February 2014

At the request of a coalition of NGOs in Cameroon, the Columbia Center on Sustainable Investment commented on several key issues related to the current the legal and fiscal framework of the mining sector in Cameroon.
The document is divided into 5 sections:
A - Fiscal framework
B - Local Content
C - Provisions with the potential to allow corruption and nepotism
D - Community issues
E - Assignment, Transfer and Capital Gains Tax

A – Fiscal framework

1. Prevalence of investment incentives

Cameroon's fiscal regime has been combining tax holiday, loss and carry forward, sometimes accelerated depreciation, and clearance from import duties during the exploration and construction phases.
Several issues arise in that context:

- Revenues to the government can be delayed far beyond the expiry of a tax holiday
- The more the incentives are in place, the more resources are required from the tax administration
- Often times, when the investment climate is not strong enough, it has been shown that incentives are helpless[1]. Contrary to their intention, incentives deprive the government of necessary revenues to implement the institutional reform that will improve the "ease of doing business."

In addition, tax holidays, in themselves have the following detrimental disadvantages

[1] The Columbia Center on Sustainable 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

- "Tax holidays are a blanket benefit unrelated to the amount of capital invested or its growth during the holiday. An alternative is to set minimum capital investment growth requirements to receive a tax holiday.
- Firms have an incentive to close and sell their businesses at the end of the tax holiday—only to reopen as a "new" investment, thus gaining an indefinite tax holiday.
- If FDI operates under double taxation agreements, tax holidays simply transfer tax revenues from the country receiving the investments to the investing home country.
- Tax holidays enable firms to funnel profits, using transfer pricing, from an existing profitable company through the "tax holiday" company and so avoid paying taxes on either.
- Most capital-intensive investments do not yield a profit until several years after operations start. Thus tax holidays for a "start up" period of five years are ineffective. Indeed, tax liabilities often kick in just about when a business starts to make a profit."[2]

Accelerated depreciation is a relatively good alternative to tax holidays because it is tied to capital expenditure, it only defers taxes and it helps companies reach a satisfying rate of return more quickly (which is important for the shareholders).
Furthermore, it is important to understand the impact of import duty clearance.
Mining is a capital -intensive business that imports a lot of equipment necessary for the exploitation of the mine. This equipment is generally not available in the domestic market. Thus giving clearance on import duties tremendously helps the companies.

At the same time, it deprives government of early revenues and of a tool that protects the domestic industry. On the second point, it is important for Cameroon to analyze if some light equipment needed by the mines is not available in the domestic market - if this is the case, an import duty on this equipment can help make this domestic equipment competitive.

Last, the 2013/004 Law on investment incentives promotes conditional incentives (Article 4,8 and 14) and the creation of a Control Committee (Article 22). This is a positive undertaking since the efficiency of incentives should always be monitored given their cost on public finances. In general, best practice recommends the following in terms of incentive granting:

Incentives should be

- **"tied to performance criteria rather than unconditional, with mechanisms for monitoring and enforcement:** Governments can condition grant of

[2]Ibid

incentives to compliance with specified requirements, ranging from basic obligations to comply with host state law, to more substantive requirements on investment targets, R&D, or employment and training; the relevant law, regulation, or contract can then specify that failure to comply can or will result in a loss of incentives for future operations, or even a duty to repay (potentially with interest) the incentives already granted (or their equivalent value).

- **back-loaded rather than front-loaded:** Incentives can be provided for up front ("front loaded") before the investment and any targets are met or over a period of time ("back loaded") once the investment and any targets are met. Front loading might increase the benefit calculus done by the firm and increase the net present value, but it exposes governments to the risk that incentives will have been paid but anticipated benefits never materialized. Back loaded investment incentives protect governments and obviate the need to use "claw backs" for unfulfilled agreements
- **rule-based rather than negotiated or ad hoc:** Governments can provide incentives through development and application of clearly defined, transparent, and objective eligibility criteria, deals negotiated on a discretionary and bilateral basis, or an approach that lies somewhere in between those two poles. The less the grant of incentives is tied to a pre-defined, public, and rule-based system, the more vulnerable it will be to skewing through corruption, information asymmetries, and disparities in bargaining power. In contrast, establishing incentives programs in generally applicable laws and regulations, and setting forth the parameters of when and under what circumstances they will be granted, helps ensure that they are and remain appropriately tailored to further identified policy objectives. For instance, governments should place tax incentives in the relevant tax code so that tax authorities can administer them. If relevant tax clauses cannot be moved to the tax law, they should at least be mirrored or copied there. Doing so unambiguously allows the tax administration to administer tax incentives and limit their abuse."[3]

Some conditional incentives may be prohibited by the WTO or Bilateral Investment Treaties (BITs). The WTO prohibits conditional incentives related to procurement requirements and trade balancing rules (Art. 4 of 2003/004 Law for instance includes some conditions that might be interpreted as anti-WTO). BITs can have more extensive rules but none of the 9 BITs signed by Cameroon and analyzed seem to contain those provisions.

