CONNEX
Contract Negotiation Support

CLAUSE INSIGHTS

Climate change –
aspects that should be given special consideration in mining contracts

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With climate change reaching a fever pitch on the international policy stage and the physical impacts already being felt in numerous countries, we wanted to highlight some of the issues that mining contracts specifically should keep in mind regarding climate change.

This is an evolving field of interest and given that contracts usually exist over the course of (at least) one generation, it is important for governments to consider tomorrow's potential impact today.

For this edition of "Clause Insights", we are very pleased to have a trio of experts from the Columbia Center on Sustainable Investment (CCSI) providing thoughts on how not only governments, but also companies, can prepare for the perhaps uncomfortable, but very necessary discussion around addressing climate change when it comes to a mining community and an operation. Martin, Perrine and Jack bring up some excellent points and very practically frame the topic.

In the 2015 Paris Agreement, the world's governments set an ambitious goal of limiting global temperature rise to 1.5°C over pre-industrial levels. To achieve this goal, global anthropogenic CO2 emissions must decline steadily and reach net zero by about 2050, through a fundamental shift away from fossil fuels and toward clean energy technologies.

This transition will be very mineral-intensive. The World Bank estimates that mineral production could increase more than 450% by 2050 to meet the demand for clean energy technologies. How these minerals are produced will have a lasting impact on the clean energy transition.

MINING AND CLIMATE CHANGE

The mining and metals sector currently contributes 4–7% of greenhouse gas (GHG) emissions globally. Without adequate regulation to incentivize climate-friendly sustainable operations, increases in mineral extraction risk increasing the sector's carbon footprint. In addition, climate change acts as a risk multiplier – it increases the risk of flooding, drought, and landslides – and, as such, exacerbates the negative externalities caused by poor mining practices.

To address these issues, climate change considerations should be incorporated into the climate, environmental, water, forestry, energy, or mining laws of mineral-rich countries. Unfortunately, legislative processes are often slow – and in countries where the legislation does not include climate change mitigation and adaptation requirements, governments may turn to contractual provisions to compel the mining sector to shift to climate-sensitive practices.

A recent CCSI publication assesses whether climate considerations were included in 21 publicly available mining contracts which states in Africa signed since the adoption of the Paris Agreement. Section 2.2.1 of the publication zooms into the role of contract clauses on climate adaptation strategies, climate risk assessments, and community vulnerability assessments in the context of mining.

ADAPTATION STRATEGIES

Climate change adaptation in a mining context refers to how companies can incorporate climate considerations into their processes, practices, and structures to mitigate climate-related risks. It relates to companies' "ability to adapt to changes, anticipate what might happen next, and absorb weather and climate-related shocks when they happen." Importantly, adaptation also refers to the role of mining companies in strengthening the resilience of mining-affected communities to climate-related impacts.

Climate change poses risks to the mining sector and mining-affected communities with the increased frequency and intensity of severe weather events that affect mining operations both directly – damage to infrastructure (during the mine's life or post closure), access to water, and more dangerous working conditions – and indirectly, when their supply chains are similarly impacted.

A climate adaptation strategy can help ensure that mining-related assets are better able to withstand more frequent and severe climate events. It can also help to mitigate the project's impact on the surrounding envi-

ronment and community, including water, during the life of the mine or post-closure. Such a strategy is most effective when mining companies integrate climate change considerations into their own corporate strategies and then make investment, construction, and operational decisions based on global climate change models tailored to local, site-specific conditions.

Integrating climate adaptation strategies into the lifecycle of a mining project benefits all stakeholders. It makes business sense for mining companies, reducing their costs and improving their performance and efficiency. For states, it helps ensure and even increase tax revenues from mining activities. In addition, it builds climate resilience in mining-affected communities.

RECOMMENDATIONS FOR MINING CONTRACTS AND CLIMATE ADAPTATION

Despite these advantages, none of the contracts reviewed includes provisions on climate adaptation strategies. CCSI developed the following policy recommendations for host governments that do not already have robust laws that operationalize adaptation goals:

» In mining contracts, governments should expressly require mines to comply with national adaptation plans (NAPs) and climate adaptation guidelines developed by the country.

» In the context of the EIAs (Environmental Impact Assessments) and EMPs (Environmental Management Plans), governments should contractually require mining companies to assess climate risks and impacts and develop management plans to address them. In the same way that contracts often prescribe the contents of an EIA and EMP, they could similarly define what a climate risk assessment and related management plan entail.

» The climate risk assessment should also cover incremental changes in climate conditions as these can affect the mining design and impact the surrounding environment on a cumulative basis.

» Climate risk assessments should be conducted as if no adaptation measures were in place to apprehend maximum risk.

» Risk mitigation strategies should be regularly (at least annually) revised to reflect the latest available data and predictions.

» Emergency preparedness plans should also be put in place, reviewed, and updated to reflect best practices with respect to climate-related risks.

» In the mining development plan, mining companies should integrate results of the climate risk assessment into management decisions on mining assets siting and infrastructure design.

» Since mining companies are well placed to assist communities in improving their resilience to climate-related risks, such as developing emergency planning practices, supporting communities to develop and implement climate change and adaptation plans, or supporting infrastructure, community development agreements (CDAs) could require companies to contribute to community climate change adaptation strategies if communities deem it appropriate.

RESILIENCE: A DUTY FOR GOVERNMENTS AND AN OPPORTUNITY FOR MINING COMPANIES

To facilitate the transition to climate-resilient organizations and infrastructure, significant amounts of funding will be needed, and more will need to come from private sources. Our recommendations may in practice lead to higher upfront costs for mining companies—for example, by conducting climate risk assessments or investing in climate-resilient infrastructure. However, research indicates that these measures tend to result in long-term savings, significant financial returns through net benefits that outsize the initial investment, and crucial societal benefits in the form of revenue streams for governments as well as climate resilience for mining-affected communities.

Therefore, while working toward adopting a robust legal framework for climate action, governments should use mining contracts as legal tools to impose climate change adaptation and resilience obligations on mining companies, leveraging their resources for resilience-building efforts in line with national adaptation strategies and plans.

In turn, mining companies that prioritize climate resilience—besides reducing GHG emissions and limiting other negative externalities—have the unique

opportunity to become leaders in this new era. They will benefit from the continued availability of resources; the security of workers, infrastructure, and supply chains; and the prosperity of their stakeholders, while supporting the achievement of the Paris goals. Accordingly, governments have a strong case to make that companies should not resist adaptation and resilience obligations as profit-reducing burdens, but should rather embrace them as leadership or even survival opportunities.

From left to right, **Perrine Toledano**, **Martin Dietrich Brauch** and **Jack Arnold** are members of the Mining & Energy team at the CCSI. Perrine is Head: Mining & Energy, Martin is Senior Legal and Economics Researcher, and Jack is Program Associate. The team conducts research, training, and advisory work on investment in extractive industries, renewable energy, and economy-wide decarbonization. Their work focuses on policies and practices to support resource-rich countries in achieving the Paris Agreement objectives and broader SDGs.

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