

# 1. Introduction

This report is intended to help government and civil society actors understand the challenges and good practices associated with effective oversight and enforcement in the mining industry. To monitor, mining obligations must first be identified, but they are not always obvious.

**Part 1** addresses this issue and makes the distinction between contractual regimes and permit regimes. It will help readers situate themselves and their respective countries within a broader global context to learn how the mining industry operates in different countries and what is required to fully understand a company's legal obligations in these different settings.

**Part 2** identifies the obstacles to effective monitoring, in particular the lack of capacity and transparency and the issue of misaligned incentives.

**Part 3** presents areas of good practice to facilitate and enhance monitoring. While no single set of best practices exists to perfectly optimize monitoring efforts, the policy options presented can provide direction.

**Part 4** ends with recommendations for a variety of stakeholders who play a role in ensuring effective, sustainable management of the world's natural resources.

This report also includes three appendices to support civil society monitoring efforts. Appendix 1 is in this report, while Appendices 2 and 3 are available online at [www.revenuewatch.org/enforcingtherules](http://www.revenuewatch.org/enforcingtherules).

- **Appendix 1** presents a civil society monitoring toolkit. It covers five broad categories of company obligations (financial, social, environmental, occupational health and safety, and operational and production requirements) and presents sample obligations, possible sources of information for monitoring implementation, and questions civil society can ask to determine whether a company is fulfilling its obligations.
- **Appendix 2** provides background information on the five categories of company obligations in Appendix 1, including additional sample provisions for each obligation.
- **Appendix 3** identifies sources of information on the fulfillment of mining companies' obligations, including company and industry reports, government reporting, the Extractive Industries Transparency Initiative (EITI) and freedom of information laws. Although this is intended primarily for civil society, governments may also benefit from the sources.

## 1.1 Contextual Framework

Activity around mining companies' obligations can be roughly divided into the following three stages:

1. *Awarding concessions*: Governments grant concessions to mining or oil companies. This may occur through public auctions, a negotiation process or an application process. At the end of this stage, a company has gained the right to mine or to extract oil. This right can take the form of a license, permit or contract depending on the legal framework in the country (see Section 1.2). Government and civil society want to ensure that the terms of the deal are fair and that the overall investment is favorable to the country.
2. *Review and analysis of concessions granted*: Relevant actors within government and civil society seek access to the signed agreement (contract, license or permit) and the opportunity to analyze its terms. Because mining permits and contracts are not always released publicly, civil society will need to demand transparency in order to achieve this step.
3. *Monitoring and enforcement*: In this stage—the primary focus of this report—a company has launched its operations, and government and civil society monitor these operations to ensure that the company is complying with the terms of the concession agreement. The executive branch of government has primary responsibility for enforcing the terms of the deals, but civil society and other government entities will also monitor to hold both the company and the executive branch accountable.

## 1.2 What Must Be Monitored and Enforced?

Mining companies are subject to a range of obligations that can be grouped broadly into (i) fiscal terms (including taxes and royalties), (ii) operational commitments (e.g., work programs), (iii) environmental obligations, (iv) worker health and safety, and (v) social commitments. More information on these types of mining company obligations is provided in Appendix 2.

How and where these obligations are defined varies across countries, and sometimes within the same country. They may be based in law or contract. And with respect to contracts, the terms may be separately negotiated or based on a model contract with specified exceptions. The more variation there is in different companies' obligations, and the more varied the sources of those obligations, the more difficult it is to determine them with certainty and to monitor them effectively.

In a pure contractual regime, little is defined in generally applicable law, so the primary document governing the investment is a contract (sometimes referred to as a mineral development agreement or MDA) negotiated by the government and the investor. It is typically a long document defining the entire range of company obligations, including tax and royalty rates. It may also cover additional obligations relating to local content, social infrastructure, environmental protection, health and safety, and so on. Individually negotiated agreements of this kind are increasingly frowned upon because of the discretion and complexity they generate, but there are many that are still in effect or in negotiation.

