

Banning cyanide mining in Romania

Economic aspects

Context

Cyanide is any chemical compound that contains the cyano group. Cyanide is highly poisonous when it takes the form of i.e. gas (hydrogen cyanide) and salt (sodium cyanide). During the Second World War hydrogen cyanide was used in the Nazi gas chambers of Auschwitz and Maidanek where it was released from Zyklon B pellets. Sodium cyanide was used by Himmler, Goering, Rommel and Eva Braun to commit suicide.

In Europe, cyanide mining is currently applied in Sweden and Greece. Since its EU accession there exists no mine operation using cyanide in Romania. The Rio Narcea Gold Mines in Spain have been closing down since 2006 and the company is moving to West Africa.¹ In Greece court decisions have ordered the closure of cyanide gold mines due to their adverse impact on human health and the environment once operation starts². It would be incorrect to claim that the Swedish company Boliden has an exemplary history of safe mining operations.

In 1998 a toxic spill from the Boliden Apirsa zinc mine "Los Frailes" in Aznalcóllar, southern Spain had disastrous environmental and socio-economic consequences for the Doñana wetland ecosystem and local communities.³ By October 2000, Boliden Apirsa declared insolvency and in September 2001 Boliden closed the Los Frailes mine; dismissing its 425 employees. According to Greenpeace as of May 2002 the total cost of the disaster amounted to EUR 377.70 million⁴.

To an important extent modern gold mining has become a chemical process using hazardous substances that remain unregulated by the mining law of the respective country. This is one of the main reasons for hazardous or chemical accidents at gold mining sites.

Several junior mining companies now wish to develop and re-develop open cast cyanide-leach operations in Romania.

1. Why a legislative proposal to ban cyanide in mining?

The above mentioned context outlines some of the reasons and urgency for introducing an amendment to Romania's mining law that would ban cyanide in mining. Romania's population and the environment, as well as neighbouring countries have on an almost annual basis been affected by cyanide spills resulting from mine sites. Currently, the Romanian environmental authorities do not have the capacity to effectively deal with cyanide spills provoked by mining.

Romania's Constitution guarantees the citizens' right to a clean environment. Decision makers must ensure that such rights are respected in order to guarantee public health.

¹ <http://www.rionarcea.com/nsgo.html>

² <http://www.eurofound.europa.eu/eiro/2003/12/feature/gr0312104f.html>

³ http://www.panda.org/about_wwf/what_we_do/freshwater/news/index.cfm?uNewsID=2399

⁴ http://archive.greenpeace.org/earthsummit/docs/corpcrimes_3of3.pdf

The act of legally banning one activity or another to guarantee constitutional rights is a standard procedure also used in Romania's mining law. Article 11 of the afore mentioned law for example forbids mining activities on lands on which are located historical, cultural and religious monuments, archaeological sites of important interest etc.

Alternatives to cyanide mining do exist⁵ but are not promoted by the mining industry. Government regulators however should do the utmost to safeguard public health including the right to a clean environment which at this day and age must include the vigorous promotion of alternatives to cyanide in mining. On an EU level, regulation is used to actively promote newly emerging safe technologies. A ban on the use of cyanide in mining could therefore create an important opportunity for Romania to take a leading role in actively promoting alternatives to cyanide mining. This is a niche from which Romania would greatly profit from a political point of view, most notably because seven years after the tragic accident at Baia Mare, Romania has the moral responsibility to show real change.

Importantly, EU directives now transposed into Romanian legislation (i.e. the environmental liability directive) could make cyanide pollution cases a criminal act to which both the operator as well as the authorities are liable. The consequences of this kind of pollution should not, under any circumstances, be underestimated, and the closing of Rio Narcea mines in Spain should also be understood in this context.

Various counties and countries affected by cyanide pollution resulting from mining activities have responded to such threats by enacting legislation to safeguard them against any further accidents. Such initiatives can be summarized in two different strategic approaches:

A. Banning cyanide in mining: The amendment proposed to art. 4 of Romania's mining law foresees the interdiction of cyanide and the cyanide technology in mining. This approach has been successfully used in other countries and counties i.e. Montana (USA), Costa Rica and more recently in several Argentinean provinces.

