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A SHAKY FOUNDATION?

ANALYSING AFGHANISTAN'S DRAFT MINING LAW

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EXECUTIVE SUMMARY

Afghanistan is endowed with minerals that could be worth a trillion dollars.¹ Both the Afghan government and their international partners understandably hope these resources will fuel development and reduce dependence on foreign aid, and are working to encourage the growth of mining. But there is a grave risk that, as in many other conflict-affected states, the exploitation of natural riches will fuel insecurity and corruption – and in the end could do far more harm than good for the Afghan people, and the Afghan economy. If Afghanistan is to avoid this resource curse, an exceptionally strong legal and regulatory framework will be vital.

The foundation of that framework will be the Mining Law, a new version of which is currently being discussed in the Afghan parliament. Its impact will depend on how it is implemented, but the law will define most of the important mechanisms of mining governance in Afghanistan, and set the context for the rest. The points presented here are intended to be relevant not just to legal issues, but to the overall structure of resource governance.

The law has some important strengths (including some improvements over the 2010 law). These include provisions on transparency, community development and environmental protection. The law requires compliance with the standards of the Extractive Industries Transparency Initiative (EITI) and recognises the importance of impartial arbitration. The Afghan government and the Ministry of Mines and Petroleum (MoMP) deserve credit for these provisions, and have dedicated great effort to creating a law which they hope will attract investment while protecting Afghanistan's interests.

However, there are also aspects of the current version of the law that are a cause for concern, or which could at least be significantly strengthened. Some of these relate to actual content – like provisions for dispute resolution which could be applied in a way that excludes local communities. But many of the biggest questions relate to what the law leaves out – like the absence of detail on bidding procedures, the lack of a clear requirement to publish all contracts, or the lack of a clear prohibition on armed groups being involved in mining. While they may be inadvertent, these gaps could leave room for abuses if they are not addressed.

Our analysis highlighted the following areas. Of these, the first four are the most urgent: they both touch on some of the most serious concerns, and are difficult to adequately address in the Regulations or other laws.

>> In a highly conflict-affected country, there are no provisions to ensure mining does not create conflict, either by supporting illegal armed groups, or as a result of the actions of security forces protecting mining operations. Armed groups funded by minerals can generate enormous destruction – a danger which is clear from not just from places like the Democratic Republic of Congo (DRC), but from Afghan examples like the militia forces involved in chromite mining in Kunar province. A prohibition on armed groups benefiting from mining, and local consultation on security, would help.

>> There is little detail in the draft law on bidding and contracting procedures or on mining royalties and revenues (less than in the current law). Bidding processes are often abused to deprive the State of large amounts of revenue. The law should set out strong principles for fair, competitive and transparent bidding, like clear criteria for eligibility and equal treatment for all companies. The law should also require that not just royalties but *all* mining income, including taxes and fees, should be paid into a single, transparent account.

>> The law requires the largest Minerals Development Contracts to be published, but has nothing specifically requiring the publication of ordinary mining contracts and related documents – a step back from the government's welcome decision in 2012 to publish most existing contracts. Without published contracts, Afghans will have no way to understand if a particular mining deal is good or bad for the country and whether it is being properly implemented.

>> While the law has some welcome provisions for transparency (including for the first time a default presumption that documents will be non-confidential), a clear requirement to publish the real, beneficial ownership of companies applying for licenses would help prevent corruption and conflicts of interest. There are many examples of shell companies being used to avoid taxes or hide the award of contracts through corruption and undue influence.

>> The law could be interpreted to give companies an unlimited right to use water – potentially causing major environmental damage and putting thousands of livelihoods at risk. The current law has clearer protections against over-use.

>> The law requires environmental safeguards and community development measures, but only after a license is granted – it does not clearly require companies or the government to assess and take into account the concerns of local communities, or potential environmental and social impacts, when making a bid or deciding which bid to accept.

>> The new law requires employment of "Afghan nationals" – unlike the 2010 legislation. But it does not specifically require efforts to employ local communities in mining areas – potentially reducing their stake in a project and increasing the risk of conflict. The possibility that outside workers could be used in places like Hajigak has already caused tensions.

>> Articles in the law on resolving disputes and grievances around mining provide for independent arbitration, but do not clearly guarantee some important principles and safeguards like accessibility. Provisions splitting the costs of arbitration between the parties, for example, could potentially exclude poor communities affected by mining. Communities which are not able to resolve their complaints might instead turn to the armed opposition.

>> The law requires that Contracts be approved by a ministerial Commission, but independent scrutiny of mining could have been strengthened by a stronger recognition of the investigative and reviewing role of Parliament. Community monitoring of mining, and an independent advisory board of different stake-holders could also help reinforce scrutiny – for example by ensuring environmental and social plans were properly developed and carried out.

>> The law has articles on resettlement, compulsory purchase, and damage to land or property, but it does not set out many of the key principles which should govern its application on these points – like compensation for loss of livelihood as well as just the market value of land. This increases the potential for unfairness or abuses.

>> The new law mainly gives rights and compensation to *owners* of land, but not to legal occupants, even where they may have been legitimately settled on the land for many years. This could potentially mean that villagers renting their land get nothing if it is damaged by mining activity.

Some of these aspects of the law reflect fears that regulation or community engagement could allow MPs or local groups to hold projects to ransom, deter investment in mining and impede economic growth. But good governance should be seen not as a barrier to minerals-led development, but as an essential pre-condition for it – for four reasons. First, the damage that resource-fuelled conflict and corruption can do to an economy normally vastly outweighs the profits that the minerals generate: places like eastern DRC have seen plenty of extraction, but very little development. Afghanistan does not need mining that comes at that cost.

Second, the threat to a legitimate mining project comes much more from too little governance than too much: community engagement for example costs much less than demonstrations or rocket attacks. Third, governance measures can and should be designed in a way that addresses legitimate concerns of mining companies about abuses or bureaucracy, without diminishing their effectiveness, as the recommendations below recognise. Finally, less governance is likely to deter rather than attract the most responsible businesses – and those are the kind Afghanistan needs.

In principle, the regulations associated with the law could address some of the concerns about it. But they cannot contradict it or add entirely new provisions, and once in place, they are much more easily changed than the law itself. There is a strong argument for making sure international standards and basic principles of good governance are set out in law wherever possible.

In its current shape the Mining Law, despite its positive aspects, represents a missed opportunity to fully incorporate the best possible protections against conflict, corruption and loss of revenue into legislation. With so much riding on the development of mining, and so many dangers, that is something Afghanistan simply cannot afford. The country's history has many examples of measures pushed through in response to short-term pressures, which carried major long-term costs. Now should not be one of those times. The Afghan government and parliament can and should act to address the weaknesses in the law, preserve its strengths, and build a solid foundation for the future.

The analysis was largely based on the work of legal experts from the University of Essex Business and Human Rights project (EBHR) carried out in August and September 2013. Additional analysis was carried out by the Vale Columbia Center on Sustainable International Investment, a joint Center of Columbia Law School and the Earth Institute at Columbia University, and by Lien De Brouckere of Global Rights. Integrity Watch Afghanistan (IWA) and members of the Civil Society Natural Resources Monitoring Network (CSNRMN) also gave considerable assistance and expert input. Global Witness gratefully acknowledges the valuable assistance provided by EBHR, the Vale Columbia Center, Global Rights, IWA, and the CSNRMN.

ANALYSIS

Key issues raised by the analysis of the law are set out below, divided according to thematic areas. This analysis did not aim to cover every possible area of concern. Many minor points were left out, as well as others where significant concerns existed but could appropriately be dealt with in the regulations. While there was a limited review of other relevant legislation like the Environment Law as part of the research, this was not exhaustive.

Suggested amendments are attached (mainly in the Annex, although some are included in the main text). These are not meant to be definitive: in some cases there may be other ways of addressing the concerns raised in the analysis, or at least other wordings which would achieve similar effects. But the amendments are intended to provide a possible wording to support MPs and the Afghan government in their review of the law, and an illustration of how the issues covered below could be remedied.

By the time this report is published, some amendments to the version of the law on which the analysis is based may have been passed by the Natural Resources Commission or other Commissions of the National Assembly. As these changes may or may survive to the final version of the law, the report makes no effort to take them into account.

The analysis in this report is based on the "Unofficial English Language Version" of the Mining Law, dated May 26, 2013. (The translation uses the title 'Minerals Law', but the original is 'Mining'.) The text is marked as a 'Draft for Review', but official sources described it as the English language version of the text as it was submitted to the Afghan parliament. This draft appears to be the same (apart from a few translation errors) as a Dari version of the law obtained from parliament.

Both are available to download at the Global Witness website. There were some questions around the text of the law. There are a number of apparent inconsistencies between the English and Dari versions, as well as other errors (Article 90, for example, refers to an Article 87, but Article 87 in the current numbering is on a totally unrelated topic). While not serious in themselves, these issues complicate the job of analysis, and Parliament will need to act to resolve them.

A COMMUNITY CONSULTATION, CONSENT, AND GRIEVANCE RESOLUTION

The law should strengthen safeguards for the rights of local communities and land-owners in disputes with mining companies.²

1. Fair dispute resolution

A strong, independent mechanism to recognise and resolve grievances around mining can be enormously important in preventing conflict between local communities and mining companies. Companies may have concerns that such mechanisms could be misused, but if the process is well-structured that risk can be minimised. And the greater danger

must surely be that communities that are denied a fair process will turn to strikes, disruption of mining activity, or even the alternative, easily available in many parts of Afghanistan, of direct violence against the mining companies and the government that is perceived as supporting them.

While the law deserves positive recognition for setting out a requirement for dispute resolution, the relevant articles have some potential weaknesses. Firstly, provision for dispute resolution varies according to individual contracts. Article 92 covers disputes between a license holder and either the State or a "non-State actor," and sets out provision for arbitration according to whatever is specified in a contract. But it does not set out in law the basic principles that are needed to ensure such arbitration is fair and accessible to local communities. Community members are unlikely to be parties to the contract – and therefore have no direct mechanism to enforce its provisions, and can potentially be excluded from attending hearings or submitting information. They are also unlikely to have been part of the negotiations which determined the dispute resolution mechanism in the first place.

