Federal Ministry
for Economic Cooperation
and Development

Natural Resource Contracts as a Tool for Managing the Mining Sector

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Abbreviations

AMV	African Mining Vision
AU	African Union
BGR	Bundesanstalt für Geowissenschaften und Rohstoffe
CBG	Compagnie des Bauxites de Guinée
CCSI	Columbia Center on Sustainable Investment
CDA	Community Development Agreement
CSO	Civil Society Organization
DRC	Democratic Republic of Congo
ESIA	Environmental and Social Impact Assessment
EMP	Environmental Management Plan
EPA	Environmental Protection Act
EITI	Extractive Industries Transparency Initiative
FTAA	Financial or Technical Assistance Agreement
FOB	Free on Board
FPIC	Free, Prior and Informed Consent
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IMC	Inter-Ministerial Commission
IFC	International Finance Corporation
NGO	Non-Governmental Organization
PSA	Production Sharing Agreement
PPP	Public Private Partnership
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US	United States
WTO	World Trade Organization

Executive Summary

In most countries natural resources are owned by the state, although the right to exploit the natural resource is typically granted to private companies – sometimes in partnership with a state mining company. Companies can be granted mineral rights in different ways. Countries with a well-developed legal system typically grant licenses through a legal framework that fully governs the rights and obligations of the state and the private entity. In such a licensing system, there is very little, if any room, for negotiation of key provisions. On the other end of the spectrum, however, and particularly in countries with a weak or inadequate legal framework, countries may grant mineral rights to companies through individually negotiated agreements that contain most, if not all the rights and obligations of the parties. In such cases, there is a wide variation of key contract provisions and countries regularly end up with poorly negotiated deals that confer limited benefits to the country and the communities affected by the mining investment and may even sit completely outside of the legal framework of the country. For this reason, which is more fully set out in this study, countries increasingly favor licensing regimes that limit the types of and extent to which terms can be negotiated.

This study examines the different types of legal regimes governing mining projects in 18 countries around the world with a particular emphasis on the key provisions in mining contracts as well as in law where countries have adopted a licensing regime. In so doing, it discusses some of the reasons for which some countries have adopted a licensing regime to fully or partially regulate the rights and obligations of the parties in a mining project, whereas other countries have opted to use mining contracts to do so. Where a country relies on contracts to govern some or all aspects of a mining project, the study further examines the relationship between a country's mining contracts and its legal framework, taking into account the trend – towards more legislated terms – that minerals regimes are taking. In addition, it analyzes the mining contract negotiation and implementation process and attempts to identify potential opportunities to support resource-rich, low-income countries in managing their mining investments from the planning and preparation for a contract negotiation or licensing round to the implementation and monitoring of the mining investment.

To answer these questions, the Columbia Center on Sustainable Investment (CCSI) compared the provisions of 30 mining contracts from 13 countries, analyzed a selection of legislative texts related to mining from 18 countries, and surveyed the experiences of negotiating mining contracts through 44 interviews with 39 experts, government officials, company representatives, and civil society organization (CSO) members.

FINDINGS

The comparative analysis of mining contracts, legal frameworks governing mining investments and the interviews illustrated clear issues and trends related to mining contract negotiations and suggested several potential opportunities for support.

Negotiated mining contracts, while capable of compensating for inadequate or underdeveloped legal regimes, far too frequently fail to achieve optimal results for a country. The benefits negotiated agreements provide in developing countries can also create the issues that frequently undermine their success. A lack of transparency, or accountability, the risks of corruption, and inconsistent terms creating difficulties in the implementation and monitoring of mining investments were all mentioned as concerns during the interviews.

The contract negotiation process itself was also credited with creating additional concerns. In particular, inexperience, asymmetrical information, external influences, and capacity limitations all contribute to suboptimal agreements for governments. The assistance of external advisors can help alleviate some of these issues but can also introduce its own. Poor coordination by donors, duplicated efforts and a disproportionate focus on negotiations at the expense of assisting in the entire negotiation process have hindered the effectiveness of these advisors.

These issues have contributed to the global trend away from negotiated mining contracts towards legislated terms to govern the rights and obligations of the parties in a mining project. There has also been an increasing use of interim mechanisms such as model mining agreements to limit the extent to which terms can be negotiated. These are positive trends and this report makes several recommendations on how to support these developments.

RECOMMENDATIONS

- Support the development of strong legal frameworks for mining and supporting model mining agreements as an interim measure.
- Support the negotiation of ancillary agreements, including those that govern the development of infrastructure for a mining project, the local content plans and community development agreements.
- Promote contract transparency.
- Better coordinate donor assistance.
- Provide support both before and after a contract negotiation.
- Provide non-legal support to the negotiation and implementation process.
- Support regional legal harmonization efforts.
- Build government capacity and understanding of commodity markets.

Introduction

Almost every country in the world has developed a distinct mining code, and the ones who have not, like Azerbaijan, have developed a body of law to govern the application, exploration, exploitation, and reclamation of their mineral resources. The granting of mineral rights is the point of entry for companies into a country's mining sector. A mineral right gives a company the exclusive ability to undertake mining-related activities within a designated area. The two primary regimes for granting and administrating mineral rights are contracts and licensing. [1]

In contracts regimes, mineral licenses and the accompanying rights and obligations are negotiated for specific projects with each individual company. Contracts regimes are more prevalent in developing countries that have young or nascent mining sectors and are supported by less robust or reliable legal frameworks.[2] The contracts system fills the gaps created by a country's inadequate or underdeveloped mining laws and offers greater flexibility for dealing with the unique needs and issues of different mining projects. For countries eager for the anticipated economic benefits of mining projects, contracts are a much quicker way to move forward than the time- and capacity-heavy process of building a strong legal framework. Negotiated contracts also result in a body of agreements with different terms, putting additional monitoring and implementation burdens on already weak administrative institutions.

Pure or strict licensing regimes define the process of granting mineral licenses and all the accompanying rights and obligations in generally applicable laws. In this system, the fiscal provisions and environmental regulations are largely identical for all companies. Licensing regimes typically exist in countries with strong institutions and a developed mineral sector. Longstanding legal frameworks and transparent governance create a safer investment environment.[3] Public participation through the legislative process in democratic states provides a venue for incorporating the public's concerns for the sector and decreases the likelihood of political volatility.[4]

1 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 12.

2 Ibid.

3 Ibid.

4 Lisa Sachs, Perrine Toledano, Jacky Mandelbaum, with James Otto, "Impacts of Fiscal Reforms on Country Attractiveness: Learning from the Facts," in Karl Sauvant, ed., Yearbook on International Investment Law & Policy 2011-2012 (Oxford University Press, 2012), p. 367.

Because the laws apply equally, the system is easier to administer and limits the opportunities for corruption in the process by allowing for stronger checks and balances.[5]

Historically, there has been a strong regional trend of contracts regimes for the mining sector in Africa. In this study alone, which was limited to countries that make at least some mining contracts publicly available, Burkina Faso, Cameroon, DRC, Guinea, Liberia, Mozambique, and Sierra Leone have all negotiated mining agreements in recent years. A number of Asian countries with young mining sectors also negotiate contracts, including Afghanistan, Azerbaijan and Mongolia.

The reliance on negotiated contracts occurs less frequently in Latin America where licensing regimes are more common, and there is often a long history of mining. Chile attributes its successful minerals-based development to a mining industry that dates back to the 1700s, a strong legal framework and its non-discretionary mineral rights regimes.[6] Like Chile, Peru too has a well-defined and unambiguous legal regime for its mineral sector.[7] Ecuador, on the other hand, with its nascent mining industry negotiated a contract in 2012 for its first large-scale mining project.[8]

As legal frameworks and government capacity continue to develop, the general trend worldwide is towards less discretion in the granting of mineral rights.[9] Most developed mining countries, including study countries Australia, Brazil, Canada, and Chile, already use licensing regimes and in recent years, many developing countries have begun reviews and reforms of the legal frameworks governing their mineral sectors.[10] In 2008, Zambia

5 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes: A Review of Issues and Challenges in their Design and Application, The Challenge of Mineral Wealth: Using Resource Endowments to Foster Sustainable Development," (February 2009), p. 9.

6 KPMG Global Mining Institute, "Chile: Country Mining Guide," (2014).

7 EY Peru, "Peru's mining and metals investment guide 2014/2015," (2014).

8 That contract, the Ecuacorriente S.A. Agreement, was reviewed as part of this study.

9 "International Advisor." Telephone interview. 11 March 2015.

10 The United States is unique among mining countries as mineral rights belong to the surface rights holder not the state. "Mineral Rights Ownership – What is it and why is it so unique in the USA?" International Energy Network, available at http://www.ieneurope.com/pdf/Mineral.pdf (last visited 29 April 2015).

replaced its previous mining law with a new Mines and Minerals Development Act which expressly prohibits the government from entering into any special agreements for large-scale mining licenses and which annulled any existing development agreements.[11] In 2012, Liberia began examining a switch from its contracts regime to a licensing regime.[12] In 2013, Guinea amended its Mining Code to remove the ability to negotiate tax provisions in mining contracts and the new code will be generally applicable to all new mineral rights going forward.[13] The DRC now technically grants mineral rights through a licensing regime, though a lack of retroactive application to previously existing rights means that negotiations still occur.[14]

The transition from a contracts regime to a licensing regime can be slow and difficult. A popular trend in countries going through that process is the adoption of model mining agreements that establish a general structure for the agreement and provide most of its non-negotiable provisions, and clearly define the limited areas that are negotiable. Burkina Faso, DRC, Guinea, Mongolia, Mozambique and Sierra Leone are all either developing model agreements or have recently developed model agreements.

This report sets out to examine these trends. It first provides an overview of licensing regimes and the rationale driving their use. It goes on to examine contract regimes and the different types of investor-state contracts that can be used in a mining investment. The report then discusses why contracts have historically been used in some jurisdictions and not others, and the circumstances that might justify their continued use to regulate mining investments. A review of key mining provisions is then provided, with an analysis of how such terms are approached in the different regimes and how the different types of agreements in contract regimes address these provisions. Finally, the report analyzes the experiences of different parties involved in the planning, preparation, negotiation, implementation, and monitoring of mining contracts, with an assessment of the challenges faced in the process and an identification of best practices. The report ultimately seeks to provide a view of the best potential approaches for German Development Cooperation to support developing countries in granting and administering their mineral rights.

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11 Mines and Minerals Development Act, Zambia, Arts. 159-160 (2008).

12 Yann Alix, "The Liberian mining law reform and the impact of the Ebola crisis," Herbert Smith Freehills, (October 2014).

13 Mining Code, Guinea, Arts. 159, 161, 163 (2013).

14 "Civil Society Member," Telephone interview. 18 March 2015.

Methodology

In preparing this report CCSI developed a matrix to compare key contract terms. Additionally, we reviewed at least two mining-related legislative texts in each country. A literature review and additional open-source research complemented this process. The team selected the subject countries, contracts, and legislative texts in consultation with BGR.

To ensure that the study provides a representative overview of the legal regimes governing mining globally, care was taken to select countries representing the widest possible spectrum of experiences. The criteria used for the selection of sample countries[15] and contracts included:

— **Regulatory regime:** We selected countries representing a range of legal and regulatory systems generally, as well as in relation to mining-related contracts specifically. We included countries with both common law and civil lawsystems. In addition, we selected countries where (i) mineral rights are governed solely through a licensing regime under the existing legal framework, and (ii) mineral rights are governed under a contract regime that allows for agreements to supplement or supplant the existing legal framework.[16]

— **Contract type:** Different contract types were analyzed, including mining development agreements, concessions, investment promotion agreements, service agreements,[17] joint venture agreements, and production-sharing contracts.

— **Income level of the country:** Countries with different income levels and stages of development were chosen to show the impact of these factors on the contract negotiation process, particularly in relation to the fiscal and stabilization provisions.

— **Country's experience with the mineral sector:** Some countries have only recently become attractive to mining investors as a result of rising commodities prices over the past decade, whereas others have a longer, more established mining history and sector. Such differences in experience with mining can also impact the use, style, and content of contracts.

— **Era during which the contract was signed:** The content of contracts has gone through several phases over the past century, shifting from being development-oriented in the 1970s to being investment friendly in the 1980s and 1990s, and shifting yet again toward strengthened provisions for the host countries at the height of the commodities boom in the 2000s.

STUDY COUNTRIES WITH LAW-BASED REGIMES:

Australia
Brazil
Canada
Chile
Peru*
Zambia

STUDY COUNTRIES WITH REVIEWED CONTRACTS:

Afghanistan	DRC	Mongolia
Azerbaijan	Ecuador	Mozambique
Burkina Faso	Guinea	Philippines
Cameroon	Liberia	Sierra Leone

** Peru grants mineral rights through a licensing regime; however, the country allows for investment promotion agreements which can exist outside the mining sector but can apply to mining projects. Several of those agreements were reviewed for this study. A fuller explanation of the role of investment promotion agreements in strict licensing regimes is provided later in this report.*

After identifying the sample of countries and contracts, CCSI formulated a list of experts to interview and drafted a comprehensive list of guiding interview questions in conjunction with BGR. CCSI conducted 44

15 The criteria fulfilled by each country selected for the study is detailed further in Appendix A.

16 Lisa Sachs, Perrine Toledano, Jacky Mandelbaum, with James Otto, "Regulatory and Policy Developments Regarding FDI in Extractive Industries,"- Karl P. Sauvant, Yearbook on Int'l Investment Law and Policy (New York: Oxford University Press, January 2013).

17 While no service agreements are reviewed as part of this study, they are discussed in the context of the Philippines which uses a form of service agreement called Financial or Technical Assistance Agreements (FTAA).

interviews to supplement its analysis of each country's legal regime and associated mining contracts. For almost every country in its sample, CCSI interviewed two experts who have been involved in advising on the legal framework, or in the contract negotiations of some of the mining concessions with respect to that country.

The 39 interviewees included 13 external advisors, 11 government officials, 9 corporate representatives or corporate legal counsel and 6 CSO representatives.[18] In general, most interviewees were closely involved with mineral contract negotiations and/or the drafting or review of at least one of the two pieces of legislation being reviewed. CCSI's comparative review and analysis of legislation and contracts in the study countries were used to inform the interviews. The insights gathered from those interviews were in turn used to give depth to CCSI's analysis and influence the direction of further research. CCSI later supplemented this work with a second round of targeted interviews. These seven additional interviews included both those previously interviewed and two new experts and were done to resolve outstanding questions and fill in any gaps revealed during later analysis.

[18] Several of those interviewed have worked for both governments and corporations in negotiations. For the purposes of this study if the focus of the interview was their work assisting governments they are considered external advisors and if the focus was their work for companies they are considered corporate legal counsel.

Regulatory Regimes: Licensing

"Many countries with successful minerals-based development attribute it to their non-discretionary regimes. Chile, for example, would faint if you mention negotiation," International Advisor.

In a regulatory regime that is purely licensing-based, companies apply for mining licenses that are governed by generally applicable law. All major obligations relating to the project, including taxes, royalties, environmental protections and local content requirements are clearly established in legislation and regulations.[19] Whatever the process of allocating mineral rights, all experts concur in appreciating the net benefits of licensing regimes (with benefits outweighing the costs).

For one, there are much **fewer opportunities for corruption** when a generally applicable law sets out the same requirements, obligations, and benefits for every company, than there are when negotiating directly between governments and companies.

Second, it **reduces** the damage that can be inflicted in negotiations by **information asymmetries** and government inexperience.

Third, there is **less of a burden on government administration** because generally applicable laws are significantly less labor intensive to implement and monitor than a series of different individual agreements with varying terms.[20]

Fourth, publication of both applications and decisions allows for **public sector oversight** as well.[21]

Fifth, a licensing regime typically places exclusive responsibility for granting mineral rights in one regulatory or administrative body backed by law which limits government discretion in awarding, suspending or cancelling those rights offering companies **greater security of tenure.**[22] This contributes to a mining sector that is seen as attractive and safe for major investment by foreign companies.

EXPLORATION/EXPLOITATION LICENSE

A license (or tenement, permits or authority to mine depending on the country) is a form of "permit" in which the government grants to a company certain exclusive rights to mineral resources in exchange for compensation. Licenses convey the right to explore for and/or exploit specific minerals and the authority to carry out commercial operations, whether the regulatory regime is law-based or contract-based. The exploitation license can be awarded in several ways. They are frequently issued in the same license granting exploration rights with the exploration license providing for the right to an exploitation license. There can however be a period where the company has the exclusive right to apply for an exploitation license.

THE CHALLENGES OF LICENSING REGIMES

While all experts agree that the benefits of licensing regimes outweigh the costs, such regimes are not free from challenges, including some they share with contract regimes.

Difficulties of Legislative Development: Developing the strong legal framework necessary for a licensing regime can be a lengthy and difficult process for developing countries. Drafting, enacting and/or amending all the legislation and regulation needed can require the kind of significant expenditures of attention, capacity and political capital that is difficult for a government dealing with many other issues to provide.[23] The process can be interrupted or set back by political instability or changes in regime. Changing a single law can be a process that takes years. This is a challenge that decreases as a country and its legal framework develops.[24]

19 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 14.
20 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 9.
21 Ibid.
22 World Bank Group, "Sector Licensing Studies: Mining Sector," (January 2009); San Bilal, "Regulatory Reform in the Liberian Mining Sector: Striking the Right Balance," GREAT Insights (July/August 2014); "Government Official." Telephone interview. 17 March 2015.

23 "International Advisor." Telephone interview. 29 April 2015.
24 "International Advisor 1." Telephone interview. 28 April 2015.

Less flexibility: The general framework in licensing regimes is to be much more prescribed.[25] Removing that flexibility and making the country less attractive to investors is a concern for some governments when considering a licensing system. This is a concern generally seen in developing countries with a shorter proven history of successful mining projects.[26] Mining companies are quick to point out that all mining projects are different. While there are serious issues with a system where everything is open to negotiation, from a corporate perspective it offers greater opportunity to tailor an agreement to fit specific needs and opportunities and maximize the viability of that individual project. One advisor observed that a negotiated agreement could allow for more specific periodic review clauses establishing events that trigger review or renegotiation.[27] Agreements could establish which provisions could be adjusted, to what extent, and under what circumstances in much greater detail than would be capable in the law.

Legislative inaction: Changing licensing procedures set out in laws and regulations requires changing those laws and regulations. For almost all governments this is a slow process. This has caused problems in some countries where a moratorium is put on the approval of new licenses in anticipation of a new law being enacted. In 2014, Mongolia repealed the 2012 Law on Prohibition of Granting Exploration Licenses, which was just the last in a series of moratoriums issued by the government as it worked to develop its new minerals law.[28] The possibility of a legislative change in Brazil has resulted in an unofficial moratorium on issuing mining licenses in that country since 2011. Some corporate representatives expressed concern about the impact that not having new exploration for several years will have on the mining sector in the future. They have also predicted further delays after a law is passed while the new system is implemented and the necessary capacity is developed, especially if the system changes to auctions, which are more labor intensive to administer.[29] The ad hoc nature of contract negotiations, while raising issues of its own, can avoid these problems.

Tension between legal regimes: While one of the benefits of a licensing regime is intended to be easier administration through use of consistent terms, these laws are generally not retroactive which can complicate the transition to a licensing regime. The DRC is a good example. The granting of mineral rights there is now regulated by the Mining Code, which prescribes a mandatory procedure for the granting of a mineral license. Applicants are generally not able to negotiate the terms under which a license is granted. Companies cannot contract out of any obligations of the Mining Code. However, if a mineral right was obtained prior to the commencement of the current Mining Code, the law allows for such rights to be alienated under terms negotiated by the parties. The majority of such rights were originally held by state-owned companies, which means that the DRC state does find itself negotiating the terms of transfer of mining agreements – potentially in ways that conflict with the terms of the Mining Code – to private parties, or to public-private joint ventures. This loophole does not extend to all contractual terms. For instance, the agreement cannot derogate from the Tax Code. Nonetheless, the ability to negotiate out of existing laws in this narrow circumstance undermines the intentions of a licensing regime and complicates its administration. Additionally, companies which entered into contracts for mineral rights prior to the introduction of the Mining Code and its associated licensing system in 2002 had the option of continuing to operate under the previous regime, which allowed for the negotiation of contractual terms.[30]

Despite the licensing provisions of the Mining Code, the DRC has also since signed a number of resources-for-infrastructure agreements. These agreements, arranged directly between the government and primarily Chinese or Korean investors, simply exchanged minerals for large infrastructural development projects.[31] The legality of these agreements was an open question until 2014 when the DRC legalized these arrangements as public private partnership (PPP) conventions. This new PPP law carved out a special legal environment and tax regimes for these projects.[32]

25 "International Advisor." Telephone interview. 11 March 2015.
26 "Government Official." Telephone interview. 17 March 2015.
27 "International Advisor 1." Telephone interview. 22 April 2015.
28 Chris Melville, "Note on the Amendment to the Law of Mongolia on Minerals dates 1 July 2014," Hogan Lovells (26 August 2014).
29 "Company Executive." Telephone interview. 10 March 2015

30 "Civil Society Representative." Telephone interview. 18 March 2015.
31 Global Witness, "China and Congo: Friends in Need," (March 2011).
32 Upio Kakura Wapol, "A New Legal Framework to Promote the Public-Private Partnership in the Democratic Republic of the Congo," Cabemery (29 April 2014).

