



global witness

Proposed Amendments to the Afghan Mining Law: December 2015 draft

Global Witness has collaborated with Integrity Watch Afghanistan to develop detailed language for the amendments to the 2014 Afghan Mining Law – reforms which we believe are urgently needed to fix a number of serious weaknesses in the law which threaten to undermine the fight against corruption, conflict and loss of revenue in Afghanistan’s mining sector. The amendments have been developed through an in-depth process of review in partnership with a wide group of Afghan civil society organisations who are members of Mining Watch Afghanistan (MWA), and in consultation with Afghan and international experts including Radon Law and Columbia University. They also build on previous work carried out by Global Witness and others for our report *A Shaky Foundation?*, which analysed the previous Mining Law in detail and raised many of the same issues.

Global Witness, along with a broad group of other Afghan and international civil society organisations, submitted these amendments to H.E. President Ghani, H.E. CEO Dr Abdullah, and H.E. the Minister for Mines Dr. Daud Saba in December 2015, and urged them to integrate them into the law as part of their commitment to good governance, and ensuring that the country’s natural resources benefit all Afghans. Further drafts of this input may be developed in future as we continue our discussions with the Afghan government, mining sector companies, civil society, and experts.

	Issue and justification	Original version of the law	Proposed amendment
1	<p><i>A requirement for publication by the government and companies of project-level payment and production figures.</i></p> <p>Publication of the quality of material that is mined, and the detail of payments between mining companies and the government, is a vital tool for transparency – making it much easier to establish whether illegal mining or other abuses are taking place and whether full taxes are being paid (especially for larger projects, given the complex trading schemes and offshore arrangements that many international extractive companies have made use of). The Afghan</p>	<p>Article 100 states that: <i>The Ministry of Mines and Petroleum, the Ministry of Finance, License Holder, contractor and other relevant agencies shall, for the purpose of transparent management and effective Mining revenues, comply with the requirements and standards of the Extractive Industries Transparent Initiative.</i></p> <p>This reference in Art. 100 of the law to EITI is important and positive, but there are no penalties for non-compliance, and thresholds for EITI participation may exclude an important part of the mining sector. A much stronger protection would be to require transparency directly (while retaining the reference to EITI). This would leave no room for loopholes</p>	<p>NEW Article 22: Transparency of mining data</p> <p>(1) The Ministry of Mines will publish, on a timely basis and at intervals of no more than six months, the following data:</p> <ul style="list-style-type: none"> • Details of all payments to and from government entities made in connection to mining-related activities, including attribution to a specific individual mining project; • other payments between government entities and extractive sector companies, license-holders or license applicants, in accordance with the regulations • The quantity, type and grade of any minerals produced from mining activities, including attribution to a specific individual mining project; <p>(2) The aforementioned data will be promptly published and maintained on the Ministry of Mines website in a standardised, software-readable format that is easily and publicly accessible.</p> <p>Add to Definitions:</p>

