

Enforcing the Rules

In many countries rich in minerals, mining deals between industry and government have failed to deliver the benefits citizens expect—not only because of bad contracts but also because governments and civil society fail to effectively monitor and enforce company compliance with contract terms.

Recent years have brought significant improvements in industry and government transparency, national mining laws and contracts, but monitoring remains the only way to determine whether activity on the ground reflects the deals struck with companies.

Many developing countries with weak regulatory systems lack the capacity or political will to ensure that company obligations are enforced. The result can be losses of billions of dollars to tax evasion and fraud, and harm to workers, the environment and social peace.

In *Enforcing the Rules: Government and Citizen Oversight of Mining*, authors Erin Smith and Peter Rosenblum examine the gaps in effective monitoring of mining obligations, identify good practices emerging in a number of countries and propose practical avenues for improvement.

The following highlights from *Enforcing the Rules* describe how the widespread lack of capacity makes innovative partnerships a critical element of successful monitoring and enforcement. Partnerships can help address unequal incentives and deficient access, but careful attention to checks and balances in the partnership process is needed.

Civil society, governments and companies must work together to improve sector governance. At the international level, governments and intergovernmental institutions should work to create an environment for better monitoring.

To learn more about *Enforcing the Rules* and download the full report, go to renewwatch.org/enforcingtherules.

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Government agencies have the primary responsibility for monitoring companies' operations to ensure they are fulfilling their obligations under the country's laws, regulations and contracts. These institutions should be structured in a way that encourages and allows effective monitoring to take place.

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Separate monitoring and enforcement from other ministry activities to avoid conflicts of interest.

Devote specialized resources to large taxpayers to maximize returns.

Create semiautonomous revenue authorities to increase accountability and improve performance.

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Government: Ensure government agencies have sufficient staff to conduct effective monitoring. Establish dedicated functions when possible.

Civil society: Collect statistics on staff numbers in government agencies and advocate increases in staff and other resources when needed.

Parliament: Review agency budgets to determine whether they devote sufficient resources to monitoring.



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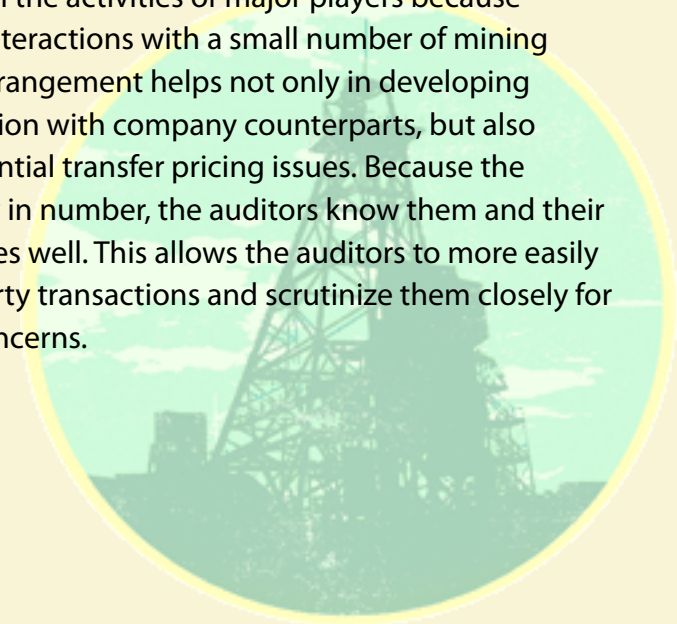
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Some countries have created large taxpayer units to dedicate special attention to the unique characteristics of large taxpayers, including industrial mining companies. Large taxpayers can account for 30 to 70 percent of a country's fiscal revenues. One official in the Mining Unit of the Large Taxpayer Office of the Zambian Revenue Authority (ZRA) reports that the staff have become experts on the activities of major players because of their frequent interactions with a small number of mining companies. This arrangement helps not only in developing good communication with company counterparts, but also in identifying potential transfer pricing issues. Because the companies are few in number, the auditors know them and their corporate structures well. This allows the auditors to more easily identify related party transactions and scrutinize them closely for transfer pricing concerns.



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The legal frameworks that determine mining companies' obligations must anticipate how those obligations will be monitored and enforced in practice.



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Define a uniform set of obligations to simplify monitoring efforts.

Establish clear monitoring roles and responsibilities to increase accountability.

Provide clearly defined rules to simplify monitoring and enforcement.

Require company self-reporting to reduce government monitoring burdens.

Design tax regimes to maximize returns and ease enforcement.



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Government and parliament: Seek to provide clear, objective rules in laws and contracts.

Civil society: Study existing laws and contracts to identify opportunities for clarifying rules. Share suggestions with government and parliamentarians on improving clarity. Stimulate public debate to generate consensus around the meaning of any rules that have been drafted vaguely.



