the EU is necessary. Communities have to be better informed about potential environmental impacts from mining activities.

The myth of 'sustainable' or 'green' mining is used by mining companies as a greenwashing tool that allows them to not take responsibility for the negative social and environmental impacts that they cause.

SOCIAL IMPACTS OF MINING

The Responsible Mining Index's indicator for "**community wellbeing**" shows that the way companies address socio-economic impacts from their activities barely reaches a score of 18%. This indicator includes involuntary resettlement, human rights infringements, deterioration of human health, engagement in local procurement, and involvement of stakeholders in decision-making processes.

Also, this indicator among others could be supplemented by elements such as[1]:

Death threats to land and human rights defenders**.** According to the Responsible Mining Foundation, 50 of the 212 defenders who were killed in 2019 had been protesting against mining operations, making mining one of the deadliest sectors.

Criminalization of protest is one of the strategies which mining companies can use to avoid public participation in decision-making processes. They can be classified as "strategic lawsuits against public participation" (SLAPPs) . Mining is recognized as the most dangerous sector for human rights defenders.

Find more about SLAPPS here.

Read more about SLAPPs in the section on Industry tactics.

The division between members of local communities. Mining companies, in order to get public support for extraction, can bribe leaders or influencers from the communities and win votes during the public consultation.

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1 In order to prepare this guideline and to provide a wide overview of the question, there have been provided interviews with local communities affected by mining projects

Food insecurity. Usually, mining activities happen in rural areas and it impacts farmers' land nearby. Land can be taken from farmers or their harvest can be contaminated by mining.

Job opportunities. Mining companies can create new job vacancies (while also destroying existing jobs and livelihoods) in the producing region, even though most jobs\ go to highly educated people from outside the region, but over time mining projects stop and it creates economic instability in the region in a vicious circle.

There are many more social impacts of mining. Read more about the Social and environmental impacts of mining activities in the EU.

ENVIRONMENTAL IMPACTS OF MINING

Mining activities can cause irreversible negative impacts on the environment at each step and level. Research shows that less than 30% of companies do not meet societal expectations for environmental responsibility (less than 30%).

Environmental impacts of mining happen on two different levels. Firstly, the day-to-day mining activities release enormous amounts of greenhouse gases, erode and contaminate soil and water, and impact local flora and fauna. Secondly, these environmental impacts are compounded by the high risk of mining induced environmental disasters such as dams breaking, pump lines failure, toxic chemicals release... — the list is long!

For more information on the impact of mining accidents on human life please see the section on mining and human rights.

Read more about the environmental damage created by mining and the myth of green mining here.

Read more about the Social and environmental impacts of mining activities in the EU.

MINING AND HUMAN RIGHTS

While the impacts of mining can be looked at from many different angles, including the environmental and social angles previously explored in this document, we have decided to add a rights-based perspective on mining with a focus on some traditional human rights. This toolbox promotes the **Right to Say No**. Putting on a pair of legal goggles can help with that goal.

Human rights can take many forms and those mentioned in this toolbox are by far not the only rights possibly impacted by mining activities.

Mining can have an impact on virtually all categories of human rights. Ranging from the loss of life to the loss of one's home and the exclusion from political decision-making.

Firstly, mining can impact substantive civil human rights such as the right to life, and the right to freedom from slavery but also political rights such as the right to freedom of information and participation in decision-making (for instance, SLAPPs as part of Industry tactics).

Secondly, mining impacts economic rights such as the right to own property and the right to adequate housing but also social and cultural rights such as the right to health, water, and work.

Thirdly, mining impacts collective rights such as the right to a healthy environment.

Most of these rights are recognised internationally and Europe wide. Some of the collective rights are currently gaining regional and global support, such as the right to a healthy environment.

You can find more detail about rights and the corresponding legal obligations on authorities and companies in the Legislation chapter of the toolbox.

A universal right to a healthy environment

SLAPPs

WHO ARE THE AFFECTED "LOCAL COMMUNITIES"?

There are several ways to define what constitutes a local community affected by mining. However, if you are reading this toolbox, the chances are that either you are a member of an affected community already or you are aware of examples where mining has affected communities.

Mining happens in several stages and the decision-making process of the public authorities granting permission for each stage varies per country, per mining stage, and per region.

In the EU, from a legal point of view, we could take inspiration from the UN Aarhus Convention which uses the term "public concerned" to explain who has the right to be involved in a decision on the environment (such as the decisions taken at several mining stages). Local communities would classify

as the public concerned if they are affected or likely to be affected by, or have an interest in, the making of an environmental decision. This includes, by definition, NGOs promoting environmental protection.

In order to define yourself as a member of an affected local community, please answer the following questions (and if there is at least one "Yes" in your responses, we believe that you can be considered a member of an affected local community for the purpose of this handbook):

- Are mining projects and associated activities (exploration, development, operation, closure and reclamation) happening or going to happen in your area and force you to resettle?
- Do mining projects affect, or are likely to affect, your daily activities?
- Do mining projects affect your quality of life, namely your health: by polluting air, contaminating water, etc.?

A helpful guide can be the Environmental Justice Atlas which includes a vast, and ever growing, database of social conflict around environmental issues. The Atlas is not limited to mining projects but collects stories of communities struggling for environmental justice from around the world. MAC-UA (Mining Affected Communities United in Action), a non-governmental, community based, united front of mining affected communities formed in response to the need to protect the integrity and interests of the people impacted by mining in Africa, also has resources and actions that can serve as inspirations for the movement in Europe.

RIGHT TO SAY NO

Mining is damaging to the planet and can be damaging to local communities. Today, the decision to start a mining operation is based on a mixture of political, economic, and individual considerations. However, the local communities are usually underrepresented in this decision-making process. The **Right to Say No** would grant local communities the final say, essentially a veto right.

The **Right to Say No** is first and foremost a legal concept. While mining activities are carried out by public or private companies, the authorisation and permitting decisions are not taken by those companies. The decisions are taken by public authorities and governments. That is why the **Right to Say No** is a right of individuals and groups *vis-à-vis* public authorities.

The **Right to Say No** originates from regions in the Global South such as

Latin America and Africa where local communities have a history of resisting extractivism. According to the **Right to Say No** concept, all people have the right to self-determination (the right to determine their own social, cultural and economic way of development) and to free prior and informed consent. This right entitles people to participate in the decision-making process and decide "YES" or "NO" for any kind of large-scale economic activities affecting them and taking place in their territory, including mining projects.

This makes the **Right to Say No** a tool for the empowerment of local communities that oppose and want to veto mining or other environmentally disastrous projects that would affect their community[2]. The **Right to Say No** is unique and can be used as a tool during all stages of a mining project.

RIGHT TO SAY NO AS A TOOL

The **Right to Say No** can be defined as a legal framework that supports the self-determination of a community relating to development, strengthening democracy and allows communication about resistance and struggling against mining and extractive activities.The "**Right to Say No**" can be used in various ways:

- **As a tool** that a community can use in its self-determination and as a 'right to say yes' to their own idea of development that allows grassroots processes to rise;
- **As a process** which allows for strengthening democracy and encourages citizen participation;
- **As a communication strategy** of communities affected by the mining projects. It is their language of resistance that grows from the bottom-up.
- **As a legal framework:** even if it is called a 'right', the **Right to Say No** does not exist as one piece of law but as a concept, it can be found in different countries and in various regulatory frameworks and can depend on at which stage of a mining project you want to use this concept.

This toolbox will concentrate more on the concept of the **Right to Say No** as it relates to public participation **(before)** and will look at the existing **legal framework,** exploring the existing legislation at the EU level that local

2 We would also recommend to you to get acquainted with the information pack from Womin Africa who was one the first organizations which shared their experiences and the idea of the RTSN.

communities can use, and successful cases[3] with strategies that helped local communities to stop undesirable mining projects before they started.

