

# 50 pieces of advice to an official who is engaged in the negotiation of mining contracts

## A HANDBOOK

Fabien Nkot



## International Mining for Development Centre

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**The International Mining for Development Centre**

assists developing countries to use their mineral and energy resources to grow their economies, reduce poverty and deliver long-term economic and social benefits to their people and communities. Our focus is three core themes – governance and regulation, community and environmental sustainability, and operational effectiveness.

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# Foreword

The governments of resource rich countries have a responsibility to be well prepared and knowledgeable in contract negotiations for natural resource extraction and long-term land leases - not just for the sake of securing a balanced financial deal, but to promote high standards in labour and human rights, environmental protection, health, safety, transparency and fiscal management.

In this Handbook, we provide 50 pieces of advice to ensure good governance, capacity building and sustainable development for your country.

The basic tenets provided in this Handbook include:

- ▲ Be prepared
- ▲ Ask questions
- ▲ Seek assistance
- ▲ Engage community
- ▲ Be as transparent as possible
- ▲ Look for added and shared value

# Preface

Yaounde, August 6th, 2014.

1. The book the reader has in his hand has nothing to do with theory. Its aim is practical.
2. This Handbook originates from personal experience. A few years ago, I was appointed as Advisor to the Prime Minister of the Republic of Cameroon, and had little knowledge on the negotiation of mining contracts. Although some reports mentioned that Cameroon had substantial solid minerals, my country had not yet started exploiting them. The President of Cameroon, Paul Biya, decided that we should start the process of exploiting our iron ore in particular. Given the complexity and the transverse nature of the issue, Prime Minister Philemon Yang thought the file should be handled at his level.
3. I was asked to be one of the chief negotiators of the USD 10 billion Mbalam-Nabeba Iron Ore Project, which includes the construction of a 35 million ton per year operation, a 580 kilometre railway and a mineral terminal at the Kribi Port. I was acting under the supervision of the Minister, Secretary General at the Office of the Prime Minister, Louis Paul Motaze, who coordinates negotiations of mining contracts for the government of Cameroon.
4. At the technical level, together with my colleague Cyrus Ngo'o, we had to surmount the challenges and find a way to protect the interest of our country, especially in regard to working with experienced international companies. At the beginning of the adventure, Serges Yanic Nana, our current Financial Advisor, who, at that time, was not yet appointed to this position, helped us to a) know our asset and b) keep abreast with the international market. Fortunately, c) Cameroon already had a relevant mining code.
5. We d) set up a political committee and a technical team for the negotiation.  
e) A member of parliament from the area of the project represented the local community affected by the project on the technical team of negotiators. We then went into the delicate process of f) recruiting international legal, financial and mining advisors and g) drafted the positions in principle of the Government of Cameroon regarding the negotiations of the Mbalam-Nabeba Iron Ore project. Then the negotiations started.

6. After several months of discussions with the developing company, we were able to sign a mining agreement. The President of Cameroon decided that the team of negotiators involved in the Mbalam-Nabeba Iron Ore project should also deal with the USD 5.0 billion Bauxite to Alumina Project in the cities of Mini - Martap and Ngaoundal. Our involvement in this bauxite project was enlightened by the experience we gained from the negotiations related to the Mbalam-Nabeba Iron Ore project. Since then, I have been involved in several other negotiations concerning international mining contracts.
7. This handbook comprises some of the practical lessons learnt along the way. Its content addresses the tenets and processes enumerated above and more. It will provide an 'uninformed official' as I was then, with the necessary tools that will help him meet his country's expectations.
8. The rationale behind this Handbook is that, if well managed, the exploitation of minerals could improve the livelihoods of many people in countries around the world. In that regard, a good negotiation of the mining contract with the developing company is the key; however, it is common knowledge that many officials in developing countries will start negotiations of mining contracts with experienced international companies with good faith as their only too - which is not enough.
9. The Handbook is the result of a collective effort. Melvin Sheriff from the Minerals Investment Commission of Liberia and I started the job. In fact, I first raised the idea of a handbook during the first meeting of the African Resources Negotiation Network (ARNN) in Yaounde in July 2013. Melvin spontaneously supported it. Among others, lawyers, Michael Blakiston and Glen Ireland made useful comments on the manuscript. Wendy Treasure and my assistant, Solange Yijika, were instrumental members of the Handbook team. But the current Handbook would not have been published without the substantial input of my colleague Jill Howieson of The University of Western Australia: she finally did... everything. Ian Satchwell and the IM4DC team gave warm support for the project. However, Helen Langley deserves a particular note for editing this book with a special touch that brought some brightness to it.
10. Of course, I should be the only one to blame about errors contained in the document. That said, if ever this document is helpful to an official involved in the negotiation of mining contracts, then the goal we set out to achieve has been met. This handbook may not have been necessary. I hope it won't be useless<sup>1</sup>.

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<sup>1</sup> Vedel, G, 1949, *Manuel Élémentaire de Droit Constitutionnel*, Paris, Recueil Sirey, p.2.

# Pre-pre-negotiation





## Know your asset

Learn about your asset. The starting-point for the development of any mineral resource or mine is the estimation of the quantity, quality, continuity, and extent of the reserves and resources. It is upon this information that the mining plan and methods of extraction and processing are developed. Without an estimate of mineral resources and reserves, a mining operation is impossible. You will need a more detailed understanding as soon as the proposal is first raised and looks serious.

To this effect, ensure that you have a robust, transparent and accurate appraisal of the natural resources available for exploitation. You may need external expert assistance to ensure that you have this appraisal. If you engage experts to assist you in this endeavour, then ensure that you collaborate and build capacity in your country to the best of your ability. Aim to establish a comprehensive report on the asset that you can trust will provide the foundation from which you can negotiate well.

You can use this report to determine the projected economics of the asset. The report should also put your asset in context with other projects in your country, but also other projects in the world, which are either producing or are at similar stages of development.

Know the fair and accurate value of any land that may need to be acquired. Be mindful that land can be acquired (preferably) by agreement, but also by compulsory acquisition. Know where the company is coming from to create benefits for all. Have knowledge of the benefits from the developer's perspective, as this will give a realistic understanding for a mutually beneficial deal. If the company's projected rate of return is not met then the project will not go ahead. Factor in the rate of return, discount from risks (political, financial, security, environmental) and royalty rates.

This may all appear costly, yet it serves as an investment. It enables you to know and better appreciate your mineral resources as well as get a mutually beneficial deal that is sustainable for all parties when proper negotiations begin. This will hold your country in good stead for the future and will facilitate transparency.

## Know what you earn

You should be able to decipher from the comprehensive report what the real worth of the asset is, and what your country should receive from the mining deal. This will help you to make sure that your country, as well as the local inhabitants of the asset area reaps a fair share of the benefits associated with the mining deal. It is risky to get to the negotiation table without a fixed idea of what your country has to offer in the deal and what you expect in return. You may give up too much or negotiate for too little.

You cannot rely on the initiating company to tell you what you have in stock. They may give you lesser figures in order to get maximum profit from the deal. Even with the best intentions, they may get the figures wrong. Two heads are better than one so that you can crosscheck each other. In the process of validating the figures, you can also build trust. Similarly, you cannot go to negotiations without understanding what the real value of the resource is, taking into account the costs of construction and operations, the cost of finance and a realistic view on the required returned to compensate for the risk.

