The Columbia Center on Sustainable Investment (CCSI) and the International Institute for Environment and Development (IIED) have been requested by Liberia's Bi-Partisan Legislative Caucus on Illicit Financial Flow and Tax to provide a brief memo on the Bao-Chico Concession Agreement, which is expected to be ratified by the National Legislature of Liberia. The purpose of the memo is to offer a high-level analysis, highlighting issues that might warrant the Caucus's closer inspection, from a public policy and sustainable development perspective. It does not constitute legal advice. The memo was prepared in response to a time-sensitive request from the Caucus: it is thus not meant to be comprehensive, and the contract may contain other issues deserving attention beyond those included in the memo. In addition, the memo does not include a review of the laws and regulations that would apply to the project and does not analyze the economic equilibrium of the deal, as no fiscal model has been developed to support the analysis. As policy research institutes, CCSI and IIED do not deliver legal advice; based on our suggestions and after further reflection, the Caucus might consider procuring legal advice to navigate issues such as those highlighted in the memo.

A. General Comments

- **The agreement supplants the law** in several instances across the agreement, specifically in S. 4.1(c), 5.7(f), 6.3(c), 13.1, 14.1, 14.4, 20.1(b), 21.1(i), 23.10(d), and 25.5(c). Ideally the agreement should sit within the law to ensure uniformity and strengthen the rule of law.
- **Government's decision-making power is subsumed by the company** where the company is allowed to assume that it has permission to proceed where the government does not meet a timeline requirement. Before such assumptions are made, there should be a follow-up request for response/notification to the government. The law and regulations also provide for procedures that should be followed. Approvals/permissions should also be done according to the criteria and timelines outlined in law. See: S. 5.2(b), 5.7(b), (c) & (f), 23.3(b), 24.4, and 26.2(i).
- **Presumed transition from exploration to mine development.** The language is somewhat ambiguous and seems to imply that the project must continue therefore all approvals will be granted. For instance, there is some ambiguity about the

company's rights and the government's obligations in terms of transition to mine development. S. 4.1(e) requires the company to get permit from EPA for exploration, and the company only has a priority right to move to mine development (S. 4.1(g)). But elsewhere, the language uses "shall" in connection with the issuance of permit. See: S. 5.1(h) ("A Mining License shall be issued…"), 5.3 ("The Minister shall grant the Company a Class A Mining License", though subject to approval of Feasibility Study), and 5.7(f) ("…the Minister shall grant the Company a Mining License….").

- **Relinquishment should align with the law**. The percentage area relinquished with each renewal should be as provided by law. Ideally, terms for relinquishment should be standardized. The mining license should be relinquished as of the date that the government grants the request and not on the date that the request was made (S. 5.8(b)).
- **Renewal of an exploration license should not be perpetual** as implied in S. 4.2(c). The period and number of times an exploration license can be renewed is provided in the mining law, and those provisions must be adhered to for transparency and uniformity.
- **The provision of Government Land should not be for free** unless there is a reciprocal benefit. The government holds the land in trust for the people, and ordinarily the company should pay for the land (S. 4.3).

B. Fiscal provisions – S. 5.7, 6.4, 14–16

- **Withholding tax rates on dividends and interest are low by international standards**. The norm is within a range of 10–20%. The withholding tax rate provided seem to differ greatly with those provided for in the Revenue Code. The withholding tax rate in the agreement should be commensurate with the provisions of the Revenue code.
- **The fiscal stabilization clause is not bound in time and enables the company to also benefit from the law should the law becomes favorable.** The international practice has evolved as encapsulated in the OECD guidelines for durable contracts: if the country assesses that a fiscal stabilization clause is key to attracting investment, the stabilization should only cover the period during which the investment is risky and should not grant investors the benefit of the law when it becomes favorable. Some countries grant stabilization clauses upon a stability premium (e.g., an increased royalty), which Liberia could consider. Progressive regimes and periodic clauses are more effective in ensuring the stability and predictability of the deal by ensuring a more balanced economic equilibrium.
- **Pricing Agreement only applicable to "Products."** The agreement only specifies the need to enter into pricing agreements for what the mining companies will produce (e.g., "the Products"), not for the goods and services used in the production, which constitute production costs. While the revenue code is broader, given that the agreement trumps the law in this regard, it would be necessary to specify that even cost-related transactions should be covered by pricing agreements and transfer pricing rules.
- **The debt-to-equity ratio of 4 to 1** is high by international standards, which is usually 3 to 1 or below, and will lead to considerably leveraged projects, with interests that will offset the taxable income.

