

Terms of Reference for Guinea Contract Review Process

I. Context

The Republic of Guinea is setting out on the path of transparency and good governance in its management of the mining sector, seeking fair treatment of mining companies, increased investor confidence, and an end to the climate of suspicion that has long characterized economic life in Guinea, particularly in the mining sector.

The Government is committed to the realization of this vision, which will advance the interests of the Guinean state and citizens, and above all of the country's investors, who for years have expressed a desire for a better business climate in Guinea.

This convergence of interests underpins the Government's initiative to review certain mining contracts, signed during previous political regimes under non-transparent conditions, which did not promote the country's long-term interests.

Guinea recently promulgated a new Mining Code that conforms to international best practice and takes a number of groundbreaking steps to promote transparency and good governance. This Code seeks to remedy the heretofore weak development of the mining sector, which has been marked by a small number of projects that have reached the exploitation phase and by well-documented economic distortions. It is clear to the majority of Guinea's citizens and to representatives of the international community that the weak realization of revenues by the state and the population derives largely from one-sided provisions in several contracts and the influence of corruption on the award of mining rights.

The contract review process will reflect President Condé's strong commitment to transparency and accountability to Guinea's citizens.

If the review results in the decision to renegotiate certain contracts, the renegotiations will be conducted transparently and will take account of economic realities, both in Guinea and internationally.

To this end, the Government has decided on a clear and systematic process for conducting the review, to be managed by two official committees, each with a specific mandate and a set of objectives that will be shared with all stakeholders.

While this approach will not eliminate the need for confidentiality in negotiations, it will serve three critical purposes:

- It will bolster the legitimacy of the negotiations, by aligning them with a clear and transparent set of objectives and a set of procedures known to all;
- It will eliminate unchecked suspicions and prevent the reforms from damaging the investment climate or Guinea's attractiveness to investors;
- It will reinforce the legal basis of contracts.

The choice of members of the two contract review committees – The Strategic Committee and the Technical Committee, whose mandates are defined in detail below – will play a determinative role in the credibility of the process. The members of the Strategic Committee must have sufficient authority to take engagements on behalf of the State, deriving from a direct connection to and direct communication with the President of the Republic. The members of the Technical Committee should hold positions of significant authority within their own divisions of the Government. Both committees must work to ensure inter-sectoral and inter-ministerial coordination. Membership of the technical committee should be based on specific criteria: legal knowledge; sector knowledge; contract negotiation knowledge; specific knowledge about the mineral in question; knowledge of global trends of the sector; industry knowledge; ability to assess/appraise the companies/individuals whose contracts may be reviewed.

In addition, the Technical Committee should work side-by-side with top-notch Guinean and international advisors to conduct the review and prepare for the negotiations, arming Guinea with the strongest possible positions.

II. Characteristics of the Contract Review Committees:

The contract review will proceed via an institutional structure integrating two committees – the Strategic Contract Review Committee and the Technical Contract Review Committee.

1. Hierarchy

The Technical Committee will be the operational arm of the contract review process. It will have twelve (12) members and will answer to the Strategic Committee.

The Strategic Committee will be composed of four (4) members, and will answer directly to the President of the Republic, to whom it will give weekly reports on its activities. Among other responsibilities, the President will step in directly in the event of stalemates among committee members or other difficulties that cannot be resolved by the committees.

2. Presidency of the Technical Committee

The Technical Committee will be led by a high-level official named by the President of the Republic. This Technical Committee President must be capable of meeting all of the tasks assigned to him/her. S/he must be a Guinean with high levels of integrity, stature with the international community, and well-established skills and experience in international negotiations. S/he must possess the total trust of the President of the Republic and have independent access to Ministers.

The Technical Committee President will be in direct communication with the Strategic Committee, to which s/he will give a weekly report on the activities of the Technical Committee. The President will be responsible for the day-to-day management of the Committee, and the management of the Government's Guinean and international expert advisors. S/he will be the head of the team responsible for any negotiations with mining

companies. The decisions of the Technical Committee should be made consensually, thus the Committee President should not take make them unilaterally.