The Extractive Industries Transparency Initiative (EITI) is a global coalition of governments, companies and civil society working together to improve openness of revenues from natural resources. You can refer to the EITI for reports on the revenues from extraction of the member countries' natural resources since 1999.

<http://eiti.org/countries/reports>

## Keep abreast of the international market

Keeping abreast with the international market will help you prepare your sales approach well, focusing on product features rather than pricing. This means knowing factors such as the desired grades, future technological innovations, and changes in supply elsewhere. By constantly improving your knowledge of what is going on in the international market, you can gauge the rise and fall of prices in relation to product quality, and secure a long-term sustainable deal.

Be warned that not even experts can predict what will happen so it is best to stay 'alive' to the markets. You can do this by signing up to industry updates online and following media networks that target resources.

You can refer to the London Metal Exchange for the current trading prices for many metals (mostly non-ferrous).

[www.lme.com](http://www.lme.com)

## Know where your project sits on the costs curve

It is important that you understand the processing, logistics and costs associated with your project. You also need to understand what other competing projects there are in the world, and the relative strengths and weaknesses of your project in comparison.

You can commission specialist (negotiators) to provide you with specific and tailored assessments of the commodity market and the comparative projects.

This is an important part in preparing for the negotiation process. A periodic check of what is going on will keep you focused and help you to avoid being cheated. It will also enable you to know what 'price tag'/royalty rate to place on your resources in due time. For instance, you can establish the following:

- Short, long and medium term pricing
- Projected market supply and demand for a commodity
- Competitiveness of project relative to commodity supply.

## Make sure you have an appropriately crafted mining code

The Mining Code is the reference to be used in the process of negotiating the Mining Contract. This Mining Code should spell out what is expected from the company as well as from the host government.

If the existing Mining Code has flaws, or there is no Mining Code, you can look at successful mining codes used elsewhere in the world and how they have worked. Places such as Canada, Brazil, or Western Australia where they have iconic mining projects are a good place to start and then you can tailor the code to suit your own country's requirements. For instance, in Papua New Guinea, they commenced with the Western Australian mining code but are now drafting their own Mining Code.

If you do have to amend, or develop a Code, it is best to have wide consultation with a good mix of stakeholders to accommodate all the interests in the Mining Act being developed. In any event, a Mining Code should consider the following.

- The company interested in mining activities in your country should be issued a mining research permit or exploration license. This sets out the location, size, duration and minimum spending on the exploration activity. It allows for regulation of the activity and gives your country preliminary information about the company. You can get some sense of how the company operates before the activity progresses to exploitation.
- To have a mining exploitation permit, the company should produce a feasibility study. This may indicate how seriously they view the mining project and to which level of geological investigation they have access. It also gives your country an improved knowledge about your geological assets.
- Make sure you know from the beginning whether local or regional authorities are also able to apply taxes to the operation. Is that allowed for in the national mining or revenue code or does it conflict with the codes? If local authorities think they are not getting a benefit directly from the mine project, but will have to deal with the impact, they will expect to be compensated in other ways.
- Define how royalties will be calculated and shared. It is important that citizens and government all understand the amount that companies will pay in royalties and how that money is collected and used. Transparency is key to providing your citizens with a sense of collective benefit and preventing corruption.
- In addition to the case-specific mining issues, it is also important for you to master the mining law and relevant mineral regulations of your country so that all agreements you arrive at will comply with the laws in force.

# Develop a mineral title licencing system

## Granting the licence

Countries with a high volume of legal mining mainly utilise a licencing system. The process for the allocation of mineral rights is based on either a non-competitive (free-entry licencing system) or a competitive (tender) process. Where less geological information is available to the government, the risk is greater and therefore the use of the non-competitive system is best.

One benefit of a non-competitive system is non-discrimination—the regulatory framework applies equally to all applicants without fear or favour, whether local or foreign. Another is the certainty of knowing what will happen to a mineral title at all stages of the mining activity. Developers and investors will not spend the big amounts required for exploration without knowing they will be able to proceed to extraction.

A licencing system establishes:

- Security of tenure - subject to titleholder compliance with its statutory and contractual obligations:
- Discoverer's rights – exclusive right to any mineral (covered in the exploration right) discovered in the license area - titled holder apply and be granted an exploitation right
- Exclusivity of exploration/prospecting and exploitation titles - exploration and exploitation titles should be exclusive to a single titleholder in any given area. However, if minerals for which the titleholder is exploiting are not contained within the existing title, the titleholder must declare such mineral so that it is lawfully included in such title.

## Duration of exploration and exploitation titles

It is important that the investor be given sufficient time to explore and exploit the mineral resources concerned, but also that the investor is precluded from hoarding mineral resources. In this regard, an exploration and exploitation title should be given a sufficiently long period and renewed.

It is not uncommon to have exploration rights granted for five years and renewed for further period of three years, whilst mining titles are granted for between 25 to 50 years and renewable once or several times, subject to compliance with investor's statutory and contractual obligations.

## Renewal of mineral rights

The titleholder should be entitled to apply for, and be granted renewal of its mineral rights.

The Extractive Industries (EI) Source Book (Source Book) is a comprehensive resource to assist countries to make decisions about their natural resources – oil, gas and minerals. It covers information on sector policy and law, contract and regulation; sector organisation and administration; fiscal design; revenue management; transparency and accountability; and sustainability.

[www.eisourcebook.org](http://www.eisourcebook.org)

## What to do if there are competing investors and low risk

If your mining industry is not yet developed and you do not have any or many active mining operations, but you know the nature of the deposit, then the option of the bid evaluation process remains the best. In Africa, bids often happen because the Mining Code is not up to scratch or doesn't cover the issues. If the number of mining applications looks like increasing, an efficient licensing process will be a more streamlined and consistent method to introduce, rather than negotiate each concession. Tenders are different from concession negotiations. Bidders should bid against a comprehensive contractual and information package to reduce subjectivity—there should be little, if any, negotiation.

To guarantee a beneficial bidding outcome, it will be important to start a bid evaluation process and set up a bid evaluation panel.

### The evaluation process

As the representative of your government for the negotiations, you may have to make some key decisions, which will either bring you a lot of credit or a lot of criticism, depending on how wise you are in your decision-making. At the top of the list of decisions you will have to be careful about is the evaluation process. Try to be as objective and open as possible throughout.

First, be sure to launch an application to tender. Make sure the information gets to the wider public. Do as much media advertising of the tender as possible. Any suspicion of practicing selective exposure of this information could be very harmful to your country and to your career.

Second, establish the receiving point. Set up an accessible secretariat for interested persons or groups to forward their tender bid files, which are then recorded with an acknowledgement of receipt.

Make sure that the team in charge of collecting tender bid files does not indulge in any corrupt

practices. One of the ways to ensure this is by drafting a transparent procedures manual regulating the activities of the team. If there are any financial requirements in lodging tender bid files, make sure that these are clearly stated in the press release. If your subordinates collect money from interested persons illegally, the blame will end up falling squarely on you.

Finally, make sure that the period between the dateline for depositing files and the evaluation of files/publishing of the winner does not exceed three months. Any longer than this could indicate laxity on your part and by implication your government or a prevalence of influence peddling and corrupt practices in the selection process.

### Set up a bid evaluation panel

Once the application to tender is launched for the mineral exploitation, there will normally be an avalanche of manifestations of interest nationally and internationally. There will therefore be a need for a selection mechanism to decipher which bidder is the best.

