



global witness

Getting to Gold

How Afghanistan's first mining contracts
can support transparency and accountability
in the sector

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Summary

The Government of the Islamic Republic of Afghanistan (GIRoA) has made welcome public pledges to transparency and good governance in its emerging mining sector. This paper considers how Afghanistan's first mining concession contracts will support these commitments.

Global Witness has carried out a review of the 2008 Aynak copper contract. To provide further comparative analysis, Global Witness decided to expand our review to include the later 2011 Qara-Zaghan gold contract. This paper identifies the positive points between the two contracts, and discusses areas which need further attention.

The review found progress from Aynak to Qara-Zaghan in transparency over publication and accessibility of

information. However, community engagement provisions have not improved from Aynak and there has been a step backwards in relation to the incorporation of international standards.

Getting the terms of these contracts right is a critical part of developing an industry which supports revenue generation and sustainable development. This is particularly important in a country where conflict and insurgency is ongoing, the local context is volatile and local communities are distrustful of official authorities. Global Witness hopes our findings can help inform the approach to current and future contract negotiations – in particular, the upcoming Hajigak iron contract.

Main Findings

Contract transparency and accessibility

- Publication of the Qara-Zaghan contract in English and the circulation of contract details in national newspapers are major advances on the Aynak contract, of which only a précis has been published.
- Transparency in Qara-Zaghan is partial however. The Qara-Zaghan contract contains much less detail than Aynak, with key information set out in separate documents which are not published. This means public access to important details on planned mining activities, and potential impacts, is not available.
- For both Qara-Zaghan and Aynak, financial terms such as royalty rates have been made public. However, there is no provision for associated information such as expected and actual production rates to be made public, which presents an obstacle to public monitoring and tracking of mining revenues.
- At the time of writing, the Qara-Zaghan contract is only available in English and not in Dari or Pashtu on the Ministry website which limits local access to the contract terms.
- For both the Qara-Zaghan and Aynak projects, public facts about the investing companies, including their beneficial ownership and corporate structure, are limited.

Contract drafting, laws and standards

- In relation to international standards and best practice, the Qara-Zaghan contract represents a big step back from Aynak. Aynak includes some international guidelines. Qara-Zaghan commits only to conventions which Afghanistan has already signed up to and even then, the company has to agree that they are suitable.
- Laws and regulations for the mining sector are being reformed. However, the Qara-Zaghan contract includes a

- stabilisation clause which effectively 'freezes' the law which applies to the project, and could prevent future positive environmental, social and other legal reforms from taking effect at the project. This represents a step back from Aynak.
- Like Aynak, the Qara-Zaghan contract contains drafting errors and ambiguities that should be addressed to avoid disputes later on.

Economic provisions

- Like Aynak, the Qara-Zaghan contract has high royalty rates. Looking beyond these figures however, there are questions over whether the full costs (for example loss of local access to land and water – see section below) have been taken into account by the Afghan government.
- In the Qara-Zaghan contract, \$100,000 has been allocated to guarantee compensation for environmental, property or other damage caused by the project. However, this sum seems far too low. It is not clear how or by whom this money will be accessed, and there is no provision for a situation where the damage caused by the company exceeds this sum.
- Firm commitments made to employing local Afghans in the Aynak contract are absent in Qara-Zaghan. This could limit the indirect economic benefits of the project to the wider community. Neither contract specifies how many Afghans will benefit from planned training programmes, nor what the programmes will cover.

Social, environmental, human rights, local economy and cultural provisions

- The Qara-Zaghan contract grants the company broad land and water rights, without any of the safeguards to protect local water and land needs that were set out in the Aynak contract. This could have serious

impacts for social, environmental and human rights as well as for the local economy.

- The Qara-Zaghan contract includes clauses which improve alignment of its environmental, social and technical plans. This could mean that as plans for mining operations develop, they can take better account of social, environmental or cultural issues. However, the limited time available for the Ministry to review and assess the project plans will make it highly unlikely it will be able to fully consult with the local community and other relevant bodies.
- The Qara-Zaghan contract places a requirement on the Ministry to cooperate with the mining company for resolving concerns. However, this is overly lenient and could mean that important questions about the company's financial capacity or environmental and social mitigation plans are not resolved.
- Neither contract makes provision for consultation or engagement with affected communities, which is a major gap. Similarly, both contracts omit human rights provisions and human rights assessments.

Security

- For both Aynak and Qara-Zaghan, security agreements have been negotiated separately and are not publicly available. It is not known, therefore, whether these agreements are in line with international best practice.

Monitoring and accountability

- Official oversight of the Qara Zaghan project is constrained by a requirement to give notice of planned visits. This requirement is not present in the Aynak contract.
- Whilst contract publication is important and represents an advance on Aynak, the lack of public access to other key project documents presents a significant obstacle to on-the-ground monitoring of the project by the local community and civil society.
- As in the Aynak contract, there is no contractual mechanism for local community concerns and complaints to be resolved, nor any requirement for dispute proceedings to be public and open. Without these there is a risk that unresolved complaints may create or feed into existing conflicts.
- The Qara-Zaghan contract does advance on the Aynak contract by including a provision making the company liable for injuries or damage caused to third parties. The company is not, however, automatically liable for injuries or damage caused by mining operations. Instead, it must be proved that the company, its agents or sub-contractors, have been negligent or careless. This requirement could be a significant obstacle to the use of this clause, potentially leading to costly and time consuming disputes which affected individuals may not be able to fund.

Recommendations

Detailed recommendations for stakeholders are laid out in the text below. Based on our analysis, the top four Global Witness recommendations are:

1. Contract transparency and accessibility

The Ministry of Mines should continue to publish mining contracts in full as soon as reasonably possible after signature and in Dari, Pashtu and English, and ensure that affected communities have full access to contract terms.

Contracts should require other project documents which contain key details on security, social, environmental and human rights obligations to be made public, as well as details of the corporate structure and ultimate ownership of the investing company.

