

Appendix 2

Mining Company Obligations

Financial Obligations

The government's ability to collect revenues from mining projects is typically the main reason to permit mining to occur in the first place: countries want to use wealth from their natural resources to contribute to economic development. To this end, governments use a mix of different fiscal instruments to collect revenue from the mining sector, including:

- Royalties
- Income taxes
- Withholding taxes
- Customs duties
- Bonuses

More detail on each of these revenue collection instruments is provided in Revenue Watch's *Drilling Down*.¹ Information on tax and royalty obligations should be publicly available and usually appears in a country's income tax act or mining code. There may be some cases in which the fiscal regime varies from the law and is defined in individually negotiated contracts, although this is not the preferable method. If a company has committed to paying a bonus, that obligation should appear in project-specific documentation, such as the contract.

Tax and royalty obligations include two important pieces of information: the rate and the base. For example, a tax rate may be 30 percent, and its base may be profits. This means that once a company calculates its profits, 30 percent of that amount must be paid to the government. The government will also establish certain controls to ensure the taxes and royalties a company owes are calculated properly. These include restrictions on what types of costs a company can deduct in calculating its profits, and on how a company can calculate its costs and revenues for tax purposes. Many of these controls are ways for governments to combat challenges associated with transfer pricing.

Transfer pricing is one of the biggest monitoring challenges for many countries. In its narrowest sense, transfer pricing is often understood as the pricing of goods within a vertically integrated company. But some of the most problematic issues may arise with management costs and service agreements among related companies. Transfer pricing is discussed in more detail in Box 7 in the body of this report.

Social Obligations

A company may be required to undertake a number of social obligations, including commitments to:

- Use local goods, services and labor whenever possible.
- Consult with local communities and/or indigenous groups about the mining project and its possible impacts.
- Build, improve and make available infrastructure, such as roads, schools or clinics.

Local Content Requirements

Local content requirements—to use local goods, services and labor—are fairly common and often appear in the mining code, although they may also be written into the contract. They take a variety of forms, but the common goal is to encourage development of local labor and industry. Table A2 summarizes a variety of approaches.

¹ David L. Goldwyn, *Drilling Down: The Civil Society Guide to Extractive Industry Revenues and the EITI*, Revenue Watch Institute, 2008, chap. 7, <http://revenuewatch.org/news/publications/drilling-down-civil-society-guide-extractive-industry-revenues-and-eiti>.

TABLE A2| **SAMPLE LOCAL CONTENT PROVISIONS**

Type of Provision	Example	Source
Company must plan for local content in its application for mining license	An application for a mineral right shall be submitted to the Minerals Commission in the prescribed form and shall be accompanied with a statement providing . . . particulars of the applicant's proposals with respect to the employment and training in the mining industry of Ghanaians.	Ghana, Minerals and Mining Act 703, 2006, paragraph 11
Company must give preference to local labor	Citizens of Sierra Leone possessing the necessary qualifications and experience shall be given preference for employment in all phases under mineral rights.	Sierra Leone, Mines and Minerals Decree, Article 116(1)
Government restricts use of expatriate workers	A mineral right holder shall not import unskilled labour for the carrying out of any of its operations undertaken under the mineral right.	Sierra Leone, Mines and Minerals Decree, Article 116(2)

In addition to broadly applicable local content requirements defined in laws, some countries have also included more specific requirements in contracts. The local content provisions from Trinidad and Tobago's Deep Onshore Model Production Sharing Contract are excerpted in Box A1. The country's approach envisions companies engaging proactively with the ministry to identify local content opportunities and to report periodically on the achievement of local content targets.