Depending on the different stages of mining, the **Right to Say No** can be utilised in different ways:

LEGISLATION

LEGISLATION GAP — LEGAL NEED FOR THE RIGHT TO SAY NO

Mining in the EU is regulated by national laws. There is currently no horizontal EU legislation on mining activities. The right for the public to participate in environmental decisions is regulated at international, EU, and national level, but there is, as of the time of writing, no legislation specifically focusing on the right of the public and local communities in mining decisions. Furthermore, existing general public participation legislation is unfit to grant local communities sufficient participation opportunities in decisions on mining. Where public participation avenues do exist, they are mostly ineffective, time restricted, and difficult to navigate. Therefore, a **Right to Say No** needs to be enshrined in national, EU, and international law pertaining to mining.

The **Right to Say No** is a legal concept in its essence and should be used to fill the gap in legal protection for affected communities, and to address the lack of enforcement of already existing laws, and the imbalance of power and economic resources that has as a result that community voices are not heard (or, if heard, often ignored, silenced and not respected). Where it doesn't exist as a guaranteed legal right, it should be advocated for.

There are some general overarching principles of law that are helpful to keep in mind when discussing projects such as mining which may have impacts on the environment. These principles are especially common in legal frameworks in the European Union. Such principles are:

- Precautionary principle
- The universal right to a healthy environment

3 Cases with strategies which local communities used when mining activities have already started can be found among others.

- The polluter pays principle
- The prevention principle
- Public participation in decision making

This toolbox will look mainly at the duties public authorities have when authorising stages of mining operations. We focus specifically on the duties to take the opinion of local communities and citizens into account. That concept is called public participation.

The **Right to Say No** is a right to be exercised in front of a public authority but in the end mining operations are carried out by companies. While the ultimate decision to authorise mining is in the hands of public authorities or the government, companies obviously play a major role in influencing those decisions. Therefore, it is helpful to understand some of the obligations companies are under such as legislation on corporate social responsibility and Due Diligence.

You can find more information on specific pieces of international, EU, and national legislation related to the **Right to Say No** in this legislation table (this is a living document and especially information on national laws will be updated).

LEGAL STRATEGY

The legal framework in most countries, and in the EU, is arguably set up in favour of mining corporations. In this toolbox we are exploring the ways in which the law can be used to strengthen or exercise aspects of the **Right to Say No.**

The first step in a legal strategy to advocate for or exercise the **Right to Say No** should be to identify the relevant laws that apply to a proposed mining project and what obligations these laws place on the relevant authorities. Special focus should be placed on any public participation requirements. These will differ greatly from stage to stage of the mining process. The goal is to influence the decision-making process of the permitting decision. Overturning a decision that has already been taken is usually more difficult than preventing a decision from being taken. In the European Union, one of the most promising avenues of arguing for the **Right to Say No** before a permit has been issued is to exercise public participation rights in the Environmental Impact Assessment process.

But besides the general authorisation permits to operate, mining activities

may also include many other types of smaller permitting procedures, such as for pollution discharging permits, water use permits, infrastructural permits, electrical power grid permits, among others. Any of these procedures offer opportunities to assert the rights of the local affected community because their authorisation is likely to impact that community's immediate environment.

PUBLIC PARTICIPATION

Public participation begins when the permitting process starts and continues with the challenging of the decisions of permitting authorities. It encompasses many different activities, from seeking information about a project, to writing comments on a draft EIA, to filing a court case challenging a decision. These opportunities will frequently be explained in different laws within a jurisdiction where a proposed mine may be located.

The first step should be to identify the laws that apply to a proposed mining project and what obligations are created on the part of the government and the project proponent by these laws. And although this section focuses on EIAs, the **Right to Say No** can be manifested in different stages: there may be other permitting steps that occur before, during, or after the EIA process. These permitting procedures may include additional opportunities for public participation. For example, a mining company may need to apply for pollution discharge permits, acquire water rights, seek permission to build roads, or obtain a source of electrical power for operations, any of which may be authorised in a distinct procedure separate from the EIA process.[4]

Public participation is an integral part of a democracy. While European states are representative democracies where we transfer decision-making powers via our votes, this does not mean that we forfeit our rights to be involved and shape those decisions. Different types of decision-making processes allow for different levels of public involvement. Decisions affecting the environment impact all of us and future generations. Therefore, public participation opportunities should be especially strong in these types of decisions (for instance, on granting permits for mining activities).

Providing opportunities for public participation on the part of an authority or government can be passive or active. Passive, when there are no legal requirements to consult with predefined parts of the public. Active, when

4 https://www.elaw.org/files/mining-eia-guidebook/Full-Guidebook.pdf (p.98)

such requirements exist, for example a requirement to actively seek out the opinions of a local population when economic projects, such as mining, could significantly affect the environment this population lives in.

In the EU, permits for mining exploration and for extraction are granted more often than not: between 2013 and 2015 82% of permits were approved for exploration and 75% for extraction. This means that any public participation efforts which aim at having a national authority reject a permitting application are facing an uphill battle of entrenched practices and unfavourable bureaucracy. Introducing a strong **Right To Say No** could help break this pattern.

Sometimes activists have to approach public participation with caution. Active public participation requirements can from time to time be a thorn in the eye of business and public authorities and meaningful involvement is reduced to a box-ticking exercise. In a similar vein, different forms of public participation can lead to citizenwashing whereby involvement of the public is misrepresented by decision-makers.

PREVENTION PRINCIPLE

The prevention principle allows for action to be taken to protect the environment at an early stage. This principle aims to prevent environmental damage such as to protected species or to natural habitats, water and soil, rather than just to react to it. It is part of Article 191(2) of TFEU, that sets out four main environmental principles that must guide policy within the scope of EU law. The other principles the precautionary principle, the polluter pays principle and the principle of rectification at source.

An example case study:

Tătar v. Romania 27 January 2009

The applicants, father and son, alleged in particular that the technological process (involving the use of sodium cyanide in the open air) used by a company in their gold mining activity put their lives in danger. Part of the company's activity was located in the vicinity of the applicants' home. In January 2000 an environmental accident had occurred at the site. A United Nations study reported that a dam had breached, releasing about 100,000 m3 of cyanide-contaminated tailings water into the environment. The applicants also complained of inaction on the part of the authorities regarding the numerous complaints lodged by the first applicant about the threat to

their lives, to the environment and to his asthmatic son's health. The Court held that there had been a violation of **Article 8 of the Convention**, finding that the Romanian authorities had failed in their duty to assess, to a satisfactory degree, the risks that the activity of the company operating the mine might entail, and to take suitable measures in order to protect the rights of those concerned with respect to their private lives and homes, and more generally their right to enjoy a healthy and protected environment. In this case the Court recalled in particular that pollution could interfere with a person's private and family life by harming his or her well-being, and that the State had a duty to ensure the protection of its citizens by regulating the authorising, setting-up, operating, safety and monitoring of industrial activities, especially activities that were dangerous for the environment and human health. It further noted that, in the light of what was currently known about the subject, the applicants had failed to prove the existence of a causal link between exposure to sodium cyanide and asthma. It observed, however, that the company had been able to continue its industrial operations after the January 2000 accident, in breach of the **precautionary principle**, according to which the absence of certainty with regard to current scientific and technical knowledge could not justify any delay on the part of the State in adopting effective and proportionate measures. The Court also pointed out that authorities had to ensure public access to the conclusions of investigations and studies, reiterating that the State had a duty to guarantee the right of members of the public to participate in the decision-making process concerning environmental issues.

Source: https://www.echr.coe.int/documents/fs_environment_eng.pdf

PERMITTING

To start mining activity, permits need to be granted by the competent authority. In general, mineral resource management, permitting and mining legislation is within the full competence of Member States (and not the EU), since raw materials are generally considered to be national natural assets. Permit systems that primarily control mining are determined in detail in national mining legislation, which generally provides the framework for exploration and mining activities. Permit systems in Member States tend to be designed to ensure that mining does not cause significant harm to the environment or human health and safety, by imposing operational and risk management controls.