	<p>government has committed to publishing some data through the Extractive Industries Transparency Initiative (EITI), but implementation has been very uneven: incorporating these requirements in law would greatly strengthen the protection they give. To be most useful, this information should go slightly further than the letter of EITI requirements, and be broken down to the level of individual projects.</p>	<p>or ambiguity, and do much to protect mining in Afghanistan from abuses.</p>	<p>Project/Mining Project: the operational activities that are governed by a single mining contract, license, lease, concession or similar legal agreements and form the basis for payment liabilities with a government entity</p>
<p>2</p>	<p><i>A requirement for the publication of the “beneficial ownership” of mining companies, and clearer prohibitions against MPs, security officers and other figures being involved in mining.</i></p> <p>Hidden ownership arrangements are a common element in corrupt and abusive deals around the world. The Law should be amended to create a clear legal guidelines for any company applying for natural resource licenses to first provide details of its real beneficial owners – that is, the identity of any person who exerts significant control or derives significant benefit from the company. This information should be made publicly available</p>	<p>A draft amendment being worked on by Ministry of Mines states: (6) Ministry of Mines and Petroleum shall, within 10 days of a contract conclusion or grant of a license, publish [any] mining contract and license together with their ancillary contracts while naming their shareholders and direct beneficiaries.</p> <p>This would be a step forward, but does not cover indirect beneficiaries of companies, and does not have any penalties for non-publication. In practice, a contract could be left unpublished for years without any public awareness.</p> <p>Article 16 (2) of the current law has some positive provisions, with a list of the positions whose holders are excluded from holding a license. However, the</p>	<p>NEW Article 26: Beneficial Ownership</p> <p>(1) All companies applying or bidding for a license are required to provide accurate information on their beneficial ownership as part of their application or bid documents. Throughout the duration of a license, license holders will inform the Ministry of Mines of any changes to this information, within one month of the change occurring. The Ministry of Mines will promptly publish and maintain all beneficial ownership information in a publicly accessible format on its website. Failure to provide information in good faith and in conformity with the regulations to this law shall invalidate a license application, and be grounds for revocation where a license has been granted.</p> <p>(2) Information on all individuals who are defined as Politically Exposed Persons (PEPs) according to the regulations of this law, and who have any level of economic interest in, benefit from, or control over an entity applying for or holding a minerals license, shall be subject to publication in accordance with Article 26 (1), irrespective of whether they would otherwise qualify as beneficial owners.</p>

<p>before a bid is considered. Any owner who is a Politically Exposed Person either in Afghanistan or elsewhere should also be publicly highlighted, even if the owner is otherwise eligible to apply for a license. Any failure to accurately disclose this information should be a ground for the automatic revocation of the license (so as to remove discretion).</p> <p>At present, Art. 42(1)(2)) of the Law requires information on shareholders to be submitted to the government, but without any requirement to make this information public. Information on indirect beneficiaries is not required. The law should require publication of information not just of shareholders but of the ultimate natural person owner, since mining companies often use complex chains of ownership and the direct shareholders may in fact be intermediate companies on which little or no information is publicly available.</p>	<p>groups specified fail to cover many important politically connected actors, do not properly address indirect ownership through front companies, and have no mechanism to require companies to actively reveal their real, beneficial owners.</p> <p>Article 16 (2) (5) adds to the excluded list: <i>5. Companies in which the listed figures in Article (151) of the Constitution of Afghanistan, have obtained direct or indirect benefits;</i></p> <p>There are two problems here. First, Article 151 of the Constitution lists a significantly narrower group of persons than Article 16 (2) of the Mining Law – it notably leaves out members of the armed forces and members of parliament, for example. This leaves MPs and Generals to legally enjoy the benefits of mining licenses so long as they did not own them – a major loophole.</p>	<p>Amend Article 16 (2) (5)</p> <p><i>5. Companies in which the individuals listed above have obtained direct or indirect benefits or otherwise exert beneficial ownership;</i></p> <p>Add to Definitions:</p> <p>Beneficial Ownership:</p> <p>Beneficial ownership is enjoyed by any natural person who, directly or indirectly, has any significant degree of control over a given legal entity, or has a significant economic interest in, or receives significant economic benefit from, such a legal entity, even where formal ownership (title) may be in the name of another entity. In addition to any other qualifying criteria, a person is automatically considered to be a beneficial owner if they own or control 5% or more of the legal person or arrangement in question.</p> <p>Politically Exposed Persons (PEPs):</p> <p>PEPs are defined as individuals belong to one of the following categories:</p> <ul style="list-style-type: none"> • Domestic PEPs: individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. • Foreign PEPs: individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials • International organisation PEPs: persons who are or have been entrusted with a prominent function by an
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3	<p><i>A stipulation that natural resource contracts become valid only after they are made public</i></p> <p>Transparency and accountability are ensured when the contract is publicly accessible. This will decrease the possibility of any contract being drafted in a way that facilitates corruption.</p>	<p>Article 23 (6) states that: <i>The Ministry of Mines and Petroleum shall publish the terms and conditions of any Minerals Development contract, and other ancillary agreements within ten (10) days after entering into such Minerals Development Contract. Publishing the personal information and any other relevant information to the security of personnel and methods of operations is not allowed without a written agreement of the Parties.</i> But this requirement only applies Minerals Development Contracts – it would not apply to the great majority or ordinary contracts.</p> <p>Article 41 allows individuals access to the license <i>register</i> and to ‘non confidential’ documents, but this is still a significant</p>	<p>AMEND Article 18: License</p> <p>(5) Mining licenses, authorizations and contracts, with all ancillary documents relevant to the implementation and ownership of the contract, will be published in a publicly accessible format on the website of the Ministry of Mines, or other reputable and publicly accessible website as defined in the regulations, within ten (10) days of being granted. Beyond this period such licenses, authorizations and contracts will be made available freely upon request. Such licenses, authorizations and contracts shall not enter into force or be considered valid until such a time as they have been so published.</p>