It is possible for you as the negotiating official to embark on the selection process singlehandedly, but this may have a lot of repercussions on you afterwards, such as suspicions of bribery, corruption and personal gain. This may have a negative effect on your country and career, whether true or false. In order to foster transparency and avoid all risks of incorrect perception, it is of primary importance for you to set up a bid evaluation panel. This panel will be in charge of assessing the files from the various bidders in order to determine the best bid proposal.

Members on this bid panel may range from economic experts, mining experts, environmentalists, etc. as well as representatives from any other relevant sector. It may be a good idea to include local authorities, community and civil society.

## Exercise due diligence in the selection

To support improvements in transparency and accountability in granting of critical licenses and concessions, and with the aim of improving the quality of market entrants, it is important for you as the government official in charge of the tender process to do your research.

The first thing you will need to do is research the interested companies:

- How long has the company been operating in the area?
- What problems has the company faced in any other country?
- Who are the people who own the company and what are their corporate ethics?
- How has the company engaged with local communities at other mine sites?
- What is the rate of accidents and other mishaps registered by the company in recent years?
- What level of social responsibility has the company manifested towards the communities and economies it has worked in?

Once you have the information you will be in a better position to determine if the company is a good corporate citizen with whom you want to contract on behalf of your population.



## Choosing the right company

The research described in Advice 8 above is used to rate the quality of the companies who are tendering.

If it is a tender scenario then there will most likely be a technical bid followed by a financial bid. If the company satisfies you on the technical issues, then it will come down to the money. Remember, the financial bid includes credit worthiness.

After the panel selects the bid winner using the above considerations, make sure you announce the winner on national television and radio, and publish in the official gazette and major newspapers. The announcement should also include the judgment criteria to clarify public opinion on the transparency involved in the selection process.

You need to be very clear about the initial terms on which the bid was launched and the terms used to appraise the bid as if they are not consistent then you could open the government for international criticism and at worst, legal action.

## Recognise 'fake' investors

Sometimes investors are in a country for duplicitous reasons. You need to look at their record of accomplishment (or not) and focus on whether there are any signs of corrupt activity and whether these investors are 'fake'.

Some of the indicators of 'fake' investors include the following.

- 'Fake' investors usually enter the country from the top; that is, through the highest authorities and not through the technical ministries involved.
- Their falseness is often further portrayed by the fact that they usually look for ways of getting money paid into their escrow accounts or receiving sovereign guarantees.
- They are usually impatient before and during negotiations. This is because they usually do not want to spend too much time in negotiations and give you the chance to discover their duplicity.
- Their profiles are often characterized by some form of material misrepresentation for example, misstating revenue figures on the application by the business owner, stealing the identification details of a known business or business owner in order to open credit in the victim's name.
- Spruikers who have a history of acquiring assets, doing little work on them and then on-selling the assets for a premium.

These are just some of the known ways that fake investors work. Be sure to do a proper background check on potential investors before getting into business with them.

# Pre-negotiation



## Be clear on why it is necessary to negotiate what you will be negotiating

**Keep preparing. You are now in the pre-negotiation phase and your preparation is vital before you head into the negotiations proper.**

Be clear on why it is necessary to negotiate and about what you will be negotiating.

If there is already a Mining Code/Act in place then perhaps you will not need to negotiate licencing arrangements or rules (see Advice 6). If the Mining Code is not yet finalised or has limitations, then perhaps you will need to negotiate all stages of the mining project from the exploration phase onwards. If there has been a tender process then you will probably be negotiating the terms of a mining contract/convention<sup>2</sup>. Will this override any existing laws? Be clear on what is negotiable and what is mandatory.

Further, know what your government's key negotiating objectives are, and know what the needs of the other party are. Be prepared by having a thorough understanding of the financial implications of every issue for both parties.

<sup>2</sup> Different names are used in different countries - contract, agreement, convention, etc.

## Set up a negotiating team

Setting up a negotiating team is important. This team will usually consist of a political committee and a technical panel, which will generally include all the different stakeholders in the project. It might also include a conflict resolution and communication team. Ensure the different arms of the negotiation team are co-ordinated and that there is a constant dialogue between them.

At every given stage, make sure your chain of command approves of the composition of the negotiating team. This will boost your confidence to go ahead, as well as that of the members of the team. It will also reduce your portion of blame in case the negotiations are not successful. Further, ensure that the relevant minister or technical people are present at meetings when they are needed.

### **The Inter-Ministerial (political) Committee**

In case you do not have a permanent body in charge of mining regulations, make sure this committee is placed at the level of the President of the Republic or the Prime Minister. Key Ministries include Mines / Land Development; Environmental Protection; Economy and Finance; Labour; Social Security; Trade and Industrial Development. Representatives from all the ministries should be on the committee.

Generally, the Minister of Mines will most likely have to call on his or her colleagues for meetings. The Minister of Mines may face difficulties with some more powerful Ministers who may be reluctant to respond to orders. These difficulties could be more acute if there is a conflict of interest between the Minister of Mines and other Ministers. Setting the coordination of the project at the

highest levels of authority in the government will make the different Ministers involved obliged to respond faster and more promptly to planning meetings thus enabling the project to proceed smoothly. Furthermore, involving the President or the Prime Minister at the helm of the project gives the project more weight in the eyes of the investors and puts the emphasis on the importance of the project to your government. This factor will strengthen your bargaining power and force the investors to consider their proposals carefully and to give greater respect to your country's interests in the mining project. In addition, these higher authorities are also in position to make strategic decisions.

### **Set up a Technical Panel**

The technical panel should be composed of experts in all of the different aspects of the project, from the various ministries involved. The technical panel plays a pivotal role in reviewing, analysing and evaluating the concession agreements as well as handling day-to-day details relating to the project.

### **Communication and conflict resolution team members**

It is often a good idea to have team members whose role is to provide the communication and conflict resolution expertise. This can consist of one or more members whose responsibility is to ensure that the communication channels are always open within the negotiation team and between the negotiating parties. These team members will possess excellent conflict resolution skills (active listening, open questioning, etc.) to ensure that the negotiations stay polite, respectful and dignified and that all the parties are heard and their interests acknowledged.

## Consider contracting international/external experts

Apart from the local experts, also consider contracting external advisors. Government negotiation teams rarely have in-house experts on all of the skills necessary for the negotiation of these agreements. International experts can assist and guide you towards making informed decisions that will satisfy all the different aspects of the project. Generally, they could include technical, legal, economic and/or financial advisors.

### Identify the gaps

Most governments recognize the need to contract external advisers to fill the gaps and are willing to use government funds to pay for the outside expertise. However, it is important for you to identify the gaps in the skills of the members of the negotiation team. The members themselves cannot be relied upon to admit where their skills may be deficient, or may not know that their skills are deficient. International experts can be engaged to fill these gaps.

### Be careful

Please be careful when contracting experts. Take into account the geo-strategic factors, the colonial history of your country and ensure that there is absolutely no conflict of interest when contracting an external advisor.

### Finding your expert: do your due diligence

Some professional associations such as the International Bar Association will probably not provide legal advice directly, but could provide references to help you find qualified legal specialists (but probably not other specialists). However, you need to be cautious when you source referral advice as the referring body could have an agenda, which may not align with the interests of the government or with the industry at large. You will need to complete your relevant due diligences.