These systems are partly subject to EU law, such as the Treaty on the Functioning of the EU (TFEU) and various directives concerning safety and environmental regulation. Therefore, EU legislation concerning environmental regulation plays a significant role in providing instruments for the design and various phases of mining activities, and it can be used to ensure that mining does not endanger human health and the environment. For this to work, the EU should strengthen the role of Environmental Impact Assessments and Strategic Environmental Assessment in mining. The Aarhus Convention sets the minimum standard for public participation rights in environmental matters in the EU, which are often realised through the EIA processes.

The EU should add Social Impact Assessments (SIA) and human rights impact assessment (HRIA), with a special regard to the rights of indigenous communities such as the Sámi, as a compulsory element in permitting processes, to improve the implementation of public participation rights during permitting of mining activities.

For more information on permitting, read here.

A UNIVERSAL RIGHT TO A HEALTHY ENVIRONMENT

On 28 July 2022, the UN General Assembly adopted a resolution declaring access to a clean, healthy and sustainable environment, a universal human right. The resolution, based on the similar text adopted in 2021 by the Human Rights Council, calls upon States, international organisations, and business enterprises to scale up efforts to ensure a healthy environment for all. 126 countries already enshrined this right in their constitutions and national laws, including 17 out of 27 EU countries.[5]

It's the first time a right to a healthy environment has been explicitly recognised at the global level. The right obliges states to protect against environmental harm, to provide equal access to environmental benefits and to ensure a minimum standard of environmental quality for everyone to enjoy.

In regard to EU law, Article 37 of the Charter of Fundamental Rights of the European Union states that "a high level of environmental protection must be integrated into EU policies" but does not recognize an individual right to a healthy environment.

Overall, the recognition of a healthy environment should be expected to

5 Check here the list with the countries recognised the right to a healthy environment

help to fill the gaps in environmental laws, tackle climate change and support respect for human rights in general. With regard to mining, the right to a healthy environment could be a useful legal and political tool to assess whether a certain mining project may be infringing upon this newly recognised right. Where **Right to Say No** strategies previously had to rely on very specific rights linked to human health, protected species, or land-use, they may in the future be able to rely on the broader and more general right to a healthy environment.

FREE, PRIOR, AND INFORMED CONSENT (FPIC)

Communities must be granted the **Right to Say No** under the mechanism of Free, Prior, and Informed consent. The United Nations Declaration on the Right of Indigenous Peoples (UNDRIP) and the Indigenous and Tribal People Convention (ILO 169) provide a right to indigenous people to self-determination through Free, Prior and Informed consent and the right to possession of their lands.

FPIC is a framework that applies to Indigenous Peoples under international law. It is relevant in the European context especially for European based companies leading projects abroad but its application in practice on European soil is difficult as there are little to no recognised Indigenous Peoples. With The FPIC framework, Indigenous People have the right to participate in legislative or administrative decisions on resource extraction activities that may affect their lands, territories, or livelihoods. It ensures that they have the right to give or withhold their consent to these activities without fear of reprisal or coercion, in a timeframe suited to their own culture, and with the resources to make informed decisions.

- **Free** means that there is no coercion, intimidation, or manipulation;
- **Prior** implies that consent is to be sought sufficiently in advance of any authorization or commencement of activities and respect is shown to time requirements of indigenous consultation/consensus processes;
- **Informed** means that information is provided that covers a range of aspects, including the nature, size, pace, reversibility, and scope of any proposed project or activity; the purpose of the project as well as its duration; locality and areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail.

- **Consent** means that there is a collective decision made by the right holders and reached through customary decision-making processes of the communities. Consultation and participation are crucial components of a consent process, and indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. This process may include the option of withholding consent.

Art 7. of the ILO 169 grants indigenous people the right to participate in the formulation, implementation, and evaluation of plans and programmes for national and regional development which may affect them directly and Art. 11 of UNDRIP provides a right to Free, Prior, and Informed consent regarding their properties.

However, UNDRIP is not a legally binding instrument, it only provides strong moral framing and only ILO 169 is a legally binding convention. Despite that, it is still challenging for indigenous people to negotiate with authorities or decide on their rights because of historical colonization and other imposed limitations. Moreover, ILO 169 has still not been ratified by European Union countries, such as Finland and Sweden, EU countries where indigenous people live, and by others that interact with them.

In principle, FPIC could be seen as a formulation of the **Right to Say No** because it implies **information** about future activities, which should be provided to people before activities start and, afterward, the community has the **Right to Say No (to consent or not)** to any activities, without any pressure or threats (**free**).

FPIC is a legal model for public participation engagement that can inspire other models which are not limited to Indigenous Peoples but are more broadly focused on all affected communities (including land belonging to minority groups). Its application in practice, however, also serves as a case study on the complexity of public participation approaches in mining related decision-making. The model is not only about consent but also about good faith from authorities and a community-centred approach. This broad interpretation of the right to public participation can feed into the **Right to Say No**.

There is a Free, Prior & Informed Consent Manual and guidelines for applying FPIC that set out broad principles, prescriptive standards, and a flexible approach to implementation in order to ensure FPIC with indigenous peoples.

AARHUS CONVENTION RIGHTS

The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention) is the only legally binding international environmental agreement and has 47 parties (one of which is the EU). Since the EU became a party to the Aarhus Convention, the three pillars have been adopted and implemented in the EU legislation through different legal acts.

The Convention consists of three pillars that have to ensure sustainable development (that means environmental protection during development):

- Right to receive **environmental information** that is held by, or for, a public organisation. This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. You must get this information within one month of your request and do not have to say why you need it;
- Right to participate in the environmental decision-making process. This means that members of the public can take part in making decisions where there may be an environmental impact. This includes proposals for projects affecting the environment, or plans and programmes relating to the environment (environmental licences, etc). The Convention itself lists mining activities in paragraph 16 of Annex 1 which enumerates all the activities covered by Article 6 regulating public participation on specific activities. The public authorities that take the environmental decisions must publish notices telling the public how they can give feedback. The public authorities must then consider this feedback when making decisions.
- **Access to justice** means that members of the public and environmental non-governmental organisations can ask for a review of decisions from the public authority which may affect the environment.

The Convention is not only an environmental agreement, it is also a Convention about government accountability, transparency, and responsiveness. It grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice.

Here are two helpful resources for anyone trying to understand the Aarhus Convention better.

- The Aarhus Convention Implementation Guide
- The ClientEarth guide on Access to Justice

AARHUS CONVENTION COMPLIANCE COMMITTEE

If a Party to the Aarhus Convention is not fulfilling its obligation, one or more members of the public can submit a communication (complaint) to the Aarhus Convention Compliance Committee. This international complaint procedure does not have the full authority of a judicial court, but it is fully independent of the Parties, holds hearings, and enjoys a high level of respect from the parties to the convention. A complaints process concludes with the Compliance Committee adopting final findings and — if the Party concerned is found non-compliant — recommendations that the Party should follow. The whole process can take several years, but the final result is usually an authoritative recommendation, agreed upon by all parties to the convention. In many cases these recommendations have led to changes in national environmental law.

You can contact the Compliance Committee here aarhus.compliance@un-.org following the format indicated **here**.

ENVIRONMENTAL DEFENDERS

Environmental defenders play a fundamental role in protecting land, forests, water and other natural resources by raising awareness about and campaigning against destructive practices, and exposing environmental crimes. However, environmental defenders are constantly and increasingly under attack across the globe. They face intimidation, harassment, stigmatisation and criminalisation, assaults and even murder. Global Witness has recorded that 1,539 environmental defenders were killed between 2012 and 2020 worldwide, and the real figure is likely much higher, given that many murders go unreported.