		<p>obstacle to full transparency. While Presidential Decree 45 of 26 July 2012 mandates publication of contracts, a number of them have not been published. This may be for technical reasons, but it is clear that an automatic mechanism would avoid this issue and guarantee transparency in the future.</p> <p>A draft amendment being worked on by Ministry of Mines states: <i>(6) Ministry of Mines and Petroleum shall, within 10 days of a contract conclusion or grant of a license, publish [any] mining contract and license together with their ancillary contracts while naming their shareholders and direct beneficiaries.</i></p>	
4	<p><i>A requirement that mining contracts be allocated according to strong principles of transparency and competitiveness, and with effective safeguards for fairness and transparency, and clear sanctions for abuses.</i></p>	<p>Article 10 (1) 5 states that the duties of the Ministry of Mines include <i>Monitoring the bidding process to ensure that it is conducted transparently and fairly in accordance with the provisions of this Law and relevant Regulations.</i> Article 19 (4) (g) states that: <i>The manner of any bidding process and other licensing related issues shall be set forth in the relevant Regulations.</i> However, a certain number of protections are basic enough to good governance that they should be included in the law itself rather than the regulations.</p>	<p>AMEND Article 19: Types of License and its granting process and authorities</p> <p>(4) Tender proceedings for Mineral Rights shall be an open, transparent, competitive and impartial procurement system, based on effective budgetary and expenditure controls and reporting requirements designed to achieve efficiency, economy, the prevention of abuses and loss of state revenue, and a fair opportunity for participation by all prospective Bidders. The manner of tendering and other licensing related issues shall be set forth in the relevant Regulations, and shall include:</p> <p>a) Clear procedures for conducting the bidding or allocation process, and clearly defined pre-qualification criteria; established in advance of the bidding process and applied equally to all applicants;</p>