Alternatively, in a pure permit regime, all of the major obligations applicable to mining operations are established through legislation and regulations. Rather than signing contracts with individual companies, the government establishes a system for companies to apply for permits or licenses to mine particular areas of land, and those permits or licenses are subject to generally applicable legislation regarding taxes, royalties, environmental requirements and so on. Companies' permits and licenses contain identical obligations.

In reality, however, no legal system relies purely on contracts or purely on laws to dictate the full range of company obligations. Instead, most countries operate somewhere on a continuum with varying degrees of reliance on individually negotiated project obligations and generally applicable obligations that apply equally across all companies. The DRC, South Africa and Peru help illustrate this continuum.

Problems with government oversight exist in every country with a large mining sector. While no country has mastered the challenges, the situation in many developing countries is far more urgent. If these nations take advantage of the information generated by increased transparency and the industry's growing engagement in sustainability, they will eventually get the most from their resources and prevent the worst harms.

The DRC is primarily a contractual regime, in which individually negotiated contracts define significant company obligations. The 2002 mining code was intended, in part, to bring uniformity to the mining sector. The code defines a general tax and royalty regime as well as significant environmental provisions that apply, in theory, to all companies. But it has had limited success, and there is no model contract under the code. In Katanga Province, the historical center of industrial mining, most mining projects are joint ventures (JVs) negotiated by the DRC's parastatal copper and cobalt company, Gécamines. The JV contracts define a range of obligations that go beyond the code and are particularly significant with respect to financing, governance and management. Companies also typically need to develop individual work programs that define many of their operational and production requirements. Some contracts entered into before 2002 remain in effect, further complicating the determination of obligations.

South Africa, on the other hand, operates a permit regime in which the word "contract" almost never appears.<sup>5</sup> Companies apply for mining rights, subject to generally applicable laws and regulations. But there are significant obligations that are subject to individual negotiation. Each company must develop and submit a project-specific Social and Labour Plan (SLP), an environmental management plan (EMP) and a work program. The company and the government must agree on the particular social, environmental and operational concerns of that project and on how the company should address them. The structure and format of the documents are defined in law, and their general contents are thus standardized across projects. Their specific contents, however, vary depending on the project's particular impacts and needs, and, as noted below, they remain largely unavailable to the public or direct stakeholders.

Peru operates across the middle of this continuum. It has generally applicable mining legislation, and companies are required to apply for mining permits, the terms of which comport with the country's legislative framework. On its face, this arrangement looks much like a pure permit regime (although the law actually refers to a "contract" as part of the licensing process); but Peru's mining sector has two unique arrangements that more closely resemble contractual regimes. The first is a stabilization contract. Once a company has a mining permit, it can apply for this type of contract, which freezes the company's tax and royalty structure so the company is not required to comply with tax or royalty increases passed after the contract takes effect. The stabilization contracts themselves do not vary greatly, but they create a situation in which the legal framework applicable to a particular contract depends on whether the company has a stabilization contract and, if so, when it came into effect. Second, some mining projects are still subject to negotiated contracts rather than the country's permit regime. When the country's mines were privatized, some that had been publicly managed were granted through a contracting process.

One of the lessons from this continuum is that focusing too heavily on the contract artificially limits monitoring efforts in contractual regimes, while looking only to laws and regulations in permit regimes leaves out important company obligations that should be examined. In fact, many significant obligations may not be found in the law or in a contract. Those include, in some cases, EMPs, work programs, social impact assessments, local development plans and other project-specific commitments. There are challenges to identifying the most significant obligations in every jurisdiction, though regimes that depend on individually negotiated contracts have historically posed the most significant problems. There, the variations among companies are further complicated by a history of secrecy that is only beginning to break down.

Nevertheless, while varying among countries, increased transparency, legal reform and the disclosure obligations of listed companies have created circumstances in which it is increasingly possible to identify the obligations of companies and to monitor them. This is discussed in more detail later in this report, including the issue of proliferation of legal frameworks in Section 2.1 and the issue of contract transparency in Section 2.2.

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<sup>5</sup> South Africa moved to a mining permit regime fairly recently as part of its post-apartheid reform efforts. The current regime is defined in the Mineral and Petroleum Resources Development Act of 2002.