If no mechanism is mentioned in a contract the law allows arbitration by an expert or a Dispute Resolution Panel of "impartial/independent experts," normally including a government representative. The recognition of the need for independence and impartiality is welcome. Again, however, there is no other mention of the basic principles these mechanisms should follow. The law could be strengthened without need for extensive changes by referring to well-established international best practice on grievance resolution, as set out in documents like the UN Guiding Principles on Business and Human Rights.³

A particular concern is the provision that "expenses of Panel members shall be shared as agreed by the Parties," which provides no guarantee that access to a mechanism would be affordable for poor communities in mining-affected areas. A process that is too formal or complex could also put these groups at serious disadvantage. (Mediation is often a useful model precisely because it is more likely to be familiar and accessible.) The law would be stronger if it more clearly required that there should be no barriers; to legitimate access to dispute resolution.

The final recourse of parties to a dispute is to one of four options: the Afghan government's Financial Dispute Resolution Commission; the International Center for Specific Investment Disputes (ICSID); the United Nations Commission on International Trade Law (UNCITRAL); or "an authorized Afghan court or any other court or arbitration authority to which the parties have agreed." In principle the fourth option, with the need for agreement from the parties, provides a safeguard here, but it is one that again may well be difficult for poorly-resourced communities to use effectively. The other mechanisms all risk being inaccessible and opaque for local communities: indeed, even governments have had serious concerns about some of them.⁴

A broader issue here is that arbitration can usually only be carried out with the consent of both parties. As it is drafted, the law could be read as simply providing a list of non-binding options. At the same time, if the state and a license-holder did go to arbitration, it would be important to ensure guarantees that the process would be done in a transparent and fair way, whatever was in the contract.

Finally, it could be useful to have provision allowing for the creation, if needed, of an ombudsman for the extractive industries – an independent official responsible for investigating and resolving complaints from citizens.

REMEDY: at a minimum, redraft Article 92 to clearly set out the key principles and processes of an equitable and effective mechanism to address disputes and grievances, while leaving the detail to the regulations. Include a provision to allow the creation of an ombudsman.

SEE AMENDMENT A FOR SUGGESTED TEXT OF AMENDMENT

2. Consultation

Consultation, especially with local communities, is mentioned several times in the law and can also be very important to win local support and prevent conflict – but this benefit can easily be lost if it is done badly or too late in the process. The law would be strengthened if it guaranteed the basic principles needed to make sure consultation genuinely reflects the interests and concerns of communities affected by mining, and takes place in some form before an area is even designated for mining activity⁵.

REMEDY: Add an article setting out the requirement for fair and accessible mechanisms for community consultation, and a requirement that communities be informed of plans for mining activity. Require some level of consultation with communities at the earliest stage, when an area is designated for mining activities.

SEE AMENDMENT B FOR SUGGESTED TEXT OF AMENDMENT

3. Community impacts: development and environment⁶

The environmental, social and economic impact of mining on local communities can be either positive or harmful, and the law will do much to determine which. It tries to do this most directly through provisions for Environmental and Social Impact Assessments (ESIAs) and Environmental and Social Management Plans (ESMPs) (Article 88), and Community Development Agreements (CDAs) (Article 91).⁷ These are important and welcome measures, but could be stronger if some possible weaknesses were addressed. These include:

- a) Many mining and petroleum laws have provision for local communities to benefit from mining not just through a Community Development Agreement but by sharing a small percentage of the ongoing proceeds of the mine to community projects (Liberia is an example). The law could allow a similar arrangement.
- b) ESIAs and ESMPs are normally carried out by consultants paid for by companies – but this raises a serious issue of possible conflict of interest. Requiring approval of consultants by an independent advisory board could help solve this problem (see Oversight section below).
- c) The law provides that community consultation and environmental impact assessment are carried out and mitigation plans submitted after an exploitation license is granted – a change from the 2010 law (see Articles 30.2 and 31.4). This means that environmental issues or the concerns of affected communities cannot play any part in the assessment of a bid and decision whether or not to grant a license, and reduces the incentive for companies to address these issues in their plans. There are legitimate concerns about the fairness and practical challenges of asking a large number of bidding companies to consult communities in depth or carry out full impact assessments before a license is granted. But a bid cannot be properly judged without an adequate assessment of its likely impacts and the views of local inhabitants – and granting a license without any local discussion could easily create conflict.

A potential solution would be to require consultation and assessment before a license was granted, but at a less extensive level. This would be in line with several other countries: in South Australia, for example, mining laws require a "Program for Environment Protection and Rehabilitation" before full exploitation begins, but a less in-depth "Declaration of Environmental Factors" before this.⁸ Other countries (for example Papua New Guinea) have provision for "Development Forums" prior to granting a licence, which include consultation with various stakeholders.⁹

d) An ESIA or impact assessment is not required for Exploration activities. It is reasonable not to demand a full ESIA for minor work, but Exploration can still cause significant damage: there is always a strong case for requiring planning and assessment that is appropriate to the proposed activity. (Some assessment is required in the law for a Reconnaissance License, but there is nothing to indicate this covers subsequent Exploration work.)

e) It is not clear what happens if a local community does not agree with a proposed CDA or ESMP, or if they are not properly implemented (although this could perhaps be grounds for revocation of a license under Article 33). Developing CDAs only "in consultation" with local communities could run counter to the idea of the CDA as a binding agreement negotiated between these communities and the company. Article 59 does indeed state that 'relevant community representatives' have to endorse a CDA before mining can start – although it is not clear who these representatives are. The law does not provide any technical support to communities to negotiate these agreements – a process that can require significant time, resources, and technical knowledge. There is also no requirement for CDAs to be coordinated with existing plans (for example from local Community Development Councils), or for them to ensure ethnic balance and take into account the interests of women. Some of these issues could be covered by regulations, but greater clarity in the law would be useful.

f) Rehabilitation and closure plans are mentioned in the Law (for example in Article 52.1.4) but with little detail of their contents. The law defines rehabilitation as restoration of land "as far as practicable to its natural state or to a safe condition which was prior to mining operations" – but 'safe conditions' could mean something much less than the pre-existing state of the land. While Article 90 provides for a financial guarantee from a license holder to ensure their compliance with environmental and social obligations, including rehabilitation, the reference it contains to Article 87 appears to be wrong. Clear guidance is needed on the guarantee required, how the amount will be calculated and how the government may draw on the funds.

REMEDY: Require an assessment of environmental and social impact before grant of license that is limited enough to not impose a major burden on companies but which makes it possible to adequately assess a bid based on the impact it would have on communities and the environment.

Add similar amendments for Community Development and consultation – so that they can influence a decision to accept or reject a particular bid without imposing an unreasonable burden. Within the regulations, integrate Community Development Councils or local shuras (community councils) into consultation and CDA planning, and clarify rehabilitation requirements and definition.

SEE AMENDMENTS B AND G FOR SUGGESTED TEXT OF AMENDMENTS

4. Resettlement

The law's provisions for the resettlement of people from mining areas (Article 40) state that resettlement should be a last resort – a positive provision. However, they only require that a license holder 'consult' with local populations, and there is no protection set out if they do not want to accept the terms offered. If not corrected, this could lead to forced resettlement of local populations without adequate consultation or compensation – and fuel major conflict as a result between local communities, the state whose security forces are used to move people out of mining areas, and mining companies. This in turn could strengthen insurgent forces, disrupt mining, and sharply reduce income to the Afghan treasury.

REMEDY: Amend Article 40 to set out the basic principles of a clear mechanism with provision for oversight and appeal.

SEE AMENDMENT C FOR SUGGESTED TEXT OF AMENDMENT

5. Land acquisition and use

Compulsory acquisition is sometimes necessary for mining activity, but must be used carefully if it is not to create anger. The law sets few limits on the right of the Ministry of Mines to take land for mining use. If the landowner does not consent, under Article 36.4 the MoMP may acquire the land in exchange for a rental fee and compensation of the landowner. The land law may have relevant provisions on this issue, but they are not referenced. There is no guarantee that the landowner may withhold consent on reasonable grounds, or appeal the taking of his land. Again, forced acquisition of land could easily fuel significant conflict if it is done without adequate recognition of the rights of landowners.¹⁰

REMEDY: Redraft Articles 35 and 36 to provide the basic principles of equitable mechanism for Compulsory Purchase, with a right of appeal (as with resettlement). Make clear that proof of right to use land is required before mining activities begin.

SEE AMENDMENT D FOR SUGGESTED TEXT OF AMENDMENT

6. Damage to land or property

Where mining activities damage property or land, the law rightly provides for compensation – a positive provision. However, Article 39(2) leaves appeals about the value or payment of compensation to undefined 'experts' and then to the courts. This may not be enough protection for land owners or occupants – especially given that the Afghan court system can at times be inaccessible, slow, and vulnerable to corruption.¹¹ People affected by mining who feel they do not have any way to get justice may turn to courts run by the Taliban or other armed groups, worsening conflict and further distancing Afghans from the government.

In addition, damage is not clearly defined to include all the potential economic harm a land-owner or occupier could face as a result of mining. If it is limited only to the market value of the land, this would leave out many important costs like loss of earnings. This is against best practice in several countries, including Australia, Ghana and Uganda.¹² The liability of license holders for this damage should also be made clear – along with the liability of parent companies where a license holder is unable to pay.

REMEDY: Redraft Article 39(2) to set out the basic principles of an independent mechanism for apportioning and paying compensation, and for appeals. Clarify what can be defined as damages for the purposes of compensation, as well as the liability and license holders and of their parent companies.

SEE AMENDMENT E FOR SUGGESTED TEXT OF AMENDMENT

7. Rights for land owners and occupiers

The law generally only assigns rights only to land owners, leaving land occupants, who may have been legally settled in an area for many years, with much less protection. There are of course reasonable concerns in the Afghan government about false or frivolous claims, and fears that people who have long left an area could return solely to receive compensation.¹³ But it should be possible to address this concern while safeguarding the legitimate rights of occupiers.

REMEDY: Amend all relevant Articles to refer to land owners and lawful occupants. (If necessary, this could be made to read 'lawful occupants having established or regular residency there) (Articles 36, 37, 39, 46, 52, 60, and 66), with regulations providing further measures to assess eligibility and avoid fraud.

B BIDDING AND AWARDING OF CONTRACTS

The law contains very few details on the bidding process – missing an opportunity to set out in law basic principles which are important to prevent serious abuses.