B. Banning different mining procedures which use cyanides: There exist different processes using cyanide in mining – i.e. heap leach, vat leach. Certain countries and counties (i.e. Colorado/ USA) including within the EU (i.e. Czech Republic) have, rather than banning cyanide or the cyanide technology, *expressis verbis* banned the particular processes using cyanide.

There exists no legislation within Romania or the EU that restricts one or the other strategic approach. Both are legally permissible possibilities.

The motivation submitted together with the proposal to amend art. 4 of Romania's mining law details the legal context that permits both on an EU and Romanian level to ban the use of cyanide in mining in Romania. Its permissibility has been acknowledged by the Juridical Commissions of Romania's Senate and Deputy Chamber; both of which favourably approved the bill to ban cyanide in mining.

⁵ <http://www.serconline.org/mining/faq.html>

2. Why is the Waste Mining Directive inefficient?

In November 2005, the EU adopted a so-called mining waste directive. This directive is a weak legislative instrument⁶ and is the result of intensive lobbying⁷ from the part of the mining industry as well as concerns expressed by Central and East European countries to i.e. remove any requirement and responsibility to clean up old and abandoned mining sites.⁸

With the exception of Greece and Sweden the mining waste directive which includes maximum permissible cyanide levels was voted by countries that do not produce gold and EU legislation does not restrict any of its member states to adopt stricter regulations than stipulated in the directive; including a ban on the use of cyanide.

Importantly, to date Romania has not transposed the mining waste directive; meaning that it does not yet have any applicability on Romanian territory and will not have so until at least 2008. Importantly, the final transposed Romanian version of the directive can differ from the guidelines set out in the official European directive.

Some of the directive's shortcomings become evident if one considers that it does not address cyanide emissions from mining operations into the air. Take the Rosia Montana mine development: if ever developed it will emit 134.2kg of cyanide per day into the air⁹; this on a normal operating day; every day. This means 48983 kg per year or 783728 kg over the 16 year mine life.

There also exists no EU legislation on Air Quality for such kind of emissions

3. How many jobs can the cyanide-based exploitation create?

Modern cyanide mining is not labour intensive. According who the IFC, the World Bank's private lending arm, a development such as proposed at Rosia Montana tends to create a maximum 350 mining related jobs at optimum production.

4. Would the Romanian Government have to pay damages to companies obliged to stop mining projects if the law on banning cyanide came into force?

NO. The environmental conditions by which a particular mine proposal may operate are not established through the Mining Licence (or Concession) granted by the National Agency for Mineral Resources. The only competent authority to establish these is the authority for environmental protection via the issuing of an administrative act called environmental agreement. Such agreement is issued according to the legal provisions in force.

Hence, whether a mine can use cyanide or not is not granted by a Mining License, but via the environmental agreement which is issued after having obtained a Mining License. In the event that a mine was granted an environmental agreement that uses cyanide-based technology before the amendment on the Mining Law comes into force, then the new law will not be retroactive. On the other hand, a company that obtained a Mining License before the new regulation came into force cannot claim damages from the

⁶ http://www.eeb.org/activities/waste/mining_waste/MWD-conciliation-briefing-WWF-EEB-101005.pdf

⁷ <http://www.cabinetstewart.com/services/contact-builder.html>

⁸ <http://www.euractiv.com/en/environment/eu-strikes-agreement-mining-waste/article-149404>

⁹ Annex to the EIA, Gabriel Resources, page Page 68 of volume 62 (English version)

Romanian Government, because it is still be able to develop a mining activity - but without cyanide.

No regional or national government that prohibited the use of cyanide in mining at a regional or central level was ever successfully sued to withdraw the ban or for claiming damages due to an operators' unfeasibility to develop a mining activity without cyanide.

Countries like Costa Rica, the Czech Republic and states such as Montana, Colorado and Wisconsin in USA banned cyanide-based technologies in mining. None of these were attacked in court by mining companies. In April 2007, the Superior Legislative Chamber of La Rioja Province in Argentina voted a law that prohibits open pit mining using cyanide in the whole province. A few days after the law was voted, Barrick – the world's largest gold mining company - announced that it would abandon its gold mining development in that province. Similar regulations on banning cyanide in mining were recently voted in the Argentinean provinces Tucuman and Chubut. On 4th October 2007, the lower house of congress in Argentina's La Pampa province adopted a law banning the use of hazardous chemical substances such as cyanide and mercury to treat or industrialize minerals.