- **Full exemption of import duties on all imported goods and equipment.** When some of these goods can be produced locally, these exemptions can put domestic producers at a disadvantage. The government could distinguish between those that cannot be produced locally and those that can.
- **Partial exemption on fuel imports.** Instead of encouraging the imports of dirty fuels, the company should be strongly encouraged and even required to assess the possibility to power its needs with a renewable energy project: it is today more economical, it eliminates local pollution, it can provide communities with access to clean and modern electricity (SDG 7), it can feed the grid with clean electricity, and it can be handed over to the government at the closing of the site.[1]
- **Direct payment of inspection fees by the Company could lead to collusion.** This mechanism can provide opportunities for corruption and biased inspections. If the government wants the mining sector to help finance the monitoring capacity of the government, fees should be established in the law, and payment should be contributed to a common trust between all companies and as a one-time fee. The goal is to break the link between a company's payment and the inspection service rendered in exchange.
- **Company should not be allowed to offset the consultants fees against royalties** (S. 6.4 (c)).
- **Low contribution to the Mining Development and Research fund:** the amount that is required for this contribution is extremely low for a company.
- **The surface rent in the agreement** is low considering that the Company may expand the production area. The agreement provides for a fixed lump sum amount of $50,000 for the first 5 years then $ 30,000 from the 6th year to the end of the agreement. Surface rent should be proportionate to the production area and not a flat fee.
- **The preparation of the list of appraisal firms should be joint** and not provided by the company only.

C. Local Content provisions – S. 11 and 12

- **Training requirements are weak.** The company's investment should be leveraged to build a strong local workforce in terms of both technical and managerial skills. The technical skills should be mining specific and transferable to other sectors. The company should be required to provide a detailed plan to be approved by the relevant authority on how the company will comply with the training requirements during the life of the project. Similarly, there should be a plan on how technology and knowledge will be transferred. Training requirements and knowledge transfer requirements are more efficient than local employment or local procurement requirements and thus should deserve attention and be carefully drafted.
- **The burden of proof of whether local goods or local employment are competitive should be shifted to the company.** If the company is not required to show evidence as to why local employment and local procurement cannot be done without endangering the project, local content will never be achieved.

[1] Please see practice on how to encourage renewable energies and other climate-related actions in contracts here: https://ccsi.columbia.edu/sites/default/files/content/docs/ccsi-climate-change-investor-state-mining-contracts.pdf.

- **Local employment targets should be grounded in analysis.** While it is hard to assess whether those set in the contract are appropriate, in general it is better for all targets to proceed from a deep analysis of the company's needs as compared to existing competences in Liberia and those that can be feasibly built up. Once the needs assessment has been made, it is easier to set gradual targets over time.
- **Fronting practice and opportunities for corruption in local procurement should be anticipated and prevented.** Many countries now have clauses in place to avoid these problems,[2] and Liberia could contemplate to put similar ones in contracts if not already included in the laws.

D. Environmental and Social Considerations

- **The ESIA is seen as a component of the feasibility study, rather than a standalone requirement**. This arrangement has practical implications; for example, the Minister of Mines is responsible for approving the feasibility study and therefore the ESIA by extension. Yet, the approval of a mineral right requires prior approval of ESIA component by EPA. This set-up seems conducive to possible pressures on EPA.
- Some important ESIA parameters seem to be mentioned somewhat in passing, perhaps the result of the ESIA being subsumed under the Feasibility Study (e.g., 5.4(g)(vi) and (ix), on compliance with certain World Bank standards).
- **The agreement has weak provisions on mine closure.** Baseline assurances on mine closure and funding should be included in the agreement. S. 5.5(c) and 5.6(c) should include a proposal to ensure the availability of funds to finance mine closure and not just environmental restoration and remediation.
- The company should be liable for obligations as set out in the final closure plan and for any remediation and restoration that resulted from its mining or exploration activities. This section needs to be redrafted to ensure adequate environmental protection and mine closure (S. 26.2 (i) and (j)).
- The agreement does not include provisions on environmental clean-up and remediation in the event of an accident, which should be included.