1. Transparent bidding as a matter of law

The law leaves procedures for bidding almost entirely to the regulations. It misses the opportunity to fix in law basic safeguards essential to help prevent abuse of the bidding process, maximise revenues, and ensure the best possible outcome for local communities and the Afghan people at large. Given the importance of transparent bidding to preventing corruption, there is a strong case for including these in the law itself, rather than the regulations.

It is also important that the assessment of a bid should take into account all costs and benefits associated with a project. The costs to the government of providing security for mining projects, for example, are often not taken into account in analysis of costs and benefits (indirect economic benefits should also be considered). Finally, it could also be useful to have a provision to clearly require the human rights, environmental and community relations record of a company to be taken into account in the assessment of a bid.

REMEDY: Amend Article 19.4, and add an Article 19.5, as follows:

19.4 The regulations to this law will establish detailed procedures for transparent and competitive bidding, including:

- a) Clear and equitable rules and procedures for conducting the bidding process and choosing a winning bid, to be established in advance of any bidding process and applied equally to all applicants,
- b) The rights and obligations of each party,
- c) Clearly defined pre-qualification and evaluation criteria;
- d) Provision to forbid preferential treatment by any Afghan government body, or individual official, which might unfairly advantage one bidder; and to ensure equal access by all qualified bidders to available information, including geological information gathered by the state;
- e) Provision for the publication of all bid documents immediately following the assessment of the bids by the Ministry of Mines, and at least three weeks prior to the consideration of the Ministry's proposal by the Commission;
- f) Provision for the Ministry of Mines to provide a timely written justification for its decisions, including granting a license and disqualifying an applicant;
- g) Provision for the creation of publicly-available model contracts as needed to provide a basis for license negotiations.
- h) Evaluation of bids based on a comprehensive investigation of their advantages and disadvantages, including social, economic, and environmental issues, the views of relevant public agencies, impact on local communities and risk of generating conflict, and other relevant factors. The assessment will include a broad cost-benefit analysis, including security, environmental and social costs associated with mining but borne by the state. The prior record of a legal or natural person with regards to commercial activity and reliability, human rights, the environment, and community relations will also be a factor in the assessment of any bid they make for a mining license.

19.5 Any Afghan official who acts in a way which gives or is intended to give unfair advantage to a bidder for a license shall be punishable by criminal prosecution and imprisonment of up to five (5) years.

C ENVIRONMENT

Environmental protections could benefit from greater clarity, especially on the role of NEPA and on the unrestricted use of water by mining companies – potentially a dangerous source of conflict.

1. Use of water by mining companies

The Law gives License Holders the right to use water as “as required” for their mining activities (Articles 51.9, 58.7, 64.6, and 71.6). Mining operations can use huge quantities of water and cause serious pollution (especially where slurry pipelines are used to transport ores) – potentially causing great harm to local communities and the environment and fuelling violence. Water is already a major source of conflict in Afghanistan.¹⁴ Major water shortages in agricultural and urban areas are already a significant worry with the Aynak project.¹⁵ It is unclear whether other environmental provisions would address these problems.

REMEDY: Include stronger protections for the rights of other water users, and make clear that a water use plan must be created and followed.

SEE AMENDMENT F FOR SUGGESTED TEXT OF AMENDMENT

2. Environmental protection

Mining activities can cause major environmental harm, and the law has some welcome provisions intended to address this. Article 114, for example, gives the MoMP the power to act to halt and remedy damage to water reservoirs caused by the license holder's activities. However, if the Ministry of Mines takes the lead in preventing and monitoring harmful environmental impacts, it could create perceptions of a conflict of interest with its role in promoting mining. For this reason it is worth making clear that NEPA retains its independent power to inspect. (On the other hand, environmental damage outside water pollution and damage to community health is also not currently included in Article 114, and could usefully be added.)

REMEDY: Add a provision to explicitly recognise the independent monitoring role of NEPA. As suggested above, add an explicit statement that a preliminary Environmental and Social Impact Assessment – appropriate to the level of mining activity and the need to make an accurate assessment of a bid, but not so burdensome as to deter serious bidders.

SEE AMENDMENT G FOR SUGGESTED TEXT OF AMENDMENT

D TRANSPARENCY

The law has some positive provisions on transparency, but would be greatly strengthened if it required publication of contracts and of the true, 'beneficial' ownership of a license holder or applicant – two basic and vital measures against corruption. It would also be useful to clarify what documents will be treated as confidential.

1. Confidentiality

The law sets out a clear presumption that information and reports shall be considered as non-confidential unless specifically prescribed otherwise (Article 111), requires license holders and the MoMP to participate in the Extractive Industries Transparency Initiative (Article 99), and requires the publication of contract terms

and conditions plus any ancillary documents for large Mineral Development Contracts (Article 23.6). However, ordinary exploitation, exploration or other contracts are not explicitly required to be made public – a very noticeable omission given the government made a commitment to publish all contracts in 2012. Without published contracts, Afghan MPs, civil society and citizens will have no way to understand if a particular mining deal is good or bad for the country and whether it is being properly implemented. Contract publication is the norm in many countries, including the United States – without any apparent harm to the national interest.¹⁶

In addition, Article 111 states that all “technical, geological and financial records or reports” shall be treated as confidential. This is not unusual, but should be carefully defined so as not to include information that is legitimate and necessary for proper public and parliamentary oversight of mining. There is also no explicit requirement that proper accounts be kept, and the right of the government to verify accounts for mining operations (set out in Article 83.4) should be more clearly asserted.

Finally, while the English version of the law refers to confidential information being made public “ten (10) years after their creation and one (1) year after expiry or termination of the license,” (presumably whichever is sooner) the Dari version of the law appears to only allow for publication ten years after expiration – a considerably less open standard.

REMEDY: Amend Article 18 to cover publication of contracts, and amend Article 111.2 to clarify the documents that will be non-confidential. Add provision on accounting standards and access. Amend the Dari version of the Article to allow for publication a year after expiration of a contract.

SEE AMENDMENT H FOR SUGGESTED TEXT OF AMENDMENT

2. Beneficial ownership

While it has some positive provisions on transparency, the law does not explicitly require owners to reveal who are their real, ‘beneficial’ owners. Experience from other countries shows that complex arrangements are often used to obscure who really controls a company and benefits from its activities – leading to serious corruption risks such as politicians awarding contracts to corporations that they secretly control.¹⁷

REMEDY: Add a requirement that companies publish their beneficial ownership.

SEE AMENDMENT I FOR SUGGESTED TEXT OF AMENDMENT

3. Supply chain transparency

The ability to track where minerals have come from along the whole supply chain – from the mine to the factory to the final user – can be of great value to efforts to prevent illegal armed groups benefiting from mining. Supply chain transparency is already being used in other countries affected by conflict to allow local and international traders to avoid buying minerals from mines under the control of local militias or other armed groups.

REMEDY: Add a requirement for mineral miners, processors and trader to follow supply chain transparency and due diligence standards appropriate to their activity.

SEE AMENDMENT J FOR SUGGESTED TEXT OF AMENDMENT

E ELIGIBILITY AND TRANSFER OF OWNERSHIP

While the law has some good provisions on eligibility and transparency, there are some weaknesses in its safeguards excluding public officials from involvement with mining companies, and in the requirement for transparency about ownership of mining companies.

1. Eligibility to hold a license

The law has positive provisions to exclude certain people from having a license (Article 16.2), but there are some potential loopholes which would be worth fixing. Under Article 16.2.5, individuals from the categories named in the Mining Law **but** not named in the shorter list found in Article 151 of the Afghan Constitution (including MPs and most judges) are only prohibited from having a **direct** interest in companies that have a mining license. Convicted felons could also hold an indirect interest, and there is nothing to stop any of these individuals receiving other indirect benefits from companies that hold a license. The law should also exclude members of informal armed groups (as well as formal security personnel) from mining licenses.

REMEDY: Amend to clarify eligibility, including for those convicted of crimes.

SEE AMENDMENT K FOR SUGGESTED TEXT OF AMENDMENT

2. Transfer of ownership

The rules on transfer of ownership or control of a license (Articles 26 and 29) contain some positive safeguards, but it would be worth more clearly closing any loophole for licenses to be held by people or companies who should not be eligible to be license-holders.

REMEDY: Make it a clearer requirement for persons or companies who purchase or take over a license to meet the same requirements as the original owners.

SEE AMENDMENT L FOR SUGGESTED TEXT OF AMENDMENT.

F SECURITY

The law is silent on security issues, but there is a real danger of mining supporting illegal armed groups.

1. Security and armed groups

Security is crucial to ensuring mining companies are able to conduct mining operations, but extensive experience from many countries shows the danger of mining fuelling conflict and funding armed groups – causing huge damage and suffering.¹⁸ The danger in Afghanistan is clear from examples like the illegal mining carried out by Afghan Local Police forces in Khas Kunar – forces which have been accused of human rights abuses and which have created tensions between local communities.¹⁹ Mining companies bringing in security forces from outside could also provoke a violent reaction if they commit abuses against the local population. To some extent security issues are dealt with in other laws, but given the continued risk of armed conflict in Afghanistan, it is worth directly addressing the special concerns relating to mining. As a minimum it could require security forces to operate according to the Voluntary Principles on Security and Human Rights.

REMEDY: Add a new article 42 (and relevant definitions in Article 3) as follows:

ARTICLE 42: MINING AND SECURITY

(1) Security for mining operations will be provided in strict accordance with the Voluntary Principles on Security and Human Rights. Failure to comply with the Voluntary Principles by security forces associated with mining operations and under the indirect or direct control of a license holder, including involvement in human rights abuses or other serious crimes, will be grounds for revocation of a license unless effective redress and measures to prevent re-occurrence are taken within 30 days. Repeated infringements shall be grounds for revocation of license.

(2) Formal armed groups, including any personnel of the Ministry of Interior, Ministry of Defence, or National Security Directorate, shall be forbidden from any involvement in mining activities or trade in minerals, with the exception of providing security in a strictly regulated manner to be set out in the Regulations to this law. Informal armed groups, including the Afghan Local Police and other community-based defence forces, shall be forbidden from involvement in, or benefiting from, mining activities in any circumstances, including through trade in minerals or provision of security. Members of informal or formal armed groups who infringe this directive will be liable to a fine or imprisonment of up to 5 (five) years.

(3) Mining companies and the Afghan Ministry of Interior will consult with local communities on arrangements for security around mining, in order to avoid conflict while guaranteeing the safety of mining operations.

