

MINING SECTOR REGULATIONS IN TERMS OF INTERNATIONAL LAW

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ABSTRACT

The importance of natural resources in human life is known to everyone. Mining activities are indispensable for modern life. The healthy development of mining, which is an economic activity, requires, above all, a constructive and appropriate legal infrastructure. Legislation is one of the primary factors affecting the mining sector, which constantly interacts with nature and society. The United Nations is closely interested in world energy and oil problems. Among the members of the United Nations, developing countries have the majority in numbers compared to industrialized countries. These underdeveloped countries use the United Nations as a forum to share their opinions on issues such as sovereignty over their mineral resources or the application of national law in investment-related disputes between foreign states and multinational companies. This study evaluated the mining sector in terms of international legislation. This research considers international agreements related to mineral exploration and exploitation that are important for global operators. The mining status in international agreements has been analyzed, emphasizing the increasing amount of multilateral environmental agreements. In addition, the challenges posed by the principles of sustainable development for the mining sector and the development of international mining law are explored.

Keywords: *Mining sector, Mining Law, International Mining Law, International Legislation*

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INTRODUCTION

In recent years, many initiatives have been taken to understand the mining sector's role within the "sustainable development" scope, focusing on mining. Many governments have implemented several regulatory actions regarding mining, including comprehensive environmental and social provisions and legal and financial aspects. (Dalupan, 2004)

Many companies related to the mining industry have created some optional codes of conduct to facilitate and implement this transformation. These rules are in parallel with studies such as the Mining, Minerals, and Sustainable Development Project (MMSD), which will be developed by multinational organizations such as the United Nations and the World Bank.

These initiatives have worked to identify current mining problems and establish principles that can be applied in the sector. Such issues include the environmental and social impacts of mining and related economic considerations (concerns that underpin sustainable development). It raises the possibility that efforts to define global problems and general principles may lead to the development of international law on mining and sustainable development. (Dalupan, 2004) However, before assessing whether these initiatives lead to the development of a global governance regime, it is necessary to evaluate the current status of mining in international law and especially in multilateral agreements.

The article attempts to provide an overview of the multilateral agreements affecting the mining sector. In addition, by making some examinations of the increasing number of multilateral environmental agreements, the development of international mining law and the status of mining in international agreements are analyzed, and the challenges posed by the later recognized and developing sustainable development principles for the mining sector and the development of international mining law are examined. The sustainable development paradigm is also discussed in this article.

1. Developments in International Mining Law

Important developments regarding the mining industry and governments' mineral resources programs worldwide exist. One of the developments is positive; the other brings out some problems. These two trends operating simultaneously have the potential to dramatically change the way mining companies, resource-based economies, and the entire world operate in the 21st century.

The first trend introduces international opportunities for the development of mineral resources. In terms of supply, industrial development, and mining, in particular, has accelerated due to several factors. These factors include the end of the Cold War, the emergence of new market economies in Asia, Latin America, Africa, and Eastern Europe, the trend towards nationalizing state mining wealth, and the increasing financial liberalization of emerging economies. (United Nations Economic and Social Council, Committee on Natural Resources, 1996, p.8)

The second trend consists of the development of mining and increasing difficulties in production. By its nature, mining causes significant environmental, social, cultural, and economic degradation. The spread of mining worldwide, especially in resource-based economies in developing countries, has increased international awareness and interest in the negative effects of mining. (Martin, 1997, p. 33) These concerns give rise to national and international legal regulations regarding mining. (UNCTAD, 1994, p.1)

Earlier in the 20th century, international agreements on natural resources largely focused on the economic value of resources, regulating the use of shared resources and their transboundary impacts. Today, more than 900 bilateral, multilateral, regional, and global international environmental agreements cover the atmosphere, space, sea, fisheries, forests, fauna, biodiversity, and forestry. (Bell, 1997)

Multilateral environmental agreements have traditionally emerged as a response to an environmental crisis. Desertification, drought, depletion of the ozone layer, damage to biodiversity, pollution, industrial accidents, and climate change problems are examples.

It should be noted that there has yet to be a comprehensive international legal regulation regarding mining and mineral resources. It is the only field where there are binding international agreements that contain general principles regarding mining, and that is the area related to the occupational safety and health of employees in mines. This situation arises from the activities of the International Labor Organization and similar institutions.

Although there has yet to be a national legal regulation on mining and mineral resources, comprehensive research on multilateral agreements provides important clues on this subject.