2. Community engagement

Future contracts should specifically provide for full community engagement. This should be in addition to the Ministry of Mines' continuing work to develop and implement social policies in mining-affected communities.

Contracts should also set out mechanisms to address local concerns and complaints in a timely and satisfactory manner.

3. Legal framework

Future mining contracts should incorporate international standards and principles to ensure that mining activities happen in line with international best practice.

The IFC Sustainability Framework, for example, provides effective guidelines on dealing with land impacts and community displacement and the UNHRC Guiding Principles on Business and Human Rights set out clear steps for the state and companies with respect to potential human rights impacts.

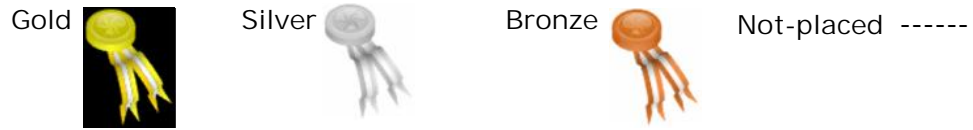
Stabilisation clauses should be carefully drafted to ensure that positive developments in social, environmental and human rights laws apply to projects.








4. Monitoring

To ensure that GIRA receives all royalties, taxes and other mining revenues it is due under the mining contracts, contracts should contain provision for comprehensive, open and unrestricted monitoring.

Social and environmental benefits including employment and training commitments should be set out in detail, without caveats to prevent their enforceability, and made public so that implementation can be monitored by local communities.

What progress has Afghanistan made in strengthening its mining contracts?



	Aynak, 2008	Qara-Zaghan, 2011
Contract transparency and accessibility	-----	
Safeguards against environmental, social, human rights, local economy and cultural impacts		
Community engagement and rights of redress for community complaints and concerns	-----	-----
Economic benefits		
Security	-----	-----
Comprehensive, open and independent monitoring		

Introduction

As Afghanistan looks to its future beyond transition in 2014, the country's potential mining wealth is increasingly taking centre stage. With the support of its international partners, the GIRoA has started selling rights to its valuable mineral and petroleum deposits. Managed well, the mining sector is forecast to bring in annual revenues of between \$500 million and \$1.5 billion from 2016, potentially rising to more than \$3 billion by 2026.¹ The hope is that the mining industry will bring in significant money to the country in the coming decades, filling the funding gap post-transition and shoring up any development gains made over the past ten years.

International experiences of developing a mining sector in an environment of ongoing conflict and serious governance concerns have not been positive, however. In countries like Angola, Cambodia, Libya and the Democratic Republic of Congo, an abundance of natural resources has incentivised and exacerbated violence, oppression and corruption, severely undermining social and economic development.

Experience suggests that now is a crucial time for the industry in Afghanistan. The terms on which these mining deals are granted will set the parameters for how the country and mining investors will benefit financially and economically, how the environment and people will be protected, and how risks of deepening conflict and corruption will be guarded against.

Awareness of the importance of getting these deals right is growing. The recent International Afghanistan Conference in Bonn emphasised the importance of transparency and accountability, in line with international best practice, to ensure that Afghanistan's mineral wealth directly benefits the Afghan people, that public resources are appropriately collected and managed and that the environment is

preserved.² In the run up to Bonn, at a business investment forum organised by Euromines,ⁱ essential preconditions for attracting and building the trust of international investors were also identified by international companies. These included transparency, a stable security situation, a skilled indigenous labour force and improved legal, regulatory and land use frameworks.³ The moves made now to implement the Euromines recommendations will be key to attracting private investment and creating a viable and sustainable business climate.

GIRoA has already taken important steps to achieve these goals. With regard to mining revenues, Afghanistan is a candidate for the Extractives Industries Transparency Initiative – a global standard that promotes revenue transparency.ⁱⁱ The Minister of Mines, Minister Shahrani, has committed to “*totally transparent*” mining extraction operations and to the publication of all contract information in English and the major national languages within 48 hours of each contract award.⁴ He has specifically recognised the need to ensure that relevant stakeholders, civil society, media and parliament have access to all information, for safeguards to be in place and for the highest standards of transparency to be achieved.⁵ The Minister has also taken the positive step of engaging with the Natural Resource Charter which provides clear principles for good resource management from discovery through to exploitation.⁶ⁱⁱⁱ The Ministry of Mines has been undertaking a full review of the legislation, regulations, procedure and policy for the mining sector, which includes developing a social policy and working with the National Environmental Protection Agency on environmental regulations.

Building on these positive moves, this paper looks at how these commitments are beginning to be implemented on a practical level in the drafting of the two

most significant mining contracts in Afghanistan so far: the Qara-Zaghan gold contract and the Aynak copper contract.

The country's first major concession was the Aynak copper deposit in Logar province. This was awarded to the Chinese state-backed consortium of China Metallurgical Group Corporation and Jiangxi Copper Company Limited in 2007, and a principle contract signed in 2008.⁷

The Qara-Zaghan gold concession in Baghlan province was tendered in 2008 and Afghan Krystal Natural Resources Company (AKNR) was identified as a preferred bidder. In early 2010, following a change of regime at the Ministry of Mines and the launch of a programme of reforms aimed at improving transparency and the regulatory framework, the Ministry held extensive discussions with AKNR reviewing the company's technical capacity, financial backing, gold mining experience and the social and environmental safeguards. Based on these discussions, a draft contract was prepared and signed in January 2011. With AKNR receiving backing from a JP-Morgan facilitated consortium of US, British, Turkish, South African and Indonesian investors,⁸ the Ministry has welcomed the Qara-Zaghan project as the *'first major investment by a big western*

company which will be crucial in changing the perceptions of international investors about Afghanistan'.⁹

This paper compares the two contracts, identifying the progress that has been made since Aynak and what lessons remain to be taken into account in the negotiation of upcoming mining contracts.