ARTICLE 3: DEFINITIONS

Add definitions for Informal armed groups and formal armed groups

G OVERSIGHT

Oversight is concentrated in the Ministry of Mines, but the role of both local communities and the National Assembly could be strengthened to provide greater independent scrutiny. At the same time some of the Ministry's own powers to inspect mines could usefully be clarified and reinforced.

1. The National Assembly

The National Assembly could play a significant role in oversight and prevention of corruption. There are concerns in some quarters about the potential for abuses if MPs are able to entirely block a contract, and parliamentary approval of ordinary mining contracts is not strongly supported by international precedent – but their scrutiny of the mining sector is legitimate and important to prevent abuses.

Under the 2013 draft, the MoMP is empowered to develop policies with no requirement to involve any other public authority in this process. (Art.7.1.1), and there is no longer any explicit mention of the parliament reviewing MoMP reports. Under the 2010 Law (Art.16), an endorsement by Parliament was required for the implementation of very large-scale mining contracts. Also, under the 2010 Law (Art.25) an agreement of the National Assembly was required for the exploration and exploitation of radioactive material.

REMEDY: Amend the Law to provide for stronger Parliamentary scrutiny of policies on the development of the mining sector, and to require the MoMP to cooperate with oversight practices and procedures of the National Assembly. Allow parliament to scrutinise and delay, but not finally block, larger contracts.

SEE AMENDMENT M FOR SUGGESTED TEXT OF AMENDMENT

2. Advisory board

An independent advisory board made up of representatives from government, civil society, local communities, business and experts could play a very useful role in providing support and advice to the Ministry of Mines from a full range of different viewpoints. The basis for such a body in fact already exists in the Extractive Industries Environmental and Social Advisory Board (EI-ESAB), although its membership would need to be somewhat expanded – alternatively a new body could be created.

One role in which such an advisory board would be useful would be to ensure the independence and quality of the ESIA process. There is always a risk of a conflict of interest as a result of the ESIA consultant being paid by the company that is applying for a license: an advisory board could be used to assess and approve the independent consultants who would conduct the ESIA, and could also help in assessing the result of their work. They could perform a similar role in selecting auditors and reviewing their work.

REMEDY: Give a reinforced advisory board – either the EI-ESAB or a new body – formal recognition in the law, with a brief description of its role.

SEE AMENDMENT G FOR SUGGESTED TEXT OF AMENDMENT.

3. Community monitoring

Bringing communities into the monitoring of mining activity can be an effective and efficient way to strengthen oversight of the sector and local trust and support. This especially applies to environmental and social plans and Community Development Agreements.

REMEDY: Incorporate a formal role for community monitoring into the law, through the provisions on Community Development Agreements.

SEE AMENDMENT B FOR SUGGESTED TEXT OF AMENDMENT.

4. Duty to act in the public interest

The 2013 draft no longer requires the MoMP to fulfil its functions 'in the public interest' and to ensure that the mineral resources of Afghanistan are exploited 'in the most efficient, effective and timely manner' (as was required by Art.5 of the 2012 Law). While not necessarily a major issue, it provides an important context for interpretation of the law and the actions of the MoMP.

REMEDY: Amend article 6.1 to re-establish the requirement that MoMP must fulfil its functions 'in the public interest' as follows: 6.(1) The Ministry of Mines and Petroleum is, in accordance with this the provisions of this Law, the authorized agency to regulate mineral activities in Afghanistan, and shall do so in the public interest to ensure that the mineral resources of Afghanistan are investigated and exploited in the most efficient, effective, sustainable and timely manner for the national interest.

5. Inspection powers of the MoMP

There are reasonable concerns that the MoMP should not be able to act arbitrarily in its inspection and control of mining activities, but the law could potentially be interpreted in a way that prevented the Ministry exercising effective oversight. Article 7.2 for example prohibits disruption of mineral activities while conducting investigations, and could be interpreted to prevent inspectors arriving without notice and effectively examining mining activities. Nor can they suspend mining activities even where there is imminent danger to workers or to the environment. Similar concerns apply to the work of NEPA.

REMEDY: Amend the law to ensure that any authorised official of the MoMP or NEPA may access the mining area without a warrant to conduct check-ups and to inspect records with no advance notice, but specify reasonable limits to prevent abuses – as follows:

Article 7: Main Duties and Authorities of the Ministry of Mines and Petroleum

(3) The authorized official may access the site at any reasonable time without warrant or permission from the license holder, but must not disrupt the mineral activities more than is strictly necessary to conduct his investigation and carry out the activities stipulated in Paragraph (2) of this Article.

(4) Authorised officials of NEPA will have the same powers to enter and inspect a mining area in relation to environmental matters falling within their remit.

H FINANCIAL AND TAX PROVISIONS

Financial and tax-related measures are very important to prevent fraud and ensure there is the greatest possible benefit to Afghanistan from mining operations, but the law is largely silent on them.

1. Royalties and valuations

It is common for mining laws to set out basic rules to ensure royalties are paid based on the full and fair market value of minerals extracted. A fair mechanism, set out in law, helps to ensure the value of minerals is not mis-represented in order to unfairly reduce or increase the amount of royalty payable to the government.

REMEDY: Strengthen the provisions of the law on royalty payments in Article 83 with standard language to guarantee an accurate and fair valuation of extracted minerals.

SEE AMENDMENT N FOR SUGGESTED TEXT OF AMENDMENT

2. Payments and resource funds

The Law has a welcome provision in Article 83 to ensure royalties are all paid into a single, easily controllable treasury account, making it more difficult to divert and hide these funds. However, it would be useful to broaden this so that not just royalties but *all* income from mining went into this single account, and that both payments and withdrawals should be public. Collecting all income in a single transparent account will further facilitate accounting and lower administrative costs – with only one point in, and one point out, for all mining income.

There could be a case for turning this account into a resource fund (or Sovereign Wealth Fund), which would act as a vehicle to invest and manage the wealth generated by natural resources, following the example of Norway and many other countries. If this were done, a separate law would be needed to set out in legislation the structure and operating rules of the fund. To make sure the fund was not misused, it would be essential for this to include key principles of best practice – like the Santiago Principles.²⁰

REMEDY: Add a new Article 84 to require all payments from mining to be made to a single transparent account. Refer to a potential resource fund but leave the substance to further legislation.

SEE AMENDMENT O FOR SUGGESTED TEXT OF AMENDMENT

3. Debt to Equity Ratios

Companies have sometimes used “thin capitalization” to avoid taxes – that is, they have borrowed heavily to invest in the project rather than raised money directly from investors, and then been able to count the interests payments as an expense to reduce their liability for taxes. For this reason a debt-to-equity ratio provision is often included in legislation or regulation for mining. (Examples include the USA, Australia, Canada, Chile, Saudi Arabia, and Malawi.)²¹

REMEDY: Add a new article 86 as follows:

86. Equity ratios

The ratio of loan capital (including debt taken with affiliates and with any legal or natural person) to paid-up equity capital must be at all times not more than 3:1. All loan capital shall be procured by the license holder on such terms and conditions to be approved by the Bank of Afghanistan, which approval shall not be unreasonably withheld.

I LOCAL PROCUREMENT

The law contains positive provision for Afghan procurement and employment, but it could be strengthened further by requiring first preference to be given to local communities.

1. Strengthening local procurement

The law contains a positive provision on local procurement in Article 110, including a requirement for employment of Afghan nationals – an important point given the potential for conflict over the use of foreign labour.

However, there is nothing requiring use of labour or goods specifically from mining-affected communities. Importing labour from other districts or regions of Afghanistan could create a major risk of conflict. In Siadara for example, local community members said they would have no choice but to resort to violence if workers for the local mine were imported from Panjshir.²²

It could be worth addressing a few further points. The requirement for 100% employment of Afghan nationals is somewhat unclear (it contradicts Article 97, for example) as well as probably difficult to enforce in the initial stages of exploitation. In addition, the requirement that local goods and services be "substantially equivalent" to foreign goods could actually provide a way for license holders to avoid buying locally. Finally, it is difficult to enforce these provisions without reporting requirements, which do not exist in the law.

REMEDY: Amend Article 110 to strengthen the obligation for companies to train and use workers, goods and services from mining-affected communities, and address other potential weaknesses in local procurement requirements.

SEE AMENDMENT P FOR TEXT OF SUGGESTED AMENDMENT

J EXISTING CONTRACTS

A few of the most important parts of the law should be applied to existing contracts in order to ensure transparency.

1. Applying key principles to existing contracts

Under Article 106 of the law existing contracts will continue to be regulated under the law in force at the time they were signed. This is not an uncommon arrangement to protect license-holders from unpredictable changes in the law, but an exception should be made for the most important basic principles, especially around transparency, dispute resolution and security. In addition, these provisions should be extended to other extractive industry operations, for example in the oil and gas sectors.

REMEDY: Amend Article 106 to make an exception so that provisions on transparency, publication of contracts, and dispute resolution should apply to all license-holders, regardless of when the license was obtained.

SEE AMENDMENT Q FOR TEXT OF SUGGESTED AMENDMENT.

ANNEX ADDITIONAL SUGGESTED AMENDMENTS

AMENDMENT A - Dispute resolution

Amend Article 92 and split it so dispute resolution for communities and companies are separate; amend Article 3

Article 92: Dispute Resolution (communities and citizens)

92.1. The government of Afghanistan shall, in addition to the normal judicial channels, maintain non-judicial dispute resolution mechanisms that will enable individuals, communities and other non-State actors affected by mining activities to access an effective remedy. The structure of the mechanism(s) will be detailed in the Regulations, and shall be established in accordance with relevant provisions of the UN Guiding Principles on Business and Human Rights, in order to provide a recourse that is: legitimate, accessible and affordable to all, fair, independent, impartial, transparent, timely, and invested with effective authority and capacity.

92.2 Companies responsible for Small-scale mining, Exploration or Exploitation activities shall maintain channels of communication that allow communities or individuals which may be affected by mining operations to contact with a minimum of delay personnel of an appropriate seniority and position to respond to their concerns or requests, in order to facilitate amicable resolution of issues arising from mining activities. This shall include a designated individual responsible for community liaison located in each mining area.

92.3 License holders will as part of their operations maintain an initial mediation or dispute resolution mechanism established in consultation with local communities and in accordance with the principles set out in Article 92.1. Where a dispute arises between a holder of a license and non-State actors as a result of mineral activities and cannot be immediately settled by mutual amicable agreement, the parties may in the first instance refer the dispute to this mechanism.