BOX A1| TRINIDAD AND TOBAGO, DEEP ONSHORE MODEL PRODUCTION SHARING CONTRACT, 2006, ARTICLE 39: LOCAL CONTENT

<p>39.1 Contractor shall comply with the Government's Local Content Policy in force and as modified from time to time.</p> <p>39.2 Contractor shall maximize to the satisfaction of Minister the level of usage of local goods and services, businesses, financing and the employment of nationals of the Republic of Trinidad and Tobago.</p> <p>39.3 Contractor shall ensure that sub-contracts are sized, as far as it is economically feasible and practical to match the capability (time, finance and manpower) of Local Enterprises and shall manage the risk to allow their participation.</p> <p>39.3 Contractor shall provide to Minister together with the annual work programme and budgets . . . a list of all projects to be undertaken as well as all goods and services that are required for the conduct of Petroleum Operations. The Minister and Contractor shall agree on a list of those projects and goods and services which shall be published in at least two local newspapers and on the Ministry's website.</p> <p>39.4 All tenders are to be advertised, evaluated and awarded in Trinidad and Tobago. Contractor shall apply to Minister for prior approval where the circumstances warrant that any part of the tender process be conducted outside of Trinidad and Tobago.</p> <p>39.5 Contractor shall give equal treatment to Local Enterprises by ensuring access to all tender invitations and by including high weighting on local value added in the tender evaluation criteria.</p> <p>39.6 Contractor shall give assurance to Local Enterprises in respect of prompt payment for goods and services actually provided to Contractor and its Subcontractors both foreign and local.</p> <p>39.7 Contractor shall ensure the development of people by imparting to nationals technology and business expertise in all areas of energy sector activity including but not limited to:</p> <ul style="list-style-type: none"> (i) Fabrication (ii) Information Technology support, including seismic data acquisition, processing and interpretation support (iii) Operations and maintenance support (iv) Maritime services (v) Business support services, including accounting, human resource services, consulting, marketing and contract negotiations (vi) Financing (vii) Trading <p>39.8 Contractor shall ensure that nationals are selected and trained consistent with Contractor's performance standards in relation to activities referred at 39.7.</p>

39.9 In addition to the requirements in Article 39.7 Contractor shall ensure that the development of people in key areas allow [sic] nationals to take more value-added, analytical and decision making roles in areas:

- (a) of a technical or professional nature including general management, design engineering, project management, seismic data processing, human resource development, legal; and
- (b) business strategic skills including leadership, business development, executive management, commercial, analytical, negotiating, strategy development and trading know how and acumen.

39.10 . . . Contractor shall maintain records to facilitate the determination of the Local Content of expenditure incurred in respect of Petroleum Operations. These records shall include supporting documentation certifying the cost of local materials, labour and services used and shall be subject to audit by Minister.

39.11 . . . Contractor shall prepare and submit reports to Minister in accordance with the specified timeframe.

Community Consultation and Consent Requirements

Requirements to consult with affected communities and/or to get their consent may arise in several possible ways:

First, treaties, constitutions or national laws may require the government to consult with affected communities on the impact of certain types of activity on their land. Several international and domestic legal instruments recognize the rights of communities—and of indigenous communities in particular—to consultation regarding mining on their lands. International Labour Organization (ILO) Convention No. 169 together with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and other human rights instruments comprise the international normative legal framework for the protection of indigenous and tribal rights, including the right to free, prior and informed consent (FPIC).²

BOX A2 | FPIC AND ILO CONVENTION NO. 169

The principle of FPIC protects the fundamental rights of indigenous and tribal people to their land and resources. It requires states to consult in good faith with affected communities on the impact of state-sanctioned activities on their land and resources with the objective of getting their consent for these activities. The right to FPIC in relation to resource extraction activity has been consistently recognized in domestic and international law, including in International Labour Organization (ILO) Convention No. 169.

Governments of countries that have ratified the ILO Convention are legally mandated to consult with affected communities in a number of circumstances—including before granting concessions for natural resource extraction projects.³ Twenty-two countries have ratified ILO Convention No. 169 as of May 2011.⁴ Latin America has the largest number. In some countries, ratified international treaties either become directly effective in domestic law (e.g., Colombia, Costa Rica and Ecuador), while other countries require separate implementing legislation (e.g., Belize). The legal status of treaties also varies by country. Some give treaties constitutional rank (e.g., Bolivia, Colombia and Peru), while others recognize treaties as being above or equal to the force of legislation (e.g., Ecuador).

Ratifying states are required to submit periodic reports to the ILO on the measures they have adopted to fulfill their obligations such as prior consultation and FPIC. Governments are required to consult with indigenous and tribal representatives in the preparation of these reports.

The second way that communities may need to be consulted is through national laws that require companies to consult with communities and/or develop plans to address community needs before beginning operations. South Africa's Mineral and Petroleum Resources Development Act requires companies to submit a Social and Labour Plan (SLP) as part of their application for a mining right and to report annually to the Department of Mineral Resources on their progress against the SLP.⁵ SLPs must contain a human resources development program and a local economic development program, including an analysis of the impact the mine would have on the local community.⁶

² See also International Covenant on Civil and Political Rights (ICCPR), arts. 1.1, 14.1 and 25; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), art. 14.2. The UN Committee on the Elimination of Racial Discrimination has recognized the requirement for FPIC prior to exploitation of indigenous peoples' land and resources. UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 13*, paras. 3, 5, UN GAOR, 52nd session, Supp. No. 18, UN Doc. A/52/18/Annex V (1997); International Covenant on Economic, Social and Cultural Rights (ICESCR), arts. 1.1, 3.1 and 13.1. The UN Committee on Economic, Social and Cultural Rights has recognized the failure of a state to obtain consent as a key causal factor in the unlawful exploitation of indigenous land and as a requirement for the grant of natural resource concessions. UN Economic and Social Council, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, 12, UN Doc. E/C.12/1/Add.100 (2004); UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Report on the 25th, 26th and 27th Sessions*, 761, UN Doc. E/2002/22 (2002).