The protection of environmental defenders is called for in the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention rights), in article 3(8), which obliges states to protect those who exercise their environmental rights from harassment, penalisation and persecution. There is a Rapid Response Mechanism under the Aarhus Convention, which can be a helpful support to environmental defenders under threat. It can kick in when someone is penalised, persecuted or harassed by the authorities or

by private companies for making use of their rights under the Aarhus Convention to protect the environment. Via this mechanism, the current Special Rapporteur on environmental defenders, Michel Forst, has the authority to approach public authorities in all Aarhus Parties directly and issue immediate protection measures to call for the prevention or cessation of the harassment and persecution of environmental defenders.

What is an environmental defender?

An environmental defender is defined by what they do, not by who they are — anyone can be an environmental defender! According to the Special Rapporteur, *"Environmental defenders comprise individuals, groups, movements, communities and organisations who may not see themselves as defenders, but who make use of their fundamental rights of freedom of expression, of association, and of assembly, to defend the environment."*

Importantly, the Special Rapporteur may also consider complaints concerning the alleged penalisation, persecution, and harassment of environmental defenders in countries that are not currently Party to the Aarhus Convention, including in Africa, Asia, and the Americas if the acts in the complaint are related to the operations of international companies based in a state which is Party to the Aarhus Convention.

Here is how you can make a complaint to the Special Rapporteur.

BERN CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE AND NATURAL HABITATS

The Bern Convention on the Conservation of European Wildlife and Natural Habitats is a binding international legal instrument in the field of nature conservation, covering most of the natural heritage of the European continent and extending to some States of Africa.

It is the only regional Convention of its kind worldwide, and aims to conserve wild flora and fauna and their natural habitats, as well as to promote European cooperation in this field. The treaty also takes account of the impact that other policies may have on natural heritage and recognises the intrinsic value of wild flora and fauna, which needs to be preserved and passed to future generations.

Fifty countries and the European Union have already signed up to the Convention and committed to promoting national conservation policies, consid-

ering the impact of planning and development on the natural environment, promoting education and information on conservation, and coordinating research.

For example: Complaint filed with the International Convention for the Protection of **?**

Other sources: https://www.kcl.ac.uk/news/law-students-act-to-protect-endangered-species-serbia-bosilegrad-ekokrajiste-earththrive

EU LAW

This legal toolbox focuses particularly on EU law for several reasons. The European Environmental Bureau, is an organisation that is registered in Europe and has expertise within the European context. This legal toolbox is also part of a larger project titled, *Understanding Green Extractivism* (see Pillar 1 and Pillar 2 to read our detailed case studies). The cases in these two pillars are either within the European region or involving European companies operating in the Global South.

This legal toolbox is considered Pillar 3 within the project and is our first attempt to analyse EU law and how the **Right to Say No** can be applied within the law, though not yet understood as such, to raise awareness on the importance of environmental democracy within extractive activities and pave the way for future legislation to incorporate more democratic decision-making within EU and national member states' laws.

- Lack of overarching mining legislation
- Environmental Impact Assessment
- Natura 2000 sites

Law governing the European Union takes precedence over national law. Some of it is directly applicable and enforceable in the Member States (Regulations) and some of it needs to first be transformed into national laws reflecting that piece of EU law (Directives).

Environmental matters are a shared competence of the EU and its Member States. EU environmental policy is based on the "principles of precaution, prevention and rectifying pollution at source, and on the 'polluter pays principle". You can find descriptions of the principles here (Precautionary principle, prevention principle, polluter pays principle).

As mentioned in the 'Legislation gap' section, there is no EU law regulating

mining activities, aside from the technical extractive waste directive (Directive 2006/21/EC), which makes the legal landscape of obligations on mining activities and permitting authorities complicated. It also means that there is no one place where the **Right to Say No** should be enshrined in EU law. If there were EU laws regulating the permitting decisions of national authorities, then that piece should include a clear veto right for affected local communities in the shape of a **Right to Say No.** The **Right to Say No** does not exist in EU law yet, but the opportunities communities have that come closest to the exercise of such a right are different manifestations of public participation.

Treaty articles

Treaty on the European Union and Treaty on the Functioning of the European Union

Depending on which part of mining activities you want to focus on, there are different overarching articles of EU law that apply. Below are some of the most relevant. Similar provisions can be found in most national constitutions as well.

- Article 3(3) TEU EU internal market goals
- Article 5(3) TEU EU subsidiarity—division btw national and EU competences
- Article 9 TFEU EU general principles, employment, health ...
- Article 11 TFEU EU goal of environmental protection
- Article 151 TFEU EU social policy
- Article 153 TFEU EU social policy
- Article 173 TFEU EU industry policy
- Article 191 TFEU EU environmental policy
- Article 193 TFEU EU environmental policy

ENVIRONMENTAL IMPACT ASSESSMENTS

The Environmental Impact Assessment (EIA) Directive is arguably the most important piece of EU legislation for the **Right to Say No** as it has the biggest impact on the permitting decisions. It applies to private and public projects which are listed in Annex I of the Directive. The EIA public participation procedure can be summarised as follows:

- scoping stage (developer requests from authorities the scope of infor-

mation about the project which they should provide for the assessment);

- providing of **information** by the developer;
- providing information about the project to the affected authorities and public;
- **consultation** by the public and authorities (through an expression of comments and opinion);
- decision by competent authorities with consideration of the outcome of the consultation (the public has the right to challenge the decision before the court).

Although not focussed specifically on the EU, this guidebook on evaluating mining Environmental Impact Assessments can be a helpful source of information.

Lawsuit. Art. 11 EIA allows the public concerned to review a procedure of EIA and to challenge the substantive or procedural legality of decisions taken by authorities. Local communities can challenge the decision of authorities that give the permission to mining companies if they find that is not lawful or if their right to participate wasn't respected. This lawsuit can be applied to the national court.

Information

Article 6 of the EIA Directive contains the right to information, meaning that the public should be provided with the relevant information as soon as it can reasonably be provided. Under this article, the public should be entitled to express comments and opinions and they have to be given reasonable time frames to do so.

Despite that, in the recent report "Social and environmental impacts of mining activities in the EU" which was made on the requirement of the Committee on Petitions, the **failure of EIAs was noted** — the inadequacy, incompleteness, or complete lack of an EIA was a major concern. The timing of an EIA — too late in the permitting process — means it is too late for the public to have a real impact (EIA's used to legitimate already approved projects), and the lack of information is a common concern.

Consultation

A big problem with the EIA Directive is that even if public engagement happens, the outcomes of the consultation are often ignored. This is because it is not required to consider the outcomes, public authorities just have to take them into due consideration, which is vague and open to different in-

terpretations.

Even though the EIA is a legally binding process, many of the community participation components are optional or readily overridden. For example, in several Member States with centralised permitting, it is usual to find circumstances where the applicable legislation allows applicants to get licences from the concerned ministry despite express rejection by landowners or local governments. The non-harmonious implementation of the EIA Directive is a problem both for affected local communities and mining corporations.

Learn more about Environmental Impact Assessments and Public Participation under EU Law

Further information on EIAs

Check the guidebook to know more how to be an effective participant in the EIA process

For example

EIAs are required under EU law even if it is an issue of prolongation of concession. In 1994, a mining company obtained a concession to extract lignite until 2020 on the territory between Poland and the Czech Republic. In 2015, the company requested an extension of the concession for six years. Poland has enacted national legislation under which it was possible to extend by six years the concession for extraction without an EIA and under which the procedure for granting the concession was, in most cases, not public. In March 2020, the mine received the requested extension until 2026. In September 2020, the Czech Republic took Poland to the CJEU under Article 259 of the Treaty on the Functioning of the European Union (TFEU), arguing that Poland's concession extension was unlawful because no EIA had been conducted, as required by EU Directive 2011/92. Additionally, since the decision was not published, the public in the Czech Republic was prevented from participating in the transboundary EIA (ECLI:EU:C:2021:420, pp. 71-72). In the end, the case wasn't solved as the Czech Republic withdraw its complaint from the court but the opinion of the Advocate General stated that Poland had infringed the EIA Directive by adopting national legislation which allowed the competent administrative authorities to extend the licence for lignite mining without carrying out the EIA. To sum up, EIA is a mandatory procedure in all cases indicated in the Directive and Member states with their legislation can't circumvent this requirement.