2. Most favored company clause

All Cameroon 's legislative instruments related to taxation refer to the most favored company clause. Besides being problematic for the government's public finances, the clause is also very difficult to administer and can increase the risks of disputes and renegotiation.

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[3]Ibid

When the fiscal terms are not established by law but on a contract basis, each mine has negotiated with the government a certain fiscal balance. If Company A has a royalty of 3% and Company B has a royalty of 5%, it doesn't mean that Company A is more favored. It all depends on the other taxes of Company A. Therefore if Company B suspects it is not as favored as A and benefits from a most favored company clause, the government will have to undertake serious fiscal modeling efforts to understand whether Company A benefits from a better package and if so how Company B should be compensated. Thereafter, company B can contest the result. This example highlights the type of tax administration problem and the possible consequences in terms of disputes. Generally those clauses should be avoided and they are becoming more and more rare.

3. Stabilization clause

Cameroon's mining law, incentives and SEZ laws put forth stabilization clauses on fiscal terms. Of course companies have strong interests in stabilization of the contract over the life of the project. In particular it helps for planning and revenue forecast purposes. It can also be in the interest of the government to offset the impression of political instability in volatile and uncertain political contexts. However it is probably not necessary for the contract or the law to stabilize the fiscal terms during the full life of the investment. Reasons for this include:

- at some point during the investment, the Company will realize a sufficient return on its original investment to have covered the initial costs in addition to a profit justifying the risk incurred.
- the legal and fiscal regime in an unstable country is likely to stabilize and mature over the duration of the investment
- circumstances will change during the several decades of the investment in particular in the market and they will alter the basis on which the original fiscal framework was agreed

In addition, stabilization agreements cause administrative difficulties by creating several generations of contracts with different terms of respect to taxation. This is particular onerous for a country with limited resources and weak administration. Stabilization clauses should therefore be limited in time and parties could reconvene at the expiration of this period to assess whether the political circumstances justify continuing with a stabilization clause.

A more modern type of stabilization clause should at least be adopted. Such a clause is the "economic equilibrium" clause stipulating that the state can pass any new laws but parties should negotiate if the changes negatively affect the "economic interest" of the project to the investor. There even exists a stronger form of this clause, requiring the state to compensate the mining company to restore the same state of profitability.

4. Deficient transfer pricing Law

Nowadays more than half of multinational companies' transactions are done with companies' subsidiaries and set at a price called a "transfer price" which is below or above the market depending on where the company wants to allocate profits. The "where" will be determined according to the tax burden of different jurisdictions. To monitor this practice and ensure that it doesn't lead to an erosion of the taxable income, legislation and contracts need to put forth the principle of "arm's length transactions" set at market prices or reference prices when those are available, reporting and putting the burden of the proof on the company to evidence that the transaction was not priced below comparable transactions. Some countries will agree with the companies on advanced pricing agreements articulating the method of valuation of goods. The government of Cameroon has released regulations of the 2012 Finance Law clearly stating the government's willingness to monitor transfer pricing transactions. However this law could be enhanced by specifying for instance in Annex 3 the need for the company to declare its chain of beneficial ownership as well as its adherence to the principle of arm's length transaction when possible.

Furthermore given that the royalty is imposed at the mine-gate (or on a net-back value), the potential to resort to transfer pricing to avoid paying royalties is tremendous. Cameroon will make more of its royalties if those where imposed on "gross revenues" or on the CIF base.

5. Lack of ringfencing

The objective of ring-fencing is to isolate one project's income statement from the other. Thus if ring-fencing provisions are in place, the losses of one project cannot offset the profits of another project for tax purposes. More concretely, if ring-fencing requirements are in place, the losses incurred in the exploration and development phase of a non-operating mine cannot offset the profits of a successful operating mine. Governments are usually recommended to seek ring-fencing to avoid delayed revenues because it is considered to level the playing field between existing operating companies and new entrants to the exploration market.

6. Lack of thin-capitalization rule

Mining laws and contract often set a maximum amount of debt that can be borrowed relative to equity. This is because financial interests are tax deductible. Another possibility is not to cap the debt but the amount of deductible interests. Taking excessive debt ends up being a way to avoid taxes. This is even a way to avoid paying dividends because debt holders have priority over equity holders. Often the debt holders will even be the shareholders of the company that will then pocket both interests and dividends. When the loan is borrowed form shareholders, the additional risk is that the interest rate is set above the market. It is therefore important to set a benchmark rate for the interest at Libor + margin.

