



global witness

BUILDING FOR THE LONG-TERM

AVOIDING THE
RESOURCE CURSE
IN AFGHANISTAN



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EXECUTIVE SUMMARY

Afghanistan's natural resources offer both hope and risk. Many people look to mining and oil to drive development as the international presence winds down. But the experience of resource-rich countries around the world shows the serious danger that, without transparency and proper regulation, extraction can easily fuel corruption and conflict that exceeds any benefits it brings.

There is a strong case for a dedicated effort to consider and respond to these risks. Global Witness and other organisations warmly welcomed the commitment of the Afghan government at the 2012 Tokyo Conference to create an Extractive Industries Development Framework (EIDF), which would set out measures to improve governance in the sector.¹ In response to this commitment, this paper sets out key policy measures to reduce the risk of conflict and corruption as a result of natural resource exploitation, and maximise its benefits for the Afghan people.

The report's over-arching recommendation is that Afghanistan should make a strategic decision to invest in a governance framework for the natural resource sector that integrates the strongest principles of international best practice, rather than simply prioritising short-term extraction. Among the specific measures called for in the report, the most important include:

>> TRANSPARENCY: Publication of extractive contracts and other information; project-level disclosure of revenues and production; publication of the true, beneficial ownership of mining companies; and a requirement that companies carry out and report on due diligence on their supply chains and operations in Afghanistan.

>> OPEN AND COMPETITIVE BIDDING: Clear rules for a transparent and impartial bidding process, with legal sanctions against officials who unfairly favour one company over another.

>> COMMUNITY RELATIONS: Strong community consultation and grievance resolution mechanisms that are also fair to companies, and which ensure communities benefit from mining.

>> SECURITY: making it illegal for formal security forces or informal armed groups to be involved in the extractives sector, and requiring police forces used to protect mine sites to operate in consultation with local communities and according to strict rules.

The idea that there is a choice between governance and development is a false one. On the contrary, measures like these are critical to ensuring that Afghanistan's natural resources actually contribute to development, rather than undermining it. Most of them are increasingly routine in other countries, and if properly implemented pose little or no obstacle to investment by responsible mining companies. Indeed, stronger governance will help attract these companies by reducing the risk to their operations, and to their reputations.

The Afghan government has already taken some very welcome steps to strengthen governance standards, like applying to join the Extractive Industries Transparency Initiative (EITI) and publishing most existing mining contracts. The measures suggested here are intended to support the government in further strengthening regulation of the sector. While most of them are new, some of these recommendations, like Community Development Plans, are already incorporated into existing legislation or contracts, and are included here as important general principles that should be restated in the EIDF.

To be fully effective, we suggest that the EIDF should include clear commitments, covering both the underlying *principles* which will guide the government (like transparency); *practices* like community engagement; and most importantly, the legislation, rules and regulations which will give those commitments their most solid form. Most of the proposals set out below are designed to be implemented through the mining law. There is a strong case for including the most important principles in the law itself, rather than in regulations or policies, which are much more easily changed, and often perceived as carrying less weight.

Simply creating rules will mean little without effective implementation, supported by Afghanistan's international partners. And these rules cannot replace the responsibility to decide whether extraction should go ahead at all: the Afghan government should carefully consider whether the minimum conditions for responsible exploitation are present for each project even *with* safeguards, and be ready to delay or halt extraction where the risks outweigh the benefits. Given the extreme urgency of reducing the impact of fossil fuels on climate change, the government should particularly seek alternatives to oil extraction – which the international community must help to create.

This report draws on Global Witness' recent analysis of Afghanistan's proposed new Mining Law,² and earlier work on the Aynak³ and Qara Zaghan⁴ contracts, as well as our long experience of these issues in other countries. It incorporates the input of a wide range of Afghan and international civil society organisations, government and industry officials, and experts, as well as recommendations made by Afghan and international civil society organisations in a joint letter in June 2012.⁵ While they are wide-ranging, the report's recommendations are not intended to be comprehensive, but to be further developed in response to local conditions and practices and in collaboration with government, civil society and industry, in order to make them as effective as possible – so that Afghanistan's natural resources can be a blessing, and not a curse.