	Licensing Regime	Contract Regime
Key Features	— Terms governed by generally applicable law — Frequently used in developed countries or those with established mining sectors	— Terms primarily established in individually negotiated agreements — Frequently used in developing countries or those with young mining sectors
Benefits	— Less opportunity for corruption — Reduced information asymmetries — Easier to implement — Public oversight — Security of tenure	— Flexibility and specificity — Supplements gaps in inadequate legal frameworks — Signals government commitment
Challenges	— Difficulties of legislative development — Less flexibility — Legislative inaction	— Often poorly negotiated — Discretion — Varying contract terms can complicate implementation — Undermining confidence in rule of law — Confidentiality — Sanctity of contracts

Regulatory Regimes: Contracts

Almost all countries in the world have a mining law – Azerbaijan being a notable exception – that they use to regulate their mining sector, but only some of them – including the 13 countries which have contracts reviewed in this study – allow for the possibility of negotiated state agreements creating special regulatory systems for mining projects.[33] Contracts secure a company's right to explore and/or exploit mineral resources in exchange for the agreed upon compensation to the government. The difference between the licenses/concessions in a pure licensing regime and contracts in a pure contractual regime is that in the latter the contract is the primary document establishing the terms and governing the project. Such contracts cover the same issue areas as those in a licensing regime, but the depth, detail and specificity with which they do so depends on the level of development and comprehensiveness of the country's legal regime.

Unlike in a pure licensing regime, negotiated contracts can supplement or even supplant existing laws.[34] In many cases these contracts are then ratified by the legislature making them essentially laws unto themselves.[35]

Purely contractual regimes are less common now, and the overwhelming trend has been to regulate mining through clear, strong legislation and regulation and to rely on mining and tax codes, environmental laws, health and safety regulations, and other generally applicable laws rather than negotiating different terms for different parties.[36] Liberia, for example, is in the process of updating its mineral law, in part to switch from its current contract-based regime to a licensing regime. This is an objective for the government because it expects the new regime to reduce the carve-outs from the law currently being made through the use of negotiated agreements.[37] In addition to that government benefit, in interviews government officials expressed the belief that a licensing regime will provide greater security of tenure for companies by limiting the government's discretion in awarding, suspending and cancelling a company's mineral rights.[38]

However, governments – generally in developing countries with young mining sectors – are still negotiating contracts with companies, and a number still heavily rely on them to establish a company's rights and obligations for a specific project. There are several reasons why contracts are still in use. First, countries generally do so because they are just beginning to develop their mineral sectors and have **existing legal regimes that are inadequate or insufficiently developed** to regulate mining projects without the help of negotiated contracts. Some have argued that this illustrates their value in establishing a stable framework for a project and overcoming market deficiencies.[39] Other international advisors argue that the heightening expectations for the benefits mining projects will create will always make agreements necessary to supplement legislation, which is inherently slow to adapt to adequately address new issues.[40]

Similarly, negotiation can be useful in situations where even with well-developed laws and regulations a country needs the **flexibility** to accommodate a special mining project.[41] This could occur in the context of greenfields – unexplored territory where it is unknown if minerals exist – or **new types of mining** where governments have an interest in encouraging investment but don't want those incentives to be permanent.[42] This is also seen with **exceptionally large or unusual projects** that require special tax provisions to be commercially viable.[43] This situation, which was most frequently invoked during interviews in regards to Australia, is discussed further below.[44]

33 Sachs, Toledano, Mandelbaum, with Otto, "Regulatory and Policy Developments Regarding FDI," 2013, op. cit.

34 The Study Country Selection Criteria matrix in Appendix A identifies which countries have contracts that supplement the law and those with contracts that supplant the law.

35 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 33.

36 Sustainable Development Strategies Group, "Model Mining Development Agreement – Transparency Template," (May 2012).

37 Alix, "The Liberian mining law reform," 2014, op. cit.

38 Bilal, 2014, op. cit; "Government Official." Telephone interview. 17 March 2015.

39 Richard Hillman, "The Future Role for State Agreements in Western Australia," Australian Resources and Energy Law Journal 293 (2006), p. 301.

40 Sustainable Development Strategies Group, "Model Mining Development Agreement – Transparency Template," (May 2012).

41 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 33

42 "Government Official." Telephone interview. 21 April 2015.

43 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 33.

44 "Corporate Lawyer." Telephone interview. 4 March 2015; "Corporate Lawyer." Telephone interview. 13 March 2015.

DIFFERENT CONTRACT ROLES

Consistent with expectations, interviews and reviewed contracts show that countries that negotiate ad hoc contracts tend to see substantial variation in contract terms across their mining sector. The variation can be attributed to the different types of contract, the circumstances under which it was negotiated, when it was negotiated, and how it interacts with existing law.

There is a range of different types of natural resource contracts[45] and the type used depends on the stage of the mining process, the legal regime of the host country, the governments and companies involved and their needs, and even the political and economic dynamics of the era in which they were concluded.

Mining (Development/Lease) Agreement: Mining agreements (or "concession agreements" in civil law countries/"conventions" in French) are the most prevalent natural resource contracts. Traditional mining agreements date to the early 20th century before the development of integrated commercial law frameworks. They were frequently used in countries under colonial control to exempt investors from being bound by generally applicable law.[46] In transition from traditional concession agreements that deferred key decisions to the company, these development agreements introduced work requirements and required government approval to undertake certain activities.[47]

The report found these agreements to generally be the most comprehensive in scope. They generally provide for the granting of exploration and exploitation licenses, though systems where licenses and contracts are concluded separately do exist. They may also include tax provisions, local procurement requirements, the right for the company to process, market and sell the minerals it extracts, a company's community development obligations, and provisions for state participation and/or control.[48] The reviewed mining agreement between the government of Cameroon and Cam Iron SA, for example, illustrates the agreement's breadth as it explicitly governs:

> "the technical, legal, tax, customs, economic, administrative, land, employment and environment conditions with a view to the Parties' performance of this Project; and…the main terms and conditions for carrying out the Mining Operations within the Exploitation Area."[49]

For developing countries with immature legal regimes that are not yet able to fully regulate the mining sector, such mining development agreements may contain rules and regulations constituting the law of the project. *(The issues of negotiation are discussed in greater detail earlier in this section.)*

Service Agreement: While an example was not publicly available from the countries selected for this report, a service agreement, as the name implies, is a contract in which the government hires a company to perform its mining operations, but the government retains control and ownership of the minerals. These agreements were common in the post-colonial era as newly independent countries nationalized industries like mining that were previously dominated by foreign-owned companies. The decision to nationalize the mining sector and create a national mining company to run it was very political; it signaled a separation from the colonial system and was an assertion of sovereignty by reclaiming ownership of national assets. However, practically, these newly created national companies frequently lacked the experience and knowledge necessary to run actual operations, so they hired foreign mining companies to do so. The scope of these service agreements was frequently less all-encompassing than mining agreements and often divided services between different providers. The country owned the minerals, infrastructure and equipment and the companies were compensated either in cash or a share of production for their services.[50] These types of agreements have been less common since the 1990s as the shift towards re-privatization of the mining industry began industry

45 This discussion is limited to agreements between the state and mining companies. Partnership or joint venture agreements without state partners, agreements between companies and their lenders or sub-contractors, and other such agreements are beyond the scope of this report.

46 James Otto and John Cordes, "The regulation of mineral enterprises: A global perspective on economics, law and policy," Chapter 4 (Westminster, Colorado: Rocky Mountain Mineral Law Foundation, 2002).

47 Ibid, 13.

48 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., pp. 41-42.

49 Cam Iron S.A. and Cameroon, Cam Iron Project, Art. 3.1(a) (2012).

50 Otto and Cordes, "The regulation of mineral enterprises," 2002, op. cit.

led to governments giving up their role as miners and only taking on the role of regulator.[51]

Some countries still utilize service agreements, typically for retaining foreign companies to provide technological and other support to the national mining company that operates the project.[52] In the Philippines, full state control and supervision in the exploration and development of mineral resources are fundamental to the country, so the law prohibits the government from partnering with mining companies that are not at least 60% Filipino owned.[53] But since the country lacks the necessary capital for large-scale mining operations, it created the Financial or Technical Assistance Agreement (FTAA) which, as a service agreement, is not covered by the restriction and allows the government to enter into agreements with wholly foreign-owned companies.[54]

Investment Promotion Agreement: As service agreements were becoming less common, some countries began shifting from mining development agreements to investment promotion agreements. After the economic crises of the 1970s – 1980s, countries began to reconsider the state-run approach to management, and in the 1990s, there was a legislative shift away from such systems towards pre-privatization. This was mirrored in the mining sector in a move from the previous developmental focus of mining contracts toward investment promotion. These shifts coincided with a period of low commodity prices that created competition between countries for foreign investment, leading to investment promotion agreements.

These agreements, designed to promote investment, were a way of supplementing or supplanting the law. Stabilization provisions are a notable focus of these agreements because protection for companies from arbitrary legislative changes is seen as a key to creating an investor-friendly climate.[55] Because these agreements can exist outside of the legal regime governing mining, they are used even in countries with strict mineral licensing systems. Both Peru and Chile have signed a number of investment promotion agreements supplementing the law and stabilizing fiscal terms in exchange of the companies paying a higher royalty rate than the statutory one. A 2009 agreement between Peru and the company Minera Chinalco S.A. analyzed for this study guaranteed the company:

> "tax stability in accordance with Art. 80(a) and (e) of the general mining law…Moreover, the income tax, the method of determining tax rates and the tax rates, the compensation for and/or return of taxes, customs duties, municipal taxes, exemptions, incentives, and any other benefits relating to stabilized taxes and schemes are governed by the rules applicable at the date of the signing of the contract…The company is not bound by any law passed after the date of signature of the contract that might directly or indirectly alter the guarantees set out in [this article] of the contract."[56]

Joint Venture: In the context of this report, joint venture agreements are contracts where a government (often through its national mining company) partners with one or more private companies on a mining project. Mining companies also frequently form initial joint ventures among themselves that then sign agreements with governments.[57] The partnership can be an alternative to a debt or equity financing for a company trying to raise capital for, or a government lacking the expertise necessary for, a mining project.[58] The Manomin tin mine in the DRC is operated by a joint venture between DBB Resources Corporation and La Congolaise d'Exploitation Miniere, a private limited liability company 50% owned by the state.[59]

Joint venture agreements were originally one approach to asserting a country's sovereign right over its minerals as a post-colonial reaction to the previous regimes. In them, government typically exercised control of the joint venture via board membership or some other contractually defined management system.[60]

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51 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 31.
52 Ibid
53 Mining Act, Philippines, Sec 3(aq) (1995).
54 "Corporate Representative." Email interview. 18 March 2015.
55 EY Peru, "Peru's mining and metals investment guide 2014/2015," (2014).
56 Summary of Art. 9 in the Investment Promotion Agreement between Minera Chinalco S.A. and Peru, Chinalco project (2009).
57 Allen & Overy, "Guide to Extractive Industries Documents – Mining," 2013, op. cit., p. 19.
58 Adam Wanke, "Financing in Difficult Times: Joint Ventures," Mining Prospects (13 March 2013).
59 DBB Resources Corporation and DRC, Manomin project (2009).
60 Otto and Cordes, "The regulation of mineral enterprises," 2002, op. cit.

Production Sharing Agreement: Production sharing agreements (PSAs) are fairly rare in the mining sector, particularly compared to the petroleum sector where they are very common. Their front-loaded nature, allowing higher cost recovery by the company, as well as the continuous need for additional capital investment as the mineral deposits become more difficult to access and extract, makes the production sharing aspect of PSAs a poorer fit for mining than for petroleum.[61] Production limits are another common feature of PSAs that does not align well with solid mineral mining. Only a few countries, such as the Philippines, still use them.[62] This study reviewed several of the PSAs currently in force in that country.

DIFFERENCES IN CONTENT

Given the range of factors influencing the decision-making around mining projects, it can be difficult to attribute differences in contract terms to the type of agreement. However, agreements often reflect the political and economic priorities of the era in which they were drafted, both in terms of their type and content, allowing for the designation of a few identifiers.[63] For example, service agreements allow for a reassertion of state sovereignty in the post-colonial period, while investment promotion agreements spur foreign direct investment in the mining sector. In turn, joint venture agreements can help to facilitate the financing of expensive mining projects. Analysis of the contracts in this study suggests that the differences between agreement types are more readily observable in the priority given to or the inclusion/exclusion of, certain terms than in the precise substance of the terms themselves.

Guinea provides an illustrative example. This study reviewed a concession for a bauxite mine the government of Guinea signed with the Fria company in 1958, the same year it became independent. The concession included no provisions for state participation. A second agreement reviewed in this study, signed with Compagnie des Bauxites de Guinée (CBG) in 1963, five years after independence, while still a concession agreement, required a 49% minority ownership share for the government and clearly asserted government ownership of mining-related infrastructure even if built by the company.[64] These provisions clearly reflected the post-colonial movement for newly independent countries to assert their sovereignty over their resources. Similarly, the content and focus of joint venture and service agreements emphasize the country's ownership and control.

Mining development agreements came into fashion in the 1970s and 1980s and, as befits their name, emphasized provisions requiring upstream and downstream economic linkages. While these agreements would all include provisions for development, such as infrastructure development, the terms themselves could vary substantially, in breadth, form, and level of detail.[65] Many, if not most, mining development agreements include local content provisions of some kind, giving preference to local goods and services.

In this area, investment promotion contracts sharply differ from other types of agreements. Local content provisions, like most development objectives, can be seen as discouraging investment, and thus, such provisions tend not to appear in investment promotion contracts.[66] Additionally, in these contracts, government control of the resources, so important in joint venture, service, and often development agreements, is deemphasized due to concerns about discouraging investment. These contracts often include provisions limiting the discretion of the government to exercise its statutory authority in an effort to limit the risks of arbitrary decision-making.[67]

In the last two decades there has been a return towards the development agreement emphasis on mining as

61 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 31.

62 In the case of the Philippines, the country's Constitution (1987) provides for the government to have full control and supervision of the mineral sector, and that the government may enter into co-production, joint venture, or production sharing agreements to undertake mineral activities where it does not wish to do so directly itself. Art. 12(2) of the Constitution of the Republic of the Philippines (1987) available at: http://www.gov.ph/constitutions/the-1987-constitution-of-the-republic-of-the-philippines/the-1987-constitution-of-the-republic-of-the-philippines-article-xii/.

63 James Otto, "Mineral Agreements," in The Regulation of Mineral Enterprises: A Global Perspective on Economics, Law and Policy (Institute for Global Resources Policy and Management Colorado School of Mines, 2002).

64 Fria Company and Guinea, Fria project (1958), Harvey Aluminium Company and Guinea, CBG project (1963).

65 Otto and Cordes, "The regulation of mineral enterprises," 2002, op. cit.

66 Xstrata Las Bambas S.A. and Peru, Xtrata Las Bambas project (2011); Minera Chinalco S.A. and Peru, Chinalco project (2009).

67 Otto and Cordes, "The regulation of mineral enterprises," 2002, op. cit.

an engine of economic development and diversification. Decried as "resource nationalism" by companies, it is driven by a boom in commodity prices and the perception by governments that mining had not been producing sufficient in-country benefits. Older agreements are being renegotiated and new agreements now might include higher royalty rates, windfall and capital gains provisions to ensure countries receive their fair share of the benefits of their natural resources.[68]

WHEN ARE CONTRACTS USED

"People negotiate agreements because they want concessions in the law. The moment the government says 'Let's talk,' the government is saying it is ready to go outside the law." – Government official

A strict hierarchy of legislation exists in the legal framework of a country with a licensing regime. A country's supreme law is its constitution, followed by its laws, the regulations promulgated pursuant to the laws, and then contracts. However, in countries with less robust legal regimes and a strong reliance on negotiated mining contracts as a result, contracts may be specifically designed to supplant all legislation.[69] The implication of this practice is that such contracts should not be necessary if and when a country develops a more mature and sophisticated legal regime. However, some international advisors have speculated that this system of negotiated contracts actually hinders progress towards such a regime.[70] For example, those interviewed suggest that the law is most often supplanted in relation to fiscal terms. Frequently, the tax laws are among the most robustly developed laws relevant to the project in developing countries, but companies regularly negotiate exceptions to the law to profit from better fiscal terms than provided for in the country's legislation.[71]

Contracts that supplement or supplant a country's legal framework can differ in content from each other. Where contracts supplement the law, the provisions being supplemented will be detailed and specific, but other provisions may still make reference to existing applicable law. The reviewed agreement between Mongolia and Ivanhoe Mines for the Oyu Tolgoi Project, for example, supplements the scant local content provisions of Mongolia's mining law with substantially more detailed local content provisions.[72] However, in other provisions the agreement explicitly defers to Mongolia's applicable law. An example of this is the following provision in the agreement:

> "The investor shall comply with the international treaties in relation to environmental protection matters to which Mongolia is a party and Articles 35 and 37 of the Minerals Law and shall obtain detailed environmental impact assessment reports (the "EIA Reports") in accordance with the Law on Environmental Impact Assessment prepared by a competent, independent, professional firm."[73]

In contracts that supplant the law, the provisions can be detailed and specific or scant, but they will not defer to the general law. Additionally, agreements supplanting the law usually – and particularly in common law jurisdictions – need to be codified into law in order to legally take precedence over the law.[74] One international lawyer noted that the use of such agreements can also provide clarity on the rules governing the project in countries with weak governments. Where a country's general law is outdated and needs to be updated to reflect current practices, such contracts can provide an ad hoc solution until the relevant laws are updated.[75] As countries develop deeper and more robust legal frameworks and it becomes increasingly difficult to justify supplanting the law, negotiated agreements could still be useful in supplementing the law to fill in gaps, or where greater specificity is required.[76]

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68 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 73.

69 Ibid.

70 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 32.

71 "International Advisor 2." Telephone interview. 22 April 2015.

72 Minerals Law, Mongolia, Art. 43 (2006); Ivanhoe Mines Ltd, Rio Tinto International Holdings Ltd. and Mongolia, Oyu Tolgoi project, Art. 8 (2009). The agreement was signed under the 2006 Mining Law which was replaced in 2014; however, both laws contain the same local employment requirements.

73 Ivanhoe Mines Ltd, Rio Tinto International Holdings Ltd. and Mongolia, Oyu Tolgoi project, Art. 6.1 (2009).

74 The necessity of this is less clear in civil law countries where there is a lot of variance on the issue and in some jurisdictions non-statutory agreements can supplant general law. James Otto, "Mineral Agreements," in The Regulation of Mineral Enterprises: A Global Perspective on Economics, Law and Policy (Institute for Global Resources Policy and Management Colorado School of Mines, 2002).

75 "International Advisor 2." Telephone interview. 28 April 2015.

76 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 14.

Infrastructure provisions were frequently cited by interviewees as benefiting from supplementary provisions in agreements. The mining sector can have unique infrastructure needs depending on the location and size of a mining development that would be difficult to address in a general law.[77] Liberia's mining law merely states that mineral rights holders have "the right to install any and all industrial infrastructure necessary for and incidental to mine or quarry operations, in accordance with prevailing standards of the mining and quarry industries worldwide, this law and the regulation."[78] The agreement for the Western Cluster iron ore project is used to go into much more specifics, requiring the company to build a two-lane, asphalt paved, all-weather road connecting Tubmanburg and the Mano River and a railroad from the mines to the port. It also reserves ownership for the roads and the fixed assets of the railroad for the government, while requiring the company to maintain them.[79]

Similarly, third-party usage of infrastructure is often dealt with through such supplementary agreements.[80] Liberia's mining law again merely states that company infrastructure "within the area subject of the mineral rights may be used by government or third parties provided however, that fair compensation shall be paid and that such use does not interfere with or hinder the [company's] operations."[81] The Western Cluster agreement then again supplements that with substantial provisions detailing third party access to the project's port, railways and power supply, how fees for use will be set and the costs and revenues divided.[82] As addressed later in this paper in the discussion of key terms, the specificity of these provisions to the project, its needs and location make it infeasible to establish them in a generally applicable law.[83]

Project specificity can also require supplementing agreements establishing the minimum mineral output level a company is required to maintain. This is an example of a provision that can be difficult to set out in legislation because it will depend on factors specific to the mine site, the mineral being mined, the market, etc.[84] Local community provisions, from development to resettlement, were also mentioned as often needing supplementing agreements due to their specificity.[85] One expert interviewed also raised the debt-to-equity ratio as a provision that, due to weak laws and the dangers of tax avoidance, could often benefit from a supplementing agreement.[86]

Several experts with experience advising developing country governments noted that, in practice, once a country allows the possibility of negotiating an agreement with supplementary provisions, it can easily find itself with a final agreement that supplants the law.[87] Companies, seeing that there is room to negotiate can often use political pressure or political connections to expand what is available for discussion, and achieving terms that are in conflict with the law.[88] Strong political will, clear limits on the discretion of the negotiating team, as well as strong public accountability can all help guard against such scenarios.[89] The agreement with Ivanhoe Mines for the Oyu Tolgoi Project is one such example. At the time, the mining law allowed for the negotiation of an agreement on tax stabilization only, but the company made additional requests such as investment allowances not foreseen by the law. However ultimately parliament refused those changes and the contract only supplements the law.[90]

Stabilization Clauses: Both the research and the interviews found that one of the most frequent (and contentious) mechanisms for supplanting the law is including stabilization provisions in the contracts.[91] The study's contract matrix shows stabilization clauses take one of two forms. First, there are those that exempt the company from being bound by new laws or regulations that might be enacted that negatively impact the company's rights and obligations under the agreement. This is the type of clause the study found Sierra Leone still negotiating, even as it builds its mineral governance including the passage of the Mines and Minerals Act of 2009. The government's agreement with London

77 "International Advisor 2." Telephone interview. 22 April 2015.
78 Minerals and Mining Act, Liberia, Art. 20.10 (2000).
79 Western Cluster Ltd. And Liberia, Western Cluster project, Arts. 6.1, 6.6, 6.7 (2011).
80 "International Advisor." Telephone interview. 23 April 2015.
81 Minerals and Mining Act, Liberia, Art. 12.1 (2000).
82 Western Cluster Ltd. And Liberia, Western Cluster project, Arts. 6.1, 6.6, 6.7 (2011).
83 "International Advisor." Telephone interview. 23 April 2015.