7. **Lack of progressive regime**

Mining investments are subject to the boom and bust of the commodity cycle and even the costs can fluctuate over the life of the contract. In this context, fiscal mechanisms that self-adjust to the circumstances of the market and the potential for "rent" (super profit beyond the required return for the investor) should be sought for. Such fiscal regimes are called progressive fiscal regimes. The opposite is a "regressive" fiscal regime, whereby royalty and tax rates are set, resulting in the government share in the profits falling with the increase in profitability of the project. In times of highs in the commodity cycle, those regressive fiscal regimes come under strains and governments embark on fiscal reforms to claw back what is seen as abusive concessions to the investor. Thus progressive fiscal regimes are attached to the promise of being more stable over time.

B – Local content

None of the documents related the mining sector besides the contracts include local-content related provisions.
This is not necessarily a problem if Cameroon provides a policy or a local content specific law instead. An overarching framework, whether under the form of a law, a policy or a model contract is needed to guide the contracts. It will reduce the room for negotiation and reinforce the bargaining power of the government. However practice has shown that predicated local content requirements are 1) not proven to work in low-income environments and 2) can be illegal under WTO and BITs.

A local content framework should nevertheless encourage the collaboration of the government and the company around the objective of building the domestic economy. A local content framework would define the local content objectives of the government and by the same token what the government means by "local". In addition the framework would promote:

- the establishment of targets over time for local employment according to skill levels and the capacity of the workforce;
- the formation of joint ventures between the foreigners and suppliers whose objective would be to supply the mining project;
- bidding procedures adapted to the domestic capacity;
- the promotion of technology transfer through training programs; and
- a public – private collaboration around all projects materialized by complementary investments by both parties, regular consultations, agreements on reporting, monitoring and measuring mechanisms.

Furthermore, we analyzed 9 BITs[4] signed by Cameroon in search of legal roadblocks to the imposition of local content requirements.

The treaty signed with the US clearly limits Cameroon's ability to impose local content-related mandatory requirements:
"Article II .6 Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments owned by nationals or companies of the other Party, which require or enforce commitments to export goods produced locally, or which specify that goods or services must be purchased locally, or which impose any other similar requirements. "

Besides the US, the treaty signed with Netherlands includes a National Treatment Obligation (NTO) clause (Article 4) of broad coverage and echoing the NTO included in WTO's TRIMs. This NTO limits Cameroon's ability to impose a local content requirement regarding local purchases. Even if this requirement is imposed equally on foreign and domestic investors, because it involves discriminatory treatment that favors domestic products over imported products, it goes against the spirit of WTO-TRIMs and the Article 4 of the treaty signed with Netherlands (since Article 4 of this treaty explicitly includes "goods" in the scope of the article.)

C – Provisions with the potential to allow corruption and nepotism

1. Discretion of the Minister

A key concern in the Mining Code is that there are many provisions that give a wide discretion to the Minister to determine particular issues under the Code, including granting or withholding rights relating to mining titles. In many cases this is because the Minister alone is given the power to make decisions, without reference to any other body, or oversight mechanism. There are also many matters left to decree or regulations to be issued by the Minister, which are not subject to the same level of oversight as legislation. While legislation must be passed by Parliament, the Minister can make regulations or decrees without Parliament's approval. The draft amendments to the Mining Code do not introduce any improvements in this regard.

The wide discretion given to one person creates the risk for corruption and nepotism, where that person has the ability to make decisions without any oversight, consultation or public record of the decisions and reasons.

It is important to have in place an oversight body, which is involved in making important decisions. This can be a Minerals Advisory Board, Inter-Ministerial Commission or similar body, comprised of a number of relevant stakeholders (such as the ministries responsible for environment, finance, land, communities, local

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[4] Belgium, China, Germany, Mauritius, Morocco, Netherlands, Switzerland, United Kingdom, United States

government and others). The composition of the members of the body and its role need to be prescribed in the legislation, both so that it is effective and to ensure that the decision making process is not inefficient and lengthy. Best practice should include also include provisions on the decision making process for this body – for example, setting out how decisions are to be reached, within what time frame, what minimum number of representatives must be present.

Areas in which the Mining Code grants the Minister complete discretion to make decisions are listed below. Each of these would benefit from the introduction of a body which has the ability to make recommendations or decisions in relation to the issue.

Individual agreements with exploration permit holders

The 2001 Mining Code (as amended in 2010) provides in Section 16 for individual agreements to be concluded between the State and each exploration permit holder. The Code lists the matters that may be covered by such an agreement. The issues are wide-ranging and have an important impact on the State, including the rights and obligations of the parties, the fiscal regime for the construction and production phases, the definition of commercial production (which can impact on the tax holiday given to the mining title holder – see section 96), rules for public health and safety as well as protection of the environment, relationships with communities, and dispute resolution.