If you do not thoroughly check out your expert, instead of being part of the solution, the expert may become part of the problem. For instance, some of the facts about the project may be confidential and foreign experts might leak sensitive information about the project to the wrong people, or the expert might not have the appropriate inter-personal skills for the negotiation.

You will need to find sources to verify the credibility and suitability of the expert. You could Google, look at some specialised publications, or refer to the CCSI Portal below. You could also find trustworthy connections in other governments and ask them whom they have used in the past.

## **Paying for your expert**

It is better to pay well for good advisors than get bad ones on the cheap and it is better if your government pays for the external experts itself. If you cannot afford the best, then you might want to look at other sources of support including non-governmental organisations such as Revenue Watch Institute or the International Senior Lawyers Project. You could also approach some international organisations, such as the World Bank, Regional Development Banks (such as the Africa Legal Support Facility of the African Development Bank), United Nations Development Program, International Monetary Fund, European Commission, and others. These organisations will often pay for external (mostly legal) expertise.

However, you do not always want to get a grant from an AID organisation for legal advice funding as the organisation could have its own agenda. They also might put the call for technical assistance out to tender, which might mean that you will not get the best advisor, as the lowest bidder tends to win the tenders to provide services.

## **Building capacity**

When there are international experts (financial, legal and technical), make sure that your local experts are also specialised in the same fields. The international experts should be employed for terms of sufficient length to enable experience to develop in the local experts and to build national capacity. Recognize that international experts will deal with many different types of contracts on a very regular basis – that is why they are so skilled and why you want them.

The Columbia Center on Sustainable Investment (CCSI) has developed a web-based portal, the Portal, which provides a matrix of available tools & resources and technical support available to assist host governments planning, preparing for, negotiating, monitoring, and implementing large-scale investment projects in the extractive industry, land & agriculture and infrastructure sectors.

[www.negotiationsupport.org/matrix](http://www.negotiationsupport.org/matrix)

## Make sure that the local community is represented in the negotiation team

It is imperative that the local community has a say in the negotiations. Adding members of parliament or the mayors of the mining locality into the negotiating team can ensure this. The advantage here is that the local representatives will have a better mastery of the geography, social history and the aspirations of the inhabitants of the area. They will therefore be able to provide to the rest of the team insights on how best to ensure collaboration from the local community concerned, as well as how to meet their interests. These local representatives will also be able to help the team to overcome language barriers, especially when it comes to communicating with the local inhabitants and authorities.

Furthermore, the presence of local representatives in the team reassures the local community that the project will be carried out with their interests in mind, since these representatives are there to ensure that their rights are respected during the execution phase of the project.

This said, great care is needed to ensure that the local representative does not leak information or promote a position, which is so focused on the local issues that it does not acknowledge the complexities of a multimillion-dollar project. Further, the local representative needs to be realistic and not raise local expectations to a level, which is unattainable.

**Red thread: Marginalising the community can lead to major conflict. See advice 33 below for more on this.**



## Draft your government's positions-in-principle paper

Ask the various ministries involved in the local team to provide you with the positions of the government related to their areas of activities. Gather these different positions in a document and take care of the strategic and political implications of each of these. After that, present these as a 'positions in-principle' paper to the international experts for them to advise on how they compare with the practice in the international mining sector and as against international standards.

When you receive the input of the international experts on the paper, assess it carefully and draft a final document taking in to account the relevant advice of your international experts. The document should set out your government's view in relation to the main issues to be negotiated. This will be an important tool to use during negotiations.

You can also develop a term sheet with Agreed Points relating to the mineral concession. Interpretative letters are another tool that you can use to summarise and clarify what might be discussed and what has been discussed. Many companies use this tool, so there is no reason why governments shouldn't also use these and be proactive.

## Make sure that everyone in the negotiations can understand each other

It is important that everyone involved in the negotiations can understand each other. It might be a good idea to ensure that most of the members of your negotiating team can communicate in English, because it is likely that most investors will speak English. It is awkward to have to translate every stage of the negotiations.

If you have team members or local representatives who do not speak English or the host language, ensure that they have a skilled translator with them at all times. You do not want to exclude valuable and knowledgeable people from the negotiations simply because they do not speak the same language.

## Know what is negotiable and what is not

Before you get to the negotiation table, you will need to discuss with your hierarchy the terms and conditions of the contract that are considered open to negotiations and those that are not –for instance, there may be some issues around which the government has ‘drawn a red line’ (see Advice No 11). This means that the company might open up debates and negotiations on other points but will simply have to abide to those specific terms of non-negotiable items or withdraw.

Further, knowing what your alternatives are can help you to frame the negotiation in a way that allows you to get to where you need to go quickly. For instance, if a royalty rate is more than 5% then the project is not likely to happen, and you should have a better alternative waiting for you in the wings. This feeds back to Advice No 1, which states that you should know what is politically palatable and what is not.

**You do not want to be locked-in, so make sure that you remain flexible by knowing your resource and knowing your alternatives - other options that you can turn to if the current negotiations are not going the way that you would like them to.**

## Ensure you have the necessary funds for the negotiations

Negotiations can be a very expensive process. You will need to make sure that the funds are in place before negotiations begin. To do this you will need to budget the appropriate funding for the negotiation.

Try to avoid the need to receive or request money to fund the negotiations from the company with whom you are negotiating. Rather, foresee development costs for the project and have the project developer to pay for these in a very transparent manner. This cost could also cover the expenses for the international experts that you are hiring as discussed in Advice 13 above.

## Acquire strategic skills

At the negotiation table, your team will need to have strategic skills. If your team doesn't possess these, then seek out experts who do. These strategic skills usually involve the skill to listen carefully, ask good questions, steer the negotiations in the right direction and manage the difficult conversations.

Managing emotions is also a strategic skill. You need to be prepared for people to have some strong emotions in the negotiation. Everyone is human and can get nervous, uptight, annoyed, frustrated, angry etc. in the heat of the moment. You will need to prepare to manage emotions—yours and theirs.

Without necessarily striving to be an expert, you should also consider revising your notes on economic and financial trends, as well as the technical, legal and diplomatic basics related to the project. Being clear on the basics will help you to be strategic.

## Look behind the positions to the interests

In the negotiations, you will have to understand that what the other party is not saying could be more important than what they say. In other words, you will need to read their proposals between the lines for hidden intentions. In order to be prepared for this, you will need to consider what the other party's interests are.

Interests are the motivators and drivers of positions, so dig behind the positions to see what the real driving interests are.

Interest-based negotiation involves exploring and satisfying interests rather than arguing and competing over positions, or who is right or wrong. A person's position is what a person says he or she wants—a demand. A person's interest is why the person wants something—the need, desire, fears and concerns behind the demand. Whereas positional negotiation starts with negotiators making demands and bargaining over those demands, interest-based negotiation involves firstly exploring what the person's interests are and then looking for different ways to satisfy them. Where the goal of positional negotiation is to achieve one's own solution, the goal of interest-based negotiation is to create a sustainable solution that meets more of the interests of all the negotiating parties<sup>3</sup>.

**Follow the advice of respected negotiators elsewhere by paying more attention to the interests (the needs, fears, concerns, ambitions) of the company rather than to its position.**

<sup>3</sup> Alexander, N & Howieson, J, 2010, *Negotiation: Strategy Style Skills*, 2nd edn. LexisNexis Butterworths, ch.3

## Prepare for the forthcoming negotiations with your team

Before starting the formal negotiations with the company, please gather all the members of your negotiating team and make sure everyone understands the 'rules of the game'. This will include who will lead your team negotiations; what roles the other team members will play and how to react to the arguments of the other party. This could also include agreeing who will not speak, if necessary.