2. Permanent Sovereignty and Limitations over Natural Resources

The right to permanent sovereignty over natural resources is one of the fundamental principles of using mineral resources in international law. This situation arises from the state's responsibility regarding the environmental damage caused by its activities under its authority and control. It refers to the environment beyond the state's national control powers.

Recognition of this right and the obligation to avoid transboundary environmental damage is regulated in various international agreements such as the United Nations Charter (1945), Continental Shelf Convention (1958), Protocol to the Convention on Long-Range Transboundary Air Pollution by Heavy Metals (1998), United Nations Declaration on the Human Environment (1972), Rio Declaration on Environment and Development (1992) and the United Nations Convention on Biological Diversity (1992). The Protocol to the Convention on Long-Range Transboundary Air Pollution by Heavy Metals (1998) demonstrates the responsibility to avoid transboundary environmental damage. The protocol aims to control heavy metal emissions. With this Protocol, States are obliged to take certain measures. However, the obligation to avoid transboundary environmental damage is not the only limitation on the state's right to permanent sovereignty over natural resources. By ratifying agreements that limit or even prohibit mineral extraction in designated areas, states accept the restriction of their sovereign rights.

Similarly, multilateral environmental agreements on social issues do not limit the right to permanent sovereignty over natural resources only to the obligation not to cause transboundary environmental damage. Within the framework of multilateral agreements, the exploitation method and intensity of mineral resources can be defined in different ways. To summarize, the principles contained in multilateral environmental agreements affect where and how mining operations should be carried out, even within the borders of independent states.

Traditionally, international law has adopted a "hands-off" approach to mining. The right to permanent sovereignty over natural resources (just like over real and legal persons) gives states the authority to have independent political and legal control as a principle of international law. (Wälde, 1992, p. 49) This is related to principle 21 of the Stockholm Declaration, the most famous expression of the doctrine of sovereignty. According to the Charter of the United Nations and the rules of international law, countries use their resources and determine their environmental policies by exercising their sovereign rights. However, states are also responsible for not harming the environment of regions and countries outside their borders during these actions.

States can limit their sovereignty through long-term legal customs practices, the development of general principles of legal nature, binding agreements, and judicial decisions. (Buergenthal, 1990) Through these new rules, states "give up" their rights and create "international law" based on new standards of behavior.

The state's permanent sovereignty over natural resources is no longer absolute. International restrictions are imposed in three ways: according to the basic principle of international environmental law, states are responsible for preventing cross-border environmental damage, fulfilling obligations in multilateral agreements, and the emergence of sustainable development principles. (Wälde, 1992, p. 50) All these factors accelerated the development of "international environmental law." To date, nearly a thousand environmentally focused international agreements have been accepted, many institutions are active, and most of these initiatives started in 1970. (Pring & Joeris, 1993, p. 422) During this period, with the spread of environmental awareness among the masses, environmental organizations significantly pressured political governments. This pressure has also been a driving force for the environment to gain a legal basis. (Kılıç, 2001, p. 133)

The branch of international mining law has yet to exist. First, states want to keep their sovereignty over mineral resources, an important part of their economy. The second reason is the primitive state of international law. Today's international legal system has no real legislative, executive, or judicial powers. In addition, the enforcement mechanism in international law could be stronger and depends largely on the political will of sovereign states. The last reason is that the sources of international law are not equal. Some international rules (for example, case law) qualify as legally binding or "hard law." Others (declarations, principles, guidelines, etc., of the United Nations and other institutions) fall into the non-binding or "soft law" category. (Wälde, 1992, p. 66) "Hard" and "soft" norms of modern international law are increasingly focused on mining. Binding rules that can be applied worldwide do not yet exist for the mining industry, although certain forms of "hard law" such as "international standards" may be in place. "Soft law", on the other hand, cannot be ignored and is the norm that states can recognize as binding rules in agreements over time.

3. International Management Regimes for Mine Resources

Unlike renewable energy sources, there has yet to be an international management regime or accepted principles for mining and mines. Various factors can explain why it will take more work to establish general principles regulating the mining sector. These factors include the wide range of mines and mineral use methods, the diversity of mining methods, and the different physical environments and climates of the mining areas.

Another important factor is the relatively small size of the global mining industry compared to the energy sector. (Hinde, 2000, p. 23) However, mineral resources are rarely shared in nature, unlike sea and water resources. Mineral reserves are generally detected within the borders of a certain state, and extraction operations are carried out within that state's borders. The Pascua-Lama mines reserves shared by Argentina and Chile constitute an exception. The countries in question have signed the Mining Integration Agreement. Thus, since mining activities and their impacts are often located within the borders of a particular state, the international community strives, at a minimum, to develop mining-focused standards or guidelines for the use of minerals.