It is preferable for each of these issues to be covered in legislation, which applies equally to every company that holds an exploration permit (and which is subject to change from time to time as the government determines). There are a number of reasons that this is beneficial. It ensures that the arrangement is transparent, as every company would be subject to the same requirements and receive the same benefits, which the public would be aware of from accessing the legislation. The avenue for corruption is much greater when an official is able to negotiate different terms in each agreement. In addition, setting out the terms in legislation limits the amount that is available for negotiation. This is important in developing countries where resources available to the government to negotiate the agreements is generally limited and far less than those available to the companies. Information asymmetries often exist, which means that the country does not achieve the optimal deal. Having individual agreements can also create monitoring and enforcement difficulties, as the administration must monitor and enforce different agreements with different terms. At the least, there should be a model mining agreement with very limited terms that can be the subject of negotiation for each permit holder. The legislation should set out which terms in the model agreement are subject to negotiation and there should be clear oversight of the negotiation process and the final agreement. Further, the law should make it clear that the terms of the agreement must conform to the laws in place in Cameroon and must not depart from them. It should also clearly that each agreement must be sent to Parliament for approval and provide a process by which this occurs.

While the 2001 Mining Code provided in Section 16(2) for agreements to be subject to Parliament approval in some circumstances (if the terms of the agreement "supplement" the provisions of the Mining Code without "departing" from it), this provision was unclear and did not provide for Parliament approval for every agreement.

The 2010 amendments to the 2001 Mining Code introduced a new sub-section 3 (16(3)). It provides that:

> *(3) For certain specific projects, the state shall acknowledge the need to negotiate interim memorandums of understanding with holders of mining titles. The signing of such instruments, which shall not contain any undertaking by the state not provided for hereunder, may take place only following production of a document from a state-authorized structure certifying the reserves.*

This provision is unusual. The notion of these "interim" agreements is unclear, and there is no guidance provided as to how they will be entered into, in which circumstances, who can approve them or what force they will have. This opens the door for individuals to potentially bind the state to agreements without any oversight. It would be preferable not to include such a provision as it does not accord with standard practice in mining laws.

Grant and renewal of mining titles

Under Section 8 of the 2001 Code (introduced in the 2010 amendments), the grant of mining titles appears to be "first come first served", that is, where two applications are lodged with equal proposals on work and technical and financial ability, the first lodged will be granted. Under the regulations, the mining title must be granted if the Registrar determines that a number of formal matters have been complied with (the land is available for grant of a title, the fee has been paid, the forms have been submitted in triplicate and security has been provided). Renewals are subject to the same procedure.

While the detail of these pre-qualifications can be set out in regulations, there should be more guidance in the terms of the legislation itself. The title allocation procedure should be transparent – for example, by requiring that all applications be published, setting out clear evaluation criteria and pre-qualification criteria and requiring that the decision be published and the reasons be made available. Further, the decision to grant or renew a title should be made following a clearly documented recommendation by the oversight body discussed in the section above (a Minerals Advisory Board or an Inter-Ministerial Commission). The pre-qualification criteria in the Mining Code are not described in much detail and the regulations under the 2001 Mining Code do not add much. Pre-qualification criteria should include clear financial and technical standards, minimum work programs and grounds on which applicants will be excluded from applying, one of which, conflict of interest, is described in more detail below. The requirement for publication of all applications, as well as clear evaluation and pre-qualification criteria, assist in limiting the discretion given to the person making the decision to grant (or renew) the title, thereby limiting the potential for corruption or nepotism.

Transfer of mining title and other transactions

All applications for transfers and other dealings in a mining title are made to the Minister, who grants or refuses these requests based on certain criteria set out in the Mining Code. The 2010 amendments to the 2001 Code introduced the need for consent to a transfer, in section 20. The details with respect to applications for transfer are to be set out in regulations, and the transfer is to be automatic if all of the obligations have been met and the correct form of application is submitted. While specifying that the transfer is automatic removes some of the Minister's discretion, the lack of specific objective criteria and the lack of a need to publish the application for transfer still leave a risk of corruption.

The assignment and transfer provisions will be discussed in more detail in a section dealing specifically with these issues.

Extension of time for exploration permit

Section 44 of the 2001 Mining Code (introduced in the 2010 amendments), provides that the holder of an exploration permit can request from the Minister a 2 year period during which it holds its exploration permit but does not commence mining (on the basis of a pre-feasibility report showing that it cannot begin immediately). This provides discretion to the Minister to grant or refuse that request, without reference to any other body.

Exclusion of certain lands or minerals

Article 5 of the 2001 Mining Code provides that the Minister may exclude certain land or minerals from the scope of mining activities. It does not provide any grounds on which such exclusions should be made or any need to refer to other ministries or laws. This provides the Minister with complete discretion to make this determination.