84 Ibid.
85 "International Advisor 2." Telephone interview. 22 April 2015.
86 "International Advisor." Telephone interview. 23 April 2015.
87 "International Advisor 1." Telephone interview. 28 April 2015.
88 "International Advisor." Telephone interview. 12 March 2015.
89 Ibid.
90 "International Advisor 1." Telephone interview. 28 April 2015.
91 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 102.

Mining for an iron ore project exempted it from paying the statutory tax rate.[92] Meanwhile the stabilization clauses in agreements negotiated prior to the law, such as the one with Sierra Rutile Limited specifically supplanting any laws (including the subsequent 2009 Act) in instances where the provisions of law are inconsistent with those of the agreement, remain in effect.[93]

A typical example of this type of clause comes from Guinea's Zogota agreement:

> "The government warrants the company from the date of grant of the concession and throughout its full duration the stabilization of current legislation and of all provisions, particularly fiscal and concerning customs and excise, stipulated in this agreement. Accordingly, all changes to current legislation, particularly fiscal and/or concerning customs and excise, after the date of grant of the concession that would as a result increase, whether directly or indirectly, the company's tax and/or customs and excise charges would not be applicable for it.
>
> On the other hand, the company may validly take advantage of such changes if their effect is to reduce its tax and/or customs and excise charges."[94]

This type of stabilization clause can be a politically contentious issue as it is seen as inhibiting a country's sovereignty by restricting the government's ability to make and pass laws. Such far-reaching exemptions from the application of new laws and regulation includes environmental and social regulations, potentially preventing the government from adopting and requiring current environmental best practices for all of the country's mining projects.[95]

The second type of stabilization attempts to establish economic equilibrium. It does not exempt the company from application of new laws or regulations, but entitles it to be compensated by the government for any materially adverse financial effects it suffers as a result. Typically, if changes favor the company, it is allowed to enjoy those benefits.[96] See the RV Investment agreement in Azerbaijan:

"The rights and interests accruing to [the company] under this agreement and its sub-contractors under this agreement shall not be amended, modified or reduced without the prior consent of [the company]. In the event that any governmental authority invokes any present or future law, treaty, intergovernmental agreement, decree or administrative order which contravenes the provisions of this agreement or adversely or positively affects the rights or interests of [the company] hereunder, including, but not limited to, any changes in tax legislation, regulations, or administrative practice, or jurisdictional changes pertaining to the contract area, the terms of this agreement shall be adjusted to re-establish the economic equilibrium of the parties, and if the rights or interests of [the company] have been adversely affected, then [the state-owned mining company] shall indemnify [the company] for any disbenefit, deterioration in economic circumstances, loss or damages that ensue therefrom."[97]

Increasingly, stabilization clauses, when used at all, are heavily circumscribed to apply only to specific fiscal provisions and only for specific lengths of time tied to the time necessary for a company to repay its financing. Guinea recently limited stability to tax provisions and for a maximum of 15 years and Burkina Faso is considering limiting tax stability to no more than 20 years.[98] Shorter, more focused stabilization also helps address the administrative difficulties these provisions can cause by creating varying contracts with varying tax provisions that must be overseen and enforced by institutions frequently operating under severe capacity limitations.

In some countries stabilization clauses require companies to accept higher tax rates. In Chile and Peru, two countries with strong legal frameworks and where mineral rights are granted through a strict licensing regime, both allow for stabilization agreements to supplement the law. Companies that want such agreements are required to pay additional taxes or royalties,

92 London Mining Company and Sierra Leone, London Mining project (2012).

93 Sierra Rutile Ltd. and Sierra Leone, Rutile project (2001).

94 BSG Resources and Guinea, Zogota project, Art. 32 (2009).

95 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 102.

96 Allen & Overy, "Guide to Extractive Industries Documents – Mining," 2013, op. cit., p. 12.

97 RV Investment Group Services, LLC and Azerbaijan, Kedabek gold mining project, Art. 21 (1997).

98 Norton Rose Fulbright, "West Africa's wave of mining reform," (January 2014).

essentially a fee for the increased fiscal protection. No companies in Chile have as of yet been willing to do so.[99]

Contracts for Exceptional Circumstances: Experts say there can be rare occasions where a project is so large it warrants the exceptional regulation of a negotiated agreement,[100] though some international experts point out the criteria for what constitutes an exceptional project is not clearly defined.[101] Generally speaking, they would be projects of such significant scale that the existing legal regime related to mining, taxation, transportation, etc. proves inadequate. For instance longer leases than provided by existing law might be required; special provisions around water rights or power generation might be necessary. In these circumstances, a negotiated agreement could allow the needed flexibility to make the project feasible.

The clearest examples of such situations are in Australia. The use of negotiated agreements, which were then enacted into law through special agreement acts, in Australia really began in the 1950s when its legislation was largely outdated or inadequate for dealing with large-scale mining projects, particularly those involving substantial construction of infrastructure. The agreements allowed for terms suited to the circumstances of such projects without requiring immediate legislative reforms, which would have been a time consuming process of piecemeal amendment of numerous statutes. They were generally used for massive projects of major economic importance. Restrictions on the state's ability to borrow money prevented them from financing the infrastructure, requiring a mechanism for securing private investment. The required scale and infrastructure investment were typically the determinative factors in the decision to negotiate an agreement.[102] In 1968 for example, the government of Queensland passed the Central Queensland Coal Associates Agreement Act which ratified the agreement establishing four mines to develop coal deposits in the Bowen Basin which would eventually supply more than half of the country's coal exports. An agreement was used because the mines required the construction of towns, railways and a coal port. In contrast, the Blackwater mine in that same Bowen Basin was licensed under the Coal Mining Acts because it had access to existing infrastructure.[103] Other rationales for negotiated agreements in Australia include the infeasibility of granting the necessary access to the land, to water resources or providing the certainty of tenure the project requires through generally applicable legislation.

Agreements can also facilitate the obtaining of better financing for companies by signaling the government's commitment to and support for the project.[104] Project costs in developing countries or in remote locations can be quite high, necessary infrastructure often doesn't exist, higher operating costs mean higher initial capital expenditures and the country's rule of law and bankruptcy protections may be weak. In those circumstances companies, their investors and financiers desire reassurance they can recover their investment.[105] An agreement, not only stabilizing fiscal provisions or signaling the government's support for the project but also implicitly endorsing the company's ability to develop and manage it, mitigates some of the risk and can lower the cost of financing. They provide even greater authority and security if they are codified into statutory law.[106]

Australia has been criticized for lacking clear criteria on when it is appropriate to negotiate, and the agreements have been subject to many of the criticisms leveled at negotiated agreements in developing countries. An independent review commissioned by the government in 2002 found public concern about the lack of public involvement in negotiations and the committee recommended a substantially reduced role for state agreements.[107] In practice they have already become much rarer.[108] One expert interviewed suggested that because tax laws are federal, these provincial government agreements did not provide sufficient guarantee for companies or benefits for government

99 Sachs, Toledano, Mandelbaum, with Otto, "Impacts of Fiscal Reforms on Country Attractiveness," 2012, op. cit., p. 360

100 "International Advisor." Telephone interview. 9 March 2015; "Corporate Lawyer." Telephone interview. 4 March 2015.

101 "International Advisor 1." Telephone interview. 22 April 2015

102 Anne Fitzgerald, "Mining Agreements: Negotiated Frameworks in the Australian Minerals Sector", Prospect Media, p. 8 (2001).

103 Ibid, 42.

104 Hillman, "The Future Role for State Agreements," 2006, op. cit., p. 298.

105 "Government Official." Telephone interview. 21 April 2015.

106 "Corporate Lawyer." Telephone interview. 29 April 2015; Otto, 2002, op. cit.

107 Hillman, "The Future Role for State Agreements," 2006, op. cit., p. 294.

108 "Corporate Lawyer." Telephone interview. 29 April 2015.

and so have been largely discontinued.[109] Of the two major mining states, Queensland has not entered into any such agreements since the 1980s, and according to several experts Western Australia has also not done so in a number of years.[110]

BENEFITS AND CHALLENGES OF NEGOTIATING CONTRACTS

Among those interviewed, negotiating agreements is generally not a well thought of approach to natural resource management at the moment. When asked about recommended best practices for negotiating mining contracts, one mining lawyer with extensive experience advising governments quipped, "avoid negotiated agreements."[111] As more and more countries move towards licensing regimes you hear very few justifications for negotiation. One is to facilitate extremely large mining projects requiring special accommodation as discussed above. Those instances are rare.[112] The other situation where negotiation is still widely used is in countries with a nascent mining sector and/or an underdeveloped legal framework for minerals.

Sierra Leone offers one such example. After it emerged from its civil war in the early 2000s it was a post-conflict country, with little infrastructure, weak institutions and a desperate need for investment and development. The government faced a difficult choice. It could wait to open the country to mining and spend years and resources it didn't have trying to develop its capacity, its mining, environmental, tax and labor legal frameworks, and its governance mechanisms with no guarantees it would pay off or it could forge ahead knowing it is not an ideal scenario in the hope that a successfully negotiated mining project would help them develop that capacity while also providing economic growth, revenue, development and employment opportunities. Given the intense need, the public pressure to show results and the country's political instability the government made the decision to negotiate agreements.[113]

STUDY COUNTRIES RANKED ON TRANSPARENCY INTERNATIONAL'S CORRUPTION PERCEPTION INDEX (2014)

Country	*Rank*	*Score*
Australia	**11**	**80**
Canada	**10**	**81**
Chile	**21**	**73**
Brazil	**69**	**43**
Mongolia	80	39
Burkina Faso	85	38
Peru	**85**	**38**
Philippines	85	38
Zambia	**85**	**38**
Liberia	94	37
Ecuador	110	33
Mozambique	119	31
Sierra Leone	119	31
Azerbaijan	126	29
Cameroon	136	27
Guinea	145	25
DRC	154	22
Afghanistan	172	12

Bold: Licensing Regimes

Unfortunately, the research suggests the same circumstances forcing governments to negotiate contracts make negotiation a dangerous proposition. Inexperience and a desperate need for investment and development put governments in very poor bargaining positions. Asymmetrical information and a poor understanding of the complexities of the agreement undermine negotiations. Weak central government and public institutions hamper government coordination and management. Capacity restraints and the high cost of enforcement hinder effective oversight.[114] In these contexts, negotiated agreements can create their own issues:

109 "International Advisor 1." Telephone interview. 28 April 2015.

110 Fitzgerald, "Mining Agreements," 2001, op. cit; "The Future Role for State Agreements," Hillman, 2006, op. cit; "Corporate Lawyer." Telephone interview. 13 March 2015; "International Advisor 1." Telephone interview. 28 April 2015.

111 "International Advisor 1." Telephone interview. 28 April 2015.

112 "Corporate Lawyer." Telephone interview. 4 March 2015; "International Advisor." Telephone interview. 11 March 2015.

113 "Government Official." Telephone interview. 19 March 2015.

114 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 34.

Discretion: One of the most common criticisms of negotiated agreements is the significant discretion it gives to a small number of people to conclude wide ranging and potentially lucrative deals, often with little to no oversight, public consultation, or transparency. Oftentimes negotiations are conducted by someone at the ministerial level or higher, and these are political appointees who may lack the necessary knowledge in this area.[115] These are fertile conditions for corruption. If negotiations are going to be conducted, the government needs an advisory board or an inter-ministerial commission that includes high-ranking representatives from all relevant ministries.[116] Its composition, mandate and decision-making process should be enshrined in legislation to give added weight to its authority, but even then it is no guarantee of success.

The current laws in Sierra Leone allow less discretion than they did a decade ago. Its legal framework has evolved.[117] Yet the licensing process is vague, companies negotiate directly with the Ministry responsible for mining and the Minister still appears to be able to grant mining licenses at his discretion.[118]

Countries that negotiate contracts are increasingly dealing with the issue by narrowing the scope of that discretion. Both legislation restricting the terms that are open to negotiation and using model mining agreements can limit the risks that go along with wide-ranging discretion. A model mining agreement is currently being developed in Sierra Leone for these reasons.[119] (The trend towards model mining agreements is discussed further later in this report.)

While strong correlations should not be drawn between the rankings of the study countries on Transparency International's Corruption Perception Index (see Box) and their choice in mineral rights regimes, it does show that the study countries with the lowest levels of corruption in their public sectors also tend to use licensing regimes. We note here that *discretion and corruption are not issues exclusive to contracts.* A licensing regime might restrict discretion through standard terms set out in the generally applicable mining laws, but that does not necessarily extend to the ancillary agreements related to the project. Several interviewees from Australia mentioned preferential treatment for a company in the form tax breaks or exemptions in infrastructure agreements related to mining projects as a past issue.[120]

Confidentiality: Given that mining agreements involve publicly owned resources and can have significant repercussions for a country's development, mining agreements are not just contracts concluding commercial terms; they are public policy documents as well. Yet, they have historically been seen as strictly confidential, and in some past instances, they were not shared with even the ministries that had responsibilities and obligations stemming from the agreement's terms.[121] The stability of an agreement requires those subject to it to accept it as legitimate. That, in turn, requires knowledge of what it contains.[122]

In the last decade, there has been a powerful movement away from that approach and towards the transparency of agreements between governments and mining companies. The Extractive Industries Transparency Initiative (EITI), an initiative promoting the open and accountable management of natural resources has gained tremendous traction. Forty-eight countries now implement EITI and another 32 comply with its requirements, including the countries publishing detailed reports on the mining revenue they receive. EITI also encourages its members to publish their mining contracts.[123]

Countries increasingly are now publishing their mineral agreements, including a number in this study. Afghanistan, DRC, Guinea, Liberia, Mozambique and Sierra Leone all now publicly release their mining agreements. Peru, which uses a licensing regime for its mineral rights, does publish its investment promotion agreements which are sometimes used for mining projects (see explanation above). This transparency can be due to legislative requirement (Liberia

115 "International Advisor 1." Telephone interview. 28 April 2015.
116 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 23.
117 "Government Official." Telephone interview. 19 March 2015.
118 "Government Official." Telephone interview. 10 March 2015.
119 Ibid.

120 "Corporate Lawyer." Telephone interview. 4 March 2015; "Corporate Lawyer." Telephone interview. 16 March 2015.
121 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 204.
122 Sachs, Toledano, Mandelbaum, with Otto, "Impacts of Fiscal Reforms on Country Attractiveness," 2012, op. cit., p. 380.
123 Extractive Industries Transparency Initiative, available at: eiti.org (last visited on 31 March 2015).

and Mozambique), voluntary commitments (DRC and Guinea), or as the result of the ratification of agreements in Parliament (Sierra Leone and Liberia). Recent contracts in Guinea, Liberia and Mongolia reviewed for this study have even included clauses specifically making them public.[124] In other instances, companies have made agreements public through the filings and disclosures they are required to make to be listed on various stock exchanges, including several mining agreement between SEMAFO and the government of Burkina Faso.[125]

The study found no indications supporting a basis for fears that contract disclosure will have a chilling effect on investment. Liberia, for example, has signed a number of large mining agreements since enacting legislation to require public disclosure of the agreements. Disclosing contracts might initially appear to conflict with the confidentiality provisions included in many contracts, but most restrictions typically focus on protecting commercially sensitive data and information, the definition of which usually does not include the contract itself.[126] Countries like Guinea that have retroactively made its contracts public have not experienced any issues.[127]

The reality is that many "confidential" agreements are already available, albeit often on expensive commercial databases regularly used by companies. As more than one government advisor observed, companies have access to other companies' contracts either through their lawyers, experts, databases or because they communicate with each other or because in countries like Sierra Leone where contracts are ratified in Parliament, they are public. This allows them to compare terms and ask the government during negotiations to explain why the terms are different.[128] This is another area where the government suffers from asymmetrical information. In that context, disclosing agreements publicly only helps with the information asymmetry between companies and governments.[129]

Such transparency efforts are also intended to improve governance and accountability and through public accountability combat the risks created by discretion. As one government official posited, there are only two explanations for poor agreements: corruption or a lack of capacity and experience on the part of the government.[130] Transparency can address not just the former but also to some extent the latter, by making the agreements available to those with the capacity to analyze and bring attention and scrutiny to poor agreements.[131] This is particularly true when contracts are ratified by parliament. If properly done, the legislative discussion on the contract and opportunity for greater public involvement allows for oversight and review before the contract is finalized and implemented. It can allow for broader support and answer the frequent criticism that the public was not involved in negotiations. In Mongolia, after review Parliament sent the Oyu Tolgoi Project agreements back to the government to make changes.[132] Clearly, transparency efforts are having some success in mitigating the issue of discretion in contract negotiations, but in the present they are still insufficient.[133]

Corruption, lack of political will, or simple logistical issues can keep contracts hidden even in countries with transparency laws. Afghanistan's new Minerals Act does not require the publication of all mining agreements, preventing civil society organizations (CSOs) from accessing certain mining contracts of interest to them.[134] In Sierra Leone, contracts are published online, but the country's high illiteracy rate and low level of Internet penetration render them unavailable to large sections of the population.[135] In many cases when contracts are available, domestic education efforts are still needed to enable the public to understand the often complex agreements. The time and effort required of CSOs and the public to hold the government

124 BSG Resources and Guinea, Zogota project (2009); African Aura Resources Ltd. and Liberia, Aura project (2004); Western Cluster Ltd. And Liberia, Western Cluster project (2011); Ivanhoe Mines Ltd, Rio Tinto International Holdings Ltd. and Mongolia, Oyu Tolgoi project (2009).

125 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 205.

126 Allen & Overy, "Guide to Extractive Industries Documents – Mining," 2013, op. cit., p. 15.

127 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 207.

128 "International Advisor." Telephone interview. 2 March 2015; Sachs, Toledano, Mandelbaum, with Otto, "Impacts of Fiscal Reforms on Country Attractiveness," 2012, op. cit., p. 380.

129 "International Advisor." Telephone interview. 23 April 2015.

130 "Government Official." Telephone interview. 21 April 2015.

131 Ibid; "International Advisor." Telephone interview. 23 April 2015.

132 "International Advisor 2." Telephone interview. 28 April 2015.

133 "Government Official." Telephone interview. 21 April 2015.

134 "Civil Society Representative." Telephone interview. 24 March 2015.

135 "Civil Society Representative." Telephone interview. 17 March 2015.

accountable for the terms of each negotiated contract still currently remains much more significant than in a licensing regime with its uniform terms.[136]

Implementation and Monitoring: Negotiating terms for a mineral agreement often focuses on not only provisions like the rate of income tax, but also the definition of income. Negotiating is determining what can be deducted against income, what losses can be carried forward, or how to calculate base rates to determine royalties. Everything could be open for discussion and thus every contract a government negotiates can be different down to a definitional level. For a country lacking the institutional capacity to monitor and enforce a uniform law, properly monitoring and enforcing a range of differing contractual terms is a practical impossibility. Companies are aware of this, and it may undermine what little leverage the government may have.[137]

Governments need to think strategically in addressing these challenges during the negotiations. The implementation and administration of mining contracts can be made easier if the government negotiates terms that are best suited to its capacities and limitations.[138] They should also negotiate for the inclusion of provisions to address key implementation issues such as requiring periodic auditing by an international auditor or forensic accounting (at the company's expense) and strict penalties.[139] The government should also develop compliance manuals, detailing all of its obligations under an agreement.[140] At the same time, governments should be developing implementing institutions, such as Sierra Leone's National Minerals Agency. This is part of a long-term process of capacity building, including bringing professionals to staff the institutions, even if it requires paying higher rates than other civil servants and offering education support and training to increase the pool of available domestic skills.[141] *(Implementation is discussed further later in this paper.)*

Undermining rule of law: Perhaps one of the greatest problems presented by negotiating contracts is the risk it creates of hindering the growth, or even actually undermining the stability, of a country's legal framework. There is some basis for concern. Negotiating agreements that depart from, or even supplant the law upset the hierarchy of law. In situations where the legal framework is weak or insufficient to properly regulate the mining sector, agreements often include terms in the contract provisions that should be enshrined in the law.[142] Not only can this open terms for negotiation that shouldn't be, such as environmental protection provisions, it can also result in the transfer of the government's administrative and regulatory responsibilities to the company.[143] The government abdicating its duties to a company creates a situation ripe for regulatory inaction, thereby preventing needed evolution and undermining trust in an unresponsive and stagnant legal regime.[144]

The government maintaining its administrative and regulatory powers may not bolster the stability of law either. The terms of many of these agreements put the government in a difficult position of conflicting interests: having an interest in the financial success of a mining project, while simultaneously required to act as a regulator and enforcer of laws and regulations that could negatively impact the profits it is hoping to share. This would be a difficult balance for government regardless, but even more so in a country where the weakness of its administrative and regulatory institutions necessitated negotiating agreements in the first place.[145] Even in situations where the government is successful in balancing these countervailing interests, the situation creates the risk of being perceived as favoring companies and profits over enforcing the law.