A word on methodology

As yet, the Aynak contract has not been published but Global Witness has obtained and reviewed the main contract terms. On the Ministry's suggestion, we have reviewed the English-language version of the Qara-Zaghan contract to provide a comparison between old and

new deals.¹⁰ Neither the bidding processes leading up to contracts, nor the surrounding regulatory framework is examined within the scope of this paper. Instead, it is intended purely to highlight one important part of the overall picture – the contractual basis for mineral exploration and exploitation.

In making this assessment, Global Witness has received input from legal specialists and has considered international best practice for mining contracts.^a Amongst other documents, Global Witness has looked at the IFC's Sustainability Framework,¹¹ the ICMM's Sustainable Development Principles,¹² the Model Mine Development Agreement being developed by the International Bar Association,¹³ the Natural Resource Charter, the UNHRC Guiding Principles for Business and Human Rights,¹⁴ the IAIA guidelines and principles, the OECD Guidelines for Multinational Enterprises,¹⁵ and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.¹⁶

ⁱ The European Association of Mining Industries (Euromines) is the Brussels-based representative of the European metals and mining industry.

ⁱⁱ The Extractive Industries Transparency Initiative (EITI) is a global standard that promotes revenue transparency, through a process overseen by government, companies and national civil society. Afghanistan became a candidate for EITI in 2010, and is currently taking steps to comply with the EITI standard. For further details on EITI, please see <http://eiti.org>. It should be noted that Global Witness sits on the EITI board.

ⁱⁱⁱ The Natural Resource Charter is a set of economic principles (twelve precepts) for governments and societies on how to best manage the opportunities created by natural resources for development. The drafters of the Charter, assembled by Paul Collier at Oxford University, are an independent group of world experts on economically sustainable resource extraction. For further details, see <http://www.naturalresourcecharter.org/>. It should be noted that Global Witness has and continues to contribute to the Natural Resource Charter.

^a This analysis was conducted with input and support from a range of experts, particularly the Essex Business and Human Rights Project at the University of Essex, UK.

Full Analysis

Transparency and Accessibility

The Qara-Zaghan contract represents a major advance in transparency. Whereas the Aynak contract has not yet been published, except in summary form, the Qara-Zaghan is available in full in English on the Ministry of Mines website. The Ministry has reported the publication of a contract summary in all major national newspapers.¹⁷ Such publication is fundamental to good management of the gold mine. Enabling the Afghan people to see the terms negotiated on their behalf for a valuable national asset is essential for establishing their trust and building local support for the project. Publication also provides the information essential for the local community and civil society to identify areas of concern at an early stage and to monitor performance on the ground.

The Ministry of Mines has also stated that the detailed Qara-Zaghan contract was published in Afghanistan's national languages on the Ministry website the day after it was awarded.¹⁸ However, as at the time of writing, only the English language version of the contract is available online. Local community members are unlikely to speak English, and since the full terms are not available in Dari or Pashtu, this severely limits the community's ability to access the contract terms, and the agreed commitments and obligations which could directly affect them. Further, it is not clear what, if any, actions have been taken to ensure that the terms are accessible to illiterate community members and that the community can access the legal and technical advice they require to understand the contract terms.

The Qara-Zaghan contract contains much less information than the Aynak contract, for example, with respect to company obligations on land and water use. This means that even though the contract itself has been published, key information on

how the project is to proceed is not publicly available. Details of how the project will proceed and how anticipated social and environmental impacts will be addressed are to be set out in other project documents to be produced in the future including the 'Exploration Plan' and the 'Feasibility Study', but there is no provision within the contract for these documents to be published. Further, documents such as the 'investment licence' which are referred to as being appended to the contract have not been published with it. On the revenue side, key financial terms such as royalty rates are set out in the contract, but there is no provision for mining production information to be made public. Without knowing what quantities of minerals are being produced, it is not possible to determine what royalties and taxes should be being paid, presenting an obstacle to public monitoring and tracking of mining revenues. **Transparency of Qara-Zaghan project documents is therefore partial, with key details not yet publicly available.**

It is notable that, as at the time of writing, only the Qara-Zaghan contract and one cement contract have been published in full on the Ministry of Mines website.¹⁹ This is despite repeated assurances from the Ministry of Mines that all contracts agreed under the current regime would be published.²⁰ Summary information and extracts of other contracts, such as the 2011 Gadakhil chromite contract and the 2011 Amu Darya Basin exploration and production sharing agreement have been made public,²¹ but the detail provided is insufficient for a full understanding of what terms have been agreed and what the economic, social, environmental and human rights implications are. **This is a major gap between the Ministry's public commitment to transparency and actual practice, which should be addressed as a priority** With regard to mining company transparency, Qara-Zaghan improves

slightly on Aynak. Under Article 1(1), details of the 'Manager, Assistants and Executive Board' of the AKNR are stated to have been registered with the Afghanistan Investment Support Agency which means that information on who is managing the company is publicly available. In addition, the Qara-Zaghan contract requires, under Article 19(1), Ministry of Mines consent for any transfer of rights or obligations from AKNR to another entity. This provision helps guard against the concession being sold on to an unsuitable entity in the future.

There is no provision within the Qara-Zaghan (or the Aynak) contract, however, for details of the company's ownership (including beneficial ownership) or its corporate structure and related businesses to be made publicly available. Such opacity can have serious implications, with risks of mining revenues going to entities involved in conflict or corruption, or of revenues being diverted before reaching the national coffers. In Angola and Nigeria, for example, Global Witness has reported on contracts being awarded to local companies, which either

do not identify their ultimate owners or are

owned by individuals linked to or with the same names as government officials, whilst in the Democratic Republic of Congo, the state mining company has sold stakes in major mines to opaque offshore companies at what appears to be a fraction of their value.²² In Zimbabwe, Global Witness investigations have revealed links between mining company owners and political, police and military figures, giving rise to risks that mining revenues could be used for off-budget funding of the security sector and for the funding of future election violence. Corporate structures have also been found to be complex, involving tax havens and secrecy jurisdictions, raising concerns of tax avoidance and corruption which could deprive Zimbabwe of potential mining revenues.²³ At Qara-Zaghan, Global Witness has heard allegations from multiple, independent sources of the potential involvement of security forces in the project.²⁴ Whilst these allegations have not been verified, given the sensitivity of the situation in Afghanistan, full transparency of company ownership is crucial to dispel such rumours from the outset.