	<p>Article 99 has language on the illegality of preferential behavior, stating that: <i>Where an applicant, License Holder, Authorization or contractor, or any other person on behalf of them directly or indirectly provides any money or any other in-kind payments [with material or intellectual values] intended to as a gratuity, gift, fee or any other favor to any Afghan Government employee or any third party for the purpose of making that person grant any License, Authorization, or contract to the applicant or holder or other relevant facilities, it shall be considered a criminal act and the perpetrator shall be prosecuted under administration corruption provision.</i> This is a positive provision, but could be strengthened by applying the same standard to officials as well as license holders.</p> <p>Article 13 (1) of the Regulations to the 2010 Minerals Law state that <i>Tender proceedings for Mineral Rights shall be an open, transparent, competitive procurement system, based on effective budgetary and expenditure controls and reporting requirements designed to achieve efficiency, economy, the prevention of abuses, and a fair opportunity for participation by all prospective Bidders.</i> However, there is no actual requirement for measures like</p>	<p>b) Timely and appropriate public consultation and notification that a mineral concession may be awarded, and provision of clear and accessible public information on how the award process will work;</p> <p>c) Provision to ensure equal access by all qualified bidders to available information, including geological information gathered by the state;</p> <p>d) For licenses allocated based on a bidding process, provision for the publication of the tender documents, winning bid documents, bid evaluation reports, and a summary of the substantive terms of all losing bids, immediately following the completion of the bidding process</p> <p>e) A requirement for the Ministry of Mines to provide a timely and public written justification for its licensing decisions, including granting a license and disqualification of an applicant;</p> <p>f) Clear criteria for the evaluation of bids, based on a full investigation of their merits and costs, including economic, financial, social and environmental issues, impact on local communities, conflict risks, and other relevant factors. The assessment will include a broad cost-benefit analysis, including costs (such as security) associated with mining but borne by the state. The prior record of an applicant company and its owners with regards to business competence, financial capacity, human rights, the environment, and community relations will also be a factor in the assessment of their bid.</p> <p>AMEND Article 99:</p> <p>(2) Any government official or contractor who acts in a manor intended to unfairly favour any applicant for a license shall be considered to have committed a criminal act and shall be prosecuted under administrative corruption provisions.</p>
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5	<i>A commitment that the government will use model contracts as the initial basis for contract negotiations, incorporating international best practice on measures against corruption and conflict, and developed in consultation with civil society, business and other stakeholders.</i>	Ministry has responsibility for developing contracts	AMEND Article 19: Types of License and its granting authorities (5) The Ministry of Mines will develop model contracts, incorporating the commercial and social protections in line with international best practice, in consultation with relevant Ministries, civil society mining companies, and other stakeholders, and shall use them as the initial basis for the negotiation or granting of licenses of all types.
6	<i>Language to enable community monitoring of mining, including allowing the payment of a small percentage of legal mining revenues to local projects through Community Development Councils.</i>	Various provisions for Community Development Agreements and consultation of communities in the development of CDAs. On revenue sharing, Article 85 allows for a 'special code': <i>The Ministry of Finance shall, in addition to its annual national budget allocation, allocate 5 % of the overall revenue from a Mine or Mines, in a special code [budget code] or wealth fund, to the economic, social and environmental development purpose of the province or provinces where the Mines are located.</i>	NEW Article 101: Community monitoring and consultation (1) The Ministry of Mines will establish regulations to allow community monitoring of mining, including a framework for establishing an inclusive and legitimate community body to lead monitoring; requirements for companies and artisanal miners to liaise with and provide necessary information to communities; and protocols for communication between community monitoring bodies and government agencies, and for responding in a transparent, rigorous and impartial way to issues raised. (2) The Ministry of Finance will establish a mechanism to pay a small percentage of legal revenues from a given mine project to communities within its local area for the purpose of local development and infrastructure projects. These funds may be drawn from the 5% of revenue allocated to provincial development in accordance with Article 84 of this law. The mechanism shall incorporate full transparency, effective and inclusive community control, and proper oversight of the allocated funds; where conditions allow, this may take the form of a supplementary contribution to the development budget provided to the local Community Development Council through the National Solidarity Program. Good faith participation in