That can be a significant political risk, particularly as countries with weak institutions frequently also experience a lack of confidence in government by the public. These risks are not limited to government. Negotiated contracts can be closely linked in content or perception to the officials or government that

136 "Government Official." Telephone interview. 21 April 2015.
137 "International Advisor." Telephone interview. 5 March 2015.
138 "International Advisor." Telephone interview. 23 April 2015.
139 "Government Official." Telephone interview. 21 April 2015
140 "International Advisor 2." Telephone interview. 22 April 2015.
141 "Government Official." Telephone interview. 21 April 2015

142 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 34
143 "International Advisor." In-person interview. 8 March 2015.
144 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 34.
145 Ibid.

negotiated them.[146] Following political turnover, new governments have found it politically expedient to, or have had public license to, re-examine the terms of contracts negotiated by their predecessors.[147]

Necessary efforts to develop and strengthen the country's legal regime as well as the government's administrative and financial management capacities can often be stymied by a system of negotiated agreements that prevents coherent treatment of parties and the general applicability of the law.[148]

Sanctity of Contract: While drafting and amending legislation and regulations can be a slow process, laws are not set in stone and can be amended, repealed, or supplemented over the course of the life of a mining project, causing uncertainty as to the terms. To minimize the risk of unfavorable changes in law, particularly to the fiscal provisions, companies may strongly favor stabilization provisions. In a similar vein, companies may strongly resist government requests for an amendment to the contract provisions on the basis that this violates the terms of the deal the parties negotiated and that both parties should be required to honor ("sanctity of contract").[149] However, in practice, while companies may protest when requested to revisit a provision by their state counterpart, companies are equally likely, if not more so, to request amendments to the mining agreements to accommodate the changing circumstances over the life of a mining project. Contracts, no matter how well drafted, are unlikely to be adapted to meet all the needs of a multi-decade project without the flexibility to be amended from time to time.

146 EI Sourcebook, "Model Mine Development Agreement (MMDA)".

147 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 34.

148 Ibid.

149 Francky Lukanda, "Renegotiating Investment Contracts: The Case of Mining Contracts in Democratic Republic of the Congo," Geo. Mason J. Int'l Com. Law, Vol. 5:3, pp. 301-360 (2014).

Model Mining Agreements

In response to many of the issues with contracts, there is a growing trend towards limiting what is negotiable. Many interviewees argued that the logical conclusion of this shift is a pure licensing regime where all terms are set out in legislation and regulations. But that can be a long process and in the interim an option that has been gaining a lot of traction as a bridge between a pure licensing regime and negotiable contracts is a model mining agreement.[150] Indonesia for example went through a number of generations of model agreements before eventually converting to a pure licensing regime in 2009.[151] One senior government official described a model agreement as "the way forward" for Sierra Leone, one of a number of countries developing a model agreement.[152]

The experts interviewed have found that drafting a model mining agreement is a faster and easier process than the typically lengthy process of drafting, enacting or amending the numerous laws and regulations necessary to create the strong legal framework required for an effective licensing regime. This is true even if the model agreement is enacted into law (a practice that is recommended to allow for parliamentary review and greater public discussion).[153] Liberia's Model Mineral Development Agreement is in its Revenue Code.[154]

The model is similar to a form contract in that it provides the general structure of the agreement and most terms, all of which are non-negotiable, while including carefully delimited areas that are open for negotiation, such as royalty rates within a certain range and community development and work commitments. It strengthens the government's position by narrowing the focus of negotiations. One of the lawyers who developed the Model Mining Development Agreement, a collection of example provisions from existing mine development agreements, pointed out that a smaller range of negotiable issues that the government team has to be knowledgeable on helps alleviate the government's capacity issues. A model agreement that limits negotiations to the percentage of income tax as opposed to the definition of income tax can keep a government negotiating team from becoming overwhelmed, despairing and then just signing the agreement, something that has been known to happen.

A model agreement can take away a lot of the risk for inexperienced government teams by restricting the opportunities for discretion and limiting the impact of external pressure on the negotiation. It can facilitate faster and more efficient negotiations. A number of international advisors and government officials noted that often the most difficult part of negotiations is reaching internal government consensus. Having a model agreement can ease that process. They also provide the opportunity to standardize key terms across a country's future agreements, which would be a significant step towards addressing the capacity problems exacerbated in many developing countries by having to implement and monitor different terms for every project.[155]

Model agreements give the government the opportunity to present their terms to companies as opposed to being presented with and negotiating off of the company's draft agreement. Working off a company's proposal not only starts negotiations from the company's perspective but uses their terms and definitions, which can lead to inconsistencies between different agreements within a country and increase the challenges of administration.[156]

Having a model mining agreement still requires the government to possess the political will to require companies to negotiate based on the model and to refuse to open the non-negotiable terms up to discussion.[157] An effective model agreement has to be well drafted and has to have the support of government. Basing negotiations off of a poor model agreement and/or allowing non-negotiable provisions to be modified as a result of political pressure from the company can result in the same problems of negotiations that lack a model.[158] These issues, though far from solely responsible, reportedly contributed to the original, heavily criticized contract between the government of

150 Sachs, Toledano, Mandelbaum, with Otto, "Impacts of Fiscal Reforms on Country Attractiveness," 2012, op. cit., p. 381.

151 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 35.

152 "Government Official." Telephone interview. 10 March 2015.

153 "International Advisor." Telephone interview. 5 March 2015.

154 "Liberia: Poverty Reduction Strategy Paper – Annual Progress Report," International Monetary Fund, p. 18 (February 2012).

155 International Advisor." Telephone interview. 23 April 2015.

156 Ibid.

157 "International Advisor." Telephone interview. 5 March 2015; "International Advisor 1." Telephone interview. 28 April 2015.

158 "International Advisor 1." Telephone interview. 28 April 2015.

Liberia and Mittal Steel.[159] Governments report that companies presented with model mining agreements often claim its project is unique and too different to fit under the model. While there might be certain extremely large projects that don't fit within the model agreement, several interviewed experts believe the vast majority can be dealt with through it.[160] The model is designed to establish the basic terms while allowing for the necessary project specifics to be negotiated.[161]

If given proper government attention a well-drafted model agreement can be developed relatively quickly. If contracted to an international expert, it could be done in as little as a few weeks. If it is a more complex situation or involves extensive stakeholder engagement, for example, it could take a year or two.[162] However, unlike a contract negotiation with a company, there is no pressure on a government to move quickly to finalize a model agreement, so the process can take much longer than it should. Even when unnecessarily lengthy, the development process for a model agreement is substantially faster and easier than drafting and enacting the legal framework required for a licensing regime.[163] For this reason, countries might stop their efforts after finalizing their model mining agreement and not seek to strengthen their laws.

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159 Global Witness, "Heavy Mittal? A State within a State: The inequitable Mineral Development Agreement between the Government of Liberia and Mittal Steel Holdings NV," (October 2006); "International Advisor 1." Telephone interview. 28 April 2015.

160 "International Advisor." Telephone interview. 9 March 2015.

161 "Government Official." Telephone interview. 21 April 2015.

162 "International Advisor 1." Telephone interview. 28 April 2015.

163 "International Advisor 2." Telephone interview. 22 April 2015; "Government Official." Telephone interview. 21 April 2015.

Key Terms

The comparative review and analysis of the texts in the legislative and contractual matrices illustrated that key mining provisions are broadly similar, but their placement in legislation or agreements often reflects a country's legal regime governing mining, underlying gaps in the law, and the varying motivations behind the choice to address an issue in an agreement instead of the law. Even when they are included in mining agreements, the type of agreement used can also vary depending on a range of factors, including but not limited to the priorities of the country, the era in which the agreement was signed, the investment climate, and the political, economic and geographical circumstances of the project. The following sets out the key provisions related to mining projects as well as how and where they are typically dealt with in different

KEY PROVISIONS	LEGISLATION	CONTRACT
Fiscal Provisions		
Bonuses		Generally seen in contracts
Royalties	Commonly seen in both	Commonly seen in both
Progressive Fiscal Terms	Starting to be introduced in law	
Capital Gains	Commonly seen in both	Commonly seen in both
Tax Exemptions	Poorly suited for contracts	
State Participation	Commonly seen in both	Commonly seen in both
Environmental and Social Provisions		
Impact Assessments	Seen in both but applied differently	Seen in both but applied differently
Water Rights	Commonly seen in both	Commonly seen in both
Community Development		Appears more frequently and with greater detail in contracts
Linkages		
Procurement	Basics established in law	Often supplement the law
Training	Basics established in law	Often supplement the law
Employment	Basics established in law	Often supplement the law
Technology Transfer	Basics established in law	Often supplement the law
Value Addition	Basics established in law	Almost always in contracts
Infrastructure	Basics established in law	Often supplement the law
Third-Party Usage	Basics established in law	Often supplement the law
Other		
Term	Generally set in law	
Stabilization		Almost always in contracts
Confidentiality		Almost always in contracts
Dispute Resolution		Almost always in contracts
Periodic Review		Almost always in contracts

regimes. When discussing the inclusion of terms in the law versus in contracts, those terms that do or should appear in legislation should be considered relevant to licensing regimes.

FISCAL PROVISIONS

One of the challenges for a government is designing a fiscal regime that balances the need to attract foreign investment with capturing a fair return from the country's natural resources. Individual fiscal terms must be considered in the context of the overall fiscal regime. Royalties serve a different purpose than income tax. Some are designed to generate revenue immediately with the start of production, others, like income tax can take years to generate revenue for the government. Some fiscal provisions require higher levels of administrative capacity than others.

Decisions on the fiscal regime and how to impose it should be tailored with an understanding of the capabilities of the government to implement and enforce what are usually quite complex provisions.[164] Fiscal provisions are one of the most likely rationales for a regime that allows agreements to supplant or amend existing law. This can be because, for companies, the fiscal provisions are the priority. According to one expert, it can also be because generally the most developed law in a developing country is its tax law. For that same reason, agreements complementing legislated fiscal terms are less common.[165]

Royalties: Royalties are unique to resource extraction and traditionally the sector's primary, and most controversial, form of taxation.[166] In the study countries, royalties have been addressed in both agreements and legislation. While companies generally think of royalties as a tax, many countries consider royalties to be compensation for the company's right to exploit and profit from the country's non-renewable mineral resources. For that reason, royalties in these countries tend to be set forth in the mineral laws and overseen by the ministries responsible for mining. In countries like Peru and the Philippines that consider royalties a form of excise tax, royalties are governed by the fiscal laws and administered by the finance ministries and the tax collection authorities.[167]

Enshrining royalty rates in the law can allow countries to standardize them across all minerals. Some countries, frequently ones with older mining laws, apply varying royalty rates depending on the mineral. This approach is based on old sovereignty issues from the period when the law was enacted and the government viewed certain minerals as more valuable or more important to the country than others. A number of countries with such laws, such as Zambia, have standardized those royalty rates in recent years.[168]

The critical issue for governments charging royalties is ensuring an accurate valuation of the minerals being sold. Mineral sales valuation has proven susceptible to manipulation through mechanisms such as transfer pricing, where companies use below-market sales to affiliated companies to establish an artificially low base for calculating royalty payments.[169] To combat such issues, it is critical for governments to require companies to sell to affiliated companies at the same prices they would if it were an "arm's-length transaction." Sierra Leone's Mines and Minerals Act state:

> "[T]he holder of a mineral right shall make sales commitments to affiliates only at prices based on or equivalent to arms length sales to non-affiliated purchasers and in accordance with such terms and conditions on which agreements would be made if the parties had not been affiliated."[170]

To ensure this occurs governments must establish a fixed point where valuation should be measured and ensure that measurement accurately determines the minerals value. Liberia failed to take these steps in the rather infamous Mittal Steel agreement, which clearly illustrates the dangers that can come from negotiating fiscal provisions. Its royalty provision stated: "The concessionaire shall pay to government in dollars a royalty at the rate of four point five (4.5%) percent of

164 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013).
165 "International Advisor 2." Telephone interview. 22 April 2015.
166 James Otto, "Mining Royalties: A Global Study of Their Impact on Investors, Government, and Civil Society," World Bank, p. 82 (2006).

167 Ibid.
168 Ibid.
169 World Bank Centre for Exploration Targeting, "How to Improve Mining and Tax Administration and Collection Frameworks: A Sourcebook," (April 2013).
170 Mines and Minerals Act, Sierra Leone, Art. 154.2 (2009).

the invoiced sales of iron ore FOB Yekepa." Despite the reference to the FOB (free on board) price, the agreement does not specify how the iron ore should be priced or require an arm's length transaction, ceding the power to set the sales price. Since royalties are calculated based on sales price, under the agreement the company could sell iron ore to an affiliated company at artificially low prices which would decrease its tax burden and enable it to pay the government extremely low royalties.[171]

Progressive fiscal terms like windfall tax, resource rent tax: Progressive taxes like sliding scale royalties, windfall taxes or resource rent taxes are flexible fiscal mechanisms that can self-adjust to fluctuating commodity prices, and they can ensure that countries participate in increased profits when commodity prices rise (in the case of price-based sliding scale royalty or windfall tax) or when costs decrease and the return increases (in the case of the Resource Rent Tax (RRT). Such taxes are not yet common and only recently have countries started to introduce them in legislation. Licensing regimes such as Peru and Chile have included progressive taxes as part of mining law reforms, though Peru has since had to revisit and refine its approach.[172] Thus progressive fiscal terms are not often seen included in contracts. Ecuador's recent Ecuacorriente agreement for example, simply states the company is bound to the 70% tax on windfall profits set out in its tax law.[173]

Capital Gains: Extracting ore is not the only way a company can profit from a mine. The projects or mineral rights themselves can be an incredibly valuable asset for a company. In 2011 Rio Tinto bought Riversdale Mining and its coal reserves in Mozambique for US$ 3.9 billion. Governments are under increased pressure to ensure that it sees a share of the proceeds of these sales. In response, countries are increasingly attempting to impose a tax on capital gains companies receive from the sale of, or as a result of their rights to, state mineral assets.[174] Some countries impose this tax through legislation, often tax legislation, such as Canada. Burking Faso is considering a new law that will impose a 20% capital gains tax on any transfer of mining title.[175] The approach of other countries has been to include provisions in mining agreements requiring governmental approval of any change of control of a company with mineral rights, including indirect changes such as sale of a controlling interest in an external parent or holding company.[176] Recent agreements in Mongolia and Liberia reviewed for this study contain capital gains tax provisions.[177] Including such provisions in agreements can be a useful interim solution to the problem in situations where legislation on capital gains tax does not exist, but where legislation does exist, addressing capital gains in an agreement creates an opportunity to negotiate exceptions to the law. The annex to the Cam Iron Agreement in Cameroon for example gave the company a three-year exemption to capital gains tax.[178]

Signature Bonus: Bonuses are a fiscal element commonly included in negotiated contracts. They are payments of fixed, lump-sum amounts usually triggered by specific events. The most common are signature bonuses, paid on the signing of the agreement. These bonuses are popular with governments but can be unpopular with companies because they are payable years before a project becomes profitable, if it ever does at all. The analysis of legal frameworks found that a signature bonus is rarely required by law in the study countries. In Cameroon, where the reviewed law made no provision for such payments, the 2012 Cam Iron agreement included a US$ 11 million signature bonus.[179] Even in the rare instances where it is required by law, such as the DRC, the amount of the bonus is negotiated in the contract. In the reviewed Manomin agreement for example, the DRC government required a US$ 5 million signing bonus.[180]

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171 The contract was heavily criticized globally and was renegotiated – and largely rewritten – in 2007. Global Witness, "Heavy Mittal? A State within a State," 2006, op. cit.

172 Sachs, Toledano, Mandelbaum, with Otto, "Impacts of Fiscal Reforms on Country Attractiveness," 2012, op. cit., p. 360.

173 Ecuacorriente, S.A. and Ecuador, Ecuacorriente project, Arts. 18.3 (2012).

174 John Skoulding, "Capital Gains Tax – The New Resource Nationalism," Oil Council (September 2012).

175 Mayer Brown Legal Update, "Issues in relation to mining projects in Burkina Faso," (November 2014).

176 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 84.

177 Ivanhoe Mines Ltd, Rio Tinto International Holdings Ltd. and Mongolia, Oyu Tolgoi project (2009); Western Cluster Ltd. And Liberia, Western Cluster project (2011).

178 Cam Iron S.A. and Cameroon, Cam Iron project, Annex VII, Art. 3 (2012).

179 Cam Iron S.A. and Cameroon, Cam Iron Project, Art. 36(3)(a) (2012).

180 DBB Resources Corporation and DRC, Manomin project, Art. 11.5 (2009).

Tax Exemptions: Often, in an effort to attract foreign investment with a competitive tax regime, governments will include tax incentives in their mining agreements. These incentives, which might include tax holidays, loss carryforward rules, and accelerated depreciation that all decrease the taxable income, can improve the feasibility of marginal projects and promote investment in exploration. These incentives also, however, delay the government receiving revenue from the projects.[181]

Tax incentives are poorly suited for inclusion in agreements where they are susceptible to the risk of corruption, asymmetrical information, and expertise disparities; instead, they should be incorporated into tax codes.[182] It is estimated that Sierra Leone for example will lose an average of US$ 44 million per year between now and 2016 as a result of tax incentives granted to mining companies.[183] The agreements the country negotiated with the companies London Mining and African Minerals included favorable departures from Sierra Leone's corporate income tax rate.[184]

State Participation: State involvement in the extraction of its resources has always been an important and frequently contentious question between governments and companies that usually requires negotiation.[185] State ownership of its resources and the use of national mining companies in the 1960s and 1970s was an outgrowth of post-colonialism politics. State equity participation was less of a priority during the era of privatization without ever going away, and recent years have seen its return to a prominent position. As governments focus on optimizing the benefits of mining to spur development, the training, employment, and technology transfer opportunities provided by state equity participation offer an avenue to create economic linkages.[186]

One way to ensure state participation is through joint venture agreements. The Manomin JV agreement in DRC and Aurifere de Guinee in Guinea give the respective government an equity stake in the respective joint venture company and the opportunity to build economic linkages. But a country could also acquire a stake in a company through a non-joint venture negotiated agreement.

ENVIRONMENTAL AND SOCIAL PROVISIONS

Arguably the biggest trend in mining in recent decades has been the rise to prominence of environmental and social issues. Mining operations have historically been associated with significant negative impacts on the environment. Their social impacts are more complex. Impact assessments, community development, human rights, and corporate social responsibility are receiving increased public scrutiny and are being included in both mining legislation and contracts.[187]

Impact Assessments: Almost all study countries require mining companies either in legislation or in contracts to conduct some version of an environmental and social impact assessment (ESIA) as a requirement for operations. They are a critical part of the project design phase, identifying potential problems, considering how to mitigate them, and incorporating those considerations into the project's planning.

ESIA requirements can be established in domestic legislation or in the mining agreements, and that placement can result in different applications. In a licensing regime such as Zambia, an EMP or a variation thereof is a requirement for application and it will be evaluated as part of the approval process for granting the license. In contract regimes, the design and requirements of ESIAs and EMPs are terms to be negotiated and only conducted after an agreement is concluded, often making them perfunctory exercises.

181 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 34.
182 Vale Columbia Center on Sustainable International Investment, World Bank, and ICA Consulting, Background Paper for the Eighth Columbia International Investment Conference on Investment Incentives: The good, the bad and the ugly, Assessing the costs, benefits and options for policy reform, November 2013.
183 One.org, "British mining companies' exploitation in Sierra Leone," (7 November 2014).
184 London Mining Company and Sierra Leone, London Mining project, Art. 5.3 (2012); African Minerals Ltd. and Sierra Leone, Tonkolili project, Art. 19 (2010).
185 "International Advisor." Telephone interview. 23 April 2015; Louis Wells, "Government-held equity in foreign investment projects: Good for host countries?" Columbia FDI Perspectives, (3 February 2014).
186 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 34.
187 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 114.

ESIA requirements can be included in mining agreements to supplement gaps in the law. For example, in the Philippines contracts reviewed for this study, the 1992 PSA included an environmental impact requirement. Following the introduction of such provisions in the 1995 Mining Act, subsequent PSAs did not include their own impact assessment requirements.[188] However, it is not uncommon to see ESIA provisions in both legislation and agreements in the same jurisdiction. Including ESIA requirements in an agreement even if it is already provided for under the law can complement the law and provide an avenue for remedy in the case of a violation by the company that is not covered under the ESIA provisions of the law.[189]

It is also not unusual to find ESIA requirements included in both the environmental and mining law of a country.[190] Sierra Leone's Environmental Protection Act (EPA) examined in this study requires environmental impact assessment (EIA) licenses for mining projects. The completion of an EIA is also one of the conditions for obtaining a large-scale mining license, and the EIA must contain "the types of information and analysis reflecting international mining best practices."[191]

Water Rights: Mining projects require a tremendous amount of water and, if not properly managed, may have substantial impacts on water resources in their areas of operation. In regions where water is scarce, a project's usage could lower the water table and leave local communities with inadequate access to water.[192] Some agreements address this by simply referring the company to "pertinent laws, rules and regulations."[193]

In some agreements, you can see the water rights provisions in negotiated agreements supplement the law as the government's understanding of the issue evolve over the course of several iterations. Liberia's 2000 Mining Act merely states that unless otherwise specified in the agreement a mineral license gives the company the right of "use of water and other resources necessary for the execution of the work."[194] The 2004 agreement with African Aura Resources, Ltd. builds slightly on that, allowing the company to "extract as much water as required so long as it doesn't deprive the surrounding community from a constant and reasonable water source."[195] A year later another agreement supplements the law further limiting the company to the:

> "right to remove, extract and use water…provided, however that the [company] shall not deprive any person of a constant and reasonable supply of usable water from a previously utilized traditional source without replacing it…"[196]

Liberia's Regulations Governing Exploration Licenses in 2010 limited companies to using water within the license area "solely to the extent reasonably necessary for exploration if the Licensee does so in accordance with applicable environmental laws," as well as prohibited companies from depriving "any person (even temporarily) of a constant and reasonable supply of usable water from a previously utilized traditional source without replacing it, or interfere with any water rights enjoyed by any user under any agreement with the Government."[197] The agreement with Western Cluster Ltd. the following year again supplemented the new regulations, expanding and extending them beyond the exploration stage:

> "The company shall not deprive any person of a constant and reasonable supply of usable water from or pollute a previously utilized traditional source without providing an alternative source of substantially the same quality and quantity, nor shall the company, without the Minister's consent and at least 30 days prior notice to the affected communities, interfere with any water rights enjoyed by any user under any agreement with the government made prior to the date of execution of this agreement."[198]

188 Case Construction PSA, 1992, Art. 10.1(l); Mining Act, 1995, Art. 70; Vincent Tan Tiong and Philippines, Tiong project, Art. 13.1 (2009); Mt. Sinai Mining Exploration and Development Corporation and Philippines, Mt. Sinai project (2011).