Recommendations:

- Mining contracts should be made publicly available in all local languages as soon as practicably possible, with steps taken to ensure they are fully accessible to affected communities.
- Contracts should stipulate the publication of key project documents which provide details of planned activities and measures to minimise and mitigate anticipated social and environmental impacts.
- Contracts should provide for the publication of all information required for public monitoring and tracking of mining revenues including estimated and actual production rates.
- There should be provision for mining company information, including corporate structures, related businesses and beneficial ownership to be made public and consistently updated.

Contract drafting, laws and standards

Both the Qara-Zaghan and Aynak contracts contain similarly broad provisions for the mining companies to manage their activities in a '*technically, financially, socially, culturally and environmentally responsible manner*', but Qara-Zaghan takes a serious step back in its incorporation of international standards and best practice.

The Aynak contract incorporates international conventions to which Afghanistan '*is or may become a signatory*' and specifically refers to international standards such as World Bank Environmental and Social Safeguard Policies, the Equator Principles and the Voluntary Principles on Security and Human Rights. By contrast, the Qara-Zaghan contract incorporates '*any applicable international conventions to which Afghanistan is a signatory, and mutually agreed upon by the Parties as best suited to the physical, social, economic, environmental, political, and security conditions found in Afghanistan*' (Article 29). AKNR is therefore only obliged to follow international conventions to which GIRoA has already specifically signed up *and* which both parties agree are appropriate. In practice, this could leave the Afghan Ministry of Mines at the mercy of the company when it comes to agreeing the standards the project should meet.

Further, Article 27(2) contains a broad 'stabilisation clause' which could serve to limit environmental, social and other safeguards from applying to the project. Stabilisation clauses aim to create a protective environment for investing companies by preventing legislative or administrative measures agreed after a contract is signed from applying to a project. They can play an important role in attracting investment to developing countries by guarding investors from political changes bringing in unexpected measures which fundamentally undermine their investment, such as an incoming

regime nationalising mining projects. However, such clauses must be drafted carefully so that they are not so broad that they, for example, prevent positive environmental and social measures from taking effect.

In the Qara-Zaghan contract, the stabilisation clause effectively freezes the Afghan Mineral Laws, preventing any changes (except with regard to health and safety), from applying to the project, unless specifically agreed by both parties. AKNR is not therefore obliged to comply with any advances or clarifications in the Mineral Laws, for example, in regard to environmental, social or human rights protections. The inclusion of this stabilisation provision is an unwelcome change from the Aynak contract and it is particularly concerning given the legislative review currently underway. For communities affected by the project, it could mean that they would have no recourse to new legal protections available in the rest of the country, effectively putting the area around the mine at a serious disadvantage. This risk is potentially exacerbated by Article 3, under which AKNR has the right to extend the contract, meaning that Mineral Laws could be 'frozen' for a prolonged period.

To ensure good management, such broad stabilisation clauses should be avoided or, at the very least, limited in time. Appropriate international standards and principles should also be specifically incorporated so that company activities are in line with international best practice from the outset. With regard to land rights, for example, referencing International Finance Corporation Sustainability Framework could bring in appropriate procedures for managing land acquisition and physical or economic displacement of people in a difficult environment²⁵ To ensure that the project benefits from improvements in international standards and principles, the contract should specifically provide for updates and developments in international best practice to apply to the project.

The OECD provides a due diligence framework for companies involved in mining and trading minerals from conflict-affected and high-risk areas,²⁶ including specific guidelines for gold mining.²⁷ As mining operations continue and gold from Qara-Zaghan starts to be traded potential purchasers will, in order to comply with the framework, need to gather information and assess whether mining activities contribute to conflict or human rights abuses. There is no reference in the Qara-Zaghan contract to complying with the OECD framework. Requiring compliance would, however, help ensure that processes are put in place from the outset to guard against mining becoming a source of conflict. With gold markets such as Dubai likely to endorse the OECD guidelines,²⁸ putting processes in place now could assist the investing company in securing future purchasers for gold from the mine. Beyond the Qara-Zaghan project itself, complying with the framework would be an important step in building investor confidence in Afghanistan's mineral sector, ensuring a clean supply chain and a strong market for Afghan gold in the future.

Turning to contract drafting, both the Qara-Zaghan and the Aynak contracts require review to eliminate errors and ambiguities. Article 7(D) of the Qara-Zaghan contract, for example, refers to an assessment which is to be carried out by an 'approved third party' but there are no details on who will provide this approval. Article 20(3) refers to a percentage fee payable if any payments due from AKNR are delayed, but it is not clear how this penalty is to be calculated. Terms such as 'Exploitation Licence', 'Social Development Plan' and 'Operations Plan' are capitalised (which means they should be defined) but there is no definition for them.

There is what looks like a significant drafting error at Article 7. The article

generally refers to a 'Feasibility Study', a term which is defined and the meaning of which is clear. There is, however, one reference to a 'Feasibility Report' in the same Article. This term is not defined, and it appears to be a mistaken reference to the 'Feasibility Study'. If this is a mistake, it has significant implications.

As Article 7 currently stands, the company is required to include technical, environmental and social assessments and plans within the 'Feasibility Report' (as opposed to the Study) and to submit this document to the Ministry of Mines for approval. At the same time, the Article states that the 'Feasibility Study' (as opposed to the Report), is legally binding on the parties and that the Study must be modified if the company discovers and gains rights to other minerals. If all references are actually supposed to be to the 'Feasibility Study', then the Environmental and Social Impact Assessment and Management Plan will form part of the Study, so are legally binding and due for update where further mineral rights are granted. As the contract stands, however, it could be argued that the Assessment and Plan do not form part of the Feasibility Study, potentially making the measures they set out to address anticipated social and environmental impacts aspirations rather than binding obligations.