³ Article 15(2) of the convention mandates states to conduct prior consultation before undertaking natural resource exploitation activities.

⁴ The list of ratifying countries is available at <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169>.

⁵ South Africa, Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002): Mineral and Petroleum Development Regulations, 2004, art. 46.

⁶ South Africa, Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002): Mineral and Petroleum Development Regulations, 2004, art. 46.

A third way community consultation requirements may arise is through external financial entities. Most significantly, the International Finance Corporation (IFC), a member of the World Bank Group, has extensive rules for free, prior and informed consent and consultation as well as information-sharing and grievance procedures that apply throughout the life of a mining project. These rules were updated in 2011 and will apply to public and some private banks that fund mining projects.

Finally, beyond legal requirements, nonbinding voluntary initiatives of companies and industry associations may also encourage processes to obtain community consent. These initiatives, such as the Sustainable Development Framework from the International Council on Mining and Metals appear to be gaining in importance.

Infrastructure Requirements

Some companies also make commitments regarding construction or improvement of local infrastructure. In some cases, they agree to provide social services as well. These infrastructure obligations are project-specific and will therefore arise in project-specific documents, such as the contract or a community development agreement.

While some countries have been moving away from infrastructure requirements because they think the government—not private companies—should be responsible for providing social services to citizens, some infrastructure requirements do still exist. In some countries, companies are better able to identify infrastructure needs in the area surrounding their mining projects, to get the required materials to the site, and to complete the construction due to their existing resources and infrastructure.

Infrastructure requirements can be difficult to monitor because they require some assessment of the quality of the infrastructure. Many of these challenges are discussed in Box 3 on the special challenges of monitoring mineral-backed infrastructure loans in the body of this report. Box A3 provides a sample infrastructure provision from Liberia's contract with Mittal Steel.

BOX A3 | SAMPLE INFRASTRUCTURE PROVISION

On and from the Commercial Operation Startup Date, the CONCESSIONAIRE shall provide, in the Concession Area, free primary and secondary education (in conformity with provisions of the Education Laws of Liberia and generally applicable standards on education in Liberia) for the direct dependents of the CONCESSIONAIRE's own employees, and the GOVERNMENT officials assigned to the Concession Area in connection with the Operations.

- Mineral Development Agreement between the Government of the Republic of Liberia and Mittal Steel Holdings N.V., 2005, Article XI, Section 1(a)

Environmental Obligations

A company's environmental obligations most often include the following:

- The company must submit an environmental impact assessment (EIA) and an environmental management plan (EMP).
- The company must comply with the terms of the EIA and EMP in its operation of the mine.
- The company must comply with the country's environmental laws.

An EIA identifies the possible environmental impact of a proposed activity, and an EMP identifies the mitigation measures that will be put in place to minimize the activity's possible environmental harm. Normally the government must approve a company's EIA and EMP in order for the project to move forward. In some countries, an EIA includes both an assessment of the impacts and a mitigation plan for minimizing them; for those cases, a separate EMP may not be required. EIAs and EMPs form the basis of a company's legal commitments with respect to environmental issues for a particular project, so they are important documents for government and civil society actors to be familiar with.

The following EIA-specific resource may be particularly valuable to those interested in monitoring a mining company's environmental commitments:

- Environmental Law Alliance Worldwide (ELAW), *Guidebook for Evaluating Mining Project EIAs* (2010), <http://www.elaw.org/mining-eia-guidebook>.

Environmental obligations tend to be defined in the country's environmental law or sometimes in the mining code, although the project-specific EIA and EMP will typically present more specific commitments. International environmental standards also play an important role in how companies operate, with some contracts even specifying that the company will comply with international good practices with respect to the environment.

BOX A4 | SAMPLE ENVIRONMENTAL PROVISIONS

Requirement to comply with the country's environmental laws:

- (1) Before undertaking an activity or operation under a mineral right, the holder of the mineral right shall obtain the necessary approvals and permits required from the Forestry Commission and the Environmental Protection Agency for the protection of natural resources, public health and the environment.
- (2) Without limiting subsection (1), a holder of a mineral right shall comply with the applicable Regulations made under this Act and any other enactment for the protection of the environment in so far as relates to exploitation of minerals.

Mine and quarry operations must be carried out in such a way as to ensure environmental protection in accordance with the Environment Code. Enterprises must take all steps necessary to prevent pollution of the environment, to treat wastes, emanations and effluence, and to preserve the forest and water resources.