4. Sustainable Development and Mining on International Law

Environmentally focused legal regulations developed by the international community in Stockholm and Rio, the United Nations General Assembly, and Johannesburg have played a major role in the universalization of environmental law and the development of the sustainable development paradigm. (Caldwell, 1999, p. 227)

The common theme of the countries' new mining laws is the "sustainable development" paradigm. The concept of "sustainability" tries to find a compromise between the contradictory concepts of protecting environmental quality and ensuring economic development. In this context, the conflict between the concepts of environment and economic development was witnessed for the first time at the 1972 United Nations Conference on the Human Environment in Stockholm. At this conference, developing countries were hesitant that industrialized countries would hinder the development of developing countries by turning their environmental protection standards into international rules. (Pring, 1999, p. 13)

Sustainable development is defined in the report of the World Commission on Environment and Development (WCED): "Development that meets the needs of today without jeopardizing the ability of future generations to meet their own needs." (WCED, 1987, p.43) This report, which is the first and only official witness in the world, is important in terms of pointing out both sides of equality in development, even though it is ambiguous. To explain sustainable development in more detail, "Sustainable development" means increasing the quality of human life within the ecosystem's limits. (IUCN, et al., 1991, p.10)

Sustainable development drives global economic efforts. (Pring, 1999, p. 20) The economy continues its existence based on natural resources. The continuation of development depends on developing and transferring knowledge, organization, technical competence, and science to life. For overall development, sustainability necessitates three elements: preserving choice for future generations, supporting social and community stability, and renewing environmental quality.

The development of the mining sector also requires the following elements: reducing poverty, meeting basic human needs, assessing and mitigating environmental impact, reducing pollution, protecting resources, and occupational health and safety standards. Sustainable

development principles are increasingly important in discussing new and existing mining developments in resource-based economies. These principles led to the renewal (Silveira, 1995, p. 239) of UN programs and are demanded by industrialized countries, international financial institutions, and some developing countries. (Cohen, 1996 p. 150) In addition, sustainability has quickly come to the agenda of the responsible international business world. The most developed international mining companies have started to implement these principles. (Wälde, 1992, p. 58)

5. Multilateral Agreements on Mining

As we have established above, the UN Charter, as the basis of international law, emphasizes the rights and obligations of states. Legal regulation and management of mining within its borders are some of the state's internal affairs.

International responsibility for this issue has begun to develop under the auspices of the UN, and the UN has also dealt with the issue, which has become a common problem for developing countries. Problems such as the global impacts of mining-related activities, human and environmental rights, climate change, and waste management have been addressed within the framework of the UN.

5.1 Stockholm Conference - Declaration and Action Plan for the Human Environment

The first assessment made on the environment on a global scale was the United Nations Conference on the Human Environment held in Stockholm between 5 and 16 June 1972. By the decision taken at the Stockholm Conference, the UN Environment Program (UNEP) was established by the UN General Assembly on 12 December 1972. Following the said Conference, policies, plans, and projects for the protection of the environment, starting from the United Nations and its affiliated organizations and other regional organizations it has begun to be addressed within a wide spectrum ranging from the Organization for Economic Co-operation and Development (OECD), the Organization for Security and Co-operation in Europe (OSCE), the European Council, the European Union (EU), the IMF and the World Bank, to the General

Agreement on Customs and Tariffs (GATT). (Çevre ve Sürdürülebilir Kalkınma Paneli, 2002, p. 6)

The Conference took place with the participation of 130 states; it resulted in the adopting of the United Nations Declaration on the Human Environment and the Action Plan for the Human Environment, emphasizing that efforts would be made at the international level to address many environmental problems. (Futrell, 1997, p.1) According to the United Nations Declaration on the Human Environment, the world's capacity to produce vital renewable resources must be maintained and, where possible, renewed and improved. The Action Plan contains many recommendations on different sectors of the environment and mineral resources. Recommendation 56 on mining and mineral resources focuses on sharing, accumulating, and accessing relevant information. The UN Secretary-General has proposed providing a convenient tool for exchanging information on mining and mining operations, especially on the environmental conditions of mining sites, measures taken on the environment, and positive and negative environmental repercussions.