'Mining Law' is defined as the '2009 Mineral Laws' but it is not clear what the latter encompasses. Is the term restricted to the 2009 Mineral Law or does it cover other legislation relevant to mining (for example, the Income Tax Law 2009 which contains specific provisions on mining)? Do the Mineral Regulations enacted in 2010 but specifically referred to by the Mineral Law 2009 apply? Without review and clarification, such ambiguities could give rise to unnecessary, costly and timely disputes in the future.

Recommendations:

- International standards and best practice on each contractual area, from operations management to addressing adverse environmental, social and human rights impacts are identified and incorporated.
- Key international standards include the IFC's Sustainability Framework (particularly with regard to community impacts), the UNHRC Guiding Principles for Business and Human Rights, the IAIA guidelines and principles, the ICMM Sustainable Development Principles, the Natural Resource Charter, the OECD Guidelines for Multinational Enterprises and the OECD Due-Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.
- *Stabilisation clauses which serve to prevent advances in environmental, social, human rights safeguards from taking effect should be avoided.*
- *Drafting carefully reviewed to avoid ambiguities and errors which could undermine GIRoA's ability to enforce positive provisions, and which could lead to costly and time consuming between the contracting parties over interpretation.*

Economic provisions

The two projects should yield substantial economic benefits – direct, in the form of royalties, tax revenues, surface rents and contract premiums, and indirect, through local employment and social and infrastructure development.

The royalty rates set out in both the Qara-Zaghan and the Aynak contracts are very high, respectively 26% and up to 19.5%. Positively, both rates are calculated by reference to an independent index (the London Metals Exchange). Under the Aynak contract, the royalty rate could be undermined by a clause which comes into play if GIRoA negotiates any mining contract which includes rates more favourable to the investor than under the Aynak contract. If another mining contract with a lower royalty rate is negotiated, for example, that lower rate would automatically apply to Aynak. A significant advance in the Qara-Zaghan contract is the omission of this provision, although the risk remains that ANRC may attempt to renegotiate the royalty rate in the future, particularly if the world price for gold drops.

High royalty rates across Afghanistan’s extractive sector also give rise to heightened risks of tax evasion or smuggling. In its recent ‘Enforcing the Rules’ report, the Revenue Watch Institute noted that billions of dollars in mining revenue are lost through failures in monitoring and enforcement, citing examples including a reported \$400 million revenue lost in one Indian state alone in 2009-10.²⁹ To guard against the risks of tax evasion and smuggling, it is crucial that GIRoA has the capacity and access required to monitor the project, including contractual rights to unannounced spot checks for official inspectors.

With regard to indirect economic benefits, the lack of enforceable obligations in the Qara-Zaghan contract is a retrograde step from Aynak. Mining could bring in substantial benefits for Afghanistan, for example, in

the form of jobs for the local community and Afghan nationals. Afghans employed through the job would benefit from a regular income and through developing their skills and experience. As they spend their income, this money would also feed through to Afghan businesses including local suppliers of goods and services, translating to a stronger local economy and better living standards.

The Aynak contract commits the investing company to employing a specified percentage of Afghan nationals in each employment category from managerial to unskilled labour. By contrast, the Qara-Zaghan contract provides only for Afghan personnel to be employed ‘*to the extent practicable*’ in all classifications of employment (Article 14(1)). Given the educational challenges in Afghanistan, it is likely that additional training would be required for Afghans to take on positions, particularly at the higher levels. This extra cost this would entail could mean that employing Afghans is deemed not ‘practicable’, resulting in few, if any, local employees. This could seriously limit the benefits of the Qara-Zaghan project.

The provision of training is another potentially major benefit. With appropriate programmes, such training could help to build up a body of skilled and qualified Afghans, improving national capacity and increasing local ability to run and fully benefit from their own mines in the long term. In countries like Liberia, the requirement for extractive investors to provide training for local people is incorporated within the legal framework.³⁰

Both Aynak and Qara-Zaghan require the investing company to provide training, with AKNR specifically required to develop a ‘*training program and facility of suitable capacity for the training of persons of Afghanistan citizenship in all classifications of employment for its Gold Production Facilities*’, but neither contract specifies how many Afghans are to benefit from such training nor its duration. Aynak contains an additional provision to provide educational grants, but again the number of beneficiaries is not specified.

These provisions are welcome but the lack of detail could mean that they provide limited benefits in practice. Without specific contractual commitments, the projects could end up providing a very small number of Afghans with training or grants. The programmes themselves may also be insufficient to substantially improve skills levels and qualifications of recipients.

The Qara-Zaghan contract does provide for a minimum of \$50,000 to be spent on the enhancement of the environment for the community near the mine (Article 18(4)), with a further minimum \$50,000 on implementation of social programs (Article 31). These figures must, however, be weighed against the potential impacts of mining activity, the assessment of which is to be detailed in the Feasibility Study including the all social and environmental assessments. Under the contract, AKNR provides, at Article 4, a guarantee bond in the amount of \$100,000 *'for compensation of, and reparation for, damage to the*

environment, property rights, and any other violations resulting from the activities of the AKNR, their employees, or contractors'. \$100,000 seems completely insufficient when compared to the potential damage that could be caused by mining activities. Whilst the separation of this figure into a designated bank account is a positive development, it is concerning that the basis for setting the bond at \$100,000 for such a breadth of potential damage is not set out, nor details of how or by whom the bond is to be triggered. There is also no provision for the figure to be revised to take account of environmental, social and other relevant assessments. Crucially, there is no provision for a situation where the damage caused by the AKNR exceeds the bond amount, and where AKNR itself has insufficient funds to cover such damage so cannot provide redress. Further, there is no provision to address damage which emerges after the contract ends (for example, mining impacts on health).