92.4 Where agreement is not reached within the terms of Article 92.3, or where a dispute is between the State and non-State actors, either party may refer the matter to the government-maintained dispute resolution mechanism set out in Article 92.1. However, a period of not less than 21 days shall be allowed for bodies subject to the complaint to remedy the issue before the matter may be referred to the government dispute resolution mechanism.

92.5 The decision of the dispute resolution mechanism specified in Article 92.1 shall be final and binding on the license holder or the State. Communities and individuals may have further recourse to judicial remedies if applicable. Submitting a complaint to a company or government-maintained dispute resolution mechanism shall not deprive those individuals or communities of their rights to other remedy, including judicial remedy.

Article 93: Dispute resolution (companies)

93.1 In all disputes between a license-holder and the State relating to contracts or mineral activities, the parties may in the first instance settle the dispute by mutual amicable agreement or by the method and authority defined in the contract for dispute resolutions. Where such authorities are not defined in the contract the parties may refer to one of the following:

1. Arbitration by an expert upon the agreements of the parties;
2. Assignment of a Dispute Resolution Panel of impartial and independent experts that shall be comprised not less than three (3) and more than five (5) members as follows:
 - i. One (1) Government representative where the Government is not a party to the dispute;
 - ii. One (1) or Two (2) independent eligible experts; and/or
 - iii. One (1) or Two (2) qualified mining experts.

The expenses of Panel members shall be shared as agreed by the Parties.

93.2 If this should not produce a resolution of the issue, the parties may, within thirty (30) days of the determination of the dispute resolution mechanism, refer the dispute to one of the following for final resolution:

- 1) The Financial Dispute Resolution Commission as stipulated in the Da Afghanistan Bank Law;
- 2) The International Center for Specific Investment Disputes (ICSID);
- 3) Arbitration under the United Nations Commission on International Trade Law (UNCITRAL); or
- 4) An authorized Afghan court or any other court or arbitration authority to which the parties have agreed.

93.4 The decision made in Paragraph (6) of this Article shall be final and applicable.

93.5 In all disputes between a license-holder and the State the applicable law will include customary international law and international treaties governing human rights, environment, labour, and anti-corruption obligations by which Afghanistan is bound, irrespective of the choice of law or other provisions specified in a license.

93.6 In circumstances stipulated in Paragraphs (1)-(7) of this Article, the license shall remain in force until a decision on the matter of dispute is finalized or until the license expires; unless the holder requests to suspend its license or to surrender part of its obligation to the Ministry of Mines and Petroleum. The Ministry of Mines, based on the dispute, situation and type of license, may make a determination to suspend the license, reduce the license area or to revoke the license.

93.7 Decisions made by either the dispute resolution mechanism or other mechanisms shall be non-confidential except where strictly required for over-riding reasons of commercial confidentiality or national security.

93.8 Any arbitration agreement entered into by the state or a license-holder shall incorporate the following mandatory provisions:

- a) Third parties, such as individuals or communities affected by the dispute, shall be able to present amicus curiae briefs to the arbitral tribunal hearing the dispute, and to receive non-confidential copies of the pleadings.
- b) Where the value of the matter in dispute exceeds \$500,000, the arbitration or dispute resolution hearings shall be held publicly.

93.9 The State may establish an Ombudsman organised under further regulations or statute to assume investigatory powers in relation to mining activities, to which individuals and communities can bring complaints.

Article 3: Definitions

Non-state actor: a community, community group, or individual, acting in relation to a mining matter which affects their interest on their own behalf rather than as a representative of government or owner or representative of a company or commercial interest.

[Add additional definitions for the terms State, Individual, Community, National Security, Commercial Confidentiality and others as needed, within the spirit of the amendments.]

AMENDMENT B - Consultation and Community Development

Insert new Articles 7.1.3 and 91 and re-number; amend current Article 91

Article 7: Main Duties and Authorities of the Ministry of Mines:

7.1.3 In consultation with local residents and relevant government ministries, and with due consideration of environmental and social impacts, economic costs and benefits, and the overall public interest, to approve the classification, declassification or reclassification of Deposits of Mineral Substances as Mines or Quarries and the designation of an area for exploration or exploitation activities, subject to the review of the Commission and the procedure to be detailed in the regulations to this law;

Article 91: Consultation with mining-affected communities

91.1 Free, prior and informed consultation with mining-affected communities and individuals, as required by the various articles of this law, must be carried out in accordance with international standards (for example the ICMM Sustainable Development Framework and IFC Performance Standard 1), and with the objective of obtaining their agreement to the proposed activities or plans. Among other measures it must ensure:

- a) That the consultation be carried out in good faith
- b) that the legitimate representative bodies of communities (for example local shuras or Community Development Councils) are able to take a full part in the consultation;
- c) that decisions arising from the consultation are taken in such a way as to enjoy the support of a clear majority of the local population and to legitimately represent their collective will as far as possible;
- d) that the interests of all affected people, including children, are addressed during the consultation process, with guarantees for the meaningful and effective participation of women, marginalised groups, and the different ethnic or tribal groups in the area;
- e) that there are no significant financial, logistical or other barriers to community participation in the consultation;
- f) that consultation will take place in a language and manner appropriate to those being consulted;
- g) that participants will have access to full and accurate information, presented in a way that they can easily understand and assimilate, on the issues at stake at a sufficiently early stage to take a full part in the consultation;

- h) that the consultation itself will take place prior to the decisions being consulted on, and will be properly taken to account within those decisions;
- i) that neither coercion or threat nor any form of private material inducement is allowed to influence the consultation;

91.2 As part of the application for an exploration or exploitation license (or changes to an existing license), a mining company shall ensure local communities and individuals that might be affected are properly informed of the fact of the application and the scope and likely impact of those activities. While a full community consultation is not required as part of an application, companies should take reasonable measures to understand and respond to major areas of legitimate concern among communities that may be affected by the planned mineral activity. The Ministry of Mines will take these efforts into account as a factor in its assessment of a bid, and may impose reasonable conditions on a license to ensure the interests of these communities are protected as far as possible. Both the mining companies and the Ministry of Mines will ensure appropriate and effective channels are available for these communities and individuals to make representations regarding possible mineral activities.

Article 92: Community Development

1. The objective of community development as set out in this law is to support sustainable, community-led social and economic development in communities affected by mineral activities, recognizing and respecting the rights, customs, traditions and religion of local communities.
2. The holder of an Exploitation License or a Small-Scale Mining License shall negotiate, conclude and implement a Community Development Agreement with the demonstrably legitimate and credible representatives of communities and individuals that may be affected by the mining activities in question, in consultation with appropriate local government representatives. The Community Development Agreement shall incorporate the Environmental and Social Impact Assessment (or Screening Report where relevant) and the Environmental and Social Management Plan in the different phases of the mining operations.
3. The Community Development Plan shall be concluded after the grant of license. As part of the application process prior to grant of license, the companies shall conduct a more limited preliminary consultation and fact-finding with local communities in order to draw up outline proposals for community development work that will be provided should license be granted. These proposals shall form part of the assessment of competing bids for a given concession, and MoMP will conduct their own inquiries as needed to ensure key concerns of local communities are addressed. Where a bid is successful they will be included among the requirements of the license and form the basis for more in-depth consultation and development of the proposals.
4. Funding and other affairs related to Community Development Agreements shall be set forth in the Regulations. All financial payments, development plans, and accounts made under a CDA shall be made available to the public.
5. In addition to the investment agreed under the CDA, a percentage of ongoing income generated by mining activities, to be set out in the regulations to this law, shall be dedicated to community development projects, to be agreed according to a similar process as the CDA.
6. Environmental, Social and Environmental, and Community Development reports and studies that are submitted by the license holder are non-confidential.
7. In addition to any other prescribed requirements, a Community Development Agreement must be based on:

- a) Meaningful consultations carried out in good faith with affected communities, and local government representatives, as set out in article 91;
- b) Comprehensive environmental and social impact surveys and management plans, water use plans, and the financial abilities of the license holder;
- c) Comprehensive planning for the license holder's contribution to community and human resources development, activity-related employment opportunities and guarantees, other non-activity related economic development opportunities and guarantees, and the provision of appropriate education, social and health facilities;
- d) Incorporation of the interests of women, children, marginalised groups, and the different ethnic and social groups in affected areas;
- e) Coordination with existing local and national development plans;
- f) Provision for formal community involvement in monitoring of the implementation of CDAs, and of the ESIA's and ESMPs incorporated within them. Community monitoring may also be provided for other aspects of mining as set out in the Regulations.

AMENDMENT C - Resettlement

Amend Article 40

Article 40: Resettlement

1. Resettlement shall be an action of last resort. Where, based on the results of the Environmental and Social Impact Assessment and Management Plan, the Ministry of Mines and Petroleum in coordination with the relevant Government agencies and in consultation with affected communities determines that resettlement is a necessary action of last resort, the holder shall, in consultation with the affected communities, prepare a Resettlement Action Plan, and provide sufficient financing for expenditure of resettlement process and fair, adequate and prior compensation of resettled individuals, in accordance with Article 35 and the regulations to this law, and with relevant international standards (including IFC Performance Standard 5). Individuals will have a right of appeal both against a decision that resettlement is necessary and against the terms of the Resettlement Action Plan, and will have the right to not be resettled with the community if they so desire.

2. Where resettlement occurs, it will not alleviate the responsibility of the license-holder and Government to ensure the individuals and communities receive other forms of reparations necessary to remedy the impact of the activities. This may include compensation and medical or social rehabilitation services.

3. Once the Resettlement Action Plan is approved by the Ministry of Mines and Petroleum, in consultation with the relevant Government agencies, the Ministry of Mines and Petroleum will coordinate and supervise the process of resettlement in conjunction with the license holders in order to ensure the respect of the communities' rights.

AMENDMENT D - Acquisition of land

Insert new Article 35 and re-number; amend current Article 35

Article 35: Compensation

1. Fair, adequate and prompt restitution will be provided as required under the provisions of this law for damage or loss to communities or individuals directly affected by a mining activity, including through compulsory acquisition or lease of land, use of land for mineral activities, disturbance of land, water, or environment, resettlement, loss of livelihood, or other losses. Restitution will be provided in accordance with recognised international best practice and an equitable procedure that will be specified in the regulations to this law and which will incorporate a right of appeal. Compensation where paid will be at full replacement costs for losses of assets, including compensation for intangible benefits, reimbursement of sunk costs, loss of future revenue, and other losses as set out in the regulations to this law.

