



**Geoscience Policy Division  
Department of the Environment, Climate and Communications  
29-31 Adelaide Road  
Dublin, D02 X285  
Ireland**

10<sup>th</sup> October 2021

**Re: Submission on the Draft Policy Statement on Mineral Exploration and Mining in Ireland, and associated SEA Environment Report and AA Natura Impact**

As a law professor and scholar researching landscape governance, including the relationship between property rights, heritage, environment, and human rights, I am making this submission to raise some broader legal issues to be taken into account in Ireland's mineral exploration and mining policy. These concern: 1) the obligations Ireland is not only bound by under EU law, but also under public international law; and 2) the subject of investor rights under private international law should the Canada-EU trade deal (in particular Chapter 8) be ratified.

This submission is therefore focused on the aspect of how Ireland can progress "many of our national, European and international policies and commitments" in relation to mining (Draft Policy Statement, page 2), while transitioning to a circular economy.

It is now recognised internationally that a circular economy is necessary for a sustainable future, and we can no longer live our lives according to the principle that resources and indeed "growth" are infinite. A stated aim of the draft policy is "to put in place a clear and sustainable policy framework that supports our communities, our environment, our climate and our mineral exploration and mining sector." In that vein, this submission will deal with the first two priority groups in the submission: communities and the environment. While recognising the importance of mining and the need to source minerals from closer to home, this must also be balanced with the importance of particular landscapes (natural and cultural) and the human rights of local communities.

***EU Law and Public international law***

1. The European Commission's 2019 Environmental Implementation Review highlighted a number of significant environmental challenges facing Ireland, notably in the areas of nature protection, water management, and access to justice (as cited in the EPA's Integrated Assessment, 2020). It also noted that 16 EU infringements proceedings are currently pending against Ireland, in addition to four having been referred to the European Court of Justice for failure to properly implement EU environmental directives, including birds and habitats directives (EPA 2020, pp. 392-4). It is important that Excluded areas (for all mining activities) include *all* Natura 2000 protected sites

(Birds and Habitats Directives), heritage sites and sites of community interest. The three pillars of access to information, public participation, and access to justice within the scope of Environmental Impact Assessment Directives also need to be carefully adhered to in any future exploration and mining plans. Access to information means that the application for exploration be made public and visible in a local context and in plain language. Public participation means that the local people and other interest parties be included in any decision-making, and access to justice means being able to challenge any permissions granted if there are concerns over significant impact on natural or cultural sites. The need to create lasting, inclusive communities is also a key component of the European Green Deal.

2. In addition to EU Law, Ireland is also bound by a number of international and regional conventions, most notably the European Landscape Convention, which led to the National Landscape Strategy being developed for 2014-2024 (DAHG/ Heritage Council 2014). The European Landscape Convention recognises the various fields of public interest in the landscape as being “cultural, ecological, environmental and social” (preamble). It obliges each state party to “recognise landscape in law as an essential component of peoples’ surroundings, as an expression of the diversity of their shared cultural and natural heritage, and as a foundation of their identity” (Art. 5 (a)). It also provides for public participation in landscape planning (Art. 6). Any mineral exploration and mining policy needs to be cognisant of the nature and value of landscapes earmarked for exploration, and this is not restricted to a “view” but rather takes into account the current use or amenity value that particular places have for people.
3. Ireland is a state party to the World Heritage Convention and currently has two sites inscribed on the World Heritage List (Brú na Bóinne and Sceilg Mhichí), in addition to 7 more sites inscribed on the Tentative List (for possible to likely inscription). It is recommended, to avoid future conflict of interest, that these sites be excluded from mining due to their outstanding universal value. These sites are:
  - i. Early Medieval Monastic Sites (Durov, Kells, Glendalough, Inis Cealtra, Monasterboice, Clonmacnoise)
  - ii. The Burren
  - iii. The Céide Fields and North West Mayo Boglands
  - iv. The Historic City of Dublin
  - v. The Monastic City of Clonmacnoise and its Cultural Landscape
  - vi. The Royal Sites of Ireland: Cashel, Dún Ailinne, Hill of Uisneach, Rathcroghan Complex, and Tara Complex
  - vii. Western Stone Forts

It is a difficult balancing act for government to weigh up societal needs with constitutional, EU and international legal obligations, but this is necessary in order to “progress its European and international policies and commitments.”