189 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 124.

190 Ibid.

191 Mines and Minerals Act, Sierra Leone, Art. 131 (2009); Environmental Protection Act, Sierra Leone, Art. 18, (2000).

192 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 115.

193 Mt. Sinai Mining Exploration and Development Corporation and Philippines, Mt. Sinai project, Art. 11.2 (2011).

194 Minerals and Mining Act, Liberia, Art. 6.7(d) (2000).

195 African Aura Resources Ltd. and Liberia, Aura project, Art. 6 (2004).

196 Mittal Steel NV and Liberia, Mittal project, Arts. 9.3, 27.1 (2005).

197 Regulations Governing Exploration Licenses, Liberia, Art. 7.3 (2010).

198 Western Cluster Ltd. And Liberia, Western Cluster project, Arts. 6.3 (2011).

Even these protections remain insufficient, a company's use or discharge of water remains conditional on it adopting the most water efficient management procedures and implementing a mechanism for recycling or reuse of water, but the example illustrates the role agreements can play in supplementing the provisions of a legal regime that is by nature slower to develop.[199]

Community Development Agreements: In an effort to ensure that local and affected communities see some benefit from the mining projects, countries are increasingly requiring companies to sign community development agreements (CDAs) and sometimes to establish community development funds. While provisions requiring CDAs can be included in either law or mining agreements, in the contract regime countries examined, the detailed terms and provisions these separate agreements need to include were much more frequently detailed in the mining agreements.[200] In some countries with strong licensing regimes and indigenous populations, including Canada and Australia, the law requires consultation with the indigenous communities and allows companies to negotiate directly with, and make fund payments directly to, these communities.[201] For those countries, these agreements are rare instances of negotiations in otherwise strict licensing-based regimes.[202]

ECONOMIC LINKAGES AND LOCAL CONTENT

In the last decade, the idea that mining should be an engine of broad-based growth and development has reemerged. As laid out in the African Mining Vision, the key to this broad development is optimizing its linkages to local economies.[203] Instead of focusing on maximizing government revenue from mining, countries should focus on obtaining optimal benefits. In this strategy, governments can sacrifice some short-term fiscal benefits for medium-to-long-term non-fiscal benefits. In this context, the ability to negotiate, if done correctly, can be quite beneficial in giving the governments the flexibility to optimize economic linkages.[204]

One way to optimize a mining operation's linkages to local economies is through local content provisions. They aim to develop a competitive local workforce, create employment opportunities for citizens, facilitate the transfer of technology, and advance the domestic private sector.[205] The need to grow the desired economic linkages while maintaining the economic viability of different projects can require a level of flexibility difficult to achieve solely in generally applicable law. As discussed above, local content provisions need to be specific to the project, and a number of experts and government officials interviewed believe that negotiated agreements can complement generally applicable laws with more detailed provisions.[206]

Employment: A case in point comes from the Philippines: In the Philippines, the Mining Act requires companies to give preference to qualified Filipino citizens. PSAs like Mt. Sinai and Vincent Tan Tiong go further in requiring their companies to create time-tables for achieving certain percentages of Filipino citizens at all levels of employment.[207]

Training: To achieve the local employment requirements, most of the agreements in this study also include requirements for the training of nationals. These requirements, which typically include creation of a plan for training and promotion of staff, and requirements that the company replace expatriate staff with local employees who have completed that training, are

199 Perrine Toledano and Clara Roorda, "Leveraging Mining Investments in Water Infrastructure for Broad Economic Development: Models, Opportunities and Challenges," CCSI Policy Paper, (March 2014).

200 Sierra Leone is one of the few countries that has tried to include detailed CDA requirements into Law (http://www.sdsg.org/wp-content/uploads/2011/06/Sierra-Leone-Mines-Minerals-Act-2009.pdf) and adopt a model CDA http://www.nma.gov.sl/content.php?p=show_news&id=73 - While having the virtue of making mandatory some fundamental principles of CDAs, this process is also criticized for making CDAs a box ticking exercise for companies and not being flexible enough to accommodate community-specific needs.

201 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 145.

202 "Corporate Lawyers." Telephone interview. 17 March 2015.

203 African Union,"African Mining Vision." African Union. (February 2009).

204 "Government Official." Telephone interview. 19 March 2015.

205 Local Content Laws and Contractual Provisions, Columbia Center on Sustainable Investment, available at http://ccsi.columbia.edu/work/projects/local-content-laws-contractual-provisions.

206 "Government Official." Telephone interview. 22 April 2015.

207 Mining Act, Philippines, Art. 62 (1995); Mt. Sinai Mining Exploration and Development Corporation and Philippines, Mt. Sinai project, Art. 13.1 (2011); Vincent Tan Tiong and Philippines, Tiong project, Art. 13.1 (2009).

often negotiated in agreements.[208] The minimum annual expenditures for training when required are often set in agreements.[209]

Technology Transfer: In the study countries, technology transfer provisions appear much more frequently in contracts than in the reviewed legislation. Joint venture agreements are by design particularly suited to encourage technology transfer.

Procurement: Local procurement provisions are often dealt with in agreements. The success of these provisions is dependent on solid drafting. The definition of what are "best efforts", what constitutes a contractor, a good or service from that country, or what is meant by "local" and "competitive" must be carefully defined to avoid questions of interpretation and ensure the appropriate parties benefit. This is an area where countries could benefit from model mining agreements that ensure such key terms are well defined and standardized. [210]

Addressing these provisions in agreements can create problems for countries that are members of the World Trade Organization (WTO), as the national treatment obligation clause of the WTO prevents foreign companies from being forced to purchase local goods or services if a better quality or priced alternative exists outside the country. Local procurement provisions in those countries often only require preferential treatment and do not or cannot specify sanctions for noncompliance.[211]

Value Addition: Most local content provisions are "upstream" linkages, designed to incorporate local involvement in mining and mine supporting operations. But local content also includes "downstream" linkages designed to provide value addition to the raw materials being mined.[212] Beneficiation and other value addition activities are attractive to governments because of the economic benefits, but they can be very expensive operations with very low-profit margins, making them economically unfeasible in many cases.[213] They are also very project specific and so are generally dealt with in agreements where they can be contentious negotiation points. One executive recounted his company's "endless" debates with the government in Liberia that was advocating for local beneficiation provisions during negotiations. The two sides ultimately agreed to a requirement that the company undertake a feasibility study.[214] Liberia's agreement with Western Cluster Ltd. for an iron ore mine included a representative provision illustrating the specificity required for value-addition:

> "The Company will work towards and assist the Government in achieving the policy of the establishment or expansion of downstream metals processing facilities in Liberia in relation to pelletization or other further beneficiation, refining and/or metals manufacturing and fabricating (to the extent not already carried out by the Company pursuant to an approved Feasibility Report) if, in light of recognized economic, technical and scientific standards, the Iron Ore mined by the Company is amenable to such additional activities and provided it is economically and practically feasible to do so...
>
> Within five years of first production the Company must finance a pre-feasibility study for the establishment in Liberia of a facility for the next value added step in the transformation of Iron Ore into steel. "Value added" means at a minimum both an increase in value and an increase in purity (grade) of the Product(s) of the Company's Mine(s). If at the time of the study the parties cannot agree on the appropriate next value addition step or steps, the parties will select an international expert in iron and steel production to define the appropriate focus of the pre-feasibility study, with the costs of such expert to be shared equally by the Government and the Company."[215]

208 Semafo Burkina Faso S.A. and Burkina Faso, SEMAFO project, Arts. 6, 7.1 (2007); "International Advisor." Telephone interview, 23 April 2015.

209 Cam Iron SA Agreement, Arts. 10.16, 32.3-6,33.1-3, Mittal Steel Agreement, 2005, Art. 11-13; Koidu Holdings SA and Sierra Leone, Koidu Kimberlite project, Art. 10,11 (2010).

210 "International Advisor." Telephone interview. 5 March 2015.

211 Ana Maria Esteves, Bruce Coyne, Ana Moreno, "Enhancing the subnational benefits of the oil, gas and mining sectors," Revenue Watch Briefing, (July 2013).

212 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 159.

213 Ibid.

214 "Corporate Representative." Telephone interview. 6 March 2015.

215 Western Cluster Ltd. And Liberia, Western Cluster project, Arts. 6.5 (2011).

Infrastructure: One of the biggest challenges to mining in developing countries is infrastructure.[216] Large-scale mining projects have tremendous infrastructure demands to bring heavy machinery, equipment, supplies, and staff to the mining site and mined ore from the site. Transportation infrastructure including roads, railways, airstrips or even seaports might be required. There will be tremendous energy, water, communications and other logistical needs. Frequently, little of this is available at often remote mining sites at the beginning of projects. If it does not exist or is not in usable shape, it will have to be built or refurbished.[217] As discussed above, due to the unique infrastructure needs of each project and their significant scale and costs, infrastructure was regularly cited by interviewees as frequently needing the flexibility and specificity provided by mining agreements.[218] In some instances, separate infrastructure agreements are required to supplement the mining license. In Mozambique, the Moatize coal mine was put out for tender separately from the tender for the project to construct a railway to transport the coal. This separation can be problematic however, and has caused severe logistical constraints for the Moatize mine.[219]

As explained above, third-party access to infrastructure is another instance where agreements are often negotiated to supplement the law. One way to increase economic linkages is to require companies to give third parties the right to access certain infrastructure to the extent that it does not interfere with the companies' operations. Governments can even mandate certain routes for roads or railroads or locations for infrastructure such as power plants to increase its benefit for third parties.[220] The agreement between Ivanhoe Mines and the government of Mongolia provides for third party access to certain public use infrastructure/services including, "roads, power, water/heating systems, water drawing facilities…schools, hospitals…an airport [and] community centers." Ivanhoe is allowed to recover the costs of this access by charging tolls for its usage.[221] Some companies have argued that having to share infrastructure with third parties who may have different standards for usage and maintenance can jeopardize a company's supply chains, and in some agreements, they still negotiate for an exclusive right to use and to decide who else may use infrastructure it has constructed.[222] The very specific nature of these rights and how they might benefit third parties require agreements, but the conflicting priorities of the company and the government on this provision can result in very lengthy negotiations.[223] The agreement for the Simandou iron ore project in Guinea took a number of years, in part due to negotiations over the 650km railway and deep-sea port the project required and their availability for third-party access.[224]

OTHER PROVISIONS

Term: The duration of a mining agreement is typically either for a set period of time as established in the agreement or by legislation, or for the economic life of the mine. DRC has done both, awarding licenses for the life of the mine in its joint venture projects, and using fixed terms in its mineral agreements.[225] The purpose of both systems is to offer companies a sufficiently long period to allow it to recoup its investment and make a profit.[226]

In study countries, fixed terms, which are more widely used and decreasing in length, are usually set in the mining laws or regulations. In the only country where agreements included a different length of term than in the legislation, Afghanistan, the law allowed for exploitation licenses for up to 30 years initially and the

216 "Government Official." Telephone interview. 21 April 2015.
217 Allen & Overy, "Guide to Extractive Industries Documents – Mining," 2013, op. cit., p. 7.
218 "International Advisor." Telephone interview. 23 April 2015; "Government Official." Telephone interview. 21 April 2015.
219 "Corporate Lawyer." Telephone interview. 4 March 2015; "Thai Company at Advantage in Bidding for New Railway," AllAfrica.com (4 August 2013).
220 "International Advisor." Telephone interview. 23 April 2015.

221 vanhoe Mines Ltd, Rio Tinto International Holdings Ltd. and Mongolia, Oyu Tolgoi project, Arts. 7.14, 7.16 (2009).
222 "Corporate Executive." Telephone interview. 19 March 2015; Allen & Overy, "Guide to Extractive Industries Documents – Mining," 2013, op. cit., p. 8.
223 "International Advisor." Telephone interview. 23 April 2015.
224 Mark Aplin and Glen Ireland, "Will Simandou Deliver on the Promise of Shared-Use Mining Infrastructure in Sub-Saharan Africa?" Infra Share, June 2014; "International Advisor." Telephone interview. 23 April 2015.
225 DBB Resources Corporation and DRC, Manomin project (2009); Entreprise Minière de Kisenge Manganese, Cliff Mining Ltd. and DRC, Kisenge Manganese project (1998).
226 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 20.

agreements under that law actually restricted it to an initial 10 years.[227]

Stabilization clauses: Stabilization provisions, which are discussed in a previous section on when contracts are used, are largely unique to contracts. Unlike other key terms, interest in its inclusion is almost exclusive to companies and can be one of their primary motives in seeking a contract. In a few rare cases such as Chile and Peru, the legal framework provides for the possibility of stabilization clauses that supplement the law in exchange for higher tax or royalty rates.[228]

Confidentiality: To this point, confidentiality provisions have generally been addressed in contracts not legislation. As transparency increases, countries are approaching it in different ways. Some countries, including Liberia and Mozambique now require contract disclosure in legislation. Other countries prefer including clauses requiring public disclosure of contracts in the contracts themselves that can then be ratified.[229] The latter solution is seen as a quicker solution than passing a transparency law or amending an existing law.

Dispute Resolution: Dispute resolution mechanisms such as international arbitration (which is discussed in greater detail later in this paper) are generally seen in contract regimes where they are addressed in mining agreements. It is more often addressed there instead of in legislation because typically it is the company which desires its inclusion. This is common in developing countries where a company is concerned about the competence and independence of its judicial system.[230] The mining acts in Liberia and Mozambique, as well as the proposed new mining law in Afghanistan reviewed for this study, all expressly defer to the contracts to set their own dispute mechanisms.[231] Dispute resolution mechanisms can also sometimes be set out in investment treaties, agreements between states setting out terms and conditions for investment by the companies of one country in the other.[232]

Periodic Review: As discussed above, periodic review provisions are an obligation imposed on the parties to meet on a regular basis, upon request of one of the parties or following a trigger event. While this type of provision can be set in law in Tanzania, if it is included in contracts it can be more detailed, specifying the trigger events and the variables to be adjusted to adapt to the change in circumstances.

227 Minerals Act, Afghanistan, Art. 34 (2010); Khoshak Brothers Company and Afghanistan, Western Garmack Coal Occurance, Art. 3 (2012); Afghan Krystal Natural Resources Company and Afghanistan, Qara Zaghan Gold project, Art. 3 (2011).

228 Sachs, Toledano, Mandelbaum, with Otto, “Impacts of Fiscal Reforms on Country Attractiveness,” 2012, op. cit., p. 360.

229 “Mining Contracts: How to Read and Understand Them,” (Creative Commons, 2013), p. 205.

230 Allen & Overy, “Guide to Extractive Industries Documents – Mining,” 2013, op. cit., p. 16.

231 Minerals Law, Afghanistan, Art.92 (2012); Minerals and Mining Act, Liberia, Art. 19 (2000); Mining Law, Mozambique, Art. 8.2 (2014).

232 “Mining Contracts: How to Read and Understand Them,” (Creative Commons, 2013), p. 197.

The Negotiation Experience

This section of the report examines the experience of preparing for, negotiating, drafting, and implementing mining contracts and legislation. It includes information drawn from 44 interviews with 39 government officials, company representatives, external advisors, and civil society members on their experiences in the entire process of negotiating mining contracts in 18 countries. The report examines negotiation preparation activities such as the building of the negotiating teams and consultations with stakeholders. It reviews the negotiation itself, including points of contention within the agreement and issues that affect negotiations. Post-negotiation issues, such as implementation and monitoring, renegotiation, the use of model agree-

AN EXAMPLE OF A MINING CONTRACT NEGOTIATION FROM A CORPORATE PERSPECTIVE

An executive who led the company team during the negotiation of an iron ore project in a West African country in the late-2000s related his experience:

The government had a large negotiation team that was well advised and was working off of a model development agreement. Nevertheless, negotiations were slow and lasted almost two years. It took a year to get the government to engage fully with the company and have concrete talks. Following three months of negotiation, there was a six-month period with little progress or communication, followed by another two months of negotiation before there was an agreement. This was highly problematic for the company because it was conducting exploration during these negotiations for the mining concession, and the longer the process took, the more the company was spending on exploration with no guarantee of reaching an agreement.

In part, the slow pace of negotiations was the result of several factors. The government's negotiating team included seven government ministers or equivalent officials. They were frequently distracted or called away by their other responsibilities. Capacity was also a problem, but this was mitigated to some degree by the government retaining experienced external advisors. On some points the company consulted with those advisors directly before negotiating with the government which made the process easier. The company had prepared for the negotiation by determining its opening positions and how far it would move on key issues. With that mandate, the company's negotiating team came in with a fair amount of discretion. The government's team did not have that same mandate.The power-centric approach to politics in the country and a lack of trust between officials on the government team restricted the team's authority to agree to terms. The government's negotiation team also excluded representatives from the region where the project was located. Local leaders were so frustrated by their exclusion that they actually reached out to the company to ask for a seat at the table.

Another obstacle was the short-term focus of both sides. Individual government officials were seeking to secure political capital and company negotiators wanted to please their superiors by "winning" the negotiation. That approach requires a "loser" which undermines the long term prospects for the agreement. Approaching it as a partnership would have been better.

There were several particular points of contention during the negotiations. The first centered on local beneficiation, which is frequently an issue during negotiations around iron ore. The other was over periodic review of the agreement. From the company's perspective, negotiation is an uncertain, expensive, and time-consuming process that generates unnecessary uncertainty for its investment. The company neither wants nor sees the need to repeat that process in only a few years. Instead, the company preferred a pre-agreed to sliding-scale royalty or windfall tax.

Once the negotiations concluded and project operations began, the company did not refer to the agreement at all as so much of it concerned future goals that would not be relevant for the project for some time. The government came under heavy criticism for the deal and the general public perception was that it conceded too much.[233]

[233] "Corporate Representative." Telephone interview. 6 March 2015.

ments and the question of external assistance, are also considered.

PREPARING FOR CONTRACT NEGOTIATIONS

While the term “negotiation” tends to evoke images of people arguing across a long table (an essential aspect of any negotiation), the majority of the negotiation process is spent doing equally (if not more) important work in advance away from the table, including but not limited to conducting research and studies, drafting terms, reviewing the other side’s proposed terms, and achieving internal consensus. Ideally, for governments and companies, walking into the negotiating room should be the culmination of many months or even years of advance work, and if the parties successfully reach an agreement, that is just the start of the work of implementation.[234] In many instances however, negotiations end in flawed agreements that are not in the interests of the country, precisely because the necessary preparatory work for negotiations, including feasibility studies and asset evaluations, was not carried out by the government.

Ideally, from a company perspective, unless it is negotiating an agreement for a surveyed or established mineral deposit, it generally will have spent a considerable amount of time and resources merely determining if there is even something to negotiate over. The company must conduct airborne geophysical surveys, mapping, and seismic analysis, often under reconnaissance permits, even just to identify potential sites for deeper exploration.[235]

If a mineral deposit is found, best practice, according to corporate representatives interviewed for this study, would have the company’s project development team step in and conduct pre-feasibility and feasibility studies. The company would need financial analyses, including the development of a financial model that predicts the return on investment at different commodity prices. Mine design and site risks would need to be considered. Mining projects – particularly in developing countries – tend to operate in an enclave where they supply their own power, water, transport and ICT infrastructure, but a project that might require a substantial additional infrastructure component, such as railways or a port for the export of bulk commodities, introduces additional complexities and requires even more analysis.[236] The company would need to understand the political interests of the government, particularly the ruling party, as well as the political environment.[237] In an ideal scenario the company would also conduct social, environmental and human rights impact assessments to understand and mitigate such risks. Realistically speaking, companies generally only conduct such assessments if required by law or internal company policy. Human rights impact assessments are particularly rare.[238]

On the other side, in an ideal scenario, the government would be performing its own due diligence during this time. It is not enough to have a potential investor in the country’s mining sector; it needs to be the right kind of investor.[239] Taking the time and effort to target and attract a world class investor with a history of success and a strong environmental, health and human rights track-record can be quite a political dilemma for a developing country. On one hand, as is often the case, it is in desperate need of the investment, development, employment opportunities and revenue that can come from mining and its government can be under intense political pressure to deliver those results. On the other hand simultaneously, weak institutions, political instability, recent past conflicts, or rumors of widespread corruption often mean that the country is considered high-risk, and as such is only attracting high-risk investors, junior companies, or companies with questionable records. Caught in this catch-22, it is tempting for a government to go after the quick resource flows and make a deal with the first company to arrive, setting a potentially dangerous precedent. The early investors and initial agreements set the tone for the sector and the wrong companies playing significant roles in the mining sector can attract more of the same and discourage responsible investors.[240]

234 ”Corporate Executive.” Telephone interview. 19 March 2015.

235 “Mining Contracts: How to Read and Understand Them,” (Creative Commons, 2013), pp. 37-40.

236 ”Corporate Representative.” Telephone interview. 6 March 2015.

