

Allocation and negotiation of licenses and contracts

Principal Elements

1. **Allocation Goals and Approaches**: understanding the key goals in allocation system design and identifying the primary types of allocation procedures.
2. **Transparency in Allocation**: understanding role of transparency in allocation systems and survey of good practices in licensing transparency.
3. **Negotiation**: brief overview of common pitfalls and certain good practices.

1. Allocation Goals and Approaches

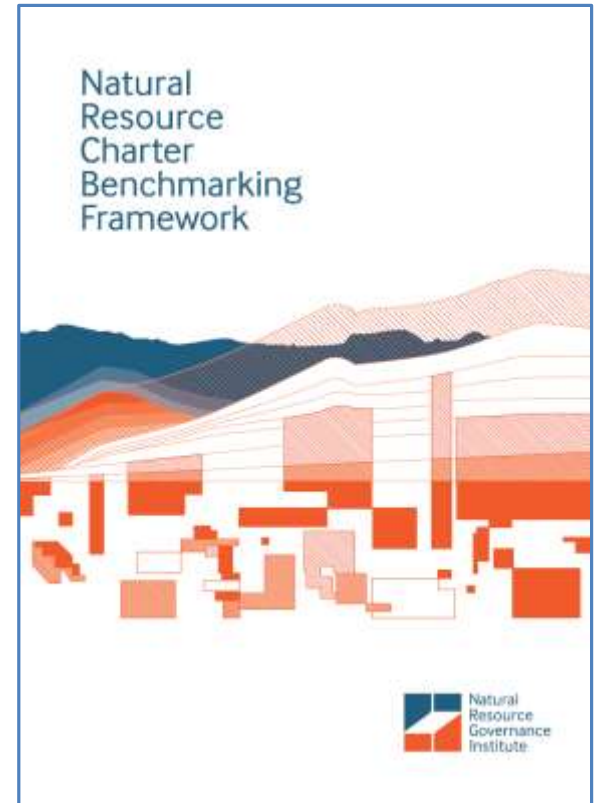
Key questions in allocation

Planning

Does the government adequately prepare before allocating licenses?

Award

Does the government allocate licenses to competent and law-abiding companies, and in a way that maximizes value for the country?



Source:

<http://www.resourcegovernance.org/analysis-tools/tools/natural-resource-charter-benchmarking-framework>



Key factors in planning

- Geological information: quality and availability impact which allocation approach is appropriate. Important government role.
- Strategic Impact Assessments (SIAs): Evaluate overall benefits and costs of licensing. Different from project-specific assessments.
- Interaction with existing rights (land, resource, etc.): Important to consider and avoid overlap / conflict.
- Appropriate pace of licensing: Need to consider how to maximize value (reduced risk after major discovery), regulatory capacity and market conditions.

Types of allocation procedures

- “First-come first-served”
- Direct bilateral negotiation
- Competitive bidding (Auctions/
Tenders)

Participant Question

Which procedure (bilateral negotiations, competitive bidding or first-come first-served) do you think would lead to the best outcome for a country? Why?

Trick question? The question should be more along lines of:

Does the government use an award process that is suitable given the competitive interest there is for licenses?

Important differences in allocation between industries

Petroleum: mix of competitive bidding (best practice) and direct negotiation

Mining: typically first-come first served or direct negotiation, except where there is a known deposit

Choosing the right partners

Pre-qualification – balance quality (ability to deliver) vs. importance of competition

➤ Technical qualifications

- years of experience, deepwater operations, current production, qualified staff, etc.

➤ Financial qualifications

- Financial ratios, assets, access to financing, financial guarantees, etc.

Should ideally be done before license applicants enter a negotiation or a licensing round, so that only negotiating with and comparing qualified companies.

Competitive bidding success factors

- Appropriate legal framework / institutional structure
- Transparent process (see next section); implemented as designed
- Objective qualification and assessment criteria
- Competitive but realistic fiscal conditions
- Conflict of interest regulations
- Capable authority in charge of allocations

2. Transparency in Allocation

Why transparency in allocation?