The Draft Policy Statement states that “it is not possible to cherry-pick an alternative development site elsewhere in a region. This is a key aspect for consideration in land-use planning.” It is suggested therefore that

4. The nature of the mineral (i.e. its importance for meeting current resource needs) be carefully considered against the damage done to local communities, heritage and the environment.
5. All minerals are not created equal. In advance of finalising mining policy, the government is advised to create a hierarchy of minerals in terms of their usefulness to the circular economy and the intensity of the extractive process involved in each. For example, gold is not as “useful” a mineral as others, and the extractive process involved in gold mining is highly destructive and water intensive. There is no real need to mine for gold anymore, unlike copper, gypsum, and zinc (which is being proffered as an alternative to Lithium). Because of ground water contamination, gold mines are often the subject of disputes and opposition by local communities.

### ***Private international law***

Another important issue to consider is Ireland’s (possible) ratification of the Canada-EU trade agreement (often referred to as CETA), which is already *de facto* in operation but which requires *de jure* adoption in order for the investor state dispute settlement chapter of the agreement to have legal effect. If this happens, the Irish government needs to be very cautious before issuing any licenses or making any agreements with Canadian mining companies. Under the agreement, they will have the right to sue the Irish state for expropriation, even if the Irish state has acted within its regulatory right in protecting the environment, public health, or human rights.

There is a misconception that the current CETA agreement protects Ireland from this scenario because it includes provisions recognising the right of states to regulate in matters of the environment, public health, or human rights. However, case law from investor state courts reveals that it doesn’t matter whether this is recognised or not. In the recent ruling involving Eco Oro (a Canadian gold mining company) v Columbia (ICSID Case No. ARB/16/41), for example, the court stated that Columbia was within its right to regulate in favour of the environment but that it still owed compensation to Eco Oro anyway, to the tune of millions of dollars. This is the reality of investor state dispute settlement, and the government needs to be aware of that fact and be prepared for such claims if entering into mining agreements with Canadian companies (a disproportionate share of the world’s gold mining industry). The same is happening at present with the now infamous Keystone (XL) Pipeline. The Biden administration has rescinded licenses for the next phase and the Canadian investors involved have sued for compensation under ISDS, even though the US is acting within its regulatory right.

6. There is a cautionary tale in recent investor-state claims involving mining. The government might in the future be faced with a scenario where it will have to decide between upholding EU and public international law on the one hand, and being sued by investors for millions - under private international law - on the other. In order to avoid future claims of expropriation, the government must either not ratify CETA, or devise a very careful mining policy whereby gold mining (a Canadian dominant industry) would be prohibited.

### ***National policy and social licence to operate***

There is increasing legal recognition of the rights of local communities to participate in the decisions affecting their landscapes, and Ireland is duty bound to include public participation early on in any planning (EIA Directives –Aarhus package-, and European Landscape Convention). In that regard, the public interest in the mineral in question should be made explicit. The public find it hard to get behind a mine when the benefactors are private investment funds and when the intervention negatively impacts their quality of life.

7. It is advised that the government create a yardstick by which “public interest” in mineral exploration and mining is determined, at the policy planning stage, i.e. in advance of any prospecting licence being granted. This will lend clarity to the process and will help to weigh up the various concerns and stakeholders involved. It will also help with transparency and the social licence to operate.
  
8. The Planning and Development (Amendment) Act 2010 (No. 30 of 2010) now incorporates the definition of ‘landscape’ as defined by the European Landscape Convention and specifies that development plans are required to incorporate landscape quality objectives (Section 10 and Sections 202-204). If landscape objectives are required for development plans, it follows they are also to be considered in the planning process when considering a major intervention, such as a mine, in the landscape.

Thank you for considering this submission.

Yours sincerely,

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