Article 36: Acquisition or lease of land

2. The Ministry of Mines and Petroleum may, for the purpose of securing the public interest, acquire the private land needed for mineral activities (when necessary), under the payment of fair, adequate and prior compensation, in accordance with Article 35 of this law and other laws and regulations. The regulations to this law will set out a fair procedure for acquisition of land in accordance with recognised international best practice and incorporating a right of appeal.

Article 37: Use of land for mineral activities

4. In the event that the landowner or lawful occupant does not consent to lease or vacate the land, the Ministry of Mines and Petroleum may put the land at the disposal of the holder in accordance with the procedure set out in Article 36.2, providing that the license holder pays fair, adequate and prior compensation to the landowner or lawful occupant as set out in Article 35.

5. Prior to the commencement of mining activities, a license-holder will provide written evidence that they have obtained surface rights over the area or the consent of the owner for starting mining operations, or that they have ownership of the land.

AMENDMENT E - Compensation

Amend Article 39

Article 39: Compensation and damages

1. In case during the mineral activities damage is incurred to property, land, person or livelihood, the holder shall be required to pay a fair, adequate and prompt compensation, as set out in Article 35, to the owner and lawful occupants, and/or take action to remedy the damage, in accordance with the applicable laws and regulations. The regulations of this law will set out a fair procedure for restitution in accordance with recognised best practice and the Land Law.

2. If the holder of a license fails to pay compensation or provide other remedy as demanded by the property owner or lawful occupant, or if the said owner or lawful occupant is dissatisfied with any offer, they shall have a right of appeal as set out in the regulations, which will allow for an independent and impartial assessment of the scale of damage and remedy required.

3. Where the holder of a license is a company of which another company holds a controlling interest, the controlling company can be liable for damages and other sums payable by the license holder, including but not limited to taxes, royalties, and funds for compliance with environmental and social protection obligations, rehabilitation of the site, resettlement, mine closure and compensation of affected communities, based on the provisions of this Law and relevant regulations. This liability can arise when:

- a) the license holder is not able to satisfy the full sum awarded against it, and
- b) the controlling company had caused the removal of assets of the license holder in anticipation of legal proceedings against the latter.

This provision applies to a controlling company which is registered, or has its principal place of business, in Afghanistan or in another jurisdiction.

AMENDMENT F - Water use

Amend Articles that mention the right to use water (36, 58, 64 and 71); insert a new article 89

(Articles 36, 58, 64, 71)

Utilize water to conduct [exploration/ exploitation/small scale/artisanal] mining activities, subject to the approved Water Management Plan, any conditions of the license, and in accordance with the applicable provision of the Environmental Law and other laws and regulations.

Article 89: Water

1. Where provision is made in this law for a License Holder to utilize water to conduct mining activities, this usage shall be subject to the provisions of relevant law managing the use of water, and the condition that the license holder:

- a) Includes within the required Environmental and Social Impact Assessment a Water Management Plan an evaluation of the volume of water required for the exploitation phase of a mining project, its source, and potential effects on local and downstream communities. These plans will be communicated with all ministries and regional bodies responsible for watershed basic planning (including MAIL, NEPA, Urban Development, and other relevant bodies) and their input taken into account. Water use plans will be subject to the approval of NEPA and the MoMP, and may only be varied with their agreement;
- b) Complies with the amount of permitted water usage which is stipulated in the license in light of the Water Management Plan, and complies with the requirement that water usage be monitored and regularly publicly reported;

- c) Shall not deprive any lands, villages, houses, or watering places for animals of a reasonable supply of water;
- d) Complies with the requirements of the Environment Act as well as other applicable laws and regulations, including those addressing water pollution;
- e) Provides remediation and compensation where the right of local communities to access water has been adversely affected.

AMENDMENT G: Environmental and Social provisions

Add a new clause to Article 7; amend Article 88; add a new article 9

(and renumber accordingly) amend obligations of license-holders in Article 46, 52, 60, 65, 72; amend Article 114

Article 7: Main Duties and Authorities of the Ministry of Mines and Petroleum

7.5 The responsibilities of the Ministry of Mines relating to environmental issues shall be carried out without prejudice to the responsibilities of the National Environmental Protection Agency.

Article 88: Environmental and Social Impact Assessment

1. Prior to the commencement of exploitation activities, the license-holder must carry out a full Environmental and Social Impact Assessment (ESIA) in order to provide a comprehensive, accurate, and independent basis for understanding the pre-existing conditions in a mining area, the range of possible impacts as a result of mining activity, and possible measures to manage and mitigate those impacts. Within that requirement, the detailed content of the ESIA may be varied within the Regulations in accordance with the potential impact of the project. The license holder will set out mitigation measures it plans to undertake in an Environmental and Social Management Plan (ESMP), including a Rehabilitation and Closure Plan, as detailed in the Regulations. Both ESIA and ESMP will be produced in consultation with relevant stakeholders and communities that may be affected by the mining activity.

2. The ESIA shall be carried out and ESMP drafted by qualified and independent professionals ("the ESIA Consultants"), who have been approved by the Mining Advisory Board set out in Article 9. The ESIA and ESMP must be reviewed and approved by NEPA and the MoMP prior to the commencement of exploitation activities, and will form part of the conditions of a license, breach of which shall be cause for withdrawal of a license if remedial action is not taken within 21 days. Either body may impose additional license conditions for environmental and social impact and mitigation measures as part of the grant of permission to carry out mining activities.

3. The elements of the assessment referred to in (1) shall include:

- a. A detailed study of the natural and man-made environment of the license area prior to any mineral activities, based on measurements and indices with respect to the quality of air and water, soil, trees, and animals, and other flora and fauna in order to provide a comprehensive environmental baseline to be measured from that time; and
- b. An Environmental and Social Management Plan that includes a detailed description of reclamation activities and mine closure including:
 - i. Detailed data regarding contaminating substances and resources, and potential damage caused by poisoning, pollution and release of destructive substances;
 - ii. Identification of potential environmental impacts of mining and all associated activities, including on water and water resources, air and soils (including cultivated and uncultivated), climate change, flora and fauna, biodiversity, important biological or geological formations, and protected areas and species; [follow the rest of existing Article 88 section 1.2]

4. As part of the application process prior to a grant of license for mining activities, applicants will submit a preliminary assessment of environmental and social impacts and a plan for their mitigation. The requirements of this assessment and mitigation plan shall be specified in the regulations to this law to be proportional and appropriate to providing a sound basis for a judgment of the potential impacts of a planned mining activity and effectiveness of mitigation measures, without excessively burdening companies applying for licenses.

5. The severity of impacts planned by the applicant, and the effectiveness of their efforts to mitigate them, shall form part of the criteria for the evaluation of a bid. They will be assessed by NEPA and the MoMP based on their own investigations as well as the information provided by the applicant, with additional input from the Mining Advisory Board. Either NEPA or MoMP may impose additional conditions for reduced environmental and social impact and increased mitigation measures as part of the grant of license. For artisanal and small-scale licenses, the evaluation may be carried out by NEPA in consultation with the MoMP based on their own investigation, without a preliminary assessment from the applicant.

6. Whenever the holder proposes to materially amend its work program, it shall provide sufficient reason to the relevant agency that it will implement an appropriate environmental and social management plan.

Article 9: Mining Advisory Board

1. The Extractive Industries Environmental and Social Advisory Board shall be mandated to:²³

- a) Support the work of the Ministry of Mines with independent, high-quality advice;
- b) Assess and approve consultants to produce Environmental and Social Impact Assessments, Environmental and Social Impact Plans, and similar output, with the aim of ensuring a pool of genuinely independent, professional, and highly-quality experts to carry out this work;
- c) Review the draft ESIA/ESMP and provide recommendations for improvements if needed. NEPA/ MoMP may set aside a recommendation, but only on condition that they provide a compelling written justification of public interest;
- d) Assess and approve independent auditors where they are required by this Law or its regulation, and review their work and reports;
- e) Carry out other duties as set out in the regulations.

2. In addition to its membership at the time of coming into force of this law, the panel's members shall include:²⁴

- a) Recognized international and national experts in relevant disciplines;
- b) Relevant ministries and departments, such as the Ministry of Rural Rehabilitation and Development, the Ministry of Agriculture, and Ministry of Labour;
- c) Representatives of mining-affected communities;
- d) Established and credible civil society groups active on environmental and social impacts on mining-affected communities.
- e) Representatives of mining industry associations or other industry representatives with no direct interest in the project under review.

(Articles 46, 52, 60, 65, 72)

Add an obligation on license holders in Articles 46, 52, 60, 65, 72 to 'Fulfil conditions that may be set as part of the approval of grant of license by MoMP, NEPA or other relevant authority with regard to the social and environmental impact of their operations, including specifying restrictions on water use'

Article 114: Compliance with the instructions from the Inspectorate

14.1 A license or authorization holder or contractor shall, for the purpose of preventing or removing the cause of any dangers resulting from mineral activities in connection to the health and safety of workers, protection of water reservoirs and prevention of damage to the environment, and public utility infrastructure [during mineral activities], comply with the legal orders that are issued by the Inspectorate.

AMENDMENT H - Transparency

Add a clause to Article 18; amend Articles 111 and 27

Article 18: License

18.5 Licenses, authorizations and contracts, with any ancillary documents, will be made public and maintained in an accessible format on the website of the Ministry of Mines within ten (10) days of being signed.

Article 111: Confidentiality

1. All information, data and reports covered by this Law shall be considered as non-confidential unless prescribed in this Law or relevant Regulations to be confidential. All non-confidential material shall be made accessible to the public via the Ministry of Mines website and other means.