The World Nature Charter adopted ten years after the Stockholm Conference, stipulates that natural resources cannot be wasted but must be used with limitations by the stated principles. The World Nature Charter, which imposes restrictions on non-renewable minerals, considers the reserve status of the minerals in question, their consumption characteristics, and the compatibility of extraction processes with the functioning of natural systems. The Stockholm Declaration, the Action Plan, and the World Nature Charter are the complex body and fundamental instrument of current international environmental law. These recognized agreements on the importance of non-renewable minerals are very important for the mining industry.

5.2 Rio Conference- United Nations Conference on Environment and Development

The Rio Conference was held in Rio de Janeiro between June 3 and 14, 1992. Unlike the Stockholm Agreements and the World Nature Charter, the agreements accepted in Rio do not contain any special mention of minerals or non-renewable resources. However, Rio has certainly been a guiding meeting for the "sustainable development" paradigm.

According to Principle 1 of the Rio Declaration, people are central to sustainable development concerns. They have the right to a healthy and creative life in harmony with nature. Therefore, human development and well-being are the primary motivation and ultimate goal of any initiative, agreement, or program. In Principle 25, it is determined that peace, development, and environmental protection are interconnected and indivisible.

Regarding environmental issues, the Rio Declaration promotes the precautionary principle, internalizing environmental costs, using economic instruments, and environmental impact assessment. In social issues, the participation of different groups is recognized and encouraged. In particular, the great role of indigenous peoples' unique knowledge in environmental management is emphasized.

It should be noted that Agenda 21 in Rio is not legally binding. It is also known as the "Earth Summit" and is a conference that brings together all the world's countries on environmental and development issues globally for the first time. As a result of the conference, five basic documents emerged: the Rio Declaration, Agenda 21, Forest Principles, Climate Change Convention, and Biological Diversity Convention. (Çevre ve Sürdürülebilir Kalkınma Paneli, 2002, p. 6)

5.3 Johannesburg Summit - World Summit on Sustainable Development

Ensuring sustainability in terms of economic development requires sensitivity in the use of resources in economic activities since the world's resources are limited. (Kaya & Tomal, 2010, p. 50) After a thirty-year process, it is time to evaluate what has been done regarding the use of resources and the environment. A "general evaluation" conference should be held on the tenth anniversary of the Rio summit. For this purpose, the "United Nations World Sustainable Development Summit" was held in Johannesburg, Republic of South Africa, from 26 August to 4 September 2002. Approximately 65 thousand heads of state and government from all over the world, technocrats, non-governmental organization officials, industrialists, local governments, and groups representing all segments of society came together at the summit. At the summit, it was confirmed that sustainable development is the main issue of the international agenda, and new data on environmental protection and

the fight against poverty were presented. (United Nations, Department of Economic and Social Affairs, 2002, p.17) The importance of non-governmental organizations and ensuring cooperation in implementing the summit decisions were emphasized. (Yıldırım & Öner, 2003, p. 15) In addition, at this summit, the concept of Sustainable Development became the name of a summit for the first time, and it was revealed that the concept was adopted and understood by all segments of society. In the statement published after the summit, economic development, social development, and environmental protection have been identified as the three components of Sustainable Development. (Tıraş, 2012, p. 63)

Chapter IV of the Implementation Plan, focusing on mining, titled "Protection and Management of economic and social development based on natural resources," is very important. (UN, 2002, p. 18) Article 46 of the Implementation Plan determines that mining, minerals, and metals are important for many countries' economic and social development. According to Article 46, Minerals are indispensable for contemporary life. What needs to be done at all levels to ensure that mining, minerals, and metals contribute more to sustainable development is as follows:

- Developing efforts to evaluate the environmental, economic, health, and social impacts of mining, minerals, and metals, including the health and safety of workers. To this end, ensuring the transparency and accountability necessary for sustainable development in mining by developing national and international partnerships and activities between relevant governments, intergovernmental organizations, mining companies, employees, and other relevant parties;
- Increase the participation of local and indigenous communities and relevant groups, including women, to enable these groups to take a more active role in mining-related work, including rehabilitation work following pit closures, observing international regulations, and taking into account important cross-border impacts in these studies;
- Providing financial and technical assistance in mining and processing minerals to developing countries and countries whose economies are in transition and improving capacity in this field, including small-scale mines within the scope of these studies. Meanwhile, where possible and necessary, carry out initiatives to

create more added value in mineral processing, improve scientific and technological knowledge, and rehabilitate areas damaged by mining activities.