Though not the head of a Ministry, the President of the Technical Committee should have the authority to assess any individual implicated in the contract review process, and to propose to the Strategic Committee or the President of the Republic the removal of any advisor to or member of the Technical Committee. Issues of conflict of interest or malfeasance of a member of the technical committee must be raised by its president to the Strategic Committee.

3. Structure

a. Strategic Committee

The Strategic Committee will be responsible for political and strategic questions related to the mining contract review. Its members will be:

- The Minister of Mines and Geology
- The Minister of Finance and the Economy
- The Minister of Justice
- The Minister of Public Works and Transport

b. Technical Contract Review Committee

The Technical Committee will be responsible for the daily activities of the contract review: review of documents, production of reports, recommendations to the Strategic Committee, and, where necessary, conduct of negotiations with companies.

The Technical Committee will be supported by a Secretariat charged with administrative, financial, and logistical tasks. The Committee will work with Guinean and international experts that will help it with its analysis.

The Technical Committee will be composed of members with the authority to act on behalf of their respective agencies of Government. They should be public officials at a high level, representing the following institutions:

- Presidency: 1 member
- Prime Minister's Office: 1 member
- Ministry of Mines and Geology: 3 members
- Ministry of Finance and the Economy (Budget): 1 member
- Ministry of Environment: 1 member
- Ministry of Public Works (Transport): 1 member
- Ministry of Local Administration and Decentralization: 1 member
- Ministry of Justice: 1 member
- Administration of Large Projects: 1 member
- SOGUIPAMI : 1 member

Because of the high stakes and the sensitive nature of the Committee's tasks, each member should have one and only one stand-in who can represent him/her in the case of absence. These stand-ins should likewise have the authority to act on behalf of their agencies. A member of the Technical Committee will be bound by all decisions taken by the Committee, even those taken in his/her absence.

c. Internal/External Experts and Resource People

The Technical Committee will have access to analysts charged with supporting the document review, conducting administrative work, and carrying out technical analysis and preliminary recommendations. These Guinean and international experts will do this technical work in advance of the Committee meetings and will provide the necessary elements for the Committee to make decisions.

The Guinean experts, chosen from the strongest personnel of different departments of the State, should have skills and knowledge on key economic, legal, financial, and geological questions. Where the necessary expertise cannot be found within the Government, the Committee may recruit Guinean consultants. Upon its formation, the Technical Committee will craft a document laying out the expertise necessary to complete its work.

The international advisors will work in close collaboration with the Guinean experts, notably in regard to financial, legal, and technical questions. Some of these international advisors will work pro-bono, others will be furnished by Guinea's development partners, and others will be recruited and paid by the state, as a function of needs and availability. The list of Guinean and international advisors will be adapted over time.

d. Secretariat

The Technical Committee will have a Secretariat, charged beginning upon the Committee's formation with the preparation of the Committee's budget, meeting agendas, the distribution of necessary documents, the classification of files, internal information dissemination, and the management of transactions.

4. Organization

The members of the Technical Committee, supported by Guinean and international advisors, will work every day, and will report every week to the Strategic Committee. During these meetings, the Technical Committee will inform the Strategic Committee on its progress, and will make recommendations.

The Strategic Committee will make decisions, which will be executed only after approval by the President of the Republic. The Guinean and international advisors may participate in Strategic Committee meetings as necessary.

5. Operations of the Committees

The Strategic and Technical Committees should have an operating budget, an office and meeting space, a Secretariat, and the necessary supplies to carry out their work. Expenses

should be covered by the State budget, and Guinea’s technical and financial partners will be asked to support the process.

The Secretariat will conduct precise accounting of its expense and any revenues generated during the process of reviewing each contract.

As is noted above, once the committees are established, the Government will establish a clear and precise chain of command, to be approved by all participating officials and validated by the President of the Republic. Once this chain of command is formalized, all communications related to the contract review process should adhere to it.