Source: https://blogs.law.columbia.edu/climatechange/2022/08/11/guest-com-

mentary-czech-republic-polands-dispute-over-the-turow-mine/

STRATEGIC ENVIRONMENTAL ASSESSMENT

A Strategic Environmental Assessment (SEA) is a process for evaluating the environmental implications of a proposed policy, plan or programme that provides means for looking at cumulative effects and appropriately addressing them at the earliest stage of decision making alongside economic and social considerations. Public participation is essential for a successful SEA.

The Strategic Environmental Assessment Directive establishes requirements for public engagement through consultation, and those outcomes should be taken into account by the decision-makers in adopting the final plans or programmes. This public involvement at an early stage was designed in order to make the decision-making process more transparent, increase representativeness of the public, and to reduce conflicts and the risk of litigation by affected stakeholder groups.

Compared with the Environmental Impact Assessment (EIA), SEAs provide recommendations at a strategic level and allow a better control over interactions or cumulative effects. There is no single approach to SEAs, as they can take different forms according to the specific needs.

Strategic Environmental Assessments can be a tool for people centred local governance. Through engaging with government plans and programmes, the planning monopoly of the central government can be minimised and local communities have a possibility to participate in decisions that impact their social and cultural lives. These possibilities are strengthened by the EU's land use planning regulations[6].

NATURA 2000

Natura 2000 is the largest coordinated network of protected areas in the world. It offers a haven to Europe's most valuable and threatened species and habitats. It stretches across all 27 EU countries, both on land and at sea. The aim of the network is to ensure the long-term survival of Europe's most valuable and threatened species and habitats.

The Habitats and Birds Directives shape EU nature conservation policy, a central element of which is the Natura 2000 network of ecological sites.

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6 C.Rega, G. Baldizzone, *Public participation in Strategic Environmental Assessment: A practitioners' perspective* (Elsevier,2014)

Mining projects in and around Natura 2000 sites are not automatically ruled out, but they must be appropriately assessed if they are likely to have a significant effect on a protected site. If such effects are expected, mining projects must either be avoided or amended. In case imperative reasons of overriding public interest for a project are established, compensatory measures must be taken. The European Commission has published detailed guidelines on undertaking mining activities by Natura 2000 requirements.

There are examples of Natura 2000 Directives being used for activism, see an example in Finland.

For example

The Regional State Administrative Agency for Northern Finland has rejected the application for an environmental permit for the Mieslahti talc mine. The permit was applied for by Mondo Minerals, which would have transported the ore to Sotkamo for further processing. The plan was to extract a maximum of 500 000 tonnes of talc ore and minerals from the mine.

Local residents have strongly opposed the mining company's plans.

The planned extraction area for the Mieslahti talc mine is located on the shore of Lake Oulu in Paltamo, on the eastern side of the bottom of Mieslahti. There are Natura sites in the vicinity of the mining area.

The mine drainage water and leachate from the waste rock area would have been treated and discharged into the Pitkänperti area of Mieslahti, where there are habitats for the moor frog. In addition, the area of the planned mine's surface drainage field contains habitat for the flying squirrel. The moor frog and the flying squirrel are strictly protected species under the Nature Conservation Act.

The Regional State Administrative Agency justifies the negative decision on the environmental permit on the grounds that even the water treatment arrangements and the phasing of the construction work in accordance with the application cannot exclude the possibility that discharges from the mining area into the watercourse will impair the survival of the breeding and resting habitat of the moor frog. In addition, the wetland included in the water treatment could alter the environment in such a way that the resting sites used by the flying squirrel would be lost or degraded.

Source: https://yle.fi/a/3-6869882

EXTRACTIVE WASTE DIRECTIVE

Without any EU legislation specifically regulating mining, the Extractive Waste Directive is the law which is most directly addressed to the mining sector. It links to all stages of mining activities and obliges operators to have waste management plans, emergency plans, and financial securities for potential rehabilitation. As such, the directive has a direct impact on permitting procedures in Member States, but its implementation varies greatly which means that in some countries it applies to thousands of mining activities, whereas in others only to a handful or none at all.

Article 8 of the Directive provides for public participation and public information early in the procedure for granting a permit. The public concerned is entitled to express comments and opinions to the competent authority before a decision is taken.

For a more in-depth discussion on the links between mining and the extractive waste directive you may wish to check this document on (re)mining of extractive waste or this document on the management of extractive waste.

WATER FRAMEWORK DIRECTIVE

The Water Framework Directive (WFD) applies to surface waters as well as groundwater. Its aim is to prevent the deterioration of the water quality in water bodies in the EU. The directive sets standards for a host of polluting substances and obliges Member States to set up river basin management plans. The directive aims to achieve good water quality in terms of ecological and chemical standards. It details what 'good' means in annexes which contain technical details. Its relevance for mining has to do with the large amounts of water used in most mining activities, which usually becomes polluted during the process and cannot be guaranteed to not mix with adjacent bodies of water.

The legal text of the directive is strong but many Member States are not currently fully adhering to all the standards in the directive. If they were, then arguably many current mining projects would be impossible due to the polluting effects on adjacent water bodies and groundwater. The directive is seen as threatening by the mining industry and is constantly under attack by the sector.

Case 1

The Turów mine case is an interesting application of the directive in a

cross-border dispute.

The dispute essentially concerned the transboundary impact of an open-cast mine in Poland on the Czech Republic's environment. The Czech Republic argued that:

- mining activities already entail, due to the mine's drainage system, a massive and uninterrupted flow of groundwater from the Czech territory into the Polish territory, at a rate of 3.10 m3 per minute. This impact has rapidly lowered the groundwater level and dried up surface waters;
- lowering the groundwater level directly impacted the drinking water supply in the affected area, since it affects the Uhelná spring (Czech Republic), which can no longer be fully used for authorised water abstraction and surface wells, which could dry up;
- the continued lignite mining activities in the Turów mine could lead to land subsidence of at least 5 to 10 millimetres in the areas close to the mine, worsening the structural effects on buildings and damage to them (ECLI:EU:C:2021:420, pp. 55-58).

Source: https://blogs.law.columbia.edu/climatechange/2022/08/11/guest-commentary-czech-republic-polands-dispute-over-the-turow-mine/

Case 2

Until recently, the Water Framework Directive was primarily regarded as a framework for establishing procedural requirements, such as monitoring and, when appropriate, improving the status of waters. However, in 2015, the Court of Justice of the European Union (CJEU) issued a decision in the Weser case (C-416/13) that the WFD's environmental goals are legally binding. As a result, unless an exception is allowed, Member States must decline approval for any project that may jeopardise these objectives. So far, the Weser case has had an impact on the permitting processes of some major projects, such as in Finland, where the Supreme Administrative Court of Finland ruled against an intended industrial bioeconomy investment in Kuopio, relying heavily on Article 4 of the WFD, which establishes the environmental objectives.

Source: https://www.europarl.europa.eu/RegData/etudes/STUD/2022/729156/IPOL_STU(2022)729156_EN.pdf p.34

SEVESO III DIRECTIVE

The Seveso III Directive on the control of major accident hazards involving

dangerous substances sets Europe-wide minimum standards for industrial safety rules. It was adapted and strengthened in response to several major industrial accidents which harmed both the environment and humans. It is applicable to mining activities and includes specific obligations on public consultation and participation in planning and modification of new establishments. The directive is relevant for mining activities such as storage of explosives on sites or the use of chemicals when extracting valuable minerals.

The directive also includes a specific duty for Member States to grant access to justice in case the public participation requirements of the directive in article 15 were not met.