237 “Corporate Representative.” Telephone interview. 9 March 2015.

238 Columbia Center on Sustainable Investment, “Governing Natural Resources: Lessons learned from good governance initiatives for extractive industry investments and large land-based agricultural investments,” p.9, 11 November 2014; “International Advisor,” Telephone interview, 29 April 2015.

239 “Government Official.” Telephone interview. 19 March 2015.

240 Ibid; Herbert M’cleod, “Sustainable development and iron ore production in Sierra Leone: The next 50 years,” International Growth Centre (9 December 2013).

If the company did not provide the necessary information in the process of seeking a license, the government should investigate the company's past experience, expertise, finances, environmental and human rights records, etc. Best practice would have it require the company to share its feasibility report.[241] The goal is to uncover anything that could potentially prevent a company from fulfilling its obligations. This exercise is particularly important for small junior companies or privately-held company suitors whose record is not as transparent or well documented as publicly-listed companies. This research can, and often is, done by the government itself, but thorough due diligence can be a complex process, and governments often lack the necessary expertise and capacity. In such cases governments could choose to hire outside firms that specialize in such investigations.[242]

CONSULTATIONS WITH STAKEHOLDERS

In addition to these preparations, many of those interviewed emphasized that both sides should consult with other stakeholders, particularly sub-national governments, CSOs and local communities in the area of the proposed project. There is increasing international recognition that local communities must be consulted and made part of public decisions that will affect them, and the principle of free, prior, and informed consent (FPIC) protects the right of indigenous peoples to also be consulted on matters that can affect their interests.[243] Governments and companies should ideally continue this engagement throughout the process, though this is frequently reported not to be the case. While on rare occasions CSOs might be in the negotiating room – Afghanistan EITI was present as an observer during past negotiations – most likely the opportunity for local communities, indigenous peoples, and CSOs to make their concerns heard will come during pre-negotiation consultations.[244] A civil society representative noted that the government engaged with them in advance of negotiations for a mining agreement. However, despite the CSO's efforts to have local communities included in the actual negotiations, they were not consulted in any way during talks, nor did the government or the company come back after the deal was completed to inform the people what was agreed to.[245]

Not only are consultations critical to achieving FPIC from communities, they are also an important step in setting reasonable expectations for the timeline and revenue of a project. Increasing expectations of the benefits that will come from a mining project is an issue companies and governments should be very sensitive to, as failure to achieve unrealistic expectations can create resentment towards both the government and the company.[246] Frequently however, what happens are overly optimistic predictions by credit seeking politicians or company statements to shareholders that only serve to inflate public expectations.[247]

Despite their importance there is considerable variance in whether and how consultations are conducted in the countries studied. The government in the Philippines, for example, holds consultations with the public, local government units and indigenous people (when projects are located in or around ancestral land). In Burkina Faso, the government goes to local communities to discuss the mine and the development plan with them. But in a number of surveyed countries, consultations were not done at all.[248] Civil society organizations "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 109. "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 109. in Azerbaijan report that neither the government nor the companies consult with them at any point in the negotiation process. Often in past negotiations in Mozambique, local communities were not involved which had a negative effect on subsequent interactions between companies and local communities as well as subsequent negotiations for other mining projects.[249]

241 "International Advisor 1." Telephone interview. 22 April 2015.

242 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 48.

243 Negotiations Portal for Host Country Governments, available at: www.negotiationsupport.org (last visited 31 March 2015).

244 "Government Official." Telephone interview. 4 March 2015.

245 "Civil Society Representative." Telephone interview. 17 March 2015.

246 "Corporate Executive." Telephone interview. 19 March 2015.

247 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 109.

248 "Corporate Representative." Email interview. 18 March 2015; "Government Official." Telephone interview. 4 March 2015.

249 "Civil Society Representative." Telephone interview. 6 March 2015; "Corporate Representative." Telephone interview. 9 March 2015.

BUILDING A NEGOTIATION TEAM

One of the most significant decisions in the negotiation process is determining the composition of the negotiating teams.[250] The structure of the government's team can vary significantly, depending on the importance of the project, the complexity of the agreement, and/or the country's governance structure. Typically government teams are led by the ministry responsible for mining, an inter-ministerial commission (IMC) or the national mining company, if it exists.[251]

An IMC generally includes high-level representatives of relevant ministries responsible for finance, environment, economic planning, and labor. Ideally, members should have experience working together and on multiple negotiations. The team in Liberia negotiating its major mining licenses is led by the Minerals Technical Committee, giving it the authority to make high-level decisions during negotiations. In Sierra Leone, a Minerals Advisory Board advises the Minister.[252] Cameroon has a similar structure comprised of a strategic counsel for negotiating mining contracts that includes political and technical units. Ministers sit on the political unit, technical advisors sit on the other, and six or seven ministries can be represented at a negotiation.[253] Some advisors would suggest it is best that the leader of the negotiating team or the IMC not be a minister or other political appointee, but the leader does need to be someone with access to, and the full support of, the head of government.[254]

INTERVIEWEES' RECOMMENDED BEST PRACTICES FOR GOVERNMENTS IN NEGOTIATIONS

- Negotiating team, especially the team leader, must have the full support and confidence of the head of government
- Team leader should not be a minister or other political appointee. Better if led by an experienced civil servant
- Team should include representatives from every ministry the contract will involve
- Government team should have experience working together and should stay together to oversee implementation
- Government should be willing to invest in hiring expert assistance
- Government must do its homework on its mineral resources and the company
- Negotiations should take place in the host country and in a language with which the government team is comfortable
- Include local lawyers in the team to get experience and be trained by the outside advisors
- Government should draft agreement so they are clear what was agreed to
- Set negotiation timetable
- Get access to the data used in the company's feasibility study

Even when not led by an IMC, the government team can be expected to include representatives from mining-related ministries including Justice, Finance, and Strategic Planning. Ideally the ministries of Environment, Labor, and the National Investment Commission (where they exist) would also be included.[255] Best practice would include a representative from every ministry that will be affected by the agreement in the negotiating team. The result can often be a large negotiating team which can create problems including confusion, internal conflict and a divided front at the negotiating table. For that reason, some countries prefer to have a larger advisory team when preparing for negotiations, but keep the actual negotiation team itself small.

Best practices would be for the government's negotiating and/or advisory teams to meet shortly before meeting with the company to go over key points and its national negotiating position. The Cameroonian government uses these meetings to set its priorities and its non-negotiable terms, for example.[256] This should take into account the stakeholder consultations, impact assessments, feasibility studies, and the differing priorities and positions of all the relevant govern-

250 "International Advisor 1." Telephone interview, 29 April 2015.
251 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 23.
252 Minerals Act, Sierra Leone, Art. 107.3 (2009).
253 "Government Official." Telephone interview. 17 March 2015.
254 "International Advisor 1." Telephone interview. 27 April 2015; "International Advisor 2." Telephone interview. 27 April 2015.
255 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 24.
256 "Government Official." Telephone interview. 17 March 2015.

ment ministries and agencies.[257] This might involve 30-40 people in a room discussing negotiation strategy. This process is important not just for achieving consensus on the issues before going into the negotiating room and identifying areas where more information or assistance is necessary, but also for getting buy-in from the other government agencies. Having broad-based inter-governmental support from the outset can prevent the development of opposition to the agreement within government.[258]

The company on the other side of the table is simultaneously putting together its team. Similarly, interviewed corporate representatives highlighted the amount of variation in the composition and size of the negotiating team, depending on the company involved, its relationship to the government and the size of the project. Small projects involving junior companies might involve a team of only five or less, just one or two business development or strategy specialists including the financial modeler, the company's in-country representative, a lawyer, and possibly a technical person (geologist, infrastructure expert, etc.).[259] Situations where the scope for negotiation is fairly limited, such as World Bank or IFC auction leading to an agreement, the small team might be all that is necessary.[260] Teams for larger projects might also include engineers, economists, the company's country manager, marketing and finance advisors and legal teams including both in-house and outside counsel.[261] Some companies will also include community relations and corporate social responsibility specialists.[262] Depending on how important the company considers the project to be, it might also include high-level corporate representatives, even the CEO. The negotiations for the license for the Moatize coal mine in Mozambique, for example, involved 20 people spread out between Mozambique and the company's home office.[263]

257 Negotiations Portal for Host Country Governments, available at: www.negotiationsupport.org (last visited 31 March 2015).
258 "International Advisor." Telephone interview. 5 March 2015.
259 "Corporate Executive." Telephone interview. 19 March 2015.
260 "Corporate Lawyer." Telephone interview. 4 March 2015.
261 "Corporate Representative." Telephone interview. 9 March 2015.
262 Ibid.
263 "Corporate Lawyer." Telephone interview. 4 March 2015.

CONTRACT NEGOTIATIONS

It is only after all of those preparations are concluded that both sides commence the actual negotiation process. The process should take place in the host country and both negotiations and drafts of the agreement should be in a language with which the government team is comfortable.[264] The two sides will spend comparatively little time in actual/face-to-face contract negotiations. Once the process starts, frequently with the company responding to the government's proposed draft mining agreement circulated in advance of the first negotiation session, days of negotiation might be interspersed over months while drafts are exchanged and reviewed, new drafts are developed, and internal consensus or approval sought.[265] Interviewees frequently cited several issues as particular points of contention that have held up or dominated negotiations. These include: stabilization, royalties and other fiscal provisions and state participation.

The first and most often referenced source of contention between the parties relates to **stabilization provisions.** Governments have a clear interest in limiting the scope of stabilization clauses. Such clauses can reduce a country's ability to respond to economic and political developments. For companies, stabilization clauses provide assurance against their investment being subject to unpredictable legal, regulatory or political changes that could affect the commercial viability of the project, such as a change in the applicable level of tax on a project.[266] From a company perspective it can also serve as protection, as the bargaining power shifts from companies in the early stages when governments are anxious for investment, to the governments as a project develops and the company commits large amounts of capital which cannot be withdrawn from the country.[267] It is in the interests of both parties to keep stabilization clauses narrowly focused on fiscal provisions and limited in time and scope, typically just long enough for the company to recoup the costs of its investment plus a reasonable return on that investment. Overbearing stabilization clauses can actually

264 "International Advisor 1." Telephone interview. 22 April 2015.
265 "Corporate Executive." Telephone interview. 19 March 2015; Mining Guide
266 Negotiation Support: Glossary, available at http://negotiation-support.org/glossary/stabilization-clause (last visited 31 March 2015).
267 Otto, "Mining Royalties," 2006, op. cit., p. 82.

undermine the stability of the overall agreement and force renegotiation when they are too restrictive on a government's ability to implement important or necessary policy changes.[268]

Periodic review provisions, usually time-based though occasionally triggered by certain specified events, are increasingly being seen.[269] A five-year review provision was included in Liberia's mining contracts. Periodic review can provide some flexibility. It is an acknowledgement that changes occur over the course of a project and allows for review of the agreement in light of current circumstances to see if any renegotiation is necessary. While companies are quick to request renegotiation when it is in their interest, they tend not look favorably upon a periodic review mechanism that provides governments with a similar opportunity. Most see it as undercutting the security of the deal and creating the possibility of having to repeat a time- and resource-consuming negotiation process again just a few years later.[270] As one company representative put it, "[Periodic review] makes a mockery of the two years they spent negotiating the original deal."[271] Corporate reception to the provision improves if the period between reviews is extended or is triggered by certain events, such as mineral prices exceed a certain range.[272]

The other most frequently invoked points of contention were aspects of the **fiscal provisions** aside from the stabilization issue, particularly **royalties.** It was regularly described as the area where negotiators spent the most time.[273] Discussions typically are more complex than merely setting a royalty rate, for example. The mineral valuation process on which royalties are based can be susceptible to manipulation if not well drafted. Governments frequently lack a clear understanding of the size and grade of mineral deposits, as well as the experience or capacity to build their own financial models or analyze those of the companies, putting them at a distinct disadvantage in this area of negotiations.

Another regularly invoked issue was **state participation,** via paid equity, carried equity or free carry.[274] Project schedules and time frames for development were also mentioned. From the company perspective, governments always want a more aggressive schedule. But if you start with an impossible schedule you are only creating the basis for future problems.[275] Other regularly cited provisions include the details of local content, such as fixed percentages and schedules, local beneficiation, and third party access to infrastructure.[276]

ISSUES AFFECTING NEGOTIATIONS

Disagreement over specific clauses is just one of the issues that can hinder negotiations and undermine efforts to reach an agreement. Respondents raised a number of issues many governments face that have negatively impacted negotiations, including:

Capacity: According to many of those interviewed, despite the economic scale of mining most countries do not understand the industry or the market. One lawyer described the lack of understanding of basic concepts in his conversations with government officials as "mind-blowing."[277] They are often inexperienced and lacking basic understanding of all areas of the process. Advice is needed on everything from the composition of the negotiating team to how commodity markets work.[278] It is not unheard of for a government to have to rely entirely on the technical information provided by the company or try and repurpose existing contracts no matter how ill-suited because it lacks the expertise to conduct its own review of the data or draft the appropriate contracts.[279] The problem is not limited to developing countries; even countries with significant mining experience can fail to recognize basic concepts. Australia, for example introduced a mining super profits tax right as the most recent mineral boom was going bust.[280] The money never came, and it

268 Natural Resource Charter, "Precept 4. Fiscal Regimes and Contract Terms," 6 August 2014.
269 "International Advisor." Telephone interview. 9 March 2015.
270 "Corporate Representative." Telephone interview. 9 March 2015.
271 "Corporate Representative." Telephone interview. 6 March 2015.
272 Ibid; "International Advisor." Telephone interview. 9 March 2015.
273 "Corporate Representative." Telephone interview. 11 March 2015.

274 "Corporate Representative." Telephone interview. 6 March 2015; "Corporate Representative." Telephone interview. 11 March 2015.
275 "Corporate Representative." Telephone interview. 6 March 2015.
276 Ibid; "Corporate Representative." Telephone interview. 11 March 2015.
277 "Corporate Lawyer." Telephone interview. 4 March 2015.
278 "Government Official." Telephone interview. 17 March 2015.
279 "Corporate Representative." Telephone interview. 9 March 2015; "Corporate Lawyer." Telephone interview. 4 March 2015.
280 Stephen King, "How the MRRT 'Super Profits' tax failed on basic economics," Essa, 28 May 2013.

contributed to the downfall of Prime Minister Kevin Rudd.[281] These problems do not just affect governments; companies have an interest in an organized and experienced negotiating partner. Not only does it decrease the cost and length of negotiations, the better prepared and supported the government side is, the better the chances of the government being a true partner and the agreement being implemented and complied with.[282]

A common issue that contributes to the capacity problem in developing countries is personnel turnover in government.[283] This can be due to financial constraints, political instability, or trust issues between the government and its advisors, but it can be difficult to build a tenable agreement when one side of the negotiation is constantly changing.[284] Guinea is an excellent example. During one negotiation the government went through three legal advisors, and another company representative worked with four presidents and eight ministers of mining in his time in the country.[285] At other times, companies themselves can create the turnover. It is not unheard of for companies to hire away members of the government negotiating team *during negotiations.* Not only can this strengthen the company's position in negotiations by undermining the government's, the newly hired employee brings with him inside knowledge of the government's negotiation strategy. Given most companies' ability to offer higher wages, this migration of talent from government can continue throughout the life of the project. This can have a discouraging effect on the government investing resources in training and capacity building.[286] Retaining external advisors is one option to help address these issues, but that comes with another set of issues discussed in a later section.

Decision-making Authority: The discretion given to company representatives in negotiations varies but they usually go in with a mandate.[287] It is not efficient for representatives to constantly refer back to their head office on when to move on to various provisions, so, frequently, the company's opening position, how far it is willing to go on certain terms, and its priority issues have been agreed to internally before negotiations commence.[288]

The decision making authority of the government's team is not always as clear. In Afghanistan, when negotiators couldn't reach consensus on certain provisions, they went to the IMC to make a decision.[289] In Liberia, the president is responsible for clearing serious disagreements.[290] These processes can add to the duration and uncertainty of negotiations.

For that reason, and to avoid decision paralysis that can come from having an insufficiently empowered negotiating team, some countries have their minister or an IMC lead their negotiations to ensure that there is decision making authority in the room. That solution can frequently create its own problems. A government official sufficiently high-ranking to have decision making authority can often be less informed on the project and sometimes unwilling to listen to the input of his technical advisors.[291] Negotiating with an IMC can mean negotiating with six or seven ministers. It is impossible to take people on that level away from their other work for the length of the negotiation, so talks were hampered by constant distractions.[292] Another issue with IMCs is the frequent lack of trust and conflicting personal interests between its members. It is not always easy for a politically sensitive minister to do what he sees as sacrificing political capital by making a concession in exchange for a benefit that will go to another ministry.[293]

One negotiator saw success in Guinea using a working group composed solely of business and development representatives from the company and officials from the relevant government ministries, no lawyers. By leaving the lawyers out of the early stages they kept the discussion focused solely on the business issues not legal issues and the phrasing of terms. Only once the group reached an agreement in principle did they bring in the lawyers.[294] Even then, discussions were

281 Jeff Sparrow, "Where it all went wrong for Kevin Rudd and the Australian Labor party," The Guardian, 6 September 2013.
282 Corporate Representative." Telephone interview. 11 March 2015.
283 "International Advisor 2." Telephone interview. 28 April 2015.
284 "International Advisor." In-person interview. 8 March 2015.
285 "Corporate Representative." Telephone interview. 6 March 2015; "Corporate Representative." Telephone interview. 11 March 2015.
286 "International Advisor." In-person interview. 8 March 2015.
287 "Corporate Executive." Telephone interview. 19 March 2015.
288 "Corporate Representative." Telephone interview. 6 March 2015.
289 "Government Official." Telephone interview. 4 March 2015.
290 "Government Official." Telephone interview. 17 March 2015.
291 "International Advisor 1." Telephone interview. 28 April 2015.
292 "Corporate Executive." Telephone interview. 19 March 2015.
293 "Corporate Representative." Telephone interview. 6 March 2015.
294 Ibid.

led by the principals not the lawyers.[295] In fact, this particular negotiation did not work off written agreements at all during the talks. Instead, they created tables aligning their positions for comparison. In this situation where the government speaks French and the company English it also facilitated quicker negotiations by largely avoiding the expensive and time-consuming process of constantly translating new drafts of the contract.[296]

External Pressures: Another big concern around negotiation is external influences. Negotiations do not take place in a vacuum, and due to the enormous financial interests and policy issues involved, the negotiating teams on both sides of the table are frequently operating under various pressures from the public and their superiors, politicians and rival companies. This creates myriad opportunities for corruption, political interference, and decision paralysis.

A good, multidisciplinary government negotiating team, with representatives from all the relevant agencies and with all the necessary technical support can still be completely undermined by political interference.[297] A review of the Western Garmack coal mine and Qara Zaghan gold mine in Afghanistan revealed clear signs of political interference in the tendering processes, issuing of contracts, and mine operations, all favoring inexperienced bidders.[298] An official in Sierra Leone related an incident where the National Minerals Agency negotiated an agreement only for the President's Chief of Staff to get involved and by the time the agreement reached the President for signature the terms had been changed. [299]In another instance the premature end of discussions of a possible renegotiation of a mining agreement was attributed to the close relationship between the CEO of Sierra Rutile Ltd. and high-ranking members of the Sierra Leonean government.[300]

External pressures are not limited to politicians:

> **Donors:** International organizations have their own political agendas, ranging from promoting neo-liberal economic models to opposing Chinese investment, and can use their influence as donors to push those agendas. As donor country aid agencies are increasingly incorporated into their foreign ministries, their aid and advice is increasingly politicized and potentially not always in the receiving government's interest.[301]
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> **The Public:** While negotiations should be a transparent process, and the public should have some level of input, ultimately, the negotiation team should consider those views and then decide what is best for the country. If it is too public, it can paralyze negotiations. As one international advisor put it, "You don't want to negotiate in an auditorium."[302]
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> **Other Companies:** Companies competing for the same project can make extravagant claims in an effort to win the deal, in the process creating unrealistic demands from government negotiators.[303]

Timetable: Unsurprisingly, the time it takes to conclude a negotiation varies wildly. They can take anywhere from 1-2 weeks to 18-24 months.[304] Negotiations that include infrastructure projects generally are reported to be more complicated and take longer.[305] The timeline can have serious implications and several corporate representatives emphasized the increased risk that results from prolonged negotiations. The longer they continue, the greater the chances that circumstances change and what was previously seen as a reasonable outcome is now perceived differently by at least one of the parties. This can result in renegotiating previously agreed to terms which erodes credibility and makes for an inefficient process.[306] This can be particularly problematic when a company is already operating under an exploration license and has

295 Among experts interviewed there was a lack of consensus around the effectiveness of this approach.
296 Ibid.
297 "Government Official." Telephone interview. 10 March 2015.
298 William Byrd and Javed Noorani, "Exploitation of Mineral Resources in Afghanistan Without Government Revenues or Development Benefits," USIP Peace Brief (November 2014).
299 "Government Official." Telephone interview. 10 March 2015.
300 Ibid.