- Transparency helps mitigate risks in selection of company and financial terms (e.g. corruption, lack of competition, etc.)
- Transparent particularly important in licensing as one of first steps in natural resource chain of decisions
- Investing companies, lenders and credit rating agencies have a strong interest in transparent and non-discriminatory licensing regime

Transparency at different stages of allocation: Planning and strategy

- Disclosures related to opening up of new areas for extractive activity
 - strategic impact assessment
 - consultation materials
- Available area(s) / block(s) – Cadastre
- Geological information (data room)



Norway

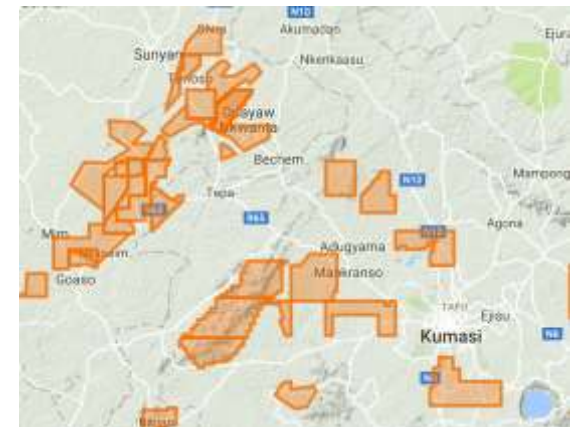


New Zealand



Australia

Ghana



Transparency at different stages of allocation: Process of allocation

- Rules for allocation process (law, regulation, bid protocol)
 - Which allocation approach used for which assets?
- Pre-qualification process, including criteria, applicant companies and qualified companies
- Model contracts (if used) and biddable / negotiable terms
- Criteria for evaluation (weighting)
- Responses to company questions
- Information about bids received
- Decision-making / justification for award (bid evaluation report, minutes of meetings)
- Disclosures regarding decision-makers in the allocation process

Example: Prequalification process

Eligibility Criteria



Lebanon – First License Round

RIGHT HOLDER - OPERATOR

Legal	Financial	Technical	QHSE
<ul style="list-style-type: none"> Joint stock company conducting Petroleum Activities 	<ul style="list-style-type: none"> Total assets of USD 10 Billion 	<ul style="list-style-type: none"> Operatorship of at least one petroleum development in water depths in excess of 500m 	<ul style="list-style-type: none"> QHSE policy statement(s) Established & implemented QHSEMS

EUROPE Pre-Qualified Operators



Lebanon – First License Round

Company	Country
	Italy
	Denmark
	Spain

SCORE CARD EXAMPLE: ANNEX 4 TECHNICAL



Lebanon – First License Round

ANNEX 4 TECHNICAL CRITERIA AND REQUIRED DOCUMENTS AND DECLARATIONS		COMPLETION STATUS	SCORE	REMARKS	STATUS	NUMBER OF OFFERS / TOTAL	STATUS
A4	Eligibility criteria	Yes / No					
A4	Technical information	Yes / No					

Companies **Not** Meeting the Pre-qualification Criteria



Lebanon – First License Round

Right-Holders Operators

1 Company	<ul style="list-style-type: none"> Does not meet any of the eligibility criteria
2 Companies	<ul style="list-style-type: none"> Do not have total assets exceeding USD 10 Bin Do not have petroleum developments at water depths exceeding 500m
1 Company	<ul style="list-style-type: none"> Does not have petroleum developments at water depths exceeding 500m

Example: Model Contract and List of assets by allocation approach



МИНИСТЕРСТВО ПО ИНВЕСТИЦИЯМ И РАЗВИТИЮ РЕСПУБЛИКИ КАЗАХСТАН
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Главная Каталог меню **МОДЕЛЬНЫЙ КОНТРАКТ**

МОДЕЛЬНЫЙ КОНТРАКТ

- [Моделный контракт на добычу](#)
- [Моделный контракт на разведку](#)
- [Моделный контракт на совместную разведку и добычу](#)
- [Моделный контракт на строительство и эксплуатацию подземных сооружений, не связанных с добычей или добычей](#)

На данный момент нет содержимого, классифицированного этим термином.

в пользу Министра
по инвестициям и развитию
Республики Казахстан
от «11» марта 2017 года
№ 412

Моделный контракт на совместную разведку и добычу

Контракт на совместную разведку и добычу
на _____
(участок недр полезного ископаемого)
на _____
(участок недр)

Судить местонахождение на административно-территориальной
единице между Республикой Казахстан, от имени которой действует
как компетентный орган

(название государственного органа)

и

(Ф.И.О. гражданина или название юридического лица (далее -
лицо) совместно владеющего участком.