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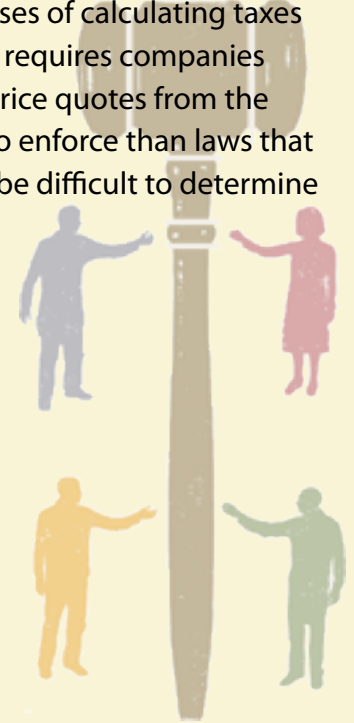
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One of the biggest monitoring challenges for many countries is transfer pricing. To combat some of the problems associated with monitoring transfer pricing, some countries have established clear, specific rules addressing how companies can calculate costs and prices for the purposes of calculating taxes and royalties. For example, Bolivian law requires companies to calculate royalties based on official price quotes from the London Metal Exchange. This is easier to enforce than laws that rely on “arm’s-length prices,” which can be difficult to determine with certainty.



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Nonexecutive branch government officials can and should play a significant role in ensuring that the mining industry is managed effectively. By calling attention to concerns and shortcomings, their reporting and advocacy will help to provide more information to civil society and improve the effectiveness of executive branch monitoring.



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Parliament: Increase transparency and accountability and monitor executive performance.

Judiciary: Enforce obligations in situations of noncompliance.

Supreme audit institutions: Investigate government's management of the mining sector.

Human rights commissions and ombudsman offices: Provide a voice for citizens.



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Civil society: Review reports and assessments from government watchdog agencies; encourage them to scrutinize the executive branch's management of the mining sector.

Parliament: Conduct independent investigations of mining company and executive branch compliance with legal obligations, and publish the findings.



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Following the presentation of the DRC's budget in 2008, the country's senate noted that the government's receipts from mining had been quite weak. As a result, the senate created a special commission to investigate the mining industry with an ultimate goal of improving revenue collection to bolster the country's budget. Through its investigation, the commission made several crucial findings, including that some companies were systematically underreporting production volumes to avoid paying taxes and royalties, and that mining and finance ministers were illegally reducing taxes for some companies.



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Partnerships can help address some of the challenges created by limitations in capacity and transparency. They can draw from the resources of the best-equipped partner—typically the private sector—to help others to develop capacity and confidence in the process.



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Partner with private sector to enhance public sector capacity.

Partner internationally to combat transfer pricing.

Partner with unions to improve health and safety monitoring.

Partner within government to combat capacity shortages.

Require company partnerships to create private monitoring incentives and increase government access to information.

Form multi-stakeholder monitoring partnerships to benefit from the skills, access, and resources of different parties.

Identify community-specific concerns and develop agreements and monitoring structures that address them.

Involve communities in participatory structures for monitoring mining projects, infrastructure development and environmental risks.



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Government: Identify strategic partners to enable better monitoring. Provide partners with the information necessary for effective monitoring.

Civil society: Share concerns with mining companies and partner with them to establish responsive, project-specific monitoring structures.

Parliament: Work with civil society to deepen understanding of monitoring concerns and improve oversight.



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At the Diavik diamond mining project in Canada's Northwest Territories, the companies, the government and the affected aboriginal communities signed a socioeconomic monitoring agreement. The plan established an advisory board, with representatives of all parties, that works together to monitor employment, training and other commitments. Diavik releases annual reports on its compliance with the agreements.



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Government and civil society have a number of tools available to them for improving compliance when information obtained through monitoring indicates that a company may not be fulfilling its obligations.



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Government: Review compliance intensively and implement sanctions on non-complying companies, to send clear signals that deter companies from ignoring the rules. Visit mine sites frequently. Pursue criminal charges against officials who severely jeopardizing public health or the environment.

Civil society: Advocate improved compliance and put public pressure on those who are not complying.



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Government: Rigorously review company reports and conduct regular inspections to encourage companies to comply.

Civil society: Conduct independent, ongoing monitoring of mining projects, and share findings with government and in the media.

Parliament: Question the government when serious instances of noncompliance come to light. Work with civil society to identify suggestions for improving government oversight.



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Ongoing government inspections are essential to ensuring company compliance. Recognizing the failure in consistent and effective monitoring, some countries have recently announced or conducted mass industry-wide audits. South Africa instituted a six-month moratorium on applications for new mining titles as part of its audit process. The resulting review found widespread noncompliance and hundreds of permits were canceled.