SUGGESTED MEASURES

1. TRANSPARENCY

Transparency can be a powerful tool against abuses which could cost the Afghan government large amounts of revenue. Specific transparency provisions in the EIDF could include:

- >> A requirement that companies involved in mining **reveal their true, beneficial owners** to the public, to prevent the use of shell companies to circumvent controls against corruption or other abuses. There are many examples of hidden company ownership through anonymous shell companies obscuring individuals who benefit from valuable natural resource deals, creating major corruption risks – and potentially costing governments hundreds of millions of dollars. The OPL 245 oil deal in Nigeria is a good example.⁶
- >> Provision for prompt and automatic **publication of all natural resource contracts** (including sub-contracts, service contracts and ancillary documents), once they are agreed. Model contracts should also be public. These requirements should be **incorporated into law** in order to make publication **automatic and routine**: allowing the decision to publish to be revisited with every concession will greatly reduce the effectiveness of publication as a deterrent to bad contracts. Contract publication is already the norm in many countries around the world, without any apparent harm to investment.⁷
- >> An **assumption that documents related to the extractive industries should be public** and easily accessible except for **narrowly defined exceptions** where there is a genuinely over-riding imperative of commercial confidentiality or national security. This includes all rules, regulations, and policies, along with bidding documents, list of pre-qualified companies, successful and unsuccessful bids, technical information, and social and environmental assessments and mitigation plans.
- >> **Supply chain transparency.** The EIDF should include a commitment to create a legal obligation on companies in Afghanistan's extractive sector to carry out and publicly report on **risk-based due diligence** to ensure that their supply chains, as well as their own operations, do not contribute to conflict, human rights abuses, or corruption – in line with OECD and UN standards. Due diligence requirements can make companies responsible for their own impact, and help cut armed groups out of the supply chain. They are already being implemented in a number of countries, for example the United States.
- >> A statement that companies should be obliged to **submit all relevant technical and geological information** to the Ministry of Mines.

2. OPEN AND FAIR BIDDING

The bidding and concession-allocation process is one of the most common targets for corruption that can cost huge amounts to national treasuries. The Democratic Republic of Congo, for example, lost at least \$1.36 billion from the under-pricing of mining assets just between 2010 and 2012.⁹ It is important that the natural resource governance framework in Afghanistan includes measures to prevent the country being the victim of similar abuses. Transparency measures like the publication of mining contracts and of beneficial ownership information can help, but for the actual bidding process, the key principles include:

>> **Clear and fair eligibility criteria, bidding procedures and time-tables for the different parts of the process**, established well in advance, and applied with strict equality to all applicants. This will allow companies to plan and make it easier to ensure the rules are applied equally.

>> **Transparency at every stage of the process.** While there are good reasons for bids to remain confidential while the process of allocating a concession is still ongoing, it is important that they should be published in full immediately after a decision on a winning applicant has been made, so as to provide a way to assess decisions, and expose any that are clearly questionable.

Other information that should be published before a decision is made includes tender documents and lists of pre-qualified companies, accompanied by evidence of their eligibility. To reduce the risk of bidders paying bribes to corrupt officials via third parties such as subcontractors, companies should be required to publicly disclose their relationships with any agents, consultants, local partners or other third parties that help them to win access to oil or mining rights, and any payments made to them.

>> **Criminalisation of actions** by government officials which give a significant advantage to one company over another. There should be no preferential treatment of any kind for individual companies involved or potentially involved in bidding for resources.

>> **The assessment of a bid should take into account all costs and benefits** associated with a project – and the government should be prepared to postpone or cancel a project if the risks outweigh the interest in proceeding immediately. Assessments should cover social and environmental impacts, but also human rights and security issues (like the risk of creating conflict between local communities) and cultural or heritage impacts (like the risk to archaeological sites). Other relevant factors include the value of secondary minerals found at a mining site, and the costs to the government of providing security for mining projects. **The human rights, environmental and community relations record of a company should also be taken into account** in the assessment of a bid – not just their commercial offer.