To this effect, conduct a meeting/workshop with your team members before the negotiations to map out specificities on the conduct and approach of your team during the negotiations. You could even consider mini-rehearsals so that everyone is clear on their role.

## Select the location and venue for negotiation

**The location and venue of the negotiations is important for setting the tone of the negotiations and for assisting the negotiations to run smoothly.**

### Location

The location depends upon the level of discussions. If the negotiations are between the CEO and the Head of State, then it may need to be in country. If the negotiations do not need to be in country then both parties can agree on the location for the negotiations (in terms of the city where the negotiations will take place).

It is often a good idea to choose somewhere midway between the headquarters of the company and the capital of your country. Midway helps you to get in the mood of negotiations, since each party is giving something to the other in terms of agreeing to go somewhere that is neutral.

However, wherever you agree to hold the negotiations, you will need to be flexible and foresee the need for visa requirements, travel access, internet, printing and other logistical support. At the documentary closeout stage it is more important to have proper office logistics.

### Venue

The venue should be chosen taking into consideration the number of negotiators on each side. The hall should have enough room to accommodate everybody around the negotiation table and the table must be wide enough to allow both sides to sit distinctly at opposite sides of the table to confer with each other briefly without being overheard. This detail, if neglected, may make negotiations frustrating or even painful, especially if team members feel compelled to withdraw themselves each time they need to confer with each other out of earshot.

Also, the venue should be quiet. The most convenient type of venue will be a conference centre or a good resort that is withdrawn from the urban centre, with coffee and other facilities readily available. Having food and drink readily available can smooth the way for the 'informal' negotiations that take place in and around the formal negotiation, so it is important there is the appropriate level of catering.

It is also good for the venue to have breakout areas and be close to the accommodation to ensure prompt starts and for the convenience of getting to and from the venue.



# In negotiation



## Some classical issues that you are likely to deal with

Some problematic issues are classical in the framework of negotiating mining contracts and you will want to do your homework to decide how to deal with these. They include:

- mining terms (e.g. 25yrs fixed renewable)
- fiscal terms (tax law)
- environmental concerns
- corporate responsibilities
- benefits to local communities
- ownership of infrastructure
- revenue percentages for the state
- percentages for local communities
- compliance with applicable regulations
- performance on project
- employment and training of locals
- inclusion of local vendors/suppliers
- community involvement, etc.

There are some resources that might be helpful such as the Model Mining Development Agreement (MMDA), which sets out a model way of doing things. However, you need to be very careful when using model agreements as every project is different and using a standard clause might stifle value creation in the particular deal.

[www.mmdaproject.org](http://www.mmdaproject.org)

Remember though, that with any pro forma document you need to look at in context of the region's political and economic framework and be realistic about the investor's perceptions about your host state. You do not want to rely on a standard clause if it is not appropriate for your country's circumstances.

## Have an agenda but prepare for timeouts and adjournments

It is a good idea to have a clear and agreed agenda for each meeting so that everyone is prepared and the timing is planned. However, during negotiations, do not hesitate to call for a time out if you feel that you need to confer with your team members on any issues. The opposite delegation will also be calling for time outs during the negotiations, so you will need to consider these time outs in the overall time budgeting of the negotiations so that the negotiations do not last later into the night than previewed.

In some circumstances, you may want to ask for an adjournment during the negotiations. This may occur, for instance, when you want to update your hierarchy on the progress of the negotiations or to get further instructions and advice from them or it might occur if the negotiations get heated or stall. It is critical that you adjourn the proceedings and give everyone the opportunity to let the tension go so that it does not affect the rest of the project or the negotiations.

**Adjourning the proceedings is a normal part of negotiating. Do not hesitate.**

## Draft the minutes of all your meetings and update your hierarchy as you go

It is a good idea to keep your hierarchy, or chain of command, fully informed as the negotiations proceed. For instance, while negotiating for the necessary fiscal package, make sure that the Minister of Finance is duly updated. In general, report to the relevant higher authorities of your country at each step of the negotiation. This will give your superiors the opportunity to evaluate the trend of the negotiations and advise you on the best options to take. This will also help you to avoid decisions that will displease your superiors or are ill-informed or that you are making under duress.

### Minutes

It is also useful to make sure that the minutes of all meetings are drafted and signed by authorized representatives of the parties at the end of each day. This will provide the hierarchy with a written document of what was discussed and what was agreed. This is also important because sometimes the parties may disagree on what were the outcomes of the day. When drafted, the minutes of a meeting provides evidence of the agreed discussion points and outcomes.

## Thoroughly review infrastructure projects (rails, ports and power)

Infrastructure is a critical issue that is often overlooked or dealt with badly. Mineral and petroleum resources are often located in remote and hostile environments and the infrastructure required often presents its own peculiar challenges. Greenfield projects can also have high costs, which can be compounded by issues of personal safety, political instability and doubts over the reliability of the legal system. The infrastructure issues should be thoroughly reviewed and discussed during the negotiations.

If the company is to build the infrastructure then the following have to be discussed at the negotiation table.

- What is needed to secure finance for the development? Will the capital and operating costs be taken into account in the economic and financial analysis of the project?
- Who owns the infrastructure and will the company or State operate it?
- Is the infrastructure included in the project area definition or not? If yes, does it benefit from the same guarantees and obligations under the mining investment agreement? If no, how it will it benefit from the mining investment agreement?
- Will the infrastructure be for the exclusive use of the project or will there be the opportunity for multi user capacity?
- Will the infrastructure be restricted to a specific commodity or will it have a public service capacity?

If the government provides some of the infrastructure then a number of considerations need to be discussed in the negotiations.

- How will the government satisfy the company's requirements for timely delivery of the service

on a cost efficient basis? What guarantees can the government provide and what should the penalties be in case of default?

- How will the user charges be calculated?
- Be clear on when roads and rail tracks can be closed or monopolized by the company. Consider access undertakings.

If the government builds the infrastructure especially for the company then you will need to agree on how it will recover its investment cost.

- Highlight the responsibilities of the government and the private parties.
- In addition to the mining investment agreement, discuss on separate agreements, such as usage, tolling charges, take or pay contracts, if necessary.
- Determine what will become of the infrastructure when operations cease, and who will bear the cost and liabilities for eventual shut down, dismantling, clean up and rehabilitation.

The opportunity that exists in getting the infrastructure issues right is immense, so it needs special attention. Take your time on these issues and do your homework by looking at how countries have created considerable value with infrastructure.

**Red thread: Just as the opportunity exists in getting the infrastructure right, getting it wrong can result in conflict, issues of personal safety and political instability. Plan the infrastructure projects carefully: consider all the potential risks and opportunities.**

The Africa Mining Vision is a pathway, formulated by African nations, that puts the continent's long term and broad development objectives at the heart of all policy making concerned with mineral extraction. The African Mining Vision sets out how mining can be used to drive continental development. [www.africaminingvision.org](http://www.africaminingvision.org)

## Equity

When dealing with a mining company to develop a mining project, states are often interested in having a high-level equity share in the project. This is normal, but should be handled carefully.

For example, if your country is offered a 40% equity share in a company that is developing the mine, you may think that this is a beneficial arrangement. However, foreign companies sometimes exploit this arrangement and manage their business in order to bring evidence at the end of the year that there were no benefits and that there is nothing to share among shareholders (which includes your country).