OTHER EU LAWS

Below is a list of EU legislation which are relevant for mining activities but which do not have a specific link to advocating for or exercising of the **Right to Say No.**

- Services Directive
- Industrial Emissions Directive
- Concessions Directive
- Public Procurement Directive
- Professional Qualifications Directive
- Worker health and safety frameworks
- Birds and Habitats legislation

CJEU CASE LAW

There is at the time of writing no case law of the Court of Justice of the European Union which would be relevant to a **Right to Say No.** Most mining related cases at the EU court are related to commercial or state aid questions.

Some examples of relevant national case law can be found in our living table on case examples.

EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights is the international court of law of the Council of Europe, based in Strasbourg, France, which interprets the European Convention on Human Rights.

The European Convention on human rights contains articles that can help

local communities who are suffering from mining projects to protect them. Article 2 protects individuals from industrial and environmental disasters (right to life) and **Article 8** can help individuals to protect their right to property (right to respect for private and family life).

In its case, **Tătar v. Romania 27 January 2009**, European Court on Human Rights ruled that the Romanian authority had failed in their duty to assess the hazard of gold mining activity that was running in the vicinity of applicants' homes. As a result, there was a breach of the dam that caused the release of about 100,000m3 of cyanide-contaminated tailings water into the environment. According to the Court, the State had an obligation to ensure safety, the environment and human health by regulating the authorising, setting-up, operating, safety and monitoring of industrial activities. The Court also found that authorities didn't follow the rules about public participation and did not give the public access to the conclusions of investigations and studies.

Right to respect for private and family life and healthy environment[7]

In 2009, in its ruling Tătar v. Romania, the European Court of Human Rights held that Romanian authorities had failed to assess the risks of mining activities and that led to the violation of rights to private lives and homes, and in general the right to enjoy a healthy and protected environment. Also, the court stressed that the state should have guaranteed the right of the public to participate in the decision-making process concerning environmental issues.

**When this sentence was produced there wasn't yet recognition of a "clean, healthy and sustainable environment" as a fundamental human right. And probably in the near future, there will be cases where mining operations would be recognised as violating this right. [8]

NATIONAL LAWS

In the EU Member States, mining permitting, environmental, and general public participation laws are the most relevant pieces of legislation. Additionally relevant can be zoning laws with a public participation element and expropriation laws through which private land is made government property.

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7 European Court of Human rights and European Court of Justice had held different rulings about infringements of human rights related to the hazardous impact on environment or access to environmental information

8 8 October 2021, the UN Human Rights Council adopted resolution 48/13 recognizing that a clean, healthy and sustainable environment is a human right.

PERMITTING PROCEDURES

Permitting procedures vary greatly from one Member State to the next, especially with regard to which authorities are competent.

Oftentimes the permitting procedure is different for state-owned — as compared to private — mining activities.

Another essential difference between the Member States is who owns the minerals. Different regimes exist from all minerals being state-owned to all minerals belonging to the landowner. Most countries, however, have a mixed system.

For a detailed overview of permitting procedures in EU member states related to non-energy minerals please see this European Commission study — Legal framework for mineral extraction and permitting procedures for exploration and exploitation in the EU.

SPATIAL PLANNING/ZONING LAWS

Spatial planning is carried out by the public authorities to dictate future distribution of activities in a given space. This can include decisions on where and whether to develop housing, industry, nature protection zones and how the land is used. In general, zoning laws and spatial planning are often local or regional competences with big differences per country. However, mining project planning often overrules some of the local and regional competencies and is dealt with at national level. Different countries have different divisions of competences. For example, in Lithuania and Slovakia, municipal councils can have a de-facto veto right on mining permits. While this does not equate to the **Right to Say No** for affected local communities, it can, nevertheless, be a useful tool. Whereas, in Portugal the permissions for new lithium mining projects are granted at national level. Zoning laws are effectively not harmonised at EU level and there is, unfortunately, no other way to navigate them than to familiarise oneself with national level rules and specific regional particularities.

In theory, decisions on zoning plans can be a first line of defence against unwanted industrial activities such as mining. Land use designation can sometimes prevent mining exploration from happening. Or, if mining exploration is noticed at a later stage, land use designation can be used to demand that it be respected, which is a useful tool in stopping a procedure and enforcing existing laws and permitting procedures that will potentially

discard mining from being approved. Therefore, the development of zoning and spatial plans can help to prevent mining. Generally speaking, spatial plans have to allow a certain minimum level of public participation under the Aarhus Convention principles. A big issue with zoning plans is that, in practice, plans unfavourable to mining projects are often simply ignored or they are amended once the political will to allow mining is strong enough. It is therefore important to be aware of national and regional zoning plan enforcement laws and methods of engaging in any process that wishes to change existing plans.

There are a host of overarching policies and laws which may have an impact on spatial planning. For an overview please consult this publication.

POLLUTER PAYS PRINCIPLE

The polluter pays principle (PPP) requires that polluters should bear the costs of their pollution including the cost of measures taken to prevent, control and remedy pollution and the costs it imposes on society. This principle underlies the EU's environmental policy and is based on common sense: the polluter — and this could be the actors or the activity causing the pollution — should pay to right their wrong.

The mining industry is affected by the Environmental Liability Directive, which is based on the polluter pays principle. According to this Directive, operators have a duty to avert environmental damage or take/finance restorative measures if such damage occurs due to their negligence or fault.

PRECAUTIONARY PRINCIPLE IN ENVIRONMENTAL LAW

The precautionary principle means that when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not yet fully established scientifically.

In the EU legislation, this precautionary principle is enshrined in Article 191 of the Treaty on the Functioning of the European Union (TFEU). According to this provision, any environmental damage "should as a priority be rectified at source".

An example of how this principle has been applied is in transparent communication with stakeholders (public concerned) about the potential risk

from economic activities that decision-makers are issuing.

CORPORATE SOCIAL RESPONSIBILITY

Sustainable Development Goals and reputation force companies to apply risk management which involves corporate social responsibility (CSR) frameworks — self-regulated protocols for private businesses. "Self-regulated" means voluntary application by the company itself. It can help to make their business more ethical for social accounting (i.e., a part of an evolving corporate reporting system that assesses and takes responsibility for the company's effects on the environment and its impact on social welfare).

The Social Licence to Operate (SLO) can be considered as an integral part of CSR and applied to the acceptance by the public of mining projects through regulatory permitting processes (e.g. public hearing). The European Commission has expressed the willingness to provide such a mechanism (tool) for public engagement such as SLO, even though mining companies continuously resist any binding process. However, this mechanism is widely criticised by NGOs and civil society because it "is limited by stakeholders engagement and by insufficient attention to impacts" and it leaves too much space for greenwashing.

DUE DILIGENCE

At the beginning of 2022, the European Commission released its Proposal for a Directive on Corporate Sustainability Due Diligence for responsible business conduct.

According to this proposal, companies have to identify actual and potential harmful impacts on the environment and human rights from their operations along the whole supply chain of their products and services, mitigate and prevent them.

This Directive will apply to companies based in and outside the EU, however only large companies fall under its action which was a real disappointment for most NGOs. With the current text, 99% of European companies will not fall under this provision.

PUTTING INTO PRACTICE

ACTIVISM EXPLAINED

We are using the term activism in this toolbox to mean the political act of campaigning to try to bring about political or social change. We most often understand it as a collective effort to create meaningful change from the grassroots level. An activist does not have to be an expert in politics or the topic they are trying to effectuate change in. The most important thing is that the goal of activism is to change the status quo or to create a better future.

Activism is often aimed at political leaders and public authorities, ut anyone with privileged access to decision-making power can be the subject of activism.

Activism can refer to different fields of society. In the context of this toolbox, activism refers to the defence of human rights and the environment when they are being endangered. At a first level, activism for human rights and environmental human rights takes the form of responding to injustice, mistreatment, violence, or prejudice and trying to obtain justice. At a second level it tries to strengthen the recognition of existing rights or make certain rights enforceable if they are not enforceable yet. Environmental activism (environmentalism) advocates the preservation, restoration, and improvement of the natural environment and processes such as climate breakdown, and may be referred to as a movement to control pollution or protect plant and animal diversity.[9]

The Fridays for Future school strikes that take place all over Europe are an example of environmental activism.