5. Does banning cyanide entail economic losses for Romanian cyanide producers?

NO. Sodium Cyanide used for mining is not produced in Romania; thus no Romanian producer that would be prejudiced by the legislative proposal. On the other hand, this means that any mining company wishing to use cyanide in mining in Romania needs to import the sodium cyanide and transport it inside the country over long distances. Europe's main cyanide producer is Degussa AG (CyPlus GmbH), a German company and its points of production are Germany and Belgium. Cyanide transport over long distances and on bad roads increases the risk of accidents; this especially in Romania where road conditions are precarious.

6. Would companies currently using cyanide suffer any economic losses?

NO. In Romania only three mining companies ever used cyanide in mining. They were: Transgold (Baia Mare), Minvest Deva (Baia de Arieş) and Remin (E.M. Baia Borşa and U.P. Săsar). All of them have been closed down, so any action to prohibit cyanide mining would not carry negative social and economic impacts.

7. How many current jobs would be affected by the cyanide ban?

None. All mining companies that were using cyanide in Romania (Transgold, Minvest Deva and Remin) are already closed, so prohibiting cyanide in mining would not cause any job losses.

8. Who is responsible in the event of a cyanide accident at a mining site?

In the event of severe pollution caused by mining operations with a negative impact on water, soil and protected areas mining companies can easily defend themselves against environmental liability, especially against the obligation to cover the environmental remediation costs.

Romania recently transposed Directive 2004/35/CE on environmental liability regarding the prevention and compensation of environmental damages. The directive states that operators causing water and soil pollution will be held liable (i.e. no need to show fault or negligence). Nonetheless, Romania transposed this Directive with some exceptions such as the following: "the operator does not carry the costs for environmental damages if it proves that its actions were not intended, or negligent and that environmental damage was caused by an authorised event and in full concordance with the conditions stipulated in the regulation issued according to the norms that implement the legislative measures foreseen in Annex 3 on the day the authorisation was issued."

This means that **Romanian taxpayer would be forced to carry the environmental remediation costs caused by pollution or accidents caused by cyanide mining operations.** Moreover, it is standard practice that each time when an accident occurs at a mine site, the mining company claims that it is not responsible because its operation was authorised by the relevant national authorities.

9. Who paid or pays for the Baia Mare cyanide spill?

When the Baia Mare accident took place in 2000, no sanctions were issued against the project owner or its administrators (Aurul S.A. and Transgold S.A.). On the other hand, **the Romanian government still has to compensate the Hungarian government with a sum of over \$100million for environmental damages caused by the cyanide spill.**

On 3 April 2007, the Maramures Tribunal forwarded the Transgold S.A. file to the Central Directorate for Investigations of Terrorism and Organized Crime (DIICOT), motivating its decision by stating that " its culpable activity - the ecological disaster and the freezing of the tailings - caused enormous prejudices to the company and huge losses, including damages for which the Romanian government has to pay the Hungarian government over \$100 million (...) this supports elements of an infraction under the competence of DIICOT. " Moreover the debts that the company had towards the state budget when it ceased operation in 2006 were at \$200 million. This shows that when litigation cases with mining companies using cyanide appear, then these actions have as their object to secure damages for the impact on human health and the environment. However, in the end these costs are carried by the population from the affected area as well as by the taxpayers.

10. Can local communities affected by cyanide mining sue the Romanian government?

YES. Considering recent jurisprudence of the European Court of Human Rights in the cases Taokyn et al. cases vs. Turkey 2004, OCKAN et al. vs. Turkey 2006 where it was concluded that art.8 of the Convention on the right to family life was violated by the opening of an open cast cyanide gold mine, a precedent to legally pursue the Romanian government was created.

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This information material was produced by the „Cyanide-Free Romania” Coalition. For more information visit www.bancyanide.ro or contact us via anamaria.bogdan@greenpeace.ro or ioana.ciuta@terraiii.ngo.ro