- Liberia, Minerals and Mining Act, 2006, Article 18—Forestry and Environmental Protection

Requirement to submit an environmental impact assessment and environmental management plan:

Any holder of a mining title or beneficiary of a quarry permit shall, before beginning work pursuant to that title or permit, prepare and submit for approval a comprehensive environmental impact assessment and an environmental management plan, including a site rehabilitation plan and cost estimates, to the mining and environmental ministries, and any other body provided for under the mining regulations.

- Côte d'Ivoire, Mining Code, 1995, Article 77

Contractual commitment to comply with international good practice:

The activities of [Tenke Fungurume Mining] will be carried on in compliance with environmental standards internationally accepted as good Mining practice.

- Amended and Restated Mining Convention among the Democratic Republic of Congo and La Générale des Carrières et des Mines and Lundin Holdings Ltd. and Tenke Fungurume Mining S.A.R.L., 2005, Article 22

Occupational Health and Safety Obligations

Companies have obligations with respect to the health and safety of their workers, known as occupational health and safety. These are typically defined in special laws particular to health and safety issues. In some countries, there are general health and safety laws for all industries, while other countries have mining-specific legislation and regulations. There are also several international conventions that address occupational health and safety, as listed in Box A5.

BOX A5 | BROAD-BASED ILO INSTRUMENTS ON OCCUPATIONAL HEALTH AND SAFETY (SELECTED)

- C155 Occupational Safety and Health Convention, 1981 (ratified by 50 member states) and its Protocol of 2002 to the Occupational Safety and Health Convention (P155)
- C187 Promotional Framework for Occupational Safety and Health Convention, 2006
- C161 Occupational Health Services Convention, 1985
- C174 Prevention of Major Industrial Accidents Convention, 1993
- C148 Working Environment (Air Pollution, Noise and Vibration) Convention, 1977
- C170 Chemicals Convention, 1990
- C162 Asbestos Convention, 1986
- C139 Occupational Cancer Convention, 1974
- C121 Employment Injury Benefits Convention, 1964

The scope of this legislation can be quite broad. As an illustration of the issues typically covered, Box A6 provides a list of some of the topics covered in the ILO Codes of Practice for Safety and Health in Underground Mines.

BOX A6 | SELECTED PROVISIONS IN ILO CODE OF PRACTICE ON SAFETY AND HEALTH IN UNDERGROUND COALMINES⁷

- General duties (competent authority; rights and duties of workers, contractors and employers; and responsibilities of suppliers, manufacturers and designers)
- Occupational safety and health management systems
- Prevention and protection (industry-specific safety and health hazards; hazard identification; and risk assessment and control)
- General physical, chemical, safety and ergonomic hazards

⁷ ILO, *Code of Practice on Safety and Health in Underground Coalmines*, 2006, <http://www.ilo.org/public/english/dialogue/sector/techmeet/meshcmo6/code.pdf>.

- Respirable dust
- Mine fires
- Machinery and plant equipment
- Explosives and shot-firing
- Surface building, other surface structures and roads
- Surveyors and plans
- Roads
- Haulage and transport
- Support of roof and walls
- Ventilation
- Competence, education and training
- Personal protective equipment
- Contingency, emergency preparedness and rescue
- Safety and health committees

Operational and Production Obligations

Governments may also regulate how companies make particular operational decisions, and how much money they are required to invest in their projects. They may require companies to submit work programs and budgets for approval, or to conduct exploration and prospecting operations within predetermined timeframes. These requirements allow governments to better define their vision for the development of the mining sector and enable them to work with companies to achieve it.

Once a country has decided to open up a particular geographic area to mining activity, that country does not necessarily know whether mineral reserves exist within that area. The faster mining companies perform exploration activity (ranging from surveying to seismic mapping), the better a government will be able to control the pace of development and ensure that natural resource extraction has the maximum benefit for the population. As the Natural Resource Charter explains, “[I]f exploration of resource deposits does not take place, or is limited in scale, due to problems in the allocation of exploration rights, a country may never know the extent of its resource wealth.”⁸

However, companies’ incentives do not always align with the government’s incentives. Exploration activity can be very expensive, and there is no guarantee that the company will find viable mineral reserves. In some cases, companies may speculatively hoard exploration permits, conducting no exploration of their own but hoping that another company will make a big discovery nearby. If such an event happens, a permit becomes much more valuable without any investment on the part of the holder.

To prevent such speculative hoarding, governments have used the following techniques, which are typically defined in the mining code:

- Impose minimum expenditure requirements in order to require companies to invest money in exploration activities.
- Require companies to relinquish some portion of their exploration concession each year or before they can request a renewal.
- Require companies to submit a work plan in their applications for prospecting or exploration permits, and to comply with that plan during the exploration phase.

⁸ Natural Resource Charter, 2010, Precept 1, Level 2, http://www.naturalresourcecharter.org/sites/default/files/nrc_brochure_final_v4.pdf.