If you are dealing with bulk commodities and there is a company to be created for the management of railway infrastructure, it may be wise to focus on what your country will gain each time the train transporting the bulk commodity uses the railway, rather than looking for high level shares within that company.

Host states really need to think about what that means throughout the life of the project. Would it be better to take a royalty at the end rather than merely assuming an equity interest? It is important to consider that sometimes states who have an equity share often want veto rights over costs and if they get a royalty then they do not focus so much on costs; this can create problems for the mining company. Also, the level of equity will be affected by whether it is free carried, loan carried or contributing. The creation of free carry and loan carry equity can have a substantial impact on both the financial viability and economics of the project. Therefore, it is important to consider how the government will fund its equity share if it decides to go that way, and whether any financial support is needed from sponsor.

**The most important thing here is that the government focuses on its revenue stream and ensures that it is stable to ensure long term social and physical infrastructure.**

## Develop social infrastructures that will benefit people and help increase their acceptance of the project

If you have to build a railway infrastructure and if it is dedicated to the mineral transportation, foresee a tarred road from the mining site to the port area. Explain to the developer of the project that this will definitely work for their company in public opinion and will be seen as a legacy of this company in the country.

This move will also benefit your government in that it will improve its image at the level of the inhabitants of the area. This is a win-win situation for the interests of all stakeholders.

The Mbalam-Nabeba Iron Ore project in Cameroon and the Congo has more than 80 per cent of the capital expenditure allocated to finance infrastructure. See also Advice 30.

## Foresee the labour aspects of the project

There are likely to be trade unions that protect the interests of workers in the different domains of a mining project. You will need to get the relevant ministries involved so that they agree on the labour conditions of the development of the project. This is particularly important because trade unions could easily unite to stifle the project through non-supply of labour if they are not comfortable with the working regulations or conditions of the project.

It is key to understand what the international practices are for the proposed project so that the project in your country can be seen as being competitive with international practice. Often a country's labour practices do not reflect what is required to run a 24-hour per day, 7 days per week, and 52 weeks per year operation, which has a high capital investment.

**It is important here that you involve representatives of the worker's syndicates, communities (from where the labour will come), the relevant ministries and the company in discussions about labour. If parties have a say in the negotiations then they are more likely to stick to the terms included.**

**Red thread:** There are many examples of where the labour movements have disrupted activities and led to conflict and tragedy. Remember though that unions are made up of individuals, and it is important to analyse where the conflict is coming from and who the influential individuals and agitators are. See the Marikana Incident for an example of a tragic example of failure to fully understand and engage the labour movements and labourers.



## Reflect on a development plan to benefit the community

Foresee a development plan for the region where the mine site is located. This will help the local community to accept the project and will meet international developmental indicators.

It is imperative that the company understands and agrees that development projects are useful to ensure harmony and stability with the locals. However, the development plan must match the needs of the particular community or else it could lead to disharmony and instability. Some things that the community could benefit from might include: schools, hospitals, health clinics, roads, markets, potable water, electricity and leisure centres.

**Consult with the community to develop the plan that will bring the best benefits to the region.**

## Engage and inform the community

**The skill to engage and inform the community in a realistic and satisfactory way is essential.**

Natural resource contracts must recognise and incorporate measures to effectively implement the principle of free, prior and informed consent in relation to actions that will affect community lands, territories, and natural resources. It is essential that landowners understand how much they should be compensated and what the true costs of resettlement entail.

Stakeholder/community meetings that are properly facilitated by respected and independent advisors specialising in community engagement are required to ensure that the community has a full understanding of all of the issues. Preferably, the advisors are in-country people with good local relationships. If local people are not available, then there are foreign organisations that will assist the local partners to conduct these meetings.

This engagement must be publicly supported and properly funded. Otherwise, there will be social and political unrest and the mining operation may be delayed or forcibly stopped by your country men and women. In these instances, the government loses revenue, the company reduces profit/incurs costs, workers lose income – and all will blame you for not getting it right!

In the stakeholder meetings, it is important that the government or company is realistic in its promises. You should carefully consider who should pay for the programs and who will manage these going forward. You should also make sure that outcomes from the meetings include a local content plan, an employment plan and other developmental agendas from the company. The timelines for this must be workable for all the stakeholders, including the company.

## Working with indigenous communities

Compliance with local ownership, land rights and indigenous heritage legislation brings considerable challenges to miners and explorers, as well as indigenous and local parties. You will need to be constantly aware of the fact that some companies have had poor past relationships with local populations, as a number of communities were not comfortable with the methods, attitudes and approaches of the mining companies. This might have left a sour taste in the mouth of some of the local communities.

Again it is important to have properly facilitated meetings with the indigenous communities, either separately or as part of the larger community. This will enable all the parties to have the opportunity to air their concerns and become clear on each other's needs and interests. You can engage third party experts to facilitate stakeholder meetings to ensure that everyone is informed.

## Educate local communities about the obligations of the company

You will also have to sensitise the local authorities about the benefits (and risks) of the contract to their communities, especially in terms of infrastructures to be constructed and social amenities, as well as taxes that the company will have to pay to them. This will allow the communities to see the project as theirs, and also help you ensure that the company respects its obligations.

Establish a pre-care supervisory committee that will be the link between the local communities and the company. Include government representatives if they add to the communication. An informed local community will also reduce the work of the supervisory committee, as the local authorities will be quick to point out where their interests are not met as previewed in the contract.

After the contract is negotiated and signed, an aftercare committee will replace the pre-care supervisory committee. These may be the same people or different. The important thing is that the local communities are made aware of their own obligations and those of the company before the company commences operations. This will help to ensure that all parties are aware of their roles and responsibilities and can help to reduce conflict.

Red thread: Mining can lead to conflict. Conflict can come from the:

- lack of sufficient consultation and community engagement
- lack of accurate information on mining impacts
- differing expectations of social and economic benefits
- environmental concerns
- disputes over land use and economic compensation
- artisanal and small scale mining activities
- migration to mining areas, and
- and differing acceptance of large-scale mining.

You need to ensure that everything is clear. Engage the community early in the decision-making, provide lots of information before, during and after the mining operations and manage the expectations of all stakeholders.

## Consider whether the mineral proceeds can be transformed in your country

To boost and encourage the industrialisation of your country, it is a good idea to consider resource transformation. Resource transformation means creating industries to convert the mineral proceeds into tangibles rather than simply sending the raw resource material elsewhere. For instance, you can create steel refineries in your country to refine the iron ore rather than exporting the raw resource, or you can require that a certain quantity of iron ore or other resources (gold, nickel etc.) in your country be provided to local buyers for local industries to process.

This is not always a good idea or practical and should be considered on a case-by-case basis. If it is possible and practical, resource transformation can increase job opportunities for the locals and can help in building capacities or transfer of knowledge in the technical areas. It can also help the local experts and scientists to benefit from the knowhow and expertise of the foreign experts, so that in the long-run, you will not need the foreign experts anymore.

The local communities often applaud these initiatives yet resource transformation is not always the answer. There may be other ways of achieving the same benefits. There are examples of where this has worked well, but also warnings of where it has failed. For instance, you can see Indonesia's new mining code that requires in country transformation and see how this has reduced investment. Also, in Western Australia, BHP Billiton and Rio Tinto attempted to upgrade their iron ore in country but this attempt failed miserably.