Настоящий контракт на совместную разведку и добычу _____

судить на _____
(участок недр полезного ископаемого)

на _____
(на участке недр)

Судить местонахождение на административно-территориальной
единице между Республикой Казахстан, с одной стороны, и _____
20 ____ года в соответствии с _____

Телефон горячей линии **Перечень слабоизученных участков недр по упрощенному**

ПЕРЕЧЕНЬ СЛАБОИЗУЧЕННЫХ УЧАСТКОВ НЕДР, ПО КОТОРЫМ
ПРАВО НЕДРОПОЛЬЗОВАНИЯ ПРЕДОСТАВЛЯЕТСЯ В УПРОЩЕННОМ
ПОРЯДКЕ

ПЕРЕЧЕНЬ УЧАСТКОВ НЕДР, ПРЕДОСТАВЛЯЕМЫХ В УПРОЩЕННОМ ПОРЯДКЕ ДЛЯ РАЗВЕДКИ



Барлау үшін оңайлатылған тәртіппен берілетін жер қойнауы учаскілерінің тізімі

№	Объект атауы	М 1:200 000 параметр	1:50 000 бастанғы бойынша	Берілгенлік координаттары бойынша		Бастанғы сағмы
				бойлық	екісі	
Степногорск к. ауданы						
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			N-42-119-B- (10,11,12,13,14,15,26,27,28,29,30,42,43,44,45,57,58,59, 60,61,70,71,72,73,74,75,76,77,83,84,85,86,87,88,89,90,9 1,92,93,94,95,96,97,98,99,100,101,102,103,104,105,106, 107,108,109,110,111,112,113,114,115,116,117,118,119, 120,121,124,125,126,127,128,129,130,131,132,133,134, 135,136,139,140,141,142,143,144,145,146,147,148,149, 150)	71° 30' 00"	52° 40' 00"	

Transparency at different stages of allocation: Award

- Area(s) / block(s) licensed
- Identity of winner(s) including beneficial ownership information
- Content of winning bid and justification of selection
- Contract / license awarded or other vehicle to set out key terms such as work obligations, payment obligations, social obligations (see first presentation on contract transparency)
- Associated documents included in allocation process, where applicable (environmental assessments, local content / recruitment / training plans, community development agreements)

Examples: Beneficial ownership and cooperation agreements

- Kyrgyzstan (Beneficial ownership)
 - Subsoil law Article 30.6.10: The mineral license application must enclose information and documents disclosing individuals being the ultimate owners and beneficiaries of the applicant legal entity
 - Information provided to government, not disclosed
 - Relevant to capital gains / change of control
- Mongolia (Cooperation agreement transparency)
 - Model Cooperation Agreement between local government and mining companies (approved by government)
 - Article 5.1: Information on the establishment of an agreement shall be provided to the local citizens, and the agreement, together with the related documents, shall be placed on the websites of the parties within 3 days.

Beneficial ownership: potential benefits and recent developments

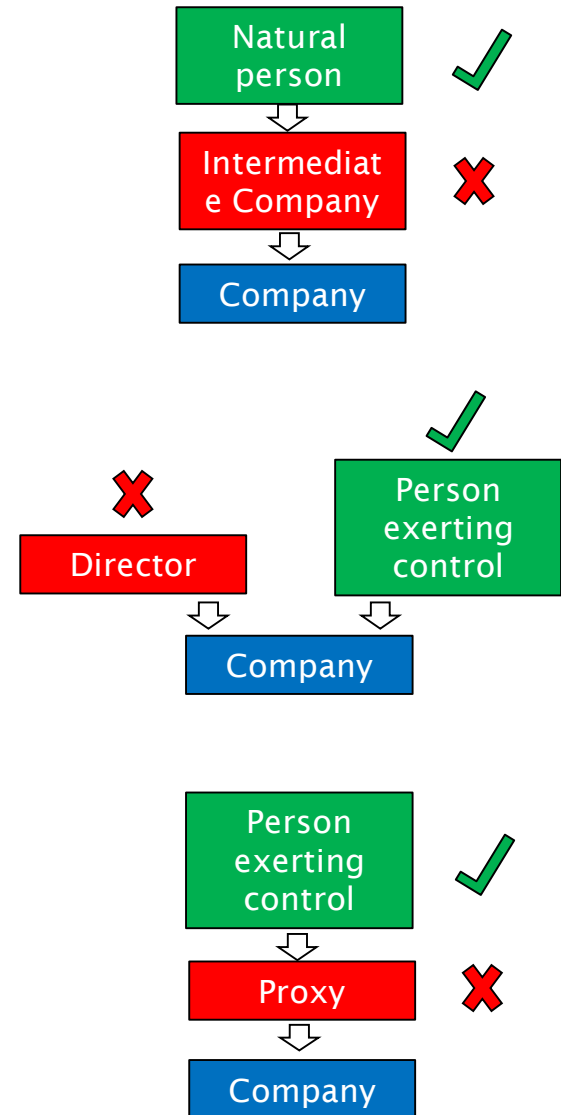
- Potential Benefits
 - Improve investment climate
 - Reduce reputational and other risks
 - Prevent corruption and illicit financial flows
 - Improve rule of law
 - Increase trust and accountability
 - Enhance revenue collection
- Recent developments
 - EITI requirement (roadmap 2017, disclosure 2020)
 - EU legal requirement
 - UK public registry Persons with Significant control
 - London anti-corruption summit commitments (Panama Papers momentum)
 - World Bank procurement angle

What is “beneficial ownership”?