			<p>community monitoring of mining shall be a condition for the payment of these funds.</p> <p>(3) Communities located in or near mining areas shall have the right to be consulted and informed on decisions by the government of license holders relating to mining activities which may have a significant impact on them. The process for consultation shall be established according to the regulations in order to be genuinely representative (including participation of women and minorities), legitimate, timely, meaningful, and independent. Companies and the government will ensure communities are provided with accurate and timely information on the issues on which they are being consulted.</p>
7	<p><i>Include provision for local, and not just Afghan employment in mining projects</i></p> <p>Communities living around the mining sites are directly affected by mining activities and should, therefore, be considered in the first instance for any available jobs related to any such mining activities. This can be an incentive for local people to cooperate with the miners and the government.</p> <p>The law has positive provisions requiring employment of Afghans wherever possible. That is laudable, but there is a particular need to ensure employment of <i>local</i> Afghans from mining areas. This is an issue of fairness, but it can also be important</p>	<p>Several articles, including 21, 42, 65, and 98, talk about obligations to hire Afghans and buy Afghan goods and services. Article 111 addresses the issue directly, stating: <i>(1) A License or Authorization Holder or contractor shall employ only Afghan nationals as skilled, unskilled and vocational labor in its Mineral Activities (projects) in accordance with the provisions of this Law.</i></p> <p><i>(2) A License or Authorization Holder or contractor shall, in its recruitment of experts, give priority to Afghan nationals having similar degree, skill and profession over foreign citizens.</i></p> <p><i>(3) A License Holder shall give priority to procure Afghan goods and services provided they are substantially equivalent or similar to foreign goods in terms of quantity, quality and price</i></p> <p>Only one article talks about local</p>	<p>AMEND ARTICLE 111: : Local procurement of Local Goods and Services</p> <p>(4) Within these requirements, particular priority shall be given to local communities in mining areas for employment as skilled, unskilled, vocational and expert labour, and in procurement of goods and services.</p> <p>AMEND ARTICLE 21(1)(14) to read:</p> <p>14. An Employment program for Afghan citizens, with particular priority given to local communities in mining areas</p> <p>[SIMILARLY AMEND ARTICLES 42 (1) (10), 65 (1) (2), 98 (2) and any other relevant articles with the words ‘with particular priority given to local communities in mining areas’]</p>

	<p>to help prevent conflict. For example, a company which brings Afghan labourers from a different province into a mining area rather than employ locals could well cause a violent reaction.</p>	<p>communities as opposed to afghans generally – article Article 42 (1) (10), which states that reconnaissance licenses must cover: <i>Proposals to employ Afghan citizens and procure goods, equipment and services from Afghanistan, considering the local community as a priority</i></p>	
8	<p><i>A requirement to use a single, transparent account for all natural resource revenues.</i></p> <p>Creating a single, transparent account for all payments to and from the government in relation to extractive activities greatly strengthens simplifies the task of identifying abuses. It also makes it easier to track how the government is using extractive revenues. Minerals as well as hydrocarbons can be extracted only once, and the income from this source should be available for the benefit not only of the current generation but to fund investment for coming generations.</p>	<p>The law currently requires payments to be made to the State Treasury account, but has no provision for transparency.</p> <p>Article 83 (3) has provisions purely in relation to Royalty payments: <i>Royalty shall be paid in accordance with terms and conditions of License and Authorization and the provisions of this Law into a dedicated State Treasury account to the bank. Each Royalty payment of gross revenues shall be accompanied by details of the Mineral produced, sold or transported.</i></p> <p>Article 85 states that: <i>A fee, Surface Rent, Royalty or other payments are public property and shall be submitted to the bank and made payable to the State Treasury Account. If the Holder denies or delays its payment, such payment may be recovered by authorized competent court as the debt of the Holder from its properties.</i></p>	<p>AMENDED Article 85.</p> <p>(a) All funds payable to the government in relation to extractive activities, including fees, bonus payments, surface rents and royalties, are public property and shall be payable directly into a single State Treasury bank account, which shall be used solely for this purpose. If the license Holder denies or delays their payment, such payment may be recovered by an authorized competent court as the debt of the Holder from its properties. All payments from the Government in relation to extractive activities shall likewise be made from this same account.</p> <p>(b) On a monthly basis, the Government will publish details of all payments and withdrawals from or to this account in a publicly accessible format on the Ministry of Mines and Ministry of Finance websites. Each transaction shall be accompanied where relevant by details of the reason for the payment, its origin and destination, the mineral produced, sold or transported, its quantity, price, grade and other relevant information.</p>