This aspirational view is totally dependent on the commodity, the availability of inputs e.g. cheap power, and the risk profile of the host country. Problems can occur when there are no refineries or local customers able to buy the resource and process it. The law can certainly contemplate resource transformation, but the point may be a moot one if there is not anyone local to exercise it.

Before considering resource transformation, some good financial modelling and commercial viability testing should be conducted. Refer to the pre-pre-negotiation section and the issues that you need to consider before you begin to negotiate.

## Take care of the future of your asset

**Think into the future. What will happen when the demand for your commodity drops and the price collapses? This is a normal part of the commodity cycle and must be factored in to your thinking.**

If your asset is iron ore, you may face a situation where you have high-grade as well as low-grade iron ore. If this is the case, bear in mind that your high-grade iron ore could run out soon. This could have a substantial impact on communities and royalties. Therefore, you need to think about the future of your iron ore. You could for instance foresee a beneficiation unit whose aim is to process the low-grade iron ore and make it to become high-grade iron ore. But be aware that this idea has not worked in other countries. You need to be pragmatic about whether the time and cost of beneficiation is worth the effort—or whether alternative investments will deliver better outcomes.

If your asset is gold, there will always be a demand but the price is linked to global financial insecurity. If your asset is coal then be aware of environmental opposition to its use. Be aware what technology is being developed for cleaner, more efficient use.

The main message here is that you need to think into the future and contemplate good times and bad times for your commodity.

## Foresee disagreements that could lead to breakdown of negotiations

Possibilities always exist for the negotiating company to disagree with the terms of the contract as put forth by your government. However, do not lose sight of the fact that your objective is to reach a fair deal. You should be flexible and facilitate a wise agreement making sure that the negotiations do not break down through misunderstandings. If there is an impasse and you think that the company is reluctant to agree to your terms for some reason, you need to test your assumptions and continue to explore each other's interests.

Some other tips for breaking impasse:

- Stop and really, really listen. Too often commercial people argue but are not really listening. They do not stop and clarify what the issues and interests really are. This is particularly the case in deadlock situations when people dig in their heels.
- Effective negotiators will stop and look at the issue from the other person's perspective—put themselves in the other party's shoes so to speak. This will help you to identify what their issues and interests are and what might be getting in the way.
- Don't let your own ego get in the way. (We can all let our egos get in the way of getting a good deal. Learn how to keep your own ego in check and learn how to deal with those people who may not be humble).

In an extreme case, if there is a breakdown of the negotiations, there are still some things that you can do:

- You could check with your Bid Assessment Bench and perhaps contemplate opening up negotiations with the next company in line –if there is a next company in line.
- You can abandon the negotiations and walk away.

**Know your alternatives. Before beginning negotiations, it is always a good idea to know what your alternatives are—namely, what other options are available to you if these negotiations break down. Knowing your alternatives can help you get clear on what you need to achieve in your negotiations and what to do in times of irretrievable impasse.**

## Make sure you have evidence that the company will gather the necessary funding for the project

Many countries have experienced issues with companies that come and sign contracts, are awarded mining permits but do not implement the project. To safeguard against this eventuality, firstly, you should have done your homework and checked the financial viability and bona fides of the company (i.e. checked whether you are contracting with the parent company or the subsidiary, and the company's history etc.).

However, sometimes things happen beyond the company's control: for instance, a global economic crisis or a movement by foreign banks to withdraw money from developing regions might occur. You need to prepare for these possibilities and remain flexible enough to recognise that sometimes things occur outside the company's control and you will need to deal with them.

You could consider including a clause in the contract that states that after a certain period, if the company is not bringing evidence of the necessary funding for the project, then the contract is null and void. However, being too rigid with funding periods sometimes does not result in the best outcomes. Anything that locks in funding needs to be done with some flexibility to cater for external circumstances. It is therefore a good idea to draft these clauses so that they are hard on the bona fides of the company but soft enough to recognise that sometimes, unforeseen things happen that can affect funding flows.

For examples of clauses that you might want to include in the contract, see the Model Mining Development Agreement (MMDA). Remember though that these examples are provided for illustrative and comparison purposes only and caution should be used when drafting an appropriate clause for your circumstances.

[www.mmdaproject.org/](http://www.mmdaproject.org/)



## Develop an implementation plan and monitoring strategy

Before negotiations are concluded, you will need to establish an activity timeline for the implementation of the project.

You will need to understand what documentation and approvals are required so that you can define the timelines and limits for the activities of the company and the state. You will also have to request for a local content plan, an employment plan and other development agenda from the company.

Also, make sure you have discussed how the project will be monitored and who will do what. It is very important to ensure that the conditions and benefits that are agreed are followed. It keeps all parties responsible for their agreed duties and gives confidence that the project is being well managed.

**Note:** There will need to be appropriately flexible Force Majeure terms in the contract that provides for extensions. Also, you will need to remain flexible on timelines, which affect funding provisions (as per Advice 37 above).

See the MMDA Force Majeure clause examples at [www.mmdaproject.org/?p=1678](http://www.mmdaproject.org/?p=1678)

## Include periodic reviews and a dispute resolution clause

The contract should have the duration of the contract clearly spelled out. If the mineral exploitation is estimated to last for 30 years for example, an activity timeline should be established with specific objectives to be attained within specific time frames, as per your implementation plan.

It is also a good idea to include periodic reviews to check the progress of the project and to allow for mutually agreed amendments to accommodate new realities. You can establish a supervisory committee to review the agreement in good faith every five years. There should be the ability to adjust some factors as required – how the relationship is going, safety, community employment/engagement, environment, but not review the whole agreement, or allow either party to vary the fiscals. This ensures that the project is going as planned, that targets are met on time and that both parties are respecting their obligations as stipulated by the contract and everyone is kept on their toes.

If either party is not meeting its obligations, then there should be a clause in the contract that sets out what occurs in this situation. It might be that you refer the matter to a respected and international mediator or arbitrator.

**Parties do not often like to think about things going wrong with their contract, but things can go wrong and having a robust dispute resolution clause is integral to the agreement. A dispute resolution clause should set out a clear pathway to resolution of the dispute. It should always begin with facilitative type of processes such as mediation and then, if necessary, escalate up to arbitration to ensure finality.**

## Stabilisation mechanisms

A stabilisation clause is a clause included in the contract in order to make sure the agreement reached by the company will not change. For instance, 1) because the change of the law in the country, or 2) because of the change of Government. It is often unique to a project and to a host state's history.

Stabilisation clauses may take several different forms. The type of stabilisation clause that is ultimately integrated into the contract requires careful contemplation as the effects of the various options vary from one to another. For instance, one type of stabilisation clause could be that the new legislation does not pertain to the development of the minerals or sharing of the benefits but the investor is entitled to be rewarded for any injustice that might have been caused by the appliance of the new lawmaking regime.

As the MMDA notes, stabilisation clauses are very controversial and need to be treated with caution. Currently Ghana, Sierra Leone, Democratic Republic of Congo, Guinea and other countries are reviewing the stabilisation clauses in their mining contracts.

The issues that you need to keep in mind involve the scope of the stabilisation, the government's policy position, and the impact that the stabilisation clause might have on future negotiations.

## Proof read every article of the contract before signature

At the end of the negotiation of the Mining Contract, make sure everybody comes together to proof read each of the articles of the Contract. This assures both parties that the resolutions noted down constitute exactly what transpired during the negotiations.