- ***EITI Standard***: “A beneficial owner in respect of a company means the natural person(s) who directly or indirectly ultimately owns or controls the corporate entity.”
- *Natural person*: A **human being**
- *Indirect*: Must consider **complex & informal linkages**
- *Ownership*: Beyond the named shareholders, the person(s) actually **at the top of the chain of ownership**
- *Control*: Person(s) who may not hold an ownership share, but still have **decision-making power over the company** (e.g. exercise control through private agreements with official owners)
- [*Financial benefits*: Some definitions cover **individuals receiving the main financial benefits of the company without ownership or control** (e.g. contractual transfer of dividends or other cash flow).]

What is not “beneficial ownership”?

- **Corporate shareholders.** Only natural persons (i.e. human beings) can be beneficial owners. Companies or other legal persons cannot be beneficial owners.
- **Directors and board members.** A person is not necessarily a “beneficial owner” because he or she is a director or board member of a company.
- **Substitutes.** Proxies inserted to represent other people’s interests should not be seen as the ultimate beneficial owner, even if they hold shares in the company.



3. Negotiation

Scope: What shouldn't be negotiated

Not all extractive projects, or elements of an extractive project, should be subject to negotiation. Often depends on country leverage, company interest / competition. Important to try to establish scope of negotiation upfront.

- Starting point may be that (i) only certain extractive projects include negotiation (e.g. no negotiation in “first-come first-served”) and (ii) even when there is negotiation as part of the allocation process for a project, negotiation is limited to certain components (e.g., work program, profit share).
- Role of law and ensuring consistency (Note: role of parliamentary ratification)
- Where applicable, model contract and / or bidding parameters can also play a role in limiting scope (Note: remember risk of post-bid negotiation)

Based on your experience, what elements of an extractive project do you think should be non-negotiable? Why and how do you make determination / distinction?

Negotiation success factors

- Preparation: Governments often fail to go into negotiations prepared (e.g. geological information / resource value, due diligence on company and its objectives, financial modeling, fall-back positions, etc.).
- Objectives / priorities: Need to be clear (i.e. not just getting “best deal possible”).
- Negotiation team:
 - Important to have interdepartmental representation / buy-in (including high-level political support) and specific subject matter expertise.
 - Aim for some level of continuity rather than putting together ad hoc teams without reference to past experience in negotiations.
 - Strong communication and decision making protocols.

Negotiation success factors

- Assistance: Evaluate internal capacities / resources and secure any external assistance needed to match company capabilities (know what is “market”). Important elements to consider:
 - Clarity of role (advisor not decision-maker)
 - Bring in early enough to have impact; consistency helps
 - Check for conflicts of interest
 - Best to procure direct, but consider donor support if necessary
 - Tie to capacity development; assistance can be domestic
- Take the lead:
 - First draft - Even where there is no model contract, government should provide first draft of agreement (or term sheet) in order to improve terms of starting point of negotiation.
 - Set terms of negotiation - Place, language, timing, duration, procedures (e.g. having agenda / issues list for each session)

Negotiation success factors

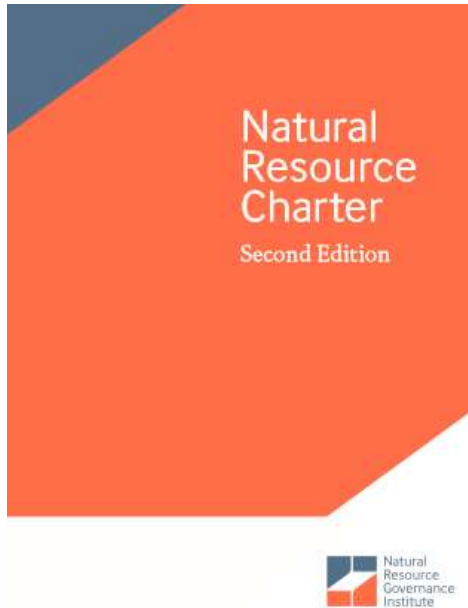
- Be realistic and aim for “win-win”- Understand investor needs and objectives in order to identify and negotiate upon common interests.
- But use leverage wisely – Always need to keep an eye on market (e.g. prices), company / investor dynamics (share price).
Transparency / oversight mechanisms can also be strong leverage (“I could agree, but [parliament would never approve] / [need to remember this contract will be public] ... ”)
- Think about the “after” during negotiations
 - Transparency / communications strategy: Manage expectations as appropriate and ensure some elements of importance to relevant stakeholders included.
 - Consider implementation / compliance monitoring during negotiation (i.e. feasibility given capacity)

Thank you / Questions?