>> **The environmental, social and community impact of a mining project should be assessed as part of the bidding process, not after it** – and should form a key part of the criteria for awarding a contract. While some aspects of community consultation or Environmental and Social Impact Assessment may take place after a license is granted, there must be detailed and accurate information about the potential impacts and the potential costs and benefits for local communities to allow these factors to be a significant part of the criteria for deciding who should get a license. Communities must be properly informed, and be able to express their views and have them taken into account by bidders and the State.

>> The EIDF could include a commitment to **use model contracts** for different types of concessions. Model contracts can be thoroughly tested and reviewed to address potential weaknesses, and can ensure standard provisions are included in every license. However, it is important that they be developed transparently, with full public and civil society participation, and be made publicly available.

All contracts should integrate standard provisions on social, environmental and community issues, as well as strong governance measures. Whatever their basis, contracts should avoid highly complex structures to ensure they can be effectively implemented and enforced.

>> **Oversight of the bidding process** by an independent body. The draft Mining Law gives the Inter-Ministerial Commission (IMC) responsibility for oversight of the bidding process, but this could also be supplemented by a Mining Advisory Board (see below) or other independent agency. Decisions of the IMC should be void if any member is shown to have an undisclosed conflict of interest.

>> **Eligibility.** It is clearly important to ensure that individuals who might have a conflict of interest or engage in abusive practices are excluded from the extractive industries. The EIDF could include a commitment to put in law that **public officials** (including MPs, judges, and all but the most junior civil servants, plus all their close relatives) are **forbidden from not just from holding a mining license, but from benefitting from one indirectly – for example through a shell company.** The prohibition should also apply to individuals with a record of human rights abuses, corruption or similar wrong-doing.

>> **Transfer or renegotiation.** Any significant alteration of the terms of a license should require the same level of scrutiny and approval as the original license. Identical contractual obligations, and identical standards for eligibility, should be imposed on any new license-holder or beneficial owner if a contract is transferred.

3. COMMUNITY ENGAGEMENT

Extractive operations can easily create conflict between local communities, companies and the government. This can cause major disruption: strikes, road blockages and even violent attacks can greatly undermine any effort to develop mineral resources.¹⁰ In Afghanistan the presence of armed movements in many parts of the country provides a particularly easy path for opposition to become violent.

Creating channels for communication and dialogue between government, companies and local communities can do much to reduce the threat of this conflict, and indeed to make the local community a positive force for stability. Some officials have expressed understandable concerns about the need to ensure community engagement processes are not taken over by armed groups, or used to extort money for individual gain. But there is great potential to build on structures like the Community Development Councils (CDCs) to create formal mechanisms that are fair, accessible and effective for all sides – and to build up informal contacts between government and local communities. If it is done well, this engagement should not be an obstacle to mining, but an important support to it.¹¹ Key points for the EIDF could include:

>> A general commitment to the **principle of working with local communities**, respecting their rights and concerns, and ensuring they also benefit from mining. The state should ensure legitimate representation and meaningful participation by local communities (including women and youth) in decision-making or oversight mechanisms, and should seek their Free, Prior and Informed Consent (FPIC) at every stage of the process, backed by written agreement negotiated by the community and extractive companies. The government should also provide expert advice and capacity development to enable local communities to understand the potential benefits and costs of a project and to take part in decision-making. Engagement with local communities should start even **before a final decision to designate an area for mining**, and continue to mine closure and clean-up, in order to identify problems early on and minimise the risk of conflict.

>> A commitment to work with communities, companies, civil society and government to **create consultation and grievance resolution mechanisms that are effective and fair for all parties**. There is much scope for designing intelligent processes, adapted to the local structures and traditions, which can address potential conflicts while minimising the danger of abuses of the process from either side. These processes should conform to international standards, especially the UN Guiding Principles on Business and Human Rights,¹² and the decisions of the dispute resolution mechanism should not prevent communities and individuals having access to judicial remedies.

>> Where **arbitration procedures** are used, they should be **transparent, fair and accessible**. International arbitration can be opaque and unaccountable, and make decisions in secret that affect local communities. Even governments have had difficulties using mechanisms like the International Centre for Settlement of Investment Disputes (ICSID).¹³ It is increasingly considered best practice for an arbitration process that involves the state or local communities to be carried out transparently, with appropriate protections for information that is legitimately commercially sensitive.¹⁴ Such procedures should also allow third parties, including civil society organisations, to present briefs to the arbitration hearing.