301 "International Advisor." Telephone interview. 5 March 2015.
302 "International Advisor." Telephone interview. 2 March 2015.
303 "Corporate Executive." Telephone interview. 19 March 2015.
304 "Government Official." Telephone interview. 4 March 2015; "Government Official." Telephone interview. 17 March 2015.
305 "Government Official." Telephone interview. 4 March 2015.
306 "Corporate Executive." Telephone interview. 19 March 2015.

to make decisions on further investment without the certainty of a concluded agreement for development.[307]

AFTER NEGOTIATION: IMPLEMENTATION AND MONITORING

While the contract negotiation process tends to receive significant attention and effort from government and donors, insufficient time and resources are spent preparing for negotiations and implementing and monitoring the signed agreement.[308] The best drafted agreement, with the most advantageous terms will do a government little good if it is not properly implemented and monitored. The government needs to map out the obligations and commitments in the agreement and relevant legislation.[309] It must commit to managing its relationship and staying in regular communication with the company and local communities. There must be coordination between the various ministries and agencies responsible for ensuring that both the government and the company fulfill their contractual commitments.[310] There needs to be a strong inspectorate that regularly visits project sites, enforces mining and environmental regulations and assists in conflict resolution.[311] The government needs to conduct regular audits of production, export volumes, mineral valuations and cost calculations.

Yet governments tend to face even more severe capacity restraints when it comes to the necessary technical and monitoring capabilities necessary to oversee a project and ensure a company complies with its obligations. Institutional capacity building is a regular concern for companies who want efficient and reliable counterparts.[312] These issues can be compounded by the fact that all too often on the government side, those responsible for overseeing implementation are not the same as those who were in the negotiations.[313]

307 "Corporate Representative." Telephone interview. 6 March 2015.
308 "International Advisor." Telephone interview. 22 April 2015.
309 Negotiations Portal for Host Country Governments, available at: www.negotiationsupport.org (last visited 31 March 2015).
310 Ibid.
311 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 57; Eleodoro Mayorga Alba, "Extractive Industries Value Chain: A Comprehensive Integrated Approach to Developing Extractive Industries," World Bank Africa Region Working Paper No. 125 (March 2009).
312 "Corporate Representative." Telephone interview. 11 March 2015.
313 "Corporate Representative." Telephone interview. 9 March 2015.

This can even lead to situations where the authorities lack knowledge of the terms and agreements they are responsible for implementing.[314] One best practice suggested by interviewees is to have the same technical staff (not subject to political cycles) who were on the government team which negotiated an agreement, be in charge of its implementation.[315]

The dangers of this lack of capacity are readily apparent. In Afghanistan, under contracts reviewed for this study, the Khoshak Brothers Company and Afghan Krystal Natural Resources Company did not provide the government with the required documentation for their respective projects, including ESIAs. There are reports that both companies are extracting minerals under exploration licenses yet effective inspections of the projects have not occurred and they have not been held accountable for the little to no taxes and royalties being made to the government.[316] In Liberia, a mining agreement obligated the government to establish a committee, to allocate the community development funds paid by the company between the three affected regions. The committee was never established and the funds paid by the company were never spent.[317]

Governments can take steps to address the issues with implementation, many of which they will encounter under a licensing regime as well as with contracts. The government's capacity, or lack thereof, for oversight should be taken into account when developing the agreement. The terms chosen cannot simply be the best terms; they need to be the terms that will work best given the abilities and limitations of that country. This could mean choosing certain fiscal provisions that are easier to administer over ones that are theoretically more lucrative.[318] "Renting" capacity is another option. While it can be a difficult process politically to fit in the budget, external assistance can be hired. Angola, for example, uses international auditors for the government audits of the country's oil leases.[319] In some situations, the costs of hiring external assistance, such as the hiring of a technical expert to monitor compli-

314 "Corporate Representative." Telephone interview. 11 March 2015.
315 "International Advisor." Telephone interview. 22 April 2015.
316 William Byrd and Javed Noorani, "Exploitation of Mineral Resources in Afghanistan Without Government Revenues or Development Benefits," USIP Peace Brief, (November 2014).
317 "Corporate Representative." Telephone interview. 6 March 2015.
318 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013).
319 "International Advisor 2." Telephone interview. 28 April 2015.

ance with mine closure requirements at the company's expense, can be included in the contract.[320] The other benefit of contracting assistance is that it avoids the serious challenge of retaining trained staff encountered by many developing governments.[321] In the longer-term, governments will need to devote effort and attention to developing implementing institutions, such as Sierra Leone is doing with its National Minerals Agency, and building their capacity.

RENEGOTIATIONS AND ARBITRATION

It is inevitable that circumstances and conditions that were the basis for the original terms will change over the life of the agreement. Unanticipated changes in market conditions and commodity prices could fundamentally change the investment landscape and the fairness of the agreed-upon terms. Inexperienced countries that previously were overmatched in negotiations or felt it necessary to offer particularly company-friendly terms to attract investors might have later developed a robust mining sector and now are seen as a desirable investment destination. Or a new government comes into power and initiates a review of agreements negotiated by the prior regime. This was the case in Guinea in 2010 when the new president Alpha Conde immediately began an examination of deals of deceased former ruler Lansana Conte.[322] Additionally, the terms of most agreements were made when there was still significant uncertainty about the geology, duration, economics, political stability and other factors that could affect the commercial viability of the project.[323] While an agreement should ensure security of tenure, it should not preclude the ability to make necessary corrections.[324]

Companies often push for the inclusion of stability provisions in contracts, frequently the protections are asymmetrical, specifically allowing companies to take advantage of changes to the legal or regulatory regime that benefit them.[325] Even with that, companies regularly ask governments to renegotiate terms. In fact, one international lawyer related that a high-ranking executive at his client, a major multinational mining company, told him that the company knows that these contracts will be renegotiated over time. From its perspective, the key issue is establishing clear triggers and processes for renegotiation so that it is not a surprise when it does happen.[326] The company would much rather build in an orderly safety valve than pretend the contract is set in stone.[327] This idea is conceptually similar to the concept of periodic review, whether predicated on a time interval or specific triggers, discussed earlier, which suggests this company's perspective might be an outlier.

Additionally, companies can take steps to avoid renegotiations by negotiating balanced agreements. A mining project is a long and collaborative process, and prioritizing short-term wins at the negotiating table over building on a strong working relationship lays the groundwork for future situations where the government has no choice but to force renegotiation or cancellation.[328] One international advisor observed however that some companies have the cynical view that it is better to negotiate imbalanced agreements with the expectation of later renegotiation because it will allow the company to appease the government by making concessions, but will generally still not fully correct the initial imbalance.

Generally agreements can be renegotiated or cancelled if the original negotiation involved fraud or corruption. Last year, the Guinean government cancelled the deeply controversial Simandou iron ore mine operated by BSG Resources, alleging that the company gained the concession through corruption.[329] Section 157 of the country's (then) Mining Code allowed for a mining title to be revoked if a company violates the prohibition on bribery.

320 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p. 60.
321 "International Advisor 2." Telephone interview. 28 April 2015.
322 Ian Cobain, Juliette Garside and Anne Penketh, "Guinea to strip Beny Steinmetz company of mining concessions," The Guardian, 9 April 2014.
323 Sachs, Toledano, Mandelbaum, with Otto, "Impacts of Fiscal Reforms on Country Attractiveness," 2012, op. cit., p. 377.
324 "Government Official." Telephone interview. 17 March 2015.
325 BSG Resources and Guinea, Zogota project (2009).
326 "International Advisor." Telephone interview. 5 March 2015.
327 Ibid.
328 Ibid; Sachs, Toledano, Mandelbaum, with Otto, "Impacts of Fiscal Reforms on Country Attractiveness," 2012, op. cit., p.382.
329 "Corporate Representative." Telephone interview. 6 March 2015; Ian Cobain, Juliette Garside and Anne Penketh, "Guinea to strip Beny Steinmetz company of mining concessions," The Guardian, 9 April 2014.

But renegotiation is as much a political issue as a legal one, and if after a few years, the perception is that the country got “a raw deal,” the government might demand to renegotiate.[330] The government will review the legality of the contract and confirm whether it is bound by its terms. Was it just signed by the minister? Did he have the proper authority? Was it in conflict with the laws? If it was, was it enacted by parliament to give it force of law? If not, perhaps the government can claim it is invalid. A four-year review of more than 60 contracts by the DRC government resulted in the renegotiation of two-thirds and the cancellation of the rest.[331]

Usually, the company wants to maintain its operations and working relationship with the government. It also might be concerned about the many ways the government could legally impair its operations (slow the issuance of necessary permits, etc.), so it might be amenable to sitting down and discussing an alteration of terms. The company might be particularly willing to talk if it is aware it had negotiated too good a deal for itself.[332] Nevertheless, for a government, the decision to cancel or force the renegotiation of a natural resources agreement can be a risky tactic that could have significant ramifications including financial penalties and damage to the country’s reputation with investors.

The corruption that caused the Guinean government to revoke BSG Resource’s mining title could only have happened because the Conte government previously revoked the licenses from Rio Tinto on claims that the company was not developing the site fast enough. This appeared to be a pretext so the rights could be sold to BSG Resources on very attractive terms for the company and with no upfront payments to the government. That ultimately prompted the bribery investigation when the new government came to power as well as a tangle of lawsuits between the companies and little to show for it all in terms of development of the iron ore deposit.[333]

Disputes that cannot be settled amicably can also be submitted to arbitration. Most agreements include clauses providing for international arbitration. It is commonly used in international commercial disputes and included in mining agreements, particularly when a company is concerned about the competence and independence of the judicial system of its state-partner.[334]

Unlike litigation, arbitration tends to be a closed proceeding and the parties and the arbitrators have much more discretion in how it will be conducted.[335] Arbitration provisions in agreements establish the law that will govern the dispute and the method of resolution. Often the agreements leave the other terms vague which can cause further complications in the midst of a dispute. The agreement usually designates one of the established sets of procedural rules to govern the arbitration, which include the United Nations Commission on International Trade Law (UNCITRAL), the International Centre for Settlement of Investment Disputes (ICSID) or the International Chamber of Commerce (ICC). It will also designate the “seat” of the arbitration, which determines what set of laws will supplement any gaps in the arbitral rules.[336]

The result is that arbitration can be extremely expensive and time consuming.[337] It can also be highly problematic, particularly for governments. The penalties awarded can also be quite high and the grounds for appeal narrow. Large penalties against governments as a result of confidential procedures have been criticized for being in conflict with principles of good governance, transparency and accountability.[338] Countries that negotiated regulatory terms into agreements can also find themselves in situations where areas are subject to arbitration that shouldn’t be, like environmental law.[339] Some experts have also expressed concern about the potential chilling effect that can result from threats of arbitration; countries lacking the finances or capacity, afraid of potential arbitration choosing not to enact or improve regulations that would improve the environment or public welfare.[340] The number of cases related to natural resources brought under arbitration

330 “International Advisor.” Telephone interview. 2 March 2015.
331 “Asset laundering and AIM: Congo, corporate misconduct and the market value of human rights,” Mining Watch, (July 2012).
332 “International Advisor.” Telephone interview. 9 March 2015.
333 “Crying foul in Guinea,” The Economist (6 December 2014).
334 Allen & Overy, “Guide to Extractive Industries Documents – Mining,” 2013, op. cit., p. 16.
335 “International Advisor.” Telephone interview. 5 March 2015.
336 “Mining Contracts: How to Read and Understand Them,” (Creative Commons, 2013), p. 193.
337 “International Advisor.” Telephone interview. 5 March 2015.
338 “Mining Contracts: How to Read and Understand Them,” (Creative Commons, 2013), p. 193.
339 “International Advisor.” In-person interview. 8 March 2015.
340 Ibid; Kevin P. Gallagher and Elen Shrestha, “Investment Treaty Arbitration and Developing Countries: A Re-Appraisal,” Global Development and Environment Institute Working Paper No. 11-01 (May 2011).

by foreign companies against countries has increased significantly in recent years further exacerbating the concern.[341]

In addition, companies have the added protection of investment treaties – where the host country has concluded one with the home country of the company – and can separately (or in addition) sue the government in an investment arbitration. Investment treaties are agreements between states that establish terms, conditions and protections for private investment by companies of one state in the other state.[342]

THE QUESTION OF EXTERNAL ASSISTANCE

It is clear many governments – especially in developing countries – face significant challenges in negotiations including asymmetrical information, inferior resources, and inexperience with the complexities of many resource contracts.[343] For that reason, many countries will bring in external advisors, experts, and negotiators.[344] That assistance is not limited to legal help. Expertise is often needed in geology, estimating mineral potential, mineral economics, mining operation and management, and developing financial models. Even an experienced mining negotiator will not have all the necessary knowledge, so it is not unusual to have a number of advisors contributing to different specific areas of the negotiation. But these are highly technical and increasingly expensive skill sets and the government has to decide which help to bring in and how to do that.

The study found there is no one way external advisors are brought into the process. They can be brought in on the basis of personal relationships with the government or because they were recommended by other governments. Sometimes help can be brought in by donor institutions. Pro bono legal assistance might be available for developing countries from organizations like the International Senior Lawyers Project. Frequently regional development banks, legal support funds or international financial institutions will provide governments with financial support for advisors.[345] However, the fact that the government did not choose that expert can cause a disconnect between government and expert, potentially leading to the government doubting the expert's loyalty and ignoring the expert's advice.[346] Sometimes the company will hire experts to assist the government because the government's lack of understanding or its unrealistic expectations are hampering negotiations. This route can put the advisor at risk of being perceived by the government as an agent of the mining company.[347] The government's concerns regarding experts hired by the company or other third parties are not unreasonable. Conflicts of interest in this area are an oft overlooked but frequent occurrence, and unscrupulous advisors have caused harm to countries.[348] Corporate law firms, concerned about alienating better paying potential corporate clients, can censor themselves or assign inexperienced associates.[349] As discussed in the context of external pressures, international institutions have their own agendas which may not always be aligned with those of the government and yet can filter through their selection of experts and advisors.[350] Referring advisors with undisclosed interests is a subtle but effective way to influence an agreement.[351]

Ulterior motives are not the only potential issue with donor assistance. According to several international advisors, donor-provided expertise is often not the best available. Donors are inexperienced in evaluating and hiring the appropriate experts and matching expertise to right project. They do not pay rates competitive for top of the line legal assistance and fail to appreciate that resource extraction is a business which requires that type of management.[352] The opportunity costs required to find contracting opportunities or prepare bid tenders can shrink the pool of available talent.[353]

341 Sachs, Toledano, Mandelbaum, with Otto, "Impacts of Fiscal Reforms on Country Attractiveness," 2012, op. cit., p. 370.
342 "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013), p, 197.
343 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 34.
344 Ibid.

345 "International Advisor." Telephone interview. 9 March 2015.
346 "International Advisor." Telephone interview. 2 March 2015; "International Advisor." Telephone interview. 11 March 2015.
347 "International Advisor." Telephone interview. 9 March 2015; "International Advisor." Telephone interview. 5 March 2015.
348 "International Advisor." Telephone interview. 5 March 2015.
349 "International Advisor." In-person interview. 8 March 2015; "International Advisor 1." In-person interview. 22 April 2015.
350 "International Advisor." Telephone interview. 5 March 2015.
351 Ibid.
352 "International Advisor." In-person interview. 8 March 2015; "International Advisor 1." In-person interview. 22 April 2015.
353 "International Advisor." In-person interview. 8 March 2015.

Many donors are non-profits and so have to take the help they are offered. But a U.S. securities lawyer doing some pro bono work advising the government will not match up well with a company lawyer who has made a career of this work.[354] More than one expert described seeing agreements drafted by such external advisors full of holes big enough "you could drive a truck through it."[355]

In addition to providing sub-optimal assistance, donor institutions can provide too much assistance related to mining law, contracts and capacity building. International aid organizations do not necessarily coordinate well and many are focused on spending their yearly budget, which can result in a government being overwhelmed by advisors with conflicting mandates, overlapping expertise, and different opinions. So many experts, missions and consultations make it even harder for advisors to develop relationships with the recipient government. Of course, the government lacks the capacity to manage all this advice, but since it is not the one paying, it does not turn it down. Afghanistan is a prime example of this problem.[356]

For these reasons, a developing government might be better advised to retain its own external advisors. There are some donor institutions, like the African Legal Support Facility, that supply loans or grants to facilitate developing governments in hiring external advisors, but this would otherwise require a government to be willing to make the financial commitment necessary to secure the best possible expert assistance.[357] This is something that many developing governments seem reluctant to do until an issue reaches international arbitration, when it may be too late. Greater investment in assistance during the negotiation process could prevent the larger expenditures (and higher risk of a binding, unfavorable outcome) when a poor deal results in arbitration.[358]

Another argument for a developing government taking ownership of its expert assistance is the value of cultivating long-term relationships with its advisors. Every country deals with its natural resources in different ways that reflect its values and experience.[359] Some emphasize the rights of landowners to the minerals on their property; others maintain that minerals belong to the country as a whole. External advisors will need to be educated on legal, economic and political circumstances, and perspectives in the country that will influence the negotiations, as well as the government's often conflicting priorities and objectives.[360] This is quite difficult when international advisors are so often not retained throughout the entire process.[361] The government further benefits from an existing relationship between the advisor and the rest of the negotiating team. There can be distrust in new relationships. The loyalty of the advisor to government has to be demonstrated. The cultural disconnect must be overcome. These are not issues in countries where there is past working experience.[362] In one instance in Sierra Leone, the World Bank awarded a contract for four mining concession negotiations which gave the advisor time to establish a working relationship with the government there and which reportedly worked very well.[363] Unfortunately, political instability and the usual turnover of government officials can mean that frequently within a few years of one project the advisor's connection is severed, or new donors are unfamiliar with who worked on past projects and so the previous advisor is not invited back.[364] Those interviewed suggested that "governments tend to have very short memories."[365]

However once external advisors are brought in and present, the question becomes, what is the role they should play in the negotiation process? Some advisors describe their role as simply that, to advise.[366] The government has the prerogative to disagree.[367] In fact, advisors should demure if the government wants them to tell it what to do. The government is the entity that needs to have ownership of the negotiation process.[368] Those interviewed who supported this position expressed concern that an international advisor active

354 "International Advisor." Telephone interview. 9 March 2015.
355 Ibid; "International Advisor." In-person interview. 8 March 2015.
356 "International Advisor." Telephone interview. 2 March 2015.
357 "International Advisor." Telephone interview. 9 March 2015.
358 "International Advisor." In-person interview. 8 March 2015.

359 "International Advisor." Telephone interview. 11 March 2015.
360 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 34.
361 "International Advisor 1." Telephone interview. 22 April 2015.
362 "International Advisor." Telephone interview. 2 March 2015.
363 Ibid.
364 "International Advisor." Telephone interview. 9 March 2015; "International Advisor." Telephone interview. 2 March 2015.
365 "International Advisor." Telephone interview. 9 March 2015.
366 "International Advisor." Telephone interview. 23 April 2015.
367 "International Advisor." Telephone interview. 2 March 2015.
368 "International Advisor." Telephone interview. 5 March 2015.

at the negotiating table can lessen the government's buy-in into the resulting agreement and allow it to later blame foreign advisors for its terms.[369] In this conception, best practice for the advisor is to develop a core of government officials and lawyers who understand the contract and what its impacts will be and assist them as they gain experience.[370] The advisor will do most of his or her work during negotiation preparations helping build consensus from the disparate views of the representatives from all the relevant government ministries/agencies. This approach has the benefit of building internal consensus which makes the resulting agreement more stable.[371] This could also include the government team drafting the agreement (with the assistance of advisors) so it is clear what they are agreeing to.[372] For some advisors, this approach extends to restricting themselves from speaking at the negotiating table; however, others take the view that if the team has prepared properly and everyone is on the same page, then it shouldn't matter who speaks.[373]

Other advisors advocate for a much more active role at the negotiating table, arguing that if advisors are empowered to engage with the company, they are in a position to play a role, if necessary, that the government representatives cannot. As a result of their outsider status, they have the ability to say things that government representatives might not want, or might not be able to say out of fear of damaging their relationships with the company. The external advisors can operate as the proverbial "bad cop," an aggressive advocate putting forward the government's positions and challenging the company's, while allowing the government the option of supporting the advisors' positions or backing down.[374]

369 "International Advisor." Telephone interview. 23 April 2015.
370 "International Advisor 1." Telephone interview. 22 April 2015.
371 "International Advisor." Telephone interview. 5 March 2015.
372 "International Advisor 2." Telephone interview. 27 April 2015.
373 "International Advisor." Telephone interview. 2 March 2015.
374 "International Advisor." In-person interview. 8 March 2015.

Summary and Recommendations

The laws governing mining and related contracts are different across the world. They differ in every country. In most countries, natural resources are owned by the state, but private companies – sometimes in partnership with state-owned mining companies – do the actual exploration and extraction of the minerals. The granting of mineral rights is the point of entry for companies into a country's mining sector. A mineral right gives a company the exclusive ability to undertake mining-related activities within a designated area and sets out the responsibilities and obligations that that right entails.

The two primary regimes for granting and administrating mineral rights are contracts and licensing. Licensing regimes, based on generally applicable laws and with limited discretionary term-setting are the typical method for awarding mineral rights in countries with robust legal frameworks and strong government institutions. In countries with young mining sectors, often incomplete or inadequate legal frameworks, and inexperienced and capacity-limited government institutions, mineral rights are often granted through negotiated agreements.

There is a range of different types of resource contracts depending on the needs of the country, its political and economic circumstances, its legal regime, and the mining project in question, among others. Joint venture agreements might be used to facilitate the financing of an expensive mining project, or to develop economic linkages and promote technology transfer. Service agreements might be used because of the importance of asserting state ownership over its mineral rights.

Relationship Between Contracts and Law

Agreements in a contract-based regime are the primary texts, establishing the terms of and governing mining projects. In licensing regimes, negotiated agreements can supplement or supplant existing laws. They are often used when countries are beginning to develop their mineral sectors and existing laws are inadequate. Negotiated agreements are also sometimes seen when countries – even those with well-developed legal regimes – need greater flexibility for special mining projects, such as extremely large or remote projects.[375]

[375] Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 34.