Other laws

2013 Law on Investment Incentives

Article 11 of this law provides that the State may extend the benefit of some tax and customs exemptions to the investor's shareholders, sponsors and local contractors if a project is determined to be important enough.[5] This could apply to mining projects and provides the State with a broad discretion to provide these potentially valuable

[5] En raison de l'importance du projet dûment évaluée, l'Etat peut exceptionnellement étendre le bénéfice de quelques exonérations fiscales et douanières aux actionnaires, aux promoteurs et aux contractants locaux de l'investisseur par voie contractuelle.

exemptions, with no guidance as to how this can be determined and no requirement that this be published or subject to review before grant. This provides the potential for grant of exemptions to people or companies connected with the person making this decision.

2. Conflict of interest

The 2001 Mining Code, including the 2010 amendments, does not contain any mechanism designed to avoid potential conflicts of interest between officials and others involved in the government exercising their duties and gaining from their position. The Petroleum Code has an example of a clause with adequate language.

It is important that a provision dealing with conflicts of interest makes it clear that public officials are not eligible, directly or indirectly, for the grant of a mining title. It is important that the list of public officials goes beyond those working in the Ministry of Mines, to include ministers, the prime minister, judges, local authorities and so on. Law No. 003/2006, on the Declaration of Assets and Property provides a broader list in Article 2 that could be adopted.

In addition, the conflict of interest provision should capture all types of participation in mining activities, beyond direct participation, such as direct or indirect ownership of shares in any corporation or the funding of any natural person engaged in mineral activities including ownership of shares or funding of natural persons by any members of family in mineral activities, and any direct or indirect benefits

The Petroleum Code contains an example of language in Article 86, which states that any official or agent of the Administration or any employee of a public or semipublic agency is forbidden from having any involvement in petroleum companies or operations directly or indirectly through an intermediary or in any way whatsoever that may impair or restrict their independence.[6] This extends beyond the ministry involved in petroleum regulation, and includes indirect involvement in petroleum activities.

3. Transparency

Transparency of contracts, of payments and of beneficial ownership of title-holders can go a long way to addressing concerns of potential for corruption.

It is an important step to require transparency of payments so that the public can monitor these payments. Such a provision should be specific as to what information

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[6] Il est interdit à tout fonctionnaire, agent de l'Administration ou employé d'un organisme public et parapublic d'avoir, dans les Sociétés Pétrolières ou Opérations Pétrolières soumises à son contrôle direct ou en relation avec lui, par luimême ou par personne interposée, ou sous quelque dénomination que ce soit, des intérêts de nature à compromettre ou à restreindre son indépendance.

companies are required to report, including project-by-project disclosure (ie disclosure by one company of its payments for each project it has in the country, not just one lump sum amount for all projects). As Cameroon is EITI compliant, the Mining Code could refer to EITI requirements.

The Mining Code should go beyond obligations to disclose payments, to also require publication of the terms of any contracts, such as those entered into under section 16 of the 2001 Mining Code. Countries are increasingly requiring that these contracts be disclosed so that the public can have access to them in order to be aware of the terms of the deal made and potentially to monitor compliance with them. Transparency of contracts is an essential step towards avoiding corruption and ensuring that all parties benefit from these deals.

Further, companies should be required to disclose their chain of beneficial ownership, that is details on every party that directly or indirectly own more than 5% of the shares of the project, at the time of its application for mining rights (and to keep this information updated). It is often difficult to determine the ultimate ownership of a company and who is receiving the benefits of its activities due to complex ownership arrangements.

Both contract transparency and beneficial ownership disclosure are encouraged under the Extractive Industries Transparency Initiative Standard agreed in 2013.

It is important that the law limits the scope of confidentiality to information and reports that should reasonably be kept confidential in relation to mining activities: technical data (i.e. the geological and geophysical information obtained by the company) – and then only for a limited period of time – as well as proprietary information that is the intellectual property of the company (as well as any information related to personnel, employees etc). All other information should be made public and the law should specify that this information is not confidential and that it will be published. The law should not simply provide that all reports from the company to the government will be kept confidential.

4. Other considerations

- Provisions that are uncommon in mining laws:
* *an* amount allocated as a bonus to negotiators. Such a provision is difficult to understand. This provides a personal incentive to those negotiators to conclude an agreement so that this fee will come to fruition. This creates a conflict of interest, providing a strong personal interest in seeing the deal done. Standard practice would be for negotiators to simply be remunerated in the usual way (i.e. through their ordinary salary).

* an avenue for the government to hand over an exploitation permit to a party it can nominate, other than through the usual application process, even if this is to encourage joint ventures with Cameroonian entities and in circumstances where the

government determines that the exploration permit holder does not have technical and/or financial capacity to continue. If the government can simply nominate the party to whom a permit will be transferred, it is highly discretionary, without regulation with respect to the handing over of the exploitation permit to the new entity. Any transfer of permit should be subject to the regular revocation of permit and transfer provisions. There should be clear guidelines as to how the government will evaluate whether a company continues to have technical and financial capacity and if the government determines that a particular company no longer has this capacity, the exploitation license should be advertised in the usual way and all parties should be given the opportunity to apply for it, with oversight in the same way as application for any exploitation license.