2. Except where specified in the regulations to this law, commercially sensitive technical, geological and financial records or reports submitted under Article twenty seven (27) of this Law shall be treated as confidential and not be divulged without the written consent of the license or authorization holder and the contractor. For a document to be classified as commercially sensitive, there must be a compelling case that its release will cause significant harm to the commercial interests of the license holder and that this harm outweighs any

public interest in publication. Mining Contracts, Authorizations, and Licenses (including ancillary documents), Feasibility Studies, Environmental Assessment and Environmental Management Plans, Environmental and Social Impact Assessments and Management Plans, Annual Social and Environmental Impact Reports, Financing Plans, Closure Plans, and data on production and financial transfers required under the Extractive Industries Transparency Initiative shall be considered non-confidential. Bid documents shall also be non-confidential after the assessment and recommendation phase of a bidding process is complete. Matters that are considered confidential shall become non-confidential ten (10) years after creation or one (1) year after expiry or termination of the license, authorization or the contract, whichever is sooner.

Article 27: Maintenance of Records (Documents)

27.1 A holder of a license shall maintain the documents related to the license in accordance with the provisions of relevant Regulations and shall provide the Ministry of Mines and Petroleum with copies of them for inspection and evaluation purpose upon request. These documents shall include complete and accurate financial records. In the case of exploration or exploitation licenses and Minerals Development Contracts the license holder must ensure these accounts meet the International Financial Reporting Standards (IFRS), and that they are audited annually by an established and independent international accounting firm. Authorised government personnel shall have the right to carry out their own audit of a license holder, or commission an independent auditor to do so, at any time. In doing so they must not unreasonably disrupt the mineral operation.

AMENDMENT I - Beneficial ownership

Add a clause to Article 16; amend Articles 99 and 3

Article 16: Eligibility for grant of a license and enacting of Contract

16.3: All companies applying or bidding for a license are required to provide accurate information on their final beneficial ownership as part of their application or bid documents, which the Ministry of Mines will keep available to the public on its website. Failure to provide accurate information in good faith shall be grounds for automatic revocation of a license. Deliberate concealment of beneficial ownership shall be punishable by forfeiture of license, and a fine of up to \$1 million levied against the license holder or applicant. Where the undeclared beneficial owner is an individual or entity that is not eligible to hold a license, the individual or individuals responsible shall in addition be liable to imprisonment of up to two (two) years.

Article 99: Extractive Industries Transparent Initiative

The Ministry of Mines and Petroleum, the Ministry of Finance, holder of a license, contractor or other relevant agencies shall, for the purpose of transparent and effective management of mining revenues, comply with the financial reporting requirements and standards of the EITI, including publication of information on beneficial ownership.

Article 3: definitions

Beneficial Ownership: Beneficial ownership is enjoyed by any natural or legal person that has the possession and/or benefits of ownership of a property or asset (such as receipt of income, or some level of decision-making power over use of the asset) even though its ownership (title) may be in the name of another entity.

AMENDMENT J - Supply chain transparency

Insert a new Article 112

Article 112: Supply chain transparency

1. Persons and legal entities operating in Afghanistan's minerals sector (including artisanal, small, medium and large-scale miners, local traders and exporters, international concentrate traders, mineral re-processors, smelters and refiners) will undertake supply chain due diligence that meets the standard outlined in the OECD Due Diligence Guidance and ensure that their activities, operations or purchases do not contribute to human rights abuses or conflict.
2. As a condition of eligibility to bid for or renew a minerals license, applicants must present evidence of a conflict minerals policy that is in line with the OECD Due Diligence Guidance.

AMENDMENT K - Eligibility

Amend Articles 16 and 3

Article 16: Eligibility for grant of a license and enacting of Contract

16.2.2 Judges, Prosecutors, Members of Provincial and Districts Councils, Staff of Ministry of Defense and Ministry of Interior Affairs and General Directorate of National Security, members of local defence forces and informal armed groups, advisors, experts and staff of the Commission stipulated in Article 9 of this Law;

16.2.5 Companies in which those listed in Article 16.2.1 of this law hold a direct or indirect interest;

16.2.10 Where one or more individual shareholder holding a controlling interest, or non-controlling interest of more than 5%, has been convicted of an offence under this Law, or has been convicted of significant human rights abuses, murder, significant fraud, money laundering, or financial crimes, or other serious crime, whether under Afghan or foreign jurisdiction; and/or

Article 3: Definitions

Interest: interest in a mining operation or entity shall be understood as including but not limited to direct or indirect ownership of shares in any legal person or funding of any natural person engaged in mineral activities in Afghanistan including ownership of shares or funding of natural persons by any members of family in mineral activities in Afghanistan, and any direct or indirect benefits.

AMENDMENT L - Transfer of license

Amend Articles 29 and 26

Article 29: Transfer of license

(1) The holders of Exploration License, Exploitation License and Small-Scale Mining License or Artisanal Mining License may, upon written approval of the Ministry of Mines and Petroleum, transfer all or part of its license privileges to a legal or natural person; provided:

- a. That the person to whom the license is transferred shall assume all obligations of the holder, and adhere to all the previous conditions and criteria of the license;
- b. That this person shall conform to the same requirements for eligibility to hold a license set out in Article 16 of this law and other relevant laws and regulations
- c. That the identity of this person, and where relevant of any beneficial owners, shall be made public prior to the transfer.

(2) Transfer of license that breaches these conditions shall be grounds for revocation of the license according to the provisions of Article 33 and the regulations to this law.

Article 26: Change of control of a License

(1) The holder of Licenses shall notify the Ministry of Mines and Petroleum of any change in the controlling authority or beneficial ownership of the body holding the license, and of any change in the shareholding of a company controlling a license of more than five percent (5%).

(2) The change stipulated in Paragraph (1) of this Article shall have legal effect upon its approval by the Ministry of Mines and Petroleum and when the following conditions are met:

1. That the holder adheres to the conditions and obligations of the license including implementing the work program and budget, submitting expenditure documents, reporting and a written notice of transfer of ownership or power to the Ministry of Mines and Petroleum; and
2. That the holder ensures that the transferee, meet the conditions and criteria of license and this Law, including the conditions for eligibility set out in Article 16

AMENDMENT M - Role of the National Assembly

Amend Article 7; insert a new Article 11

Article 7: Main Duties and Authorities of the Ministry of Mines and Petroleum

7.1.1 In consultation with relevant Ministries and agencies, developing policies for the purpose of regulating the development of the mining sector and monitoring their implementation, subject to the scrutiny of these policies by parliament;

7.9 Publishing an annual report of mineral activities not later than ninety (90) days after the end of each fiscal year and to be submitted to the National Assembly through relevant sources for public review of the activities and the operations of the Ministry of Mines and Petroleum within that year.

7. 10 cooperating with the oversight exercised by the National Assembly in its various forms and requests for information, including providing with minimum delay information requested by Members of Parliament or Parliamentary Committees.

Article 11: Approval of Parliament

11.1 Exploitation of radioactive materials shall be upon the approval of the Council of Ministers and endorsement by the Parliament.

11.2 Mining Development Contracts and other large-scale contracts shall be implemented upon the approval of the Council of Ministers and with the scrutiny of the Parliament. Parliament may request, and shall be provided with, additional information for their deliberations, and may request amendments to a contract as a condition for their endorsement. By withholding its endorsement, Parliament may delay implementation of a contract for a maximum of 3 months, after which it shall be deemed endorsed.

AMENDMENT N - Royalties

Amend Article 83

Article 83: Royalty

1. A holder license or authorization shall be liable to pay a royalty on minerals and semi-processed or processed minerals calculated as may be prescribed in this Law and relevant Regulations.
2. Reconnaissance License and Exploration License activities shall not be subject to royalty so long as no minerals are sold or transferred to another party.
3. Royalty shall be paid in accordance with terms and conditions of license and authorization and the provisions of this Law. These revenues will be subject to regular audit by an auditing company with a good international reputation, with which state officials and license holders will provide full cooperation.
4. Royalty shall be paid on a mineral on receipt of each payment or other consideration for such a mineral. Each royalty payment of gross revenue shall be accompanied by full details of the mineral produced, sold or transported, including the terms of payment thereof, within 60 days of the sale.
5. The Mining Cadastre shall inspect and examine any samples, books, records and accounts and obtain information necessary to ascertain the quantity or value of mineral products necessary to verify the amount of any royalty payable.
6. The royalties payable shall be calculated based on the gross market value of a mineral. For the purpose of calculation of royalties, the term "gross market value" shall be defined as the sale value of mineral receivable at the mine gate in an arm's length transaction without discounts, commissions or deductions for the mineral on disposal; and "arm's length transaction" shall mean a transaction between a willing buyer and willing seller

in the open market where the purchase price for the sale is not influenced by any special relationship or other arrangement between the parties to the transaction and is not affected by any non-commercial considerations and specifically excludes any barter, swap, exchange, transfer price arrangement, marketing fee, restricted or distress transaction that is associated with special financial, off-take financing, commercial or other considerations.

AMENDMENT O - Payments and resource funds

Add a new Article 84 (and amend Article 83 as above)

Article 84: Payments

1. All payments made to the government or to any government agency in relation to mining, including taxes, rents, royalties, application fees, license fees, signing bonuses, dividend payments from any mining-related state owned enterprises, income from the sale of and other payments, shall be paid into a single, dedicated State treasury account. Each payment will be accompanied by full information on the justification and the basis by which it was calculated. Details of all payments made into and out of this account shall be published in an accessible form within seven days of the payment having been made. Failure to comply may be grounds for forfeiture of license.

2. The dedicated account described in Article 84.1 may be converted into a State resource fund designed to manage and invest mining income on behalf of the Afghan people, but only under dedicated separate legislation which shall set out the structure and operating principles of such a fund, and which shall include measures to prevent its misuse

AMENDMENT P - Local Employment and Procurement

Amend Article 110

Article 110: Local procurement

1. A license or authorization holder and contractor shall employ one hundred per cent (100%) Afghan nationals as unskilled and low-skilled labour in its mineral activities (projects), in accordance with the provisions of this Law.

2. Afghan workers will be employed for skilled labour positions unless a company can demonstrate that it has made a substantial, good faith effort to recruit sufficiently qualified workers and that it is not reasonably possible either to a) recruit sufficiently skilled Afghan workers directly, or b) recruit and train Afghan workers who could be brought to the required skill level at a reasonable economic cost to the license holder or contractor.

3. A license or authorization holder and contractor shall, in its recruitment of experts, give priority to Afghan nationals having similar skill and profession over foreign experts.

4. For all skill levels, first preference for employment and training opportunities shall be given to Afghan nationals from communities affected by the mining activity in question. License holders will ensure equal opportunity of access to employment and training opportunities for women, marginalised groups, and different ethnic and social groups.