E. Water – S. 6.3 and 16.7

- **Weak water use regulations.** The contract authorizes the generous use and pollution of water, provided that an alternative source is provided to the affected community. It is today well-known that environmental damage should be avoided first and foremost, since mitigating measures are never fully effective in restoring initial conditions. In addition, mining companies now have tremendous capacity to avoid using fresh and underground water altogether if they are simply subject to the prohibition to generate wastewater and to the requirement to reuse and retreat their own waters. If the company builds a water treatment facility, it gives the opportunity to share it and address the sanitation and water supply needs of the

[2] Check Uganda here: https://ccsi.columbia.edu/sites/default/files/content/docs/Uganda%20-%20Local%20Content%20Petroleum%20Sept%202021%20-%20Final.pdf or Ghana here: https://ccsi.columbia.edu/sites/default/files/content/docs/Local%20Content%20-%20Ghana%20Petroleum%20-%20CCSI%20-%20December%202019.pdf

communities. The exemption from paying water charges makes the matter worse and gives the wrong incentive to the company.

- **The agreement permits the company to utilize traditional water sources without community consultation**. The company's right to access water supplies should be in accordance with environmental, water, and other applicable laws, including the need to have community consultation before using a community water source.

F. Compensation and resettlement (S. 7.1)

- **The requirement for the company to pay landowners and occupants reasonable compensation "for loss of or diminution in the value of such Land" is vague**, lacking clear arrangements for the management of compensation for communally held land, and guidance for how such compensation should be calculated, by whom, and according to what consultation process. The resettlement processes in S. 5.6(b) also fail to emphasize the international best practice of restoring resettled populations to as good a position, or better.[3] Further, the prohibition on additional surface rentals (S. 16.8(d)) (which could be additionally paid to community members) further constrains communities' abilities to contract with companies to protect their rights, livelihoods, and interests.

G. Benefit sharing (S. 8 and Exhibit 5)

- **S. 33.6 (Third-Party Beneficiary) undermines meaningful community benefit sharing and reinforces the concerning approach, set out in the contract, that affected communities are simply to be subject to the measures pre-decided by the government and company**, rather than active participants in project-related decisions and in their sustainable development.
- **The choice of having only a fixed payment amount for contribution to community spending has disadvantages**, including:
    - The amount does not increase if the company's production (and hence impacts on the community) increases or if the profitability of the mine increases. This means that the company can make disproportionate profits without sharing those with the community.
    - A preferable model would be to mix fixed payment obligations with other obligations tied to production, revenue, or profit, or a combination of these factors. Doing so will provide a minimum baseline for profit allocation while also including the community when activities, income or profits increase.
- **The Committee's composition and appointment processes is not in line with best practices.** In particular:

[3] See, e.g. International Finance Corporation, Performance Standard 5, para. 21 https://www.ifc.org/wps/wcm/connect/75de96d4-ed36-4bdb-8050-400be02bf2d9/PS5_English_2012.pdf?MOD=AJPERES&CVID=jqex59b ("the client will offer the choice of replacement property of equal or higher value, security of tenure, equivalent or better characteristics, and advantages of location or cash compensation where appropriate … Cash compensation levels should be sufficient to replace the lost land and other assets at full replacement cost in local markets.")