D – Community issues

1. Acquisition of land and resettlement

Expropriation of land for the purpose of mining projects and resettlement of communities is a highly sensitive issue, with the potential to increase or to entrench poverty for displaced persons. The provisions in the 2001 Mining Code and the 1985 law on expropriations are insufficient to deal with this issue and more detailed provisions are required to accord with international good practice as well as Cameroon's human rights obligations. There are a number of international frameworks that should be taken into account in the provisions on expropriation and compensation, including Cameroon's obligations under international human rights conventions (the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights). The UN has adopted Basic Principles and Guidelines on Development-Based Evictions and Displacements (as Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living), which provides a number of principles that should be taken into account. Importantly, these principles require the state to have in place a resettlement policy framework. In addition, the document describes a right to resettlement "which includes the right to alternative land of better or equal quality and housing that must satisfy the following criteria for adequacy: accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and access to essential services such as health and education"[7], to information on the proposed resettlement and to consultation and participation in the process and to appeal decisions regarding expropriations. The IFC's Performance Standard 5 on Land Acquisition and Involuntary Resettlement can also provide guidance as to how the Mining Code's provisions should be framed, as can the African Development Bank's Involuntary Resettlement Policy.

[7] Paragraph 16 of the UN Basic Principles and Guidelines on Development-Based Evictions and Displacements

The Mining Code

The 2001 Mining Code deals with expropriations in sections 66-7, requiring requests for expropriations to be sent to the Minister of Lands and for a committee to undertake an inquiry into the proposed expropriation and prepare relevant decrees. Once these decrees are made, the state can cancel any existing leases on the land and provide them to the mining operator. All expenses and compensation are to be paid by the mining operator (section 69). Section 73 also refers to compensation for the landowner, as does section 76, but only provides for very limited compensation and section 77 provides that the amount of compensation will be determined by agreement between the landowner and mining operator, and if it cannot be agreed the parties can consult an expert, arbitration or petition to lands authority. Where the disagreement cannot be resolved, the lands authority may make a determination after consulting an expert at the expense of the mining operator (section 79). These provisions are very limited and do not accord with best practices on expropriations and resettlement.

The law on expropriation (Law No, 85-89 of 1985), which is not mentioned in the Mining Code, must also be considered as it may have an effect on the provisions regarding expropriation of land and compensation. It does provide some more detail than the Mining Code, but still leaves communities at risk of poverty as a result of expropriation of land. The biggest deficit in the law on expropriation is that it provides for very limited compensation for victims of expropriation (Chapter II), basically only for the "direct, immediate and verifiable material damage caused by the dispossession" (section 7(2))). This can only cover the bare costs of land, buildings, crops and any other type of development on the land, preferably in payment of cash. It goes so far as to state that where a person is relocated, if the value of the land is greater than the land that has been appropriated, that person will repay the difference in value. There is also a very limited grievance mechanism provided, where the victim of expropriation can make a claim first to the administration in charge of land, and if not satisfied to the competent court. In order to follow international practice, the law on expropriations should either be amended or it should be specifically excluded from application under the Mining Code and superseded by provisions to be included in the Mining Code.

Regulations define some aspects of the law on expropriations. They describe the membership of the evaluation and observation commission that has a role in determining compensation (although this role is not clearly stated in the law itself). This commission is important as it is composed of inter-ministerial representation as well as representatives of local and traditional authorities. The regulations also provide a process under which the proposed expropriation is publicized and affected people are given the opportunity to make comments. The regulations however do not provide any more detail on compensation.

Key issues

Importantly, under international good practice cash compensation alone is inadequate, any expropriation must consider restoring people's livelihoods and social systems.[8] The approach to resettlement should be with a view to sustainable development of local communities, improving living conditions and not merely compensation for direct losses. People beyond those holding formal legal title to the land should be considered, for example those with customary rights to land.

A key factor in ensuring that resettlement is carried out appropriately and in accordance with international good practice is a requirement for the mining company to prepare a resettlement plan (or resettlement action plan). This should be prepared using a participatory process, which should start at the earliest stages of development and be continued throughout the life of the project. The Mining Code should include a requirement for such a plan, with a dedicated committee - including representatives from relevant ministries, local authorities and communities - to review and monitor such plans. The Mining Code should also define the process by which the plan is prepared – which should include the participation of affected communities, its dissemination, monitoring and enforcement provisions and grievance mechanisms for issues that arise under the plan.