Activism can take many forms. We have summarised the most prominent tools for anti-mining activism in this toolbox.

CAUSES THAT MAY INTEREST YOU

You are of course the best person to judge what you should fight for, but if you are reading this toolbox, chances are that you are trying to fight mining. We have found the below categorisation helpful in organising our own fight:

9 https://en.wikipedia.org/wiki/Environmentalism

- **Resisting a particular mining project**

  The focus on one particular mining project either before any damage could have been done or the stopping of an already ongoing mining project at any stage of the project. Oftentimes, the effects of mining activities need to be fought off even after a mine is closed when the closure leaves the environment in pieces. You can read more about the stages of mining.

- **Recognition of the Right to Say No**

  Advocating for the **Right to Say No** can happen at the same time as resisting a specific mining project in your area and often the two struggles are mutually supporting. The demand for the **Right to Say No** combines environmental and human rights activism. You can read more about the concept here.

- **Preventing new mining in the future**

  Mining free territories

  Mining can be stopped by preventing any mining plans to be made at all. This can be done through so-called 'no mining zones'.

  It has to be reiterated that mining is by nature unsustainable. Any claims of sustainable mining are unfounded and not based in science. Globally, mining needs to stop, and preventing mining in certain locations can prevent a lot of damage.

  If certain areas are classified as protected areas no mining should be able to happen in this territory. **Mining free territories** are already being declared and have to be respected. A just transition should encourage transparent and inclusive land-use planning that involves all relevant stakeholders and all affected groups.

  Here are two examples from Honduras and from France, where mining free zones were declared. For more about zoning laws, check out this section.

  In order to make mining unnecessary in the future, we need to change our way of life and have transparent and inclusive land planning involving all affected groups. Check out some examples of community-led post-extractive 'alternatives'.

- **Creating a system where mining is no longer tolerated**

  At the European level, the European Action Plan on Raw Materials

doesn't consider reducing demand in raw materials as one of the options.[10] Rather, it encourages increased mining in Europe to reduce the reliance on international suppliers.

The supply of raw materials on Earth is limited which means that the demand is not impacted by the supply in the way it is with other products. The only long-term alternative is to reduce the demand and to recycle those materials already in circulation. The only sustainable option is to reduce and ultimately stop mining long-term and to transition the growth and extractivism economics into newer models.

WHERE TO GET INSPIRATION?

For the purpose of this guideline best practices and case examples were gathered from all over the world in a Google Sheet. The list is non-exhaustive and if you know of any other examples or are involved in an ongoing struggle yourself, please feel free to complement the spreadsheet.

Learn what strategies other communities use, check this video.

Another useful resource, but not limited to mining, is the Environmental Justice Atlas (EJAtlas) database. It contains locations and a general overview of environmental conflicts around the world. It intends to increase the visibility of these struggles, highlight allegations and testimonies, and present the case for real corporate and governmental accountability for the injustices caused by their actions.

We have gathered some case examples here.

TOOLS FOR ACTIVISM

In this section, we present various tools for activism that can be used by local communities.

The tools you choose to use for activism will be influenced by your own creativity and the resources available to you. While the representation of industry interests is usually financed very well, money is not the only resource needed when trying to influence policy or a decision-making process. Mining companies are financed very well, they have marketing experts, community managers, social workers and so much more to influence, convince and even intimidate local communities. They are so well prepared because they know the

10 https://friendsoftheearth.eu/publication/driving-destructive-mining/

obstacle that a community in resistance is to their mining project. As a community you have a lot of power to stop a project and there are several tools which you can use to do that!

The usefulness of certain tools and strategies for resisting mining projects will vary depending on what stage the mining project is in. You can find a rough overview of the different stages of mining in the visual map here.

In this toolbox we are going to explore the following tools for activism.

- **Solidarity**
- **Legal tools**
- **Holding Governments accountable**
- **Education**
- **Be heard**
- **Campaigning**

This resource here might help you get started.

SOLIDARITY/BUILDING ALLIANCES

Solidarity is support that individuals, organisations or countries give to each other in fighting for a common goal. Solidarity in human rights and environmental activism can be extremely helpful as it results in the sharing of resources, knowledge, and skills, and it acts as a multiplier of voices.

The purpose of solidarity networks is to strengthen communities, help them to raise their voices to the level of the political field or level and enhance systemic change.

What can solidarity look like?

- Opportunities to discuss problems, experiences, and opposition tactics at national, regional, and international level
- Willingness to listen and learn about other experiences
- Direct engagement, such as providing necessary training
- Political support for campaigns and advocacy
- Joint research or research that benefits the solidarity network
- Networks for direct assistance to victims, such as legal support

For frontline communities, being part of a solidarity network can help to amplify their struggles. It can contribute to putting international pressure on governments, and can even support the struggle of a single person.

We encourage you to reach out to other individuals, groups, and organisations who are facing similar struggles to yourself. You might be able to find some inspiration in this Google Sheet of cases.

Find here an example of many organisations coming together for the same cause.

Examples of solidarity networks:

- WoMin Africa supports community activists, especially women, to organise themselves and to have access to information and knowledge about how to fight against undesirable mining projects. They also have a helpful **Right to Say No** information pack.
- Yes to Life, No to Mining (YLNM) is a global solidarity network of and for communities, organisations and networks who are standing for their **Right to Say No** to mining and advancing life-sustaining, post-extractive alternatives;

More examples of such networks can be found here. Here you can find video on how European communities are already asserting their rights.

CAMPAIGNING

Campaigning can be defined as an organised set of activist activities that are pre-planned and are carried out strategically. A campaign is usually a mix of different tools for activism and often focuses on one specific decision-making process or general awareness raising. With regard to mining, a campaign is most effective if it takes into account the calendar of upcoming decisions on permitting authorisations. Experience shows that the impact of a big display of local sentiment or the involvement of the media on decision-making varies significantly depending on the temporal proximity to that decision.

Do you want inspiration? Check more campaignings against mining activities in the Mines and Communities database!

Here is a suggested action plan for a possible campaign:

1. Identify the stage the mining project is at
2. Identify the main decision-makers and when the main decisions will be taken
3. Educate local communities about the impacts of the proposed mining project and results of similar projects

4. Build a local movement
5. Educate others about the goals of your advocacy
6. Seek support and/or establish partnerships with other communities and Civil Society Organisations (such as NGOs, Unions, etc)
    a. Examples:
    Rainforest Rescue supports communities resisting extractivism
7. Directly contact decision-makers and politicians
8. Plan a direct action (protest, march, etc)
9. Assess your legal options
10. Create media interest
11. Carry out your direct action
12. Evaluate the success of your campaign
13. Start an online petition! (Example: https://www.salvalaselva.org/peticion/1264/alto-a-la-violencia-minera-contra-las-mujeres-en-ecuador#letter)
14. Persevere!

Good example of a campaign against a mining project:
Rosia Montana, Romania (Save Rosia Montana Campaign)

Find and get to know the mining companies you might be facing with this list!

USE LEGAL TOOLS

Going to court can be expensive, time-consuming, and intimidating, but it is one of the most effective tools to get a decision overturned.

There are some legal avenues which fall short of immediately going to court but can nevertheless be helpful. You may wish to consider them, as they are usually much less resource demanding.

Access to information requests. As explained in our section on the Aarhus Convention rights, environmental information is not always published proactively by public authorities. But just because you cannot find information on a government website, does not mean that you aren't entitled to that information. All European Member States (as well as the EU institutions) have systems in place through which you can officially request information and documents. In the area of mining, documents containing information on permitting applications, information about environmental impact assessment processes, zoning-law discussions, and email exchanges between different public authorities can all be very helpful to inform an anti-mining

campaign. It is your right to request and access this information, even if your Government doesn't make it easy fo you to get it.