By the same token, contact between high-level state authorities and mining companies subject to the review process should be kept to a strict minimum. Once negotiations begin, all communications between an investor and the Government should pass through the President of the Technical Committee, with the exception of day-to-day administrative matters.

6. Confidentiality

All individuals participating in the process, including the international advisors, will sign a confidentiality agreement, to guarantee the non-disclosure of sensitive information generated during the contract review process, most notably during negotiations.

III. Actions of the Committees:

1. Preliminary Actions

Before officially beginning the contract review, the newly-created Strategic and Technical Committees should clearly lay out their respective roles in the processes, come to a mutual understanding of the stakes of the process, establish detailed terms of reference, and identify their needs for training, both on technical issues and as regards the management of the process.

The Technical Committee should prepare the first stages of the process, by collecting existing facts and materials and preparing the questionnaire that will be sent to mining companies.

Training

In order enhance their analysis and to give the two committees an opportunity to exchange ideas with international lawyers experienced in negotiations between governments and private companies, the Technical Committee will organize a seminar that will gather the members of the two committees, Guinean experts and resource people, international lawyers working pro bono, and other experts working with the Government. This inaugural seminar, supported by Guinea’s development partners, will focus on public concessions (particularly in the mining sector), the significance of the sector in national development plans, international experience in mining contract reviews, and negotiation techniques. The

seminar will also serve to identify further capacity-building needs, which will feed into the planning of subsequent training sessions.

Necessary Knowledge for the Committees

To carry out their mandates effectively, the two committees should use these Terms of Reference in formulating the precise terms of their mandates, elaborating their work programs, and planning the schedule of their activities.

The new Mining Code should be intimately known by all participating officials. Experts from the Ministry of Mines will conduct presentations to their colleagues in the committees to ensure that the Code is well-understood.

Assembly of Documents

The first task of the Guinean and international experts will be to assemble all relevant documents related to the contracts implicated in the contract review. These documents should be filed and indexed, and should be easily accessible for the work to follow.

Preparation of a Questionnaire

The Technical Committee will develop a questionnaire to be sent to the holders of mining titles deemed to be of strategic importance to the State, to have reached a certain level of project development, and/or associated with signed conventions, according to a precise order to be established by the Government. The questionnaire will include some standard questions that will be identical for all title-holders, and other questions that will be specific to the situation of individual titles. It will seek to establish the status of each title, its history (including the procedures associated with the acquisition of the title), the status of operations and investments made by the company, and the degree of conformity of the title and its execution with legal and contractual obligations.

Upon the public launch of the contract review process, the Strategic Committee will publish a decree, signed by the President of the Republic, which will elaborate certain core principles. This decree will require all holders of conventions and/or other relevant mining titles to respond to the questionnaire developed by the Technical Committee within a fixed time period (probably 30 to 60 days). The decree will recall the categories of factors to be subject to the provisions of the Mining Code, and will state that any company that does not respond to the questionnaire would face strong sanctions up to cancellation of the title. The decree will be formally disseminated and widely diffused in public (both in Guinea and internationally), and mailed with appropriate evidence of delivery to the listed address of each title-holder to ensure that interested parties are aware of the procedures.

The state will value the good faith of the title-holders in their responses to the questionnaire.

Publication of Contracts

All existing mining contracts will be published at the outset of the contract review process, to demonstrate the Government's commitment to transparency and to justify to the public any ultimate decision to modify a contract significantly, modify it lightly, or leave it as is. It will be announced at the same time that all contracts amended or renegotiated as part of the process will be published, to make the results of the review accountable to the public.

2. Organization of a National Public Forum

To establish the consultative and participatory nature of the process, the Government will gather major stakeholders for an open forum, to help clarify the goals and shape the process for the review. These stakeholders will include:

- i. Mining Companies
- ii. Guinean civil society
- iii. Unions
- iv. Political parties
- v. Representatives of international institutions and diplomatic missions

The purpose of such a forum would not be to fundamentally alter the Government's overall plan for the review process, but to offer the Government an opportunity to describe its vision, and enable the other stakeholders to make suggestions and express their objectives and concerns. The questionnaire to be sent to title holders will be presented and discussed at the Forum, to ensure that it is known and understood by all stakeholders.