- Whereas company representation is guaranteed, "officials, businesses and residents from the affected counties" only have vague promises of having opportunities to participate. Government actors are given too much power over the establishment of processes.
- It would be preferable to stress that the committee is multi-stakeholder, that community representatives *other than formal leaders and representatives*, will be chosen by the communities, and will include representatives of women, youth, people with disabilities, and other groups. Civil society groups should also be included—this should be a mixture of grassroots groups and leading national civil society organization (CSO) groups involved with the LEITI, the Kimberly Process, and other mining industry initiatives.
- Local and national government could also be represented.
- Committees or sub-committees may be needed for each community affected by the project.
- Proposals for spending should be harmonized with existing local government spending.
- Proposals for spending should be initiated by community members and then put to the committee for approval or amendment.

- **The process leading to these provisions reflects a lack of meaningful community involvement and negotiation.**
  - The terms of the community funding proposal indicate that the company has been closely involved in the design of this process, whereas the actual beneficiaries (affected community members and local government) likely have not in any meaningful way. This will likely increase the risk of the project being viewed as imposed on a top-down basis, with no recognition of existing community rights, culture, and livelihoods, increasing the risk of disruption and conflict that have been shown to cost extractive companies up to USD 20 million per week.
  - If there has not been adequate consultation with the communities, we recommend re-negotiating the mineral development agreement to incorporate the meaningful participation of the communities. Three different options for doing so are:[4]
    - Involving the community in negotiations and as a party to the contract.
    - Inviting the community to attend and actively participate in negotiations.
    - Conducting periodic community consultations during investor–state negotiations.

H. Community consultation

- **The contract should refer to, and align with, Liberia's requirements for free, prior and informed consent (FPIC)** (contained in both the Land Rights Law of 2018 and the Community Rights Law of 2009 with respect to Forest Lands). Presently, only "hearings" are envisaged around the ESIA, EMP, SIA and SMP processes (s 5.5(d) and

[4] See https://ccsi.columbia.edu/sites/default/files/content/docs/publications/Briefing-FPIC-and-investment-approval-July-2020.pdf p. 7 for more information.

5.6(c)). Such "hearings" should be the culmination of significant efforts to inform and empower community members to understand and respond to the project. They should also be only one link in the chain of iterative dialogues that should persist throughout the length of the project.
    - We also query whether the company's right to approvals and *"consents… [of] any local municipalities"* (s 19.9) would actually prohibit communities from withholding their consent.
- **The contract should provide for ongoing regular opportunities for community members** (extended beyond formal representatives to include women, youth, and other groups) **to attend dialogues and consultations with company and government representatives.** Community consultation and FPIC should also be required prior to approvals/permits/contracts/licences, assignments and transfers, closures, modifications to the project, and other changes such as those listed in S. 23.
- **The contract should provide for regular information disclosure**, in accessible and culturally appropriate formats, by the company and government to communities' members and representatives concerning:[5]
    - Their rights and applicable laws
    - The project proposal, implications, and decision-making processes
    - The company (or companies) carrying out the project
    - The company's lenders and equity investors
    - The company's buyers and other value chain actors
    - Available avenues for grievance redress
    - Updates on company conduct and project impacts
    - What will happen after the project ends
- **Communities should have rights to monitor the project, including physical access to project areas and surrounds.**

I. Climate resilience – S. 5.4, 5.5, and 29.2

- **Failure to explicitly require consideration of climate change impacts.** The contract merely requires that the Feasibility Report contain confirmation that "the design of each proposed Mine and related Mining Plant, Infrastructure and equipment…is appropriate for the climate and geography of Liberia" (S. 5.4(g)(vii)), but fails to acknowledge that climate change is a reality for which the mining company must plan. Mining investments must be designed, built, and operated with the long-term effects of climate change in mind.
- **Failure to require a climate change-specific risk assessment**. The provisions on the Environmental Impact Assessment (EIA) Study Report and the Environmental Management Plan (S. 5.5) should require that the mining company conduct a site-specific assessment of the climate-related risks of the project, whether in an independent report or as part of the EIA report, and prepare to address the risks identified. The assessment should take into consideration direct threats not only to

[5] For a breakdown of these information categories, see CCSI, *Transparency for Whom?* (2021), pp. 38–39, https://ccsi.columbia.edu/sites/default/files/content/4020-CCSI-Land-Investment-Transparency-report-06-mr_0_1.pdf.

the mining project but also to the surrounding communities and social, environmental, infrastructure, and other features that might be at risk, such as waterways. Infrastructure such as tailings dams, which can be extremely vulnerable to climate change impacts, should be made as climate-resilient as possible (e.g., using dry tailings, avoiding upstream dams, real time monitoring), with care to avoid maladaptation (e.g., reinforcing tailings dams to protect against flooding in a way that could lead to more erosion).