Recommendations:

- *To ensure that financial and economic benefits are fully realized, contracts should provide for details of anticipated revenues and costs to be made public.*
- *There should be sufficient time for the Government of the Islamic Republic of Afghanistan (GIROA) to review assessments and plans, engage with affected communities on expected impacts and planned measures and fully evaluate cost estimates put forward for addressing impacts..*
- *There should be provisions for financial plans to be prepared and regularly updated, with details of company ability to meet projected costs independently verified.*
- *Financial protections should be put in place to ensure that compensation required for damage caused by mining operations can be addressed, including appropriate bonds and guarantees, with details of triggers and access details clearly laid out.*
- *Contracts should include provisions against corrupt activities and should allow for open and independent monitoring to guard against smuggling.*
- *As above, companies should be required to make their structures and beneficial ownership public, with provisions in place to minimise tax avoidance.*
- *Clear and enforceable commitments should be set out with regard to non-revenue benefits such as employments and training.*

Social, environmental, human rights, cultural and local economy provisions

Qara-Zaghan marks a significant advance on Aynak in its contractual requirements for environmental, social and financial plans to be produced and approved before mining activities commence. Before exploration begins, an Exploration Plan must be produced, which must include plans to address anticipated environmental impacts, the company's capacity to finance anticipated costs and expenditure and a plan of anticipated physical activities. Similarly, before exploitation starts, a Feasibility Study must be produced, detailing environmental and social assessments as well as exploration plan results and technical plans. Ensuring that environmental and social assessments are considered from the outset is important to ensure that mining operations and available funding takes full account of required environmental and social measures.

Under Articles 6(2) and 7(2), however, the Ministry of Mines has only two weeks to respond to the Exploration Plan, and one month to respond to the Feasibility Study. In both cases it must provide its acceptance or a rejection with specific reasons. Given the breadth of each of these documents, these time periods provide insufficient opportunity for effective consultation with affected populations or for engagement with other relevant ministries. If the Ministry does reject either document, it is required to

cooperate with the company to resolve *'the concerns resulting in rejection'*. The need to be seen to cooperate could, in practice, put pressure on the Ministry to be more accommodating to the company. On specific points such as the company's financial capability to finance the project, which is to be set out in the Exploration Plan, it is not clear how Ministry concerns can be resolved other than agreeing to more flexibility than may be appropriate.

Afghanistan is a historically and culturally rich country. At Aynak, operations have been significantly impacted by the discovery of ancient Buddhist monasteries and artefacts at the project site. Taking account of that experience, the Qara-Zaghan contract incorporates a specific clause to cover such discoveries, requiring notification to the Ministry of Culture within 24 hours of any such finding (Article 28). The clause could be strengthened further, however, by putting in place a procedure for mining plans to be changed and operations to be suspended in the event of historical finds being made.

A major gap in the Aynak contract is the lack of provision for engagement with the communities likely to be affected by the project. Unfortunately, there is no progress on this point in the Qara-Zaghan contract, with a similar lack of provision for local engagement.

Under Articles 29(2) and 29(3) of the Qara-Zaghan contract, the Ministry of Mines is obliged to grant rights to land and subsurface water, and facilitate the use of surface water as 'necessary for this Contract'. There are no details as to who determines what land and water is 'necessary' for the project and on what basis, nor is there any reference to taking account of existing uses of land and water. The Aynak contract imposes restrictions on access to land and water, for example, prohibiting MCC from using agricultural water, or depriving local users of water supplies they have customarily used (Clause 37(c)). It also references international standards where land resettlement is required (Clause 23). By contrast, the Qara-Zaghan contract requires only that AKNR includes in its plans *'details for its usage of water and for the protection of local community water supplies'* (Article 18) – a lack of protection which represents a backward step from Aynak. It is particularly concerning given the water intensive nature of gold mining,³¹ and the potential ramifications of impacting water supplies in a country where the population is dependent on

agricultural and livestock farming activities and water scarcity is already an issue.³² Mining could have serious adverse impacts on the existing local economy which needs to be specifically considered.

For both contracts, what is clearly absent is any provision to engage with the local community from the outset to identify and raise awareness of likely impacts and to agree with them measures to minimise and address such impacts. At Aynak, the Ministry of Mines has recognised the need for community engagement and is now carrying out consultations, helping to address the gap in the contract. However, incorporating the community engagement requirement into the contract, and specifying the standards which such engagement will meet is important to ensure that consultation takes account of international experience and that the company is required to take account of the results of consultation in the planning and implementation of mining operations.

Social and environmental packages which are supposed to benefit the community also need to be designed with community input so that they reflect both local and government priorities. More generally, there need to be processes in place to regularly review and update measures agreed and, as explained below, a forum for community concerns and complaints to be raised.

As explained above, the inclusion of a stabilisation clause in the Qara-Zaghan contract is another area of concern, preventing any new environmental, social and other protections brought in by GIRoA as it continues to reform legal frameworks from applying to the Qara-Zaghan project. This could put the population around the mine in a disadvantageous position, compared to the rest of the population.

There is also insufficient focus on human rights protections, particularly within the Qara-Zaghan contract.