The publication of titles and mining contracts will ensure that all stakeholders are aware of the strong will of the Government to make the contract review process transparent.

The Technical Committee will be responsible for the organization of this Forum, and for the publication of a report on the substance of the consultations and the Government's decisions on priorities and procedures for the review.

3. Recruitment and Supervision of Independent Advisors

In consultation with the Strategic Committee, the Technical Committee will be responsible for recruiting international consultants, experts, and firms to support the contract review and negotiations with mining companies. This recruitment will be conducted via open tender. The services of these experts may be financed by the State budget, international organizations, and/or mining companies themselves via a specific fund managed by the Committee.

The Technical Committee and its President, in collaboration with the Ministry of Mines, will also be responsible for the supervision of the consultants, experts, and firms, including oversight of costs and effective coordination of services.

4. Categorization of Titles

The Technical Committee's analysis of existing mining titles and contracts will begin even before the companies have submitted their responses to the questionnaires, and will be bolstered once the responses are received. After an exhaustive analysis, the Committee's experts will submit specific recommendations from which the Strategic Committee will make a final decision about the categorization of titles and conventions. The categories will include:

- Ordinary exploration permits, *i.e.*, those whose mineral value is limited or has not been established, which will be reviewed under the auspices of Cadastral control by the Ministry of Mines and Geology: review of titles, followed by analysis of geological information submitted and relinquishment.
- Exploration permits of known strategic value, concessions, and mining conventions, whose review will be handled by the Technical Committee. The criteria for designation of these titles as “Strategic” will be clearly defined by the Technical Committee. They will be reviewed according to a “fast-track” procedure managed by the Technical Committee itself, in an order to be defined in collaboration with the Strategic Committee.

The Technical Committee may submit to any title-holder supplemental questions that arise during the review process, and give the company a brief period in which to respond.

Within the group of strategic titles and contracts to be reviewed, the Technical Committee will establish several categories: expired titles, valid titles, titles in conformity with the requirements of the 1995 Mining Code, titles in violation of legal obligations, etc. All mining titles within one of these sub-categories will be handled equally.

5. Analysis of “Strategic Titles/Contracts ”

The procedure for analysis of “Strategic Titles/Contracts ” should include:

- a financial model of the title/contract, to determine the financial stakes, the current balance of financial benefits between the parties, and the desirable balance between the parties according to international norms and principles of equity;
- an assessment of the differences between the content of the contract and the new Mining Code, especially in the areas of fiscal payments, employment, governance, social and environmental norms, state equity participation, infrastructure, transportation, and commercialization;
- the legal status of each contract, the legality of the process by which it was awarded, the conformity of contract clauses with Guinean legislation, and the risks or opportunities associated with potential arbitration;
- the specific challenges or opportunities associated with the development of each project, notably those related to transportation infrastructure, local development, and the use of Guinean sub-contractors;
- the Committee’s view on the possibility of renegotiation of each contract, as a function of the elements noted above;
- a recommendation about amendments, a new convention, or cancellation of the contract.

Upon the conduct of this analysis, the Strategic Committee will propose, for validation by the President of the Republic, a decision on how to harmonize each contract with the new Mining Code, which will require the application of certain standard provisions and in many cases will require inviting the title-holding companies to the negotiating table.

6. Cancellation of Titles or Termination of Contracts

Any decision to cancel a title or to terminate a contract will follow the following procedure, which will guarantee maximum transparency, equity, and respect for property rights:

- Notification to the company of the Technical Committee decision to cancel the title or terminate the contract;
- Company right of response;
- Hearing of the Company and discussion with the Technical Committee;
- Recommendations to the Strategic Committee for a final decision on cancellation or termination.