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Resources

Allocation – NRCGI materials



Natural Resource Charter (NRC) Precept 3

http://www.resourcegovernance.org/sites/default/files/documents/nrcj1193_natural_resource_charter_19.6.14.pdf

NRC Benchmarking Framework Precept 3

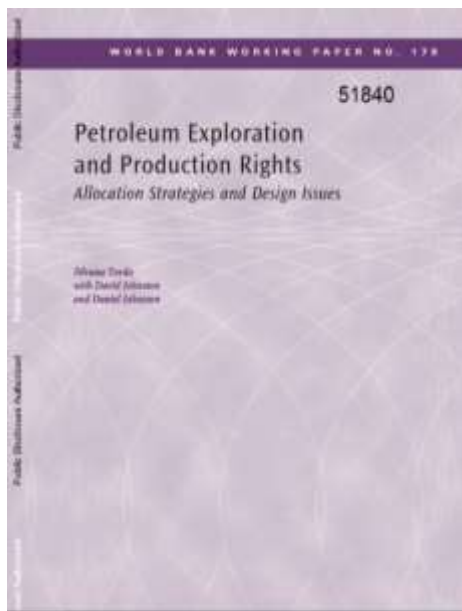
http://www.resourcegovernance.org/sites/default/files/documents/precept_3.pdf

Reader on “Granting Rights”

http://www.resourcegovernance.org/sites/default/files/nrgi_Granteeing-Rights.pdf



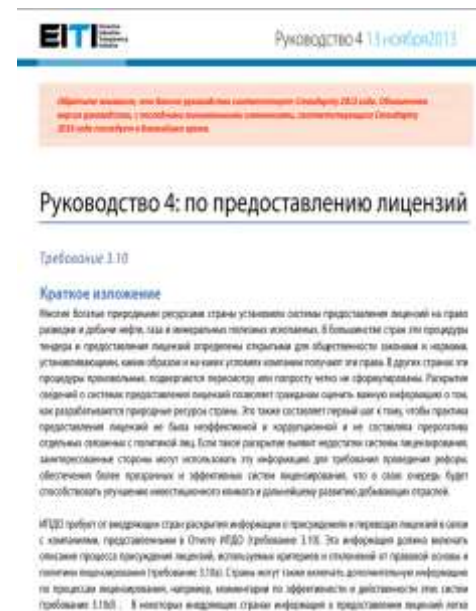
Allocation – other resources



<http://documents.worldbank.org/curated/en/785881468336848695/Petroleum-exploration-and-production-rights-allocation-strategies-and-design-issues>



<http://documents.worldbank.org/curated/en/867071468155129330/pdf/58789W0Sector1BOX353819B001PUBLIC1.pdf>



EITI, Guidance Note on License Allocation, <https://eiti.org/GN4>
* Note: Russian version not most recent



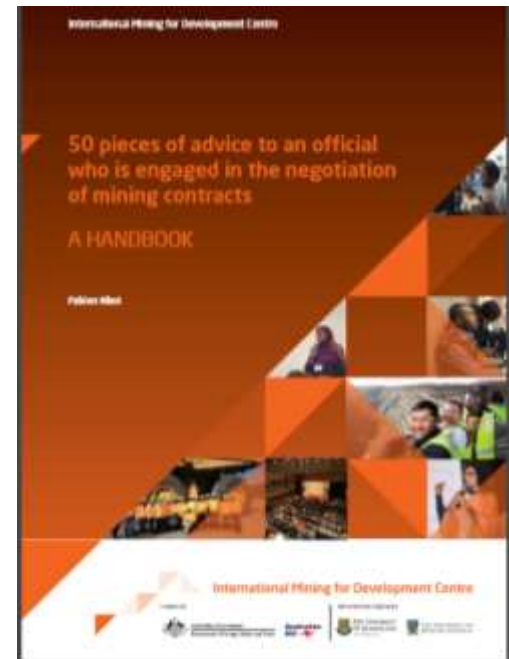
Negotiation



negotiationsupport.org/



<http://www.iisd.org/sites/default/files/publications/iisd-handbook-mining-contract-negotiations-for-developing-countries-volume-1.pdf>



<http://im4dc.org/wp-content/uploads/2013/07/Negotiation-Handbook.pdf>