Whilst the contract provides for environmental and social assessments and plans to be produced and approved, there is no similar requirement for human rights impacts to be assessed, nor for plans to be put in place to minimise and mitigate anticipated impacts. The importance of taking account of human rights risks from the outset is widely recognised. Under the Model Mining Agreement which is being developed by the International Bar Association, for example, there are provisions setting out the responsibilities of all parties with respect for human rights, and a specific requirement for *'an independent assessment of the potential for human rights impacts from the presence and activities of the project, and how the Company's policies, procedures, and practices affect the human rights of the population in the area of the Project'*.³³

Recommendations:

- *Operational, financial, environmental, social, human rights and cultural assessments and plans should be prepared, and reviewed at the same time to ensure that they are fully aligned.*
- *Contracts should provide for full engagement with affected communities from the outset and throughout the duration of the project, with measures to mitigate and minimise adverse impacts agreed with them along with any social packages.*
- *A suitable process to address community complaints should be set up.*
- *International standards and best practice on environmental protection should be incorporated, and public access to documentation provided to enable open and independent monitoring.*
- *Specific provisions should be incorporated with respect to the monitoring and accountability of company sub-contractors and consultants.*

Security

Security for both the Qara-Zaghan and the Aynak projects is the general responsibility of GIRoA, but the exact details are set out in separate agreements to be negotiated after the main contract has been signed, with no provision for their publication. **In an environment of ongoing conflict, the issue of who controls security around a valuable national asset requires specific consideration, as does the risk of human rights abuses by security forces**, it is vital that safeguards are agreed from the outset and included in the mining agreement. The parties should take account of international standards, including the Voluntary Principles on Security and Human Rights. Whilst the Principles do not address all risks associated with security, they do require companies to take important steps such as putting in place procedures to systematically record and report any credible allegations of human rights abuses by public security in their areas of operation, to urge investigations where appropriate and to take appropriate steps to prevent recurrence. Other standards

including the UNHRC Guiding Principles on Business and Human Rights should be incorporated, to ensure that best-practice on human rights protections is in place from the start.

Global Witness has previously investigated the risks associated with the use of state security forces to guard mines. Looking at major mining operations in Indonesia, for example, we highlighted the risk that, in conflict zones with weak or non-existent rule of law, security forces may demand payment from extractive companies for protection from armed groups or disgruntled local communities, and may be implicated in human rights abuses.³⁴ The contracts should provide for full transparency over all payments made by mining companies both to guard against such corruption and to help protect the reputation of both the mining companies and the country's security forces. More broadly, incorporating the OECD Due Diligence Guidance from the outset can help protect against minerals mined in Afghanistan becoming or being seen to be a source of conflict financing in the future.

Recommendations:

- *Security provisions should be in line with international best practice, with contracts incorporating appropriate principles and standards including the Voluntary Principles on Security and Human Rights and the UNHRC Guiding Principles on Business and Human Rights.*
- *Company payments should be transparent and monitored to guard against any off-record payments to security forces.*
- *Security agreements should be published so that the roles and duties of each party are publicly understood, potential risks can be identified and addressed as quickly as possible, and victims of human rights abuses by security forces know how and from whom they can seek remedy.*

Monitoring and accountability

Whilst the publication of the Qara-Zaghan contract in English is a major step forward, the fact that it is not currently available in Dari or Pashtu undermines the ability of the local community and civil society to access the terms, monitor their

implementation and raise concerns where agreed obligations are not fulfilled.

In addition, details of planned activities and social and environmental commitments are set out in other project documents such as the Exploration Plan and Feasibility Study. There is no provision to make these documents publicly available, creating a further obstacle to community and civil society monitoring. The company could, for instance, agree with the Ministry of Mines to avoid mining activity in specified areas to limit environmental and social impacts, but if this limitation is not made publicly available, groups on the ground will not be able to check whether or not the company complies with this obligation.

Under Article 22 of the Qara-Zaghan contract, the Ministry of Mines may assign up to five trainees to work with the company for limited periods to develop their professional expertise. This is a very positive provision which helps to build capacity at the Ministry (although it could benefit from further detail, particularly with regard to duration), strengthening the institution's ability to monitor mining projects in the future. At the same time, protections should be put in place to ensure that the independence of ministerial staff is not prejudiced through an overly close relationship with the company.

As with the Aynak contract, **there is no procedure in place under the Qara-Zaghan contract to address community concerns or complaints as they arise – a crucial step to avoid tensions building up, particularly in a country where conflict already exists and distrust in the government is high.** It

may be that a procedure is included within the Environmental and Social Management Plan detailed in the Feasibility Study, or as with Aynak that a separate 'grievance redressal mechanism' is being established and, if so, this information must be made publicly available. Under the contract itself, only the Ministry of Mines and AKNR can bring formal actions, so the local community would need to rely on the Ministry's willingness and capacity to raise a complaint on their behalf.

There is limited protection for third parties within the contract, the strongest provision being Article 37 under which the company is liable for injuries or damage to third parties caused by the negligence or carelessness of AKNR, its agents or subcontractors. However, this provision is weaker than it could be, since it means that the company will only be required to provide compensation where it is proved to have been negligent or careless, rather than being automatically liable for any damage resulting from its operations. The potential for drawn out and costly legal proceedings raises the risk that affected people may run out of time or funds before a judgment is made.³⁵ In other countries, much stronger protections are being brought in. In Uganda, for example, new legislation holds companies liable for '*pollution damage without regard to fault*'. A further issue is that there is no contractual requirement for dispute proceedings to be open and published, meaning that affected parties cannot observe proceedings or review the dispute settlements which could have major implications for them.

With regard to official monitoring of the Qara-Zaghan project, under Article 12, written notice is required before Ministry of Mines representatives (except the Health and Safety Inspectorate) can access the site. **As it stands, this provision could prevent the Ministry and other regulatory bodies from making unannounced spot checks, undermining the regulatory oversight function of such visits.**

More broadly, AKNR activities agreed under the contract could have adverse impacts unless there is clear oversight from the outset. Under Article 24, for example, AKNR is responsible for supplying and procuring energy for the project. This is a broad provision and there needs to be official oversight in place to avoid energy being sourced in a way which is detrimental, for example, by diverting a river for hydropower or by building a sub-standard power plant.