- **Failure to consider climate change adaptation requirements in the mine closure plan.** The provision on mine closure plan (S. 5.5(b)) should take into account the effects of climate change that will intensify over time and by the end of the project. The closure plan should include rehabilitation strategies that reflect an understanding of the changing relationship between the ecosystem and the climate; and require companies to model the long-term sustainability of rehabilitation projects.
- **Failure to allocate climate risks to the mining company.** The definition of 'force majeure' (S. 29.2) covers, among others, "acts of God" and "any…natural disasters," "provided any such cause was not within the reasonable control of the party claiming the benefit of Force Majeure and could not have been avoided or overcome by such party through the exercise of due diligence." Mining investors facing events attributable to climate change could, in theory, invoke these causes in the force majeure clause to attempt to escape contractual performance, arguing that such events were "not within the reasonable control" of the mining company. As climate data becomes more accurate and robust and extreme weather events more common, climate change–related events are becoming more foreseeable. In addition, even if mining investors are unable to prevent or control the occurrence of the events, they can prepare for, prevent, and control the impacts of the events on their mining investment. Rather than allowing the mining company to escape performance in a climate-related event through the force majeure clause, the contract should make the company liable to the state and third parties (including local communities in particular) for any damage from climate-related events the impacts of which the mining company did not adequately prepare for, prevent, or control.

I. Dispute resolution – S. 27.2–27.9

- **The contracts should not include an arbitration clause but refer any contractual disputes to adjudication by the host state's domestic courts.** Research and practice show that arbitration can have various unintended and undesirable consequences. It can, for example, undermine sovereignty, regulatory space, and the rule of law. Private arbitrators have discretion as to whether and how to apply the law of the host state. Arbitrators can and often do also second guess the legitimacy and even override the public interest–focused determinations of regulatory and administrative agencies. Transparency and opportunities for public participation in the proceedings are also subject to the discretion of the arbitrators; they are limited in most arbitrations compared to domestic court proceedings, where a certain level of disclosure is required, cases often become a part of the public record, and third-party interventions are routinely allowed in matters of public interest. In arbitration,

there typically are no opportunities to correct errors of law or fact, given that arbitral awards, unlike most domestic court judgments, are not subject to appeal. Although arbitration is often marketed as being better than adjudication by local courts, its advantages are not always clear, and any benefits that do exist may be enjoyed disproportionately by the investor, while the state and its people bear a larger share of the costs. Because the benefits of arbitration are uncertain while its risks and costs are high, and because domestic courts are better suited to understand and address local mining investment disputes, investor–state mining contracts and model mining agreements should not include arbitration clauses. Instead, they should require that disputes arising out of the contract be resolved by the host state's domestic courts, supported by technical expertise (including that from climate scientists) as appropriate.

- **Failure to consider other aspects in the arbitration clause.** If Liberia agrees to include an arbitration clause in the contract, the government needs to make sure to receive adequate consideration in exchange for this concession, which requires taking several aspects into account, such as choices of applicable rules, seat, subject matter limitations, time limits for bringing a claim, among other considerations. Detailed discussions about the risks of arbitration alluded to above and the considerations on the agreement to arbitrate, if included in the contract, lie beyond the scope of these red-flag comments. Finally, it is important to note that not providing for contract-based arbitration does not eliminate the risk of potential treaty-based claims.

J. Security

- **The provisions on security give contracted security personnel extensive enforcement powers generally held by the police force.** Contracted security is given the powers of apprehension and detention as well as to search, exclude, and evict persons. Giving such powers to a private, contracted security leaves room for abuse of power considering the difficulty in regulating the private security sector. Contracted security guards should operate according to and within the applicable laws (S. 9.2).