2. Social impact assessments

There is no requirement in the 2001 Mining Code for applicants or title-holders to prepare a social impact assessment (SIA). The 2002 regulations state that the feasibility study required for an exploration permit (or renewal) and the environmental impact assessment and management plan required for an exploitation permit must include a socio-economic study of the impact of the project on local populations, but no further detail (articles 65, 120 and 128 of the 2002 regulations respectively). In addition, the 2005 Decree on procedures for carrying out environmental impact studies also requires that socio-economic factors and effects on humans are taken into account in a detailed environmental impact study (article 5). The Decree also requires an awareness program to be carried out, proof of meetings with communities and public hearings and opportunities for comments from local communities when an environmental impact study is undertaken, as well as an approved program of dissemination (articles 11 and 12 respectively). Although these requirements for public consultation and dissemination are positive, the provisions on social impact assessment do not go far enough.

Social impact assessments and management plans are increasingly being required as good practice. This is a document that describes the full range of social, economic and health issues affecting local communities, predicts significant adverse social

[8] Indeed, the UN Basic Principles and Guidelines on Development-Based Evictions and Displacements state in paragraph 60 that "Cash compensation should under no circumstances replace real compensation in the form of land and common property resources. Where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better."

impacts and potential benefits and sets out proposals for avoiding, mitigating or compensating for adverse effects and enhancing potential benefits. The SIA should also be prepared using a participatory process, capturing the requirements for public consultation required for environmental impact assessments described above. The SIA and the associated management plan should be updated regularly (for example, at 2 yearly intervals), as well as at every new stage of the project and in anticipation of operational changes. Human rights impact assessments could be included within the SIA. The title-holder should be required to engage with local communities to assess potential impacts from the earliest stages in the project and then throughout the life of the operations and closure.[9]

3. Community development

It is becoming common across Africa (and globally) for countries to require mining companies to ensure that they provide for development of local communities, rather than leave it entirely to companies' corporate social responsibility initiatives. The 2001 Mining Code contains only limited provision for community development around the mining project, with not enough detail to ensure that community development is implemented. Details of relations with affected communities are to be dealt with in individual agreements made with each title-holder (Article 16 of 2010 amendments to the 2001 Mining Code), but there is no detail as to what this should involve. Article 137 of the 2002 regulations provides that 25% of the ad valorem and the extraction tax paid by the companies will be distributed to local populations (10% to the populations and 15% to the relevant local commune). The detail is to be set out in a joint decree of the Minister of Mines and the Minister of Finance (we have not seen this decree).

In order for the funds to benefit communities, in this joint decree (or set out clearly in the law or regulations), there needs to be some detail put around the way these funds will be allocated and managed. Key issues include the following.

- There needs to be clarity around the definition of "local population" so that it is clear which communities will benefit from the funds. This definition can be subject to review, so that communities that become affected by the mining operations down the track can be included.
- It should be clear how the commune may spend the funds allocated to it, and on which communities within its boundaries.
- There should be a clearly defined process to determine which projects will be funded using these funds. In this regard it is beneficial for the projects to align with any local development plans of the communities or the commune. The process for determination of projects should be participatory and take into account the views of all stakeholders, including potentially marginalized populations.

[9] See UN Principles for responsible contracts: integrating the management of human rights risks into the State-investor contract negotiations: guidance for negotiators

- Transparency of payments to the communes and populations is important, as is transparency of the spending of the funds.
- There should be oversight of the activities of the commune (as well as the body to whom the portion allocated to the population will be paid), preferably by an independent body.

In addition to allocating funds to a community, governments in Africa and globally are increasingly requiring companies to enter into "community development agreements" with local communities which address issues such as how local communities can take advantage of any opportunities presented by the mining project, how adverse impacts can be mitigated, and how the mining company must provide for local development. Any requirement for a community development agreement should be carefully drafted to ensure that the process for entering into them is participatory, representative and fairly negotiated on behalf of the community.

4. Water

The 2001 Mining Code provides the title-holder with the right to take any water flowing through the land that is included in its exploration permit, subject to "any laws in force" (section 41(1)) and where a mining operator is occupying land, section 74 provides the right to use free water falls, surface and underground water subject to compensation or payment of taxes and royalties[10] as required under law. While there is a law on water management (the 1998 law on water management), it does not contain any provisions that deal with these issues, beyond a broad statement that water is a common heritage and the state is to provide protection, management and easy access to all (Article 2(1)).

The taking of water can significantly impact local communities who may rely on that water for subsistence and for their livelihoods. Any right to take water should at the least be subject to the water requirements of the local communities – it should not take away from their requirements and, if it does, the company should be required to provide alternative suitable water sources that are not more costly to the community. In search of increased sustainability, any right to take water should also be subject to prior evaluation of the water efficiency practice of the company. Stringent environmental standards requiring "0 water waste and discharge" should be imposed in order to encourage the company to recycle and reuse its waster water, and treat it when needed. Only once the mining company has used its best efforts to implement a water efficient system should the government and the company discuss the mine's actual demand for water. Any maximum levels of water that may be taken should be calculated on a cumulative basis, taking into account other uses of the water sources.