A further issue is company sub-contractors and consultants. Whilst AKNR is held fully responsible for their activities, sub-contractors are not obliged

to comply with the same provisions as AKNR (for example, with respect to employing Afghan personnel), nor is there any requirement for AKNR to monitor their activities so as to ensure that detrimental activities are addressed pre-emptively rather than after they have caused damage. The Aynak contract provision on sub-contracting has similar weaknesses, but it does contain a requirement for subcontractor records to be made available to Ministry of Mines inspectors – an important provision for monitoring which should be followed.

Recommendations:

- *Contracts should enable official inspections to be carried out without prior notice.*
- *Affected communities and civil society should have access to all project documentation required to effectively monitor how government and company obligations are undertaken.*
- *Open and transparent procedures should be established to address local concerns and complaints quickly and efficiently.*

Conclusion

Over the next two years, Afghanistan is set to continue awarding concessions and negotiating contracts which could have impacts for generations to come. At the time of writing, the contract terms for the Hajigak concession in Bamyan province – the largest unmined iron deposit in Asia – are being negotiated, and rights to six oil blocks in the Afghan-Tajik basin are about to be auctioned. Putting the right terms in place is crucial to ensuring that the Afghan people truly benefit from their country's natural resource wealth.

The Qara-Zaghan contract represents a positive advance in transparency, which is to be commended. However, the failure to publish other mining contracts in full is a serious concern, severely undermining the Ministry of Mines' public commitment to transparency and good governance. As future contracts are negotiated, it is crucial that they build on the Qara-Zaghan example, with full publication of the contract terms, supported by contractual provisions for publication of other key project documents, and for key terms to be made fully accessible to potentially

affected communities. To build trust in Afghanistan's emerging extractives sector, and enable commitments to be properly monitored, it is of fundamental importance that the Afghan people can see and understand the terms negotiated on their behalf.

Comparing Qara-Zaghan to the Aynak contract also highlights gaps in provisions for community engagement and mechanisms to deal with community concerns and complaints. Worryingly, there are also areas where Qara-Zaghan appears to be weaker than Aynak. For example, with international standards and environmental and social protections. As Afghanistan continues to negotiate new contracts, these terms need to be improved.

It is crucial that Afghanistan, with the support of its international partners, ensures that it learns from its own recent experiences and the experiences of other resource-rich, but conflict-afflicted countries, so as to ensure that contracts negotiated now provide a platform for a strong, stable and peaceful mining sector.

Detailed Recommendations

Global Witness recommends the following principles are applied in future concession contract negotiations:

Transparency

- Mining contracts should be made publicly available in all local languages as soon as practicably possible, with steps taken to ensure they are fully accessible to affected communities.
- Contracts should stipulate the publication of key project documents which provide details of planned activities and measures to minimise and mitigate anticipated social and environmental impacts.
- Contracts should provide for the publication of all information required for public monitoring and tracking of mining revenues including estimated and actual production rates
- There should be provision for mining company information, including corporate structures, related businesses and beneficial ownership to be made public and consistently updated.

Contract drafting, laws and standards

- International standards and best practice on each contractual area, from operations management to addressing adverse environmental, social and human rights impacts are identified and incorporated.
- Key international standards include the IFC's Sustainability Framework (particularly with regard to community impacts), the UNHRC Guiding Principles for Business and Human Rights, the IAIA guidelines and principles, the ICMM Sustainable Development Principles, the Natural Resource Charter, the OECD Guidelines for Multinational Enterprises and the OECD Due-Diligence Guidance for Responsible

Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

- Stabilisation clauses which serve to prevent advances in environmental, social, human rights safeguards from taking effect should be avoided.
- Drafting carefully reviewed to avoid ambiguities and errors which could undermine GIRoA's ability to enforce positive provisions, and which could lead to costly and time consuming between the contracting parties over interpretation.

Economic provisions

- To ensure that financial and economic benefits are fully realized, contracts should provide for details of anticipated revenues and costs to be made public.
- There should be sufficient time for the Government of the Islamic Republic of Afghanistan (GIRoA) to review assessments and plans, engage with affected communities on expected impacts and planned measures and fully evaluate cost estimates put forward for addressing impacts.
- There should be provisions for financial plans to be prepared and regularly updated, with details of company ability to meet projected costs independently verified.
- Financial protections should be put in place to ensure that compensation required for damage caused by mining operations can be addressed, including appropriate bonds and guarantees, with triggers and access procedures clearly laid out.
- Contracts should include provisions against corrupt activities and should allow for open and independent monitoring to guard against smuggling.
- As above, companies should be required to make their structures and beneficial ownership public, with provisions in place to minimise tax avoidance.

- Clear and enforceable commitments should be set out with regard to non-revenue benefits such as employments and training.

Social, environmental and human rights provisions

- Operational, financial, environmental, social, human rights and cultural assessments and plans should be prepared, and reviewed at the same time to ensure that they are fully aligned.
- Contracts should provide for full engagement with affected communities from the outset and throughout the duration of the project, with measures to mitigate and minimise adverse impacts agreed with them along with any social packages.
- A suitable process to address community complaints should be set up.
- International standards and best practice on environmental protection should be incorporated, and public access to documentation provided to enable open and independent monitoring.
- Specific provisions should be incorporated with respect to the monitoring and accountability of company sub-contractors and consultants.

Security

- Security provisions should be in line with international best practice, with contracts incorporating appropriate principles and standards including the Voluntary Principles on Security and Human Rights and the UNHRC Guiding Principles on Business and Human Rights.
- Company payments should be transparent and monitored to guard against any off-record payments to security forces.
- Security agreements should be published so that the roles and duties of each party are publicly understood, potential risks can be identified and addressed as quickly as possible, and victims of human rights abuses by security forces know how and from whom they can seek remedy.

Monitoring and accountability

- Contracts should enable official inspections to be carried out without prior notice.
- Affected communities and civil society should have access to all project documentation required to effectively monitor how government and company obligations are undertaken.
- Open and transparent procedures should be established to address local concerns and complaints quickly and efficiently.

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Buchanan House
30 Holborn
London
United Kingdom
EC1N 2HS
www.globalwitness.org