7. Renegotiation of Unequal Contracts

Upon a decision to renegotiate a contract, the Technical Committee will be responsible for managing the negotiation process, with the support of Guinean and international experts. The support of lawyers skilled in international negotiations will be particularly important at this stage. Negotiations will be linked to a coherent national development strategy, and will seek to bring the contracts closer to the new Mining Code, as well as the priorities identified in the National Public Forum. Essential elements of the negotiation strategy include:

- the analyses conducted during the preceding stages, including of gaps between the contract and legal obligations ;
- financial models that will enable the Government to simulate the effects of different proposals made during the negotiations;
- well-elaborated strategies, adapted to each situation, on the elements the state considers negotiable and non-negotiable. These strategies should be drawn up in a standard format that allows Government officials at the highest levels to read and understand them, and to contribute to their development despite the limitations on their time;
- a well-established and highly-functioning negotiating team: decisions should be consensual and internal debates should not be conducted in front of the other party. Where there are disagreements within the negotiating team, the team should step out to discuss them, and should come back to the table with the companies only when there is internal resolution. Decisions should be informed by the analysis conducted by the Guinean and international advisors.

At the conclusion of each negotiation, a new convention or standardized amendment, including a detailed plan for correcting any breaches of Guinean legislation, will be signed by the State and the title-holder.

8. The Importance of Public Communication

Effective communication with the public, both within Guinea and internationally, will be prioritized throughout the review process. The Government will name an official spokesperson for the review, who will coordinate closely with the President's communication team.

Specifically, the entire process will be announced and discussed at the Public Forum. Once the order of contracts to be reviewed has been determined, it will be widely communicated. Once a decision about a particular title has been made, or a negotiation has been completed, the results will be immediately and clearly disseminated.

A specific communication strategy will be necessary for each stakeholder group – mining companies, the international diplomatic community, Guinean NGOs, political parties, and the public at large. The Technical Committee will regularly meet the different stakeholder groups in person.

9. Collaboration with Investors

Once the committees have been established, the Government will work with investors to develop basic rules of collaboration between the State and companies. These rules can be adjusted according to the specific needs of each contract, but it is important to have general procedures covering the scheduling of sessions, the process for naming representatives, the location of meetings, the allocation of costs, information requests, the beginning and end of sessions, the drafting of documents, confidentiality, and communications with the media.

10. Identification of Necessary Information and Data

The Technical Committee should identify in advance its information and data needs. For example, for a negotiation relating to bauxite/alumina, the Government will need specialized studies on production costs, market prices, and/or studies on typical oil production costs. The Technical Committee budget should take into account these information needs.

11. Formulation of General and Specific Objectives

Before each negotiation, the Technical Committee should identify the overall objectives of the negotiation, determine possible alternatives to renegotiation, identify the implications of different negotiating points and prioritize among the Government's demands, and assess the likely priorities of the adverse party. The President of the Technical Committee will be responsible for consolidating the Committee's position and ensuring that the positions of different representatives (Finance, Environment, Mines, etc.) are not in opposition.

12. Identification of Political, Economic, Legal, or Physical Constraints

It is important for the Technical Committee to anticipate any possible political, economic, legal, or physical constraints that may serve to restrict its options. The Strategic Committee should inform the Technical Committee of all relevant factors, including political factors, associated with the review process. By taking these constraints into account, the Technical Committee should be able to define, before the review of each contract or any possible negotiation, the ideal solution, the minimum acceptable solution, and the best alternatives.

IV. Reports

Beyond a weekly report to the President of the Republic, the Strategic Committee should prepare monthly reports for the Cabinet, and quarterly reports to be distributed to the National Assembly and the media.

V. Tenure of the Strategic and Technical Committees

The two committees will be established on January 2012, with a term set initially at one year. Upon the submission of quarterly reports to the National Assembly, the Strategic Committee will describe the progress it has made and evaluate whether there is a need to increase or renew the term.