[10] The meaning of this condition remains unclear to us.

5. **Protection of cultural heritage**

The law should protect important cultural and sacred sites and require mining operations to preserve these. The 2001 Mining Code is too weak in this regard – section 63 provides only that sacred site *may* be protected as part of protected zones, for the preservation of the "…national interest". The IFC's Performance Standard 8 on cultural heritage provides some guidance on this issue.

6. **Grievance mechanisms**

The law should provide dispute resolution mechanisms for community members, under which any grievances can be resolved, as described in the UN Guiding Principles on Business and Human Rights. As they are not party to any agreements between the State and the title-holder, community members cannot take action to enforce any provisions. The mechanisms should be both judicial and non-judicial. An operational-level mechanism should be included, under which the grievance can first be brought to the company and considered by a relevantly qualified and designated individual. Failing that, there should be an administrative and a judicial mechanism available. The costs of access to the dispute resolution mechanism should be reasonable so that communities are not constrained from accessing it and the mechanism should be legitimate, accessible, predictable, equitable, transparent and rights-compatible.[11] The Mining Code provides only that the parties may refer to an expert, and then to arbitration, and finally to the lands authority in the case of disagreement on the amount of compensation for damage (section 77). The dispute resolution mechanism should apply more broadly to any grievance that may arise over the life of the project and should also accord with the principles discussed above.

E – Assignment, Transfer and Capital Gains Tax

1. **Capturing indirect transfers**

Section 20 of the 2010 amendments to the Mining Code deals with the issue of transfer of rights ownership. However, this provision seems to cover only direct transfers of rights, as defined below. It is unlikely this would be interpreted as covering the indirect transfer of rights, as defined below. Thus, it is necessary for the mining code to explicitly capture all of the various scenarios through which a license may be transferred (both direct and indirect) including, importantly, a change in control of a company. These scenarios need to be captured so that Cameroon can capture some of the benefit obtained by the company from the transfer of the right.

[11] In accordance with the UN Principles for responsible contracts: integrating the management of human rights risks into the State-investor contract negotiations: guidance for negotiators

We note that the 2012 Finance Law, Section 42-70, intends to cover indirect transfer by targeting companies not registered in Cameroon but the language is very vague.

Direct transfer

There is a direct transfer/assignment of the rights in the project (e.g., the mining license or a part of it is assigned from one company to another). There is no change of control/sale of shares of the company holding the license. What occurs is a transfer of rights in the license either between foreign companies, between domestic companies or between foreign and domestic companies

Indirect transfer

There is no direct transfer or assignment of the rights in the project. A new agreement (e.g., mining license) is not signed. There is a change in control of the company which holds the mining license – as a result of a sale of shares of either the company holding the mining license, or in one of the companies in the chain of ownership of that company (e.g., the holding company or the ultimate parent company) which may be carried out in a foreign jurisdiction.

2. Information requirements

Obtaining information about a transfer is key not only to determining whether the country is satisfied with the proposed transfer, but also to Cameroon's ability to impose a capital gains tax, or other tax on the transfer. The company can make significant profit on such a transfer so it is important that Cameroon is able to capture some of this gain that is attributable to Cameroon's resources. This is especially the case where the transfer is indirect and may occur offshore, between two entities that are not Cameroonian.

Section 20 of the 2010 amendments to the Mining Code mentions the need for the title holder to notify the government and that the approval is automatic if the title holder seeking transfer of its right and the assignee satisfy the conditions specified by the regulations. We have not seen any regulations made following the 2010 amendments, and the 2002 regulations (Chapitre 6) seem to only specify that the assignee carries over the obligations and rights of the transferor. These requirements are not detailed enough to ensure that Cameroon is able to apply a capital gains (or other) tax on the transfer. The requirements do not appear to be strong enough to ensure that Cameroon obtains the necessary information – the wording is not prescriptive enough and there are no stringent penalties if the information is not provided.

The legislation should clearly require the title-holder to provide information on the chain of beneficial ownership of both the transferor and transferee, as well the terms of the acquisition. In order for Cameroon to track indirect transfers, Cameroon needs to require information regarding the company which holds the mineral rights and particularly its chain of beneficial ownership at the outset. Those documents need to be provided at the time of the application for the right.

If the information is not provided, there could be a penalty as well as a voiding of the transfer of the right and/or cancellation of the right. Similarly there should be penalties for failure of tax payment, such as imposing a lien on the Cameroonian rights, suspending operations and ultimately cancelling the right.

3. Double Tax Agreements

Finally, Double Tax Agreements signed by Cameroon with other countries can limit Cameroon's to tax capital gains on indirect transfers by specifying that Capital Gains tax only apply to direct transfer and resident companies.

For further information and questions:

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