## Get parliamentary approval/ ratify the contract

It is imperative that the agreed contract receives parliamentary approval and ratification. You need ratification to ensure that:

- the state is properly authorized to enter in to the agreement, and
- the contract applies beyond the law.

It may be that you need an Enabling Act to be presented to Parliament if some elements of your contract are beyond the existing laws of your country. If it is absolutely the case that you need to draft an Enabling Act, then you will probably need to get legal advisors to join you in the drafting, which will then be introduced to the House of Representatives by your government.

Given that parliamentarians are usually there to protect the interests of the people, a well-drafted Enabling Act (and a well-crafted contract) that is clearly geared towards economic growth, provision of jobs and the improvement of living standards should easily get endorsed by the Parliament.

## Be as transparent and public as possible

Once both parties are settled on the terms of the contract, the next thing will be the signing of the contract. This will no longer be behind closed doors. It will be a heavily media publicized event that will bring both your government and the company into the public eye.

Be mindful that there will be opportunities and risks with this. A publicised signing event will make the wider national community aware of the project. This may increase interest for employment and business opportunities, but may also bring criticism about ownership, environment, benefits etc. This is why it is good policy to be as engaging and transparent as possible throughout the negotiation process.

It is likely that your government will benefit from a signing event in that it will use the event to show the national and international community its willingness to carry out huge projects leading to the economic and social advancement of the country. This event will also send a strong signal to international investors about the country as a good investment destination.

On the part of the company, the signing event will again make the company known to the host community. Previous stakeholder consultation will prepare the minds of the local community on what to expect once the project is afoot and this is another opportunity to make public several aspects of the project. This is important since it will help build the confidence of the public opinion vis-a-vis the project.

## Produce the contract or a summary or simplification of the contract for the community understanding

On balance it is better if the entire agreement is made public to overcome the suspicions of civil society and demonstrate transparency. However, if the agreement is complex then it can be strategic to provide a summary or simplified version of the contract (void of technical jargon) to foster understanding of the contract by the public. This can help the press, local communities as well as the host community heads to better appreciate the contract terms and reinforce the understanding of what to expect from the project.

Make sure you agree with the company on the information to send out to the public, since the terms of such mining contracts are generally confidential and the company might not want some parts of the contract being released.

You can also use the EITI (Extractive Industries Transparency Initiative) to make public and transparent the content and benefits of the contract. This will earn you positive attitudes from the national and international community.

<http://eiti.org/>

# Post negotiation





## Implement a timeline and monitoring strategy/plan

During negotiations, you will have established the expected timelines and milestones for the implementation of activities. This timeline will incorporate your strategy for monitoring the progress of the project.

Monitoring is likely to be carried out by the different ministerial departments who were involved in the negotiation process. This will enable those various ministerial departments to ensure that priorities and obligations are being met in the project.

It is a good idea to form an agreed group that represents the various departments and stakeholder groups (mines, revenue, and audit inspectorate departments, EITI representatives, civil society, environmentalists etc.). These will include employees of the different Ministries involved in the project, as well as independent experts from the private sector, notably in economics, accounting, legal issues and indigenous peoples' concerns. This is the Monitoring Team. Make sure the group meets regularly and knows what they must monitor and how they report back.

## Monitoring compliance

The Monitoring Team will have to see that both the government and the company are respecting the terms of the contract during the implementation phase of the project. If they are not, then this should initially be addressed within the company or department directly by the relevant member of the Monitoring Team. If stakeholders were involved in the negotiation then they will have more reason to comply. If there is an individual that deliberately is not complying then raise the issue with the department head and take the appropriate sanctions.

If they are complying, then this is good and should be noted, but do not then get complacent and stop monitoring properly!

**Enforcement is always a last resort. It is better to try and problem-solve the non-compliance before enforcing sanctions.**

## Institute an aftercare committee

Because you are dealing with very important projects that require the involvement of highest authorities in the country, it is a good idea for you to institute a Committee of Ministers as an aftercare committee. This is also a good idea to increase the awareness of the Ministers since their representatives do not always report to them faithfully.

The aftercare committee should include community representatives to deal with issues between the Company and the Community; and issues with other Government Agencies. This committee should also handle unforeseen circumstances and be able to engage a facilitator or mediator as necessary.

Take special care of the fact that the State and the investors are effectively meeting the concerns of the local communities as scheduled. If you fail in doing this, you may jeopardize the whole project since you may face strikes and other protests. This may also discredit your government.

Below is a link to Fact Sheet and case study setting out what happens to mine sites after a mine is closed.

[www.miningfacts.org/environment/what-happens-to-mine-sites-after-a-mine-is-closed/](http://www.miningfacts.org/environment/what-happens-to-mine-sites-after-a-mine-is-closed/)

## Develop yearly post impact studies/evaluations

It is important to have annual evaluations of the impact of the mine operation, particularly if you have not dealt with the company or the mineral or the scale of mine before.

Given that every project always has unexpected results as well as social, economic and environmental impacts, there is need for you to foresee the initiation of the socio economic and environmental impact of the project on the local area as well as on the state as a whole. This helps you to find out if the project is producing expected results, and if not, how the project could be redirected to meet the goals set down at the onset.

In case of environmental complications, post-impact studies will enable you to find solutions to the problem soon enough before the project develops an adverse effect on the environment, the public and in turn, the image of your government.

**Red thread: being complacent about the project once it appears to be underway can have detrimental effects; keep reviewing to ensure that all is on track.**

## Consider local shares participation

Given that one fifth of agreement provisions will likely be devoted to employment, education and training, successful long-term employment of indigenous people on jobs associated with the project should be as high as possible. It is also important to try as much as possible to get local investors to buy the available shares in the company. This will give the locals a sense of belonging and ownership of the project such that they will be compelled to join the government in protecting the project in order to maximise their own profits. It will also enable the project to benefit the locals, who will take the lead when it comes to dialogue with village authorities, understanding local dogmas, myths, superstitions and preferences. This will further enhance the rapprochement between the state, the companies and the host communities ensuring the smooth functioning of the project.

## Renew contracts

If the duration of the contract expires while resources are still available, it will be advisable for you to renew the company's contract for continuous development, especially if the company has proven to be effective and trust worthy. This will also reduce extra time and costs for opening fresh negotiations.

Ensure there is a renegotiation clause in the contract with criteria that triggers its use. If the company is not proving to be effective and trustworthy, then there must be a mechanism to address that. If the operation has proved to be a positive one on all fronts, then it makes good sense to continue it. Do reassess the terms of the contract to accommodate changing conditions or requirements.

**If the relationship has been good for the company and the community then they will support the government in continuing the life of the project.**

# Afterword

With this Handbook, we have provided advice to assist you and your government to achieve all that is possible in negotiating mining contracts. With this guidance we hope that you will be able to transform your country using mining as a catalyst. We conclude with the aspirations of the African Mining Vision, which can equally be applied anywhere in the world.

- ▲ Enhance value by promoting linkages
- ▲ Obtain a fair share of the revenue
- ▲ Improve public participation and accountability
- ▲ Pursue an integrated view of the rights of all the stakeholders: partner with stakeholders rather than compete
- ▲ Value your environmental resources and always consider intergenerational equity
- ▲ Use mineral revenue efficiently and effectively and think into the future
- ▲ Promote local development
- ▲ Encourage regional cooperation and harmonisation
- ▲ Strengthen institutions and communities: build capacity wherever possible



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