Requests for review which stay within the same authority. Many public authorities have a process by which they review their own decisions before a court would get involved. Oftentimes these review processes are even a prerequisite before one can take the issue to court anyway. If these procedures are not clear, it is worthwhile asking the decision granting authority itself for details about review possibilities.

Actual court cases on mining can either be filed against the mining operator or the permitting authority. In this toolbox we are only concerned with challenges against the permitting authority because the **Right to Say No** can only be exercised in front of a national authority or a government. Legal action taken directly against mining operators usually take the form of civil law claims for damages and are usually unlikely to stop a mining project.

For more information have a look at our sections on legislation.

LEGAL AID

Often the help of a lawyer is needed when trying to bring a case to court. There are different ways to get inexpensive or free legal aid but systems vary per country. Generally speaking there are three different ways to receive support. Firstly, via state systems of supporting underprivileged applicants with legal representation. Secondly, via non-for-profit organisations that fund legal claims for certain environmental or human rights goals. Thirdly, via pro bono lawyers who work for legal firms that offer parts of their professional services at no or very low cost if certain criteria are fulfilled. Many environmental NGOs have experience with using this system of pro bono lawyers. Recently, using strategic litigation for environmental goals has been on the rise and has proven effective on, at least, delaying mining projects.

KEEP GOVERNMENTS ACCOUNTABLE

One straightforward method to hold local or national governments to account is of course to take them to court. Read more about this here.

But there are also other avenues to hold governments to account that are neither a court-proceeding nor a political advocacy campaign.

Complaints to the European Commission. Complaints could be made to

the European Commission by any EU citizen if the government does not comply with the EU regulations. Check the guideline on how to make a complaint to the EU institutions. After checking the information, the European Commission may initiate a formal infringement procedure against the country in question but the choice whether or not to do so remains fully with the European Commission.

Complaints to Ombudsman offices. All European Union countries have some form of ombudsman office or offices embedded in their national systems. While ombudsman mandates vary significantly from one country to the next, as a general rule their decisions are not binding (unlike courts) and they are able to assess more than just the strict legality of a public authority's acts or omissions. Many countries also have specifically dedicated environmental ombudsman offices which can be helpful in mining related issues. The European Ombudsman has a mandate to review the acts of European Union Institutions but not those of national authorities. The European Ombudsman may also be helpful if the European Commission has not dealt properly with a complaint as discussed in the paragraph above.

Complaints to the Aarhus Convention Compliance Committee. The Aarhus Convention has a Compliance Mechanism that is similar to a court system but falls short of the legal enforceability of its final decisions. It is, however, a very authoritative source if the rights to access to information, public participation, and access to justice have been infringed upon. A procedure with the Aarhus Convention Compliance Committee can take several years until its concluded but the Convention has recently installed a Rapid Response Mechanism which is able to react much faster in case an environmental defender is in danger.

You can find an example of a mining related Aarhus Convention Compliance Committee case here.

BUILD UNDERSTANDING AND EDUCATE

Levels of understanding of the adverse impacts of mining vary greatly. Especially in areas where no previous mining has taken place, local inhabitants may not be aware of the unsustainable and damaging nature any mining project inevitably brings with it.

Sometimes a lack of fundamental knowledge about mining can also lead to misunderstandings and frustrations when inhabitants are confronted with the activities of activists.

Education can take the form of explaining the adverse impacts of mining, or informing local inhabitants about the rights they already have and those public participation rights, such as the **Right to Say No**, which they are not yet able to exercise effectively.

You may wish to take inspiration from WoMin Africa which is an ecofeminist movement for the African continent. It has already successfully introduced the concept of **Right to Say No** and shared its experiences through community training.

Here is another great example where a local movement led by the indigenous Sámi in northern Finland managed to stop an exploration project.

BE HEARD

The media is a great tool for activism because it can be an inexpensive multiplier of your message. The media can be helpful in raising awareness, forcing a reaction, increasing the profile of your struggle, and increasing the political costs of decisions.

Use the Media Creatively:

- Organise your own media campaign via social media
- Find journalists who can raise the profile of your local issues
- Create events that are media worthy to attract attention

To keep up with the mining resistance news check out this website which is a database of around 14,000 articles covering 1,856 mining companies with operations in 171 countries concerning 82 minerals and metals, published by a unique network of indigenous and solidarity NGOs, representing many thousands of people directly affected by the mining industry.

Here is an example of a social media campaign *#GlobalDayAgainstMegaMining*

PETITIONING

A petition is essentially an opportunity to fast track your concerns directly to elected politicians. The right to petition exists in one shape or form in most EU Member States. It also exists at the European level.

The effectiveness of petitions varies greatly per country, issue, and parliament. The most successful petitions are usually those which are part of a wider organised campaign, of which the submission of the petition itself is only one part. Normally, petitions go hand in hand with a hearing in a

parliamentary committee, which can help create coalitions with interested politicians or journalists.

Petitioning to the European Parliament is regulated via the procedure you can find here.

Here are some examples of concerns raised by affected citizens in EU level petitions:

- Failure of EIAs — in practice, they are often inadequate, incomplete or there is a complete lack of an EIA, and no formal announcement of public consultation
- Threat to Natura 2000 areas was one of the greatest concerns analysed: often, these protected natural sites are located in rural areas where mining development is rapidly expanding
- Losing drinking water, pollution of groundwater, lack of valid water permits and problems with wastewater management
- Rural livelihoods; damage to agriculture, food production, nearby farms
- Timing of an EI; if left too late in permitting, means it's too late for the public to have a real impact (EIA's used to legitimate already approved projects)
- Fear of evictions
- Mining as causing a loss of income and putting regions economy at risk

For more information check this report.

DIRECT ACTION

A direct action is some sort of protest or demonstration which uses a mass of like-minded people to showcase the outrage or make demands relating to a certain issue. The freedom of assembly is one of the oldest democratic rights and arguably the historically most effective way to engage political change.

Direct action is not without danger depending on the regime, but with the right to protest in Europe fairly well protected (although never to be taken for granted, as recent trends remind us), it remains a viable and strong option. Besides just taking to the streets, direct action can also many other creative non-violent forms. Here are some tips:

- To get media attention and raise public awareness about what is happening, hold public meetings, protests, or demonstrations, or even occupation, and blockades.
- Encourage public opinion to support your campaign

- Obtain the support of well-known, extremely reliable, and powerful people. Judges, politicians, and even corporate executives may qualify as these people

INDUSTRY TACTICS

While you are probably reading this toolbox in order to inform how best to support your own demands, it can be helpful to be aware of some of the tactics used by industry to undermine anti-mining activism. These are, amongst others:

Repression of activists[11] through criminalisation, arrests, state-sponsored violence and misinformation about their actions.

Slapps

Strategic Lawsuits Against Public Participation (SLAPPs) are attempts to intimidate and silence people through lengthy and expensive litigation (taking people to court) that drains the target's resources. SLAPPs are an abuse of the legal system as well as a threat to democracy and to human rights such as free speech. Journalists, activists, whistle-blowers, rights defenders, and other watchdogs are the people most often targeted by SLAPPS.

In Europe, there is a coalition of NGOs called CASE (Coalition against SLAPPs in Europe) that works to expose legal harassment and intimidation, protect the rights of those who speak out, and advocate for comprehensive protective measures, legislation, and reform.

However, strategic litigation can also be used to protect human rights and the environment.

Investor-State Dispute Settlement

When a community protests against mining companies' plans and is able to bring the project to an end, it can seem like the community has won. However, the project's sponsoring firm later can file a lawsuit against the nation for interfering with its earnings, seeking millions or possibly billions in damages, along with compensation for any future profits.

Companies may file lawsuits against countries under the parallel justice system known as investor-state dispute settlement, or ISDS, if they believe that laws or court decisions, even those with a clear goal of protecting people or the environment, have a negative impact on their profits.

Case law from ISDC

11 https://www.sciencedirect.com/science/article/abs/pii/S0962629821000020

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