However, at the end of the summit, participants stated that the measures taken to solve the problems in the mining sector were insufficient and that these measures had been criticized before. (Sampat, 2002)

5.4 United Nations Framework Convention on Climate Change

The United Nations Framework Convention on Climate Change (UNFCCC) was opened for signature at the United Nations Environment and Development Conference held on June 3-14, 1992. The purpose of the Convention is to succeed in stopping the accumulation of greenhouse gases in the atmosphere at a level that will prevent the dangerous anthropogenic impact on the climate system, to reach such a level in a time that will allow the ecosystem to adapt naturally to climate change, food production will not be damaged, and economic development will continue sustainably.

The basic principles of the Convention are:

- Protecting the climate system based on equality and following the principle of common but different responsibilities,
- Taking into account the needs and special conditions of developing countries that will be affected by climate change,
- Taking precautions against the effects of climate change and ensuring that the measures taken are cost-effective and provide global benefit,
- Supporting sustainable development and including the policies and measures to be determined in national development programs,
- The cooperation of the parties.

In the Convention, countries with historical responsibilities for the emergence of climate change and OECD member countries at the time were grouped into two lists according to their development levels. According to the Convention, unlike Annex I, Annex II countries have obligations such as providing financial support to developing countries

that carry out emission reduction activities and assisting their development and technology transfer. By the relevant provisions, for the Convention to enter into force, 50 countries had to submit their ratification or acceptance documents to the UN by February 1994; more than 50 countries had submitted their ratification or acceptance documents to the UN, and the Convention came into force on 21 March 1994. One hundred ninety-two countries have ratified the Convention, including 41 Annex-I Countries (40+EU) and 151 Non-Annex-I Countries. All four countries (Andorra, Vatican, Iraq and Somalia) have observer status. (DSİ Genel Müdürlüğü, Etüd ve Plan Dairesi Başkanlığı, İklim Değişikliği Birimi, 2012, p. 1)

5.5 Kyoto Protocol

Since the absence of any sanctions in case of non-fulfillment of the obligations mentioned at the conference held in Rio De Janeiro in 1992 constituted the missing part of this contract, in order to overcome this deficiency, a new document was prepared in which the obligations were more strictly controlled and had sanctions, and was signed in December 1997. It was discussed and opened for signature in Kyoto, Japan. (Çetin, 2013, p. 80)

The Protocol aims to reduce greenhouse gases worldwide. In this Protocol, the parties included in Annex-I commit to reducing the total emissions of CO₂ equivalent greenhouse gases caused by human activities listed in Annex-A to at least 5% below the 1990 levels during the commitment period covering 2008-2012. It is stated that they will ensure that the amounts determined by and calculated following the registered digitized emission limitation and reduction commitments are not exceeded and that these parties will have made demonstrable progress in realizing their commitments in this Protocol by 2005. Since the parties in Annex I, which correspond to at least 55% of the total CO₂ emissions of 1990, must ratify the Protocol in order for the Kyoto Protocol to come into force, the Kyoto Protocol was declared de facto on 16 February 2005, with the approval of the Russian Federation on 18 November 2004 has entered into force. One hundred sixty-eight countries and the EU are parties to the Protocol. (DSİ Genel Müdürlüğü, Etüd ve Plan Dairesi Başkanlığı, İklim Değişikliği Birimi, 2012, p. 2)

Conclusion

New game rules with their characteristics have emerged in the international mining market. On the one hand, it is affected by the globalization of the world economy. On the other hand, creating a new model of the state's political and economic systems that meet international standards in sustainable development conditions has become a prerequisite for reviewing national mining legislation. Renewed Mining Law focuses on strengthening the state's position in major investment projects to ensure the economic interests of countries. Mining Law has been developing within the branch of law for years, both at the international level and within the country. Changing relationships in the mining sector; expanding the use of minerals. The characteristics of this economic sector and the importance of its legal regulation for the state and society should be considered. More basic scientific research is needed.

There are several multilateral agreements affecting the mining sector. The Stockholm and Rio Conferences, the Johannesburg World Sustainable Development Summit, and the agreements and action plans that emerged after these conferences are considered turning points. The problem of the production capacity of renewable resources was put forward at the Stockholm conference. The Rio instruments defined the concept of "sustainable development" without mentioning the mining sector, and at the end, mining principles were announced at the Johannesburg summit. It has been concluded that the branch of international mining law has yet to be established because states do not want to give up their sovereignty, and the international legal system does not have real legislative, executive, and judicial powers.

The role and position of the state in the use and management of mines, international legal obligations of states regarding mining, analysis of investment-related elements of mining contracts, and resolving disputes arising from Mining Law are among the most difficult issues.

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