5. A license holder shall give priority to procure Afghan goods and services unless it can show that it is not reasonable and economically practical to do so. First preference shall be given where possible to goods and services from mining-affected communities.

6. Applicants for a minerals license will include details of how much they intend to provide employment, training and education a) to Afghan nationals, and b) to Afghan nationals from mining-affected areas. Such commitments, along with commitments above and beyond the basic requirements set out in law on local content of goods and services, promotion of social and economic development around a mining area, and research and development activities of public value, shall be taken into consideration in evaluating the merits of a bid for a minerals license.

7. Annual reporting provided for in Article 27.5 shall include a report of employment of Afghan staff and justification for employment of non-Afghan staff, as well as a report of expenditure on Afghan goods and services, of research and development activities, and of employment and training given to Afghan workers. Authorised personnel of the Ministry of Mines shall be responsible for verifying these reports, and for ensuring that employment and procurement takes place in accordance with the provisions of this Law.

AMENDMENT Q - Existing Licenses

Amend Article 106

Article 106: Existing Licenses

1. Any license granted or contract signed by the Ministry of Mines and Petroleum prior to the adoption of this Law shall continue in force until its expiration or termination and they shall be regulated by the Law under which it was granted. The exception shall be provisions of this law relating to Transparency (Articles 18 and 111), the EITI (Article 99), Dispute Resolution (Article 92), Community Consultation (Article 91), and related Definitions (Article 3), which shall apply to all contracts and licenses irrespective of date. These provisions will also apply to other extractive industries falling under the remit of the Ministry of Mines and Petroleum, including petroleum and gas operations.

2. Where any license or contract stipulated in Paragraph one (1) of this Article expires, the holder of a license or contractor may, on priority basis, apply to obtain a new license over the same area or its extension thirty (30) days prior to expiration of its license based on the provisions of this Law and relevant Regulations.

ENDNOTES

¹ James Risen, "U.S. Identifies Vast Mineral Riches in Afghanistan," *New York Times*, June 13, 2010, <http://www.nytimes.com/2010/06/14/world/asia/14minerals.html?pagewanted=all> (accessed October 29, 2013).

² For more on mitigation of social and environmental impacts of mining, including conflict, see for example Robert Goodland, "Responsible Mining: The Key to Profitable Resource Development," *Institute for Environmental Diplomacy & Security at the University of Vermont*, April 2012, http://www.uvm.edu/ieds/sites/default/files/Responsible_Mining.pdf (accessed November 16, 2013).

³ Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, adopted by the Human Resources Council in its Resolution 17/4, of 16 June 2011, pp 22–31, <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> (accessed 21 October, 2013).

⁴ Nicolas Boeglin, "ICSID and Latin America: criticisms. Withdrawals and regional alternatives," *Committee for the Abolition of Third World Debt*, July 4, 2013, <http://cadtm.org/ICSID-and-Latin-America-criticisms> (accessed November 23, 2013).

⁵ "Does mining cause social conflict?" *Miningfacts.org*, <http://www.miningfacts.org/Communities/Does-mining-cause-social-conflict/> (accessed October 29, 2013).

⁶ For a good study of the elements needed for strong Environmental and Social Impact Assessments, see Robert Goodland, "WRI's Informative Memo for Access Law & Practice: Environmental and Social Assessment," *World Resource Institute*, 2008, <http://www.accessinitiative.org/sites/default/files/ESAMemo.pdf> (accessed November 17, 2013).

⁷ The idea that the benefits from mining activities are not limited to compensation for damage but must also extend to benefit sharing or other help for communities is increasingly accepted internationally. Chile, Papua New Guinea, and South Africa have strong policy and regulatory approaches, whilst Egypt, Eritrea, Guinea, Mozambique, Nigeria, Sierra Leone, and Yemen have recently introduced community development regulations. Elizabeth Wall and Remi Pelon, "Sharing Mining benefits in Developing Countries," *World Bank*, July 2011, pp 6–10; http://siteresources.worldbank.org/INTOGMC/Resources/336099-1288881181404/eifd21_sharing_mining_benefits_2.pdf (accessed 22 October 2013).

⁸ "Mining Act and Regulations," *Government of South Australia*, July 2011 http://minerals.pir.sa.gov.au/licensing_and_regulation/legislation/mining_act_and_regulations (accessed November 23, 2013). A full ESIA is required for mining operations with major impacts in Brazil and in Chile, while other types of studies are required for other phases or projects that are not able to cause significant impacts. In Brazil, the environmental license is a condition for granting an exploitation license. Chilean law also admits public participation during the preparation of the ESIA. Brazilian Environmental Law No. 6,938/1981, http://www.planalto.gov.br/ccivil_03/leis/l6938.htm; Chilean Environmental Law No. 19,300/1994, <http://www.leychile.cl/Navegar?idNorma=30667#miner0>

⁸ David Brereton, John Owen, and Julie Kim, "www.eisourcebook.org, "Good Practice Note: Community Development Agreements," *El Sourcebook*, 2011 http://www.sdsg.org/wp-content/uploads/2011/06/csr-good_practice_notes_on_cdas_document_final_260911.pdf; "Mining Community Development Agreements – Practical Experiences and Field Studies," *World Bank*, June 2010 <http://www.sdsg.org/wp-content/uploads/2011/06/CDA-Report-FINAL.pdf> (accessed November 23, 2013).

¹⁰ Excessive power to acquire land without consent has been identified as a problem in several countries, including Ghana and Kenya. In other countries, like Uganda, compulsory acquisition of land for development of economic activities is not permitted. Peter G. Veit with Gaia Larsen, "Overlapping Land and Natural Resource Property Rights: A Comparative Analysis from Africa," *World Resources Institute*, February 28, 2013, http://www.conftool.com/landandpoverty2013/index.php/Veit-231_paper.pdf?page=downloadPa per&filename=Veit-231_paper.pdf&form_id=231&form_version=final, (accessed 21 October, 2013).

¹¹ Thomas Barfield, Neamat Nojumi, and J Alexander Their, "The clash of two goods: State and non-State dispute resolution in Afghanistan," *United States Institute for Peace*, http://www.usip.org/sites/default/files/file/clash_two_goods.pdf (accessed November 23, 2013).

¹² In jurisdictions in Australia (WA, Victoria, SA and NSW), the value of the compensation includes also the deprivation of use of the land, loss of earnings and social disruption. Land owners and occupiers in Ghana, Kenya and Uganda are entitled to compensation in case of losses, damages and disturbance caused by mining activities. "Exploration and Mining Legislation – Onshore", Government of Australia, http://www.ret.gov.au/resources/Documents/Minerals%20and%20Petroleum%20Exploration/Guide_for_%20Investors_9OnshoreLegislation.pdf (accessed 21 October, 2013); Peter G. Veit with Gaia Larsen, "Overlapping Land and Natural Resource Property Rights."

¹³ Discussion with official of the Afghan Ministry of Mines, October 2013.

¹⁴ "Natural Resource Management and Peacebuilding in Afghanistan," United Nations Environment Programme, May 2013 http://www.unep.org/disastersandconflicts/portals/155/countries/Afghanistan/pdf/UNEP_Afghanistan_NRM.pdf (accessed November 23, 2013).

¹⁵ "Copper Bottomed? Bolstering the Aynak contract," Global Witness, November 2012, p 11, http://www.globalwitness.org/sites/default/files/library/Global%20Witness%20Response%20to%20MoM_0.pdf

¹⁶ These include Kurdistan, Guinea, Niger, the United States, the Democratic Republic of Congo, the Republic of Congo, Timor-Leste, Sierra Leone, and Liberia. Global Witness, "Copper Bottomed?"

¹⁷ "The curious case of Nigerian oil block – OPL245," Global Witness, June 13, 2013, http://www.globalwitness.org/sites/default/files/library/The%20case%20of%20Nigerian%20oil%20block%20OPL245_0.pdf

¹⁸ "Faced With a Gun: What Can You Do?" Global Witness, July 2009, http://www.globalwitness.org/sites/default/files/pdfs/report_en_final_0.pdf; "Coming Clean: How supply chain controls can stop Congo's minerals trade fuelling conflict," Global Witness, May 2012, https://www.globalwitness.org/sites/default/files/120531_Coming%20Clean_lowres.pdf; Santiago Fisher, "Vers la fin du conflit avec les FARC en Colombie?," Commission Justice et Paix, April 2013, http://www.justicepaix.be/IMG/pdf/2013_Analyse_Vers_la_fin_du_conflit_avec_les_FARC_en_Colombie.pdf, (accessed 21 October, 2013); Charu Lata Hogg and Matthew Smith, "Asia Meeting Summary – Human Rights in Burma," Chatham House, March 2013, <http://www.chathamhouse.org/sites/default/files/public/Research/Asia/040313summary.pdf> (accessed 21 October, 2013).

¹⁹ "Chromite Extraction in Kunar: Factor of [In]Stability," Integrity Watch Afghanistan, November 2013, http://www.iwaweb.org/Docs/EIM/chromite_extraction_in_kunar_factor_of_instability.pdf (accessed November 23, 2013).

²⁰ "Generally Accepted Principles and Practices – Santiago Principles," International Working Group of Sovereign Wealth Funds, October 2008, <http://www.iwg-swf.org/pubs/gaplist.htm> (accessed November 23, 2013).

²¹ A sample of debt to equity ratios is as follows. USA: 1.5:1 debt-to-equity ratio; Australia: 3:1 debt-to-equity ratio; Canada: 2:1 debt-to-equity ratio; Chile: 3:1 debt-to-equity ratio; Peru: 3:1 debt-to-equity ratio; Saudi Arabia: lower of actual interest or interest + 50% taxable income before interest; Sierra Leone: 3:1 debt-to-paid up share capital; South Africa: 3:1 debt-to-equity ratio; Zambia: 3:1 debt-to-equity ratio; Malawi: 4:1 debt-to-equity ratio.

²² Conversation with local community council members in Siadara, Bamiyan province, November 13, 2013.

²³ If instead of using the existing Extractive Industries Environmental and Social Advisory Board, parliament and the Afghan government prefer to create a new body, this first sentence should be changed to read: "An independent panel of experts will be established according to the regulations to this law, in order to:"

²⁴ If instead of using the existing Extractive Industries Environmental and Social Advisory Board, parliament and the Afghan government prefer to create a new body, this sentence should be changed to read: "The panel's members shall include:"



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