Agreements supplementing the law generally contain substantial detail on the provisions being supplemented, while otherwise referring to existing law. Provisions dependent on factors specific to the project are the ones most often supplemented and can include those related to infrastructure or local communities.[376] Agreements supplanting the law do not. Those interviewed suggest that fiscal terms are the ones most often supplanted.[377]

Contract Issues

While all these types of agreements, detailing the terms and conditions for managing a specific project, can compensate for the shortcomings of the existing legal structures, they frequently fail to achieve optimal results for the country. The very benefits that make negotiated agreements so common for the mining sectors of developing countries can be the source of the problems that frequently result.

One of the biggest criticisms of negotiating agreements is that it gives significant discretion to a small number of people, often with little to no oversight, public consultation, or transparency. Given the financial potential and economic value of mining agreements, discretion without proper accountability can create serious risks of corruption. Unlike legislation that is public and allows for political accountability, many negotiations are confidential and often the resulting contracts are kept confidential as well. This can extend so far that in some cases, other government ministries tasked with obligations resulting from the agreement were still not informed of its terms.[378]

Some studies suggest it is possible that negotiated agreements might also undermine the long-term growth and stability of a country's legal framework.[379] Negotiated agreements can depart from or even supplant the law. Regulatory terms that should not be open for negotiation may be included in the contract, which can result in the transfer of the government's administrative and regulatory responsibilities to the company. In countries where weak institutions have

[376] "International Advisor 2." Telephone interview. 22 April 2015.

[377] Ibid.

[378] "Mining Contracts: How to Read and Understand Them," (Creative Commons, 2013).

[379] Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 34.

already created a public lack of confidence in the government, this can create a significant political risk.

The Negotiation Process

The process of negotiating a mineral agreement can create additional issues for developing countries. Inexperience and a desperate need for investment and development put governments in very poor bargaining positions. Asymmetrical information and a poor understanding of the complexities of the agreement undermine negotiations. Weak central government and public institutions hamper government coordination and management. Capacity restraints and the high cost of enforcement hinder effective oversight

A common problem that contributes to the issues that governments face in negotiations is capacity and experience. The officials tasked with negotiating a mineral agreement are often inexperienced and lack the basic understanding needed for all aspects of the process. Due to financial constraints, political instability, or trust issues between the government and its advisors, government negotiating teams can also experience significant personnel turnover. It is difficult for a government to advocate effectively for its interests in a negotiation when facing such challenges.

Another concern in the negotiation process is external influences. Far from taking place in a vacuum, due to the enormous financial, economic, and political implications at stake, the negotiating team is often operating under intense pressure from a variety of stakeholders. While in some cases this influence can be necessary and useful for the process, it can also paralyze decision-making and create opportunities for corruption and political interference.

Implementation

A successful agreement can depend as much on proper implementation as it does on proper drafting.[380] Yet a government often faces even more daunting technical and capacity challenges in implementation than in negotiation. It must oversee the obligations and commitments of the agreement, conduct audits and inspections, coordinate between relevant government ministries and communicate regularly with the company and local communities. The individuals and institutions responsible for implementing agreements can often be different than those who negotiated the agreements, and in some cases due to poor government coordination or a failure to include relevant institutions in the negotiations, they can be unaware of its terms and obligations. The difficulty of these implementation, monitoring and enforcement responsibilities for inexperienced and capacity-restricted government institutions can be greatly exacerbated in contract regimes where they have to administer the varying terms, standards and definitions of individually negotiated agreements.[381]

External Assistance

Many countries will bring in external advisors, experts, and negotiators to assist with the resource, experience, and information asymmetry issues they face.[382] For inexperienced governments negotiating complex and far reaching mining agreements against companies with extensive expertise in these areas, the need for this external support is often undeniable. Yet in interviews for this report, a reoccurring complaint from many external experts who assist governments in such negotiations was the lack of coordination between donors in providing this support. Issues of conflicting advice, duplication of efforts, and undermined efforts to build relationships were all raised. Governments and donor institutions tend to focus most of their attention on the actual contract negotiation process while devoting insufficient effort and resources on both government preparations for negotiations and monitoring and implementation of the agreements once they are signed.

Too many different aid agencies or institutions are providing the same assistance and services. One expert complained that an institution like the World Bank could conduct training for government officials in a country on mining contract negotiation and then a few months later, an international NGO would conduct their own training on contract negotiation. Not only can this be an issue of resources spent on redundant support, it can often result in governments receiving conflicting advice. Different donors and different

380 "Government Official." Telephone interview. 10 March 2015.

381 "International Advisor." Telephone interview. 5 March 2015.

382 Commonwealth Secretariat & International Council on Mining and Metals, "Minerals Taxation Regimes," 2009, op. cit., p. 34.

experts provide different guidance. Their best practices and approach to the issues might conflict. While multiple perspectives are often beneficial, for governments with little experience in properly evaluating conflicting guidance to determine their own best practice, they can in some cases add to the capacity issues.[383] There can be a freezing effect from too much assistance.

Lack of coordination between donors can also hinder relationship building between governments and expert advisors. To maximize the benefits of expert assistance to governments during contract negotiations, the external advisors need to be well informed on the nuances of the country's legal, economic, and political situations, and there must be mutual trust between the advisor and the government's negotiating team. Having existing relationships can expedite the development of that understanding and trust. However, external advisors say donor institutions often initiate the advisors' work providing assistance to developing governments. Due to poor communication, donor organizations hiring experts to assist a government are usually unaware of which experts were involved in past projects in that country. This adds to the existing challenges external advisors encounter in trying to build long-standing relationships with governments.

Global Trends

The continued development of legal frameworks and government institutions in developing countries coupled with the issues entailed by negotiating and implementing contracts has led to a global trend towards fewer discretionary mechanisms for granting mineral rights. This is reflected in the licensing practices of developed countries in the study, such as Australia, Brazil, Canada and Chile which have a long history of mineral development and leave only narrowly circumscribed areas open to negotiation.

Increasingly, developing countries – still the primary users of contract regimes – have begun reviews of the legal frameworks governing their mineral sectors. The results of these reform efforts are almost universally systems with less discretion.

Recently, Guinea amended its Mining Code to make it generally applicable to all agreements, to restrict the government's ability to negotiate tax provisions and limit agreements to supplementing not supplanting the Code.[384] A new minerals law was also enacted in Afghanistan in August 2014 to improve the governance of the mining sector and ensure that any mining contracts entered into must comply with the laws of the land.[385] Liberia is considering a licensing system over its current contract regime.[386]

Other countries have adopted model mining agreements and are using them as the basis for their negotiations. Model agreements are similar in concept to form contracts. Most of the document is established and non-negotiable; however, it includes certain well defined areas that are negotiable. These areas can also frequently only be negotiated within a pre-established range. Governments are finding that they strengthen their bargaining position and reduce the capacity challenges they face with more experienced companies if the topics available for negotiation are terms like the royalty rate, not how royalties are calculated. In this study alone, Burkina Faso, Guinea, Mongolia, Mozambique and Sierra Leone have all either developed or are considering developing model mining agreements.

In fact, the only study countries not fitting this trend are those that are very new to large-scale international mining (Afghanistan, Cameroon, Ecuador), a country that lacks even a distinct mining law (Azerbaijan), and the Philippines, which is the outlier to this global trend.

Recommendations

The following recommendations are the result of the comparative analysis of 30 contracts from 13 countries, a review of the legal frameworks of 18 countries, and interviews with 37 external experts, government officials, company representatives, and CSOs. They are intended to provide some initial guidance and help fo-

383 "International Advisor." Telephone interview. 9 March 2015.

384 KPMG Global Mining Institute, "Guinea: Country Mining Guide," 2014; "Corporate Representative." Telephone interview. 18 March 2015.

385 Unofficial translation of Afghanistan's Mineral Law dated 16 August 2014 (Issue 1143), available at: http://mom.gov.af/Content/files/Afghanistan-%20Minerals%20Law-%20English%20 03_09_2015.pdf.

386 Alix, "The Liberian mining law reform,"2014, op. cit.

cus further discussion on the best potential approaches for German development cooperation in supporting developing countries in granting and administering their mineral rights.

Recommendation: Support the development of strong legal frameworks for mining and supporting model mining agreements as an interim measure

Countries are increasingly dealing with the issues of discretion, corruption, and government capacity by limiting the scope of what is negotiable through robust legal frameworks and a license-based system of granting mineral rights. If done properly, this can facilitate a country's sustainable development while keeping it attractive to foreign investment. Strong mining laws and a license-based system can strengthen a government's bargaining position, decrease the information asymmetries, alleviate government capacity issues, and decrease the risks, impacts or perception of corruption or outside interference. It reduces transaction costs by decreasing the amount of time negotiations require.[387] To achieve such successes, there is both the need and the opportunity to provide governments with support for drafting, enacting, and implementing the legislation and regulations needed for a strict license regime.

While not a replacement for a strong legal framework, model mining agreements can give countries a method for continuing development of its mining sector during the often lengthy transition to a licensing regime. Model mining agreements are an increasingly popular mechanism, but the countries most in need of model agreements are often the exact ones lacking the expertise necessary to develop them. There is the opportunity in those countries to support the development of strong model agreements and to support their enactment into law as an interim measure, to provide the opportunity for parliamentary review, public discussion and transparency. In countries in the long-term process of developing its legal framework, model agreements – even those not enacted into law – can provide a viable mechanism for meeting the country's short-term needs.

For foreign support providers, the development of a model mining agreement has the added benefit of being a large-impact project of finite duration with a clear deliverable.

Recommendation: Support the negotiation of ancillary agreements, including those that govern the development of infrastructure for a mining project, the local content plans and community development agreements

Certain aspects of mining projects, such as those related to local content requirements, infrastructure, or the benefits to be conferred on affected communities, are more specifically addressed in ancillary agreements. This is because such issues tend to be more project-specific than other mining provisions governing the rights and obligations of the parties – whether it be in a mining contract, or in law where a project is governed by a licensing regime.

While the principle government local content obligations can be addressed in generic laws, and some project-specific principles can be addressed in contracts, the details of the implementation plan of the local content provisions are typically found in a local content plan that must be approved by a government representative or committee. It usually requires an assessment of the present and future skills available in the country as compared with the evolving demands of the company. It should propose sliding scale targets to be reached over time, enabling means such as training programs, review periods and enforcement mechanisms. While it is often seen as a company's exercise, it should in fact proceed from a public-private partnership around the issue, stating the obligations of the government as well. Therefore, we consider this local content plan as being an agreement between the parties as well. Given its impact on the realization of local content, assistance for managing the local content process is also needed.

In turn, while some basic infrastructure requirements – such as the need for transport or power infrastructure, or the right to use water from a particular source, may be included in a mining contract or license, detailed requirements for the construction, financing, operation, and maintenance of key infrastructure is likely to require additional agreements. Special care in

387 Peter Rosenblum & Susan Maples, "Contracts Confidential: Ending Secret Deals in the Extractive Industries," Revenue Watch Institute (2009).

negotiating such agreements will be required where the government wishes to promote open access of the mining–related infrastructure and when the infrastructure serving the mine is operated by a third party.

Finally, in respect of affected communities, separate community development agreements are increasingly common to set out particular company obligations. The requirement to consult with affected community representatives may be set out in the mining contract itself, but the details of when, how, and with which community representatives to do so is more likely to be found in a CDA.

Such mining-related agreements should of course present no contradiction with the mining agreement, which could expressly require such agreements to be entered into and may even set out the principles that should govern those agreements.

While most of the emphasis on contract negotiations is placed on the mining contract itself, the specific nature of each of these types of agreements requires specialized expertise that may be lacking in a government negotiating team. External assistance with the preparation for, and negotiation and implementation of such agreements could go a long way towards promoting the sustainability of mining projects.

Recommendation: Promote contract transparency

Open and transparent contracts are critical to good governance and the publicly accountable management of natural resources in contract-based regimes. Transparency can mitigate the issues of discretion in contract negotiation and facilitate effective management. An increasing number of countries now publish their mining agreements and contract transparency initiatives are seeing growing traction globally. To further this progress, support is needed for the development and passage of laws on contract transparency in developing countries, as well for accompanying the process of disclosure of contracts in a way that is most beneficial to all stakeholders.[388] While less optimal, support should also be given to efforts requiring the ratification of mining agreements which will improve oversight and allow for public accountability earlier in the contract process.

Recommendation: Better coordinate donor assistance.

Improved coordination among multilateral aid organizations, donor governments, and the pool of experts and advisors working in this space would make negotiation assistance more efficient and effective. Establishment of a donor coordination framework specific to supporting the mineral sector in developing countries or another mechanism for increased communication between donor governments, multilateral institutions and international experts could address such issues. It would increase information sharing on past and future projects and facilitate complementary projects by donor institutions instead of conflicting ones. Improved coordination would make it easier to develop multi-project or multi-negotiation relationships between developing governments and advisors. One advisor interviewed noted that a coordination framework could also encourage the involvement of more advisors and experts by lowering the opportunity costs of finding consultancies and project opportunities.

Recommendation: Provide support both before and after a contract negotiation.

Granting a mineral right may take months or even years, but the terms of the right may have repercussions for governments for decades. Yet too often, there is the perception on the part of donor institutions and developing governments that the granting of a mineral right is the final endpoint. Donor support in advance of a mineral right might include geological mapping, financial modeling, and business strategy

[388] In Guinea, CCSI and NRGI supported by the World Bank partnered with the government's mining contract review committee to produce www.contratsminiersguinee.org, which has significantly increased the transparency of the Guinean mining sector and the knowledge of Guinea's government officials, citizens, and investors.

and negotiation support.[389] After the right is granted, while there may be donor agencies that provide some level of implementation support – OECD for example is developing Tax Inspectors Without Borders – very little support is given to building integrated government oversight over the project. From a government perspective, mining projects involve coordinating a number of government ministries and agencies, addressing administrative and technical issues, and making complex, sector-specific decisions.[390] Such capacity building and support efforts can be especially useful in contract regimes where the implementing institutions are faced with terms, standards and definitions that vary due to individually negotiated agreements.[391]

Support is needed for a government implementation committee that would monitor the ongoing obligations set out in the right, resolve technical issues, and make those complex, sector-specific decisions. Provisions for such a committee should be included in licenses and mining agreements, including funding provisions for any external advisor the government may wish to retain. Support efforts should begin by advocating for the inclusion of implementation committee provisions and provisions for its financing in the rights granting process. Support after the right was granted should focus on developing compliance manuals detailing all of the government's obligations under the agreement, and on a continued engagement to identify the government's technical assistance needs as they develop, for which assistance will be directed through the implementation committee. Support could also be given for embedding advisors in relevant ministries such as mining or finance for extended periods to assist during the early stages of implementation, or hiring domestic professionals to staff the institutions even if it requires paying higher rates than other civil service positions.[392]

Recommendation: Provide nonlegal support to the negotiation and implementation process.

In addition to expanding support to the entirety of the negotiation and implementation process, support needs to be expanded beyond just legal and negotiation assistance. Governments are often in even greater need of support with mineral economics, mining operation and management, which can be entirely new to them. One particular need is assistance in building and evaluating financial models, a critical area where governments often operate at a significant informational disadvantage. Governments also are frequently in need of access to greater geological information, such as their own geological surveys.

The institutions implementing the agreements need support and training as well. Capacity building is needed for the inspectorate responsible for enforcing mining, safety and environmental regulations. Government auditors as well as economic and ore geologists monitoring revenue and production levels could benefit from training and assistance.

Recommendation: Support regional legal harmonization efforts.

The African Mining Vision adopted by the African Union in 2009 put forth a holistic framework for mining in Africa that included the need to build and integrate mining networks regionally. African countries have responded, and there have been legal harmonization efforts around mining at the sub-regional level. The Economic Community of West African States is attempting to establish a common code of conduct for mining in its draft Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector.[393]

Such endeavors at regional coordination and eventually regional integration in mining are in the early stages. These efforts should be supported in developing countries worldwide. Regional cooperation could potentially accelerate the optimization of mineral resources and expand the scope of economic linkages.[394] For countries competing with each other for foreign investment, regional legal harmonization would reduce the pressure to engage in a war of incentives. It would make it easier to develop cross-border mineral deposits

389 Sachs, Toledano, Mandelbaum, with Otto, "Impacts of Fiscal Reforms on Country Attractiveness," 2012, op. cit., p. 374.
390 "International Advisor." Telephone interview. 9 March 2015.
391 "International Advisor." Telephone interview. 5 March 2015.
392 "International Advisor 2." Telephone interview. 22 April 2015.

393 Hany Besada and Philip Martin, "Mining Codes in Africa: Emergence of a "Fourth" Generation?" The North-South Institute (March 2013).
394 "Government Official." Telephone interview. 19 March 2015.

and increase markets for minerals.[395] Regional harmonization of mining-related law would also increase stability of and trust in the law while strengthening the position of those countries' negotiators.

Recommendation: Build government capacity and understanding of commodity markets.

According to many of those interviewed, despite the economic scale of mining, most countries do not understand the mining industry or commodities markets. One corporate representative expressed the belief that a lack of understanding of the volatile nature of mining's "boom and bust" cycle contributed to the political downfall of the prime minister of Australia in 2013.[396] Given the impact that these commodity cycles can have on the success or failure of mining projects, more effort is needed to build government understanding of these complex markets.

Support needs to be given to training programs on mining commodities and commodities markets for government decision-makers in the mining sector and for those involved in negotiations around mining projects. Additional more substantive support should be given for the education and training of mineral economists and commodities specialists in government in developing countries.

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395 AU Conference of Ministers Responsible for Mineral Resources Development, "Minerals and Africa's Development," (December 2011).

396 "Corporate Lawyer." Telephone interview. 4 March 2015; Jeff Sparrow, "Where it all went wrong for Kevin Rudd and the Australian Labor party," The Guardian, 6 September 2013.

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Appendix A

STUDY COUNTRY SELECTION CRITERIA[397]

Country	Regulatory regime					Contract Type[X]							Country Income Level			Mining Sector Experience		Era			
	Common Law	Civil Law	Licensing Regime	Contract Regime	Transitioning from Contract to Licening	Concession	Joint Venture Agreement	Devel-opment Agreement	Investment Promotion	Production Sharing	Supplement the Law	Supplant the Law	High Income	Middle Income	Low Income	None/Limited	Established	1960-70s	1980-90s	2000-2008	2009-Present
Afghanistan		X[1]			X (2014 Minerals Law)[5]	X						X			X	X					X
Australia	X		X		N/A						N/A	N/A	X				X				
Azerbaijan		X		X				X				X		X[9]			X		X		
Brazil		X	X		N/A						N/A	N/A		X[10]			X				
Burkina Faso		X			Working on a new mining law and has an MMDA (2005)			X			X				X		X		X	X	
Cameroon		X[2]						X				X		X		X					X
Canada	X		X		N/A						N/A	N/A	X				X				
Chile		X	X		N/A						N/A	N/A	X				X				
DRC Congo		X			Working on a new mining law		X	X				X			X		X		X	X	X
Ecuador		X				X						X		X		X					X
Guinea		X			X (New Mining Code: 2011)							X			X		X	X	X		X
Liberia	X				X (MMDA: 2008)[6]			X			X	X (pre-2008)			X		X			X	X
Mongolia		X			X (Draft MMDA not yet passed)			X			X			X			X				X
Mozambique		X[3]			X (New Mining Law: 2014)[7]	X						X			X		X			X	
Peru		X	X						X		X			X			X				X
Philippines		X[4]								X	X			X			X		X		X
Sierra Leone	X				X (Draft MMDA not yet passed)			X		X		X			X		X			X	X
Zambia	X				X (Mining Law: 2008)[8]						N/A	N/A		X[11]			X				

Regulatory regime section describes the current state of the countries. The other sections describe the contracts collected for the study - and their relationship with the Law at the date the contract was signed.

t1 Civil law mixed with customary & Islamic law.
t2 Mixed legal system of English common law, French civil law, & customary law.
t3 Mixed with some customary law.
t4 Mixed with customary & Islamic law.
t5 The new Minerals Law is being revised.
t6 Liberia began examining a transition to a licensing regime in 2012 but has an MMDA since 2008.
t7 Still unclear if Mozambique's new law will prohibit contract negotiations.
t8 Zambia fully transitioned to a licensing regime in 2008, annulling all previous mining contracts.
t9 Upper Middle Income.
t10 Upper Middle Income.
t11 Lower Middle Income.

397 Note that this study limited its review to publicly available mining contracts, which are more readily available since 2000 owing to the recent rise of transparency initiatives in the mining sector. The higher representation of mining contracts in recent years in the comparison, however, distorts the finding of a trend towards licensing regimes rather than negotiated contracts.

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ADDRESSES OF THE BMZ OFFICES

→ BMZ Bonn
Dahlmannstraße 4
53113 Bonn
Germany
Tel. +49 (0) 228 99 535 - 0
Fax +49 (0) 228 99 535 - 3500

→ BMZ Berlin im Europahaus
Stresemannstraße 94
10963 Berlin
Germany
Tel. +49 (0) 30 18 535 - 0
Fax +49 (0) 30 18 535 - 2501

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30655 Hannover
Germany
Tel. +49 (0) 511 643 - 0
Fax +49 (0) 511 643 - 2304
Internet: www.bgr.bund.de/DE/Themen/Zusammenarbeit/TechnZusammenarbeit/Politikberatung_SV_MER/Home/politikberatung_svmer_node.html

AUTHOR
David Kienzler with the collaboration of Perrine Toledano, Sophie Thomashausen and Sam Szoke-Burke (Columbia Center on Sustainable Investment)

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CONTACT
poststelle@bmz.bund.de
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