>> Community engagement does not need to be limited to contract negotiations. The government could set out a commitment in the EIDF to create **effective channels for informal engagement**, for example by tasking local MoMP officers to meet with community elders on a regular basis – the ministry could also encourage contacts between communities in different mining areas to share their experiences and manage expectations.

>> Local engagement should equally extend to monitoring of mining activities. **Community monitoring** (the creation of mechanisms for local communities to take part in oversight of mining activities, and channels for them to report concerns) has considerable potential to increase the engagement and support of local people. This can provide effective scrutiny of mining operations in a way which does not ask more of an over-burdened Ministry of Mines. Again, care would be needed to avoid abuses by either side, but the principle should be firmly included within the EIDF.

>> **Give local communities a stake in mining operations**. This in the first place means requiring **Community Development Agreements** to be negotiated with legitimate local representatives after consultation with the broader community (and not just officials) – and for these to be included in contracts. There could also be a commitment to directly **dedicate a small percentage of the value of extracted materials** to community projects. However, it is important that outline proposals for CDAs be required before a contract is granted and be made a factor in assessing a bid, to ensure there is an incentive for companies to offer the best possible deal. Direct support to local communities also requires appropriate safeguards against corruption or other abuses.

>> The EIDF should make clear that support to local communities from mining companies **should not undermine or replace the government's duty to provide services**, or bypass local governance structures and development plans. This support should also be planned to ensure its sustainability after the end of exploitation. Social support must not be used as a lever to put inappropriate pressure on local communities in their relations with companies or the state.

>> Rules on **local procurement** where equivalent goods and services can be provided in-country can help to increase the development impact of the extractive industry, as can commitments to train Afghan workers. However, it could also be useful for the Framework to include a commitment to **support training, employment and purchasing specifically from the area where extraction is carried out**, and to spread those benefits across the whole range of local communities. This would increase local support and reduce the chance of conflict.

>> The EIDF could set out **clear and fair rules to deal with the most common sources of tension**, including **resettlement**, **land** acquisition and use, **water** use, **compensation** for damage to land or property, and **rehabilitation** of land after the end of a mining project. The rules should be based on a commitment to seek free, prior and informed consent, allow for a right of appeal, and set out procedures for independent monitoring and independent assessment of damages and compensation. They should normally apply to legal occupants of land as well as its owners – given that many legitimate local inhabitants will either be renting land or not have formal documentation for land they own. Resettlement should at a minimum conform to the World Bank's resettlement guidelines.¹⁵

>> The EIDF could include a commitment to create and **enforce detailed health and safety standards** in extractive operations. This could include implementing IFC Performance Standard 2.¹⁶

>> As well as engaging with local communities, the government **should maintain strong contacts** with Afghan and international **civil society organisations**, including universities, experts, and the media and should involve them in discussions on policy and in monitoring of mining activities. The EITI Multi-Stakeholder Group (MSG) and a possible Mining Advisory Board could be vehicles for doing this, but less formal contacts will also be important. The EIDF could also include a commitment to **hold regular meetings with civil society representatives**, with participation open to all with relevant interest in the area.

>> The EIDF could also recognise the contribution that civil society organisations and the media can make to oversight and monitoring, for example through their independent investigations and work with local communities. It should include **protections to ensure civil society groups and the media are allowed access to mining sites, as well as to information from mining projects**, and commit to protecting the **right of civil society, local communities and the media to speak out** without fear of retribution.

4. SECURITY

It is critical for the EIDF to consider security issues around extraction. Many countries have found that mining can help fund illegal armed groups or drive violent conflict over resources – indeed there is extensive evidence that illegal armed groups in Afghanistan, both pro and anti-government, already draw significant revenues from this source. Apart from conflict-reduction efforts like community consultation, there are several key concerns which the EIDF could cover:

>> **Involvement of armed groups in extractive activity.** While natural resources are not the only reason for the presence of illegal armed groups, they can be an important factor in their ability to operate. The EIDF should at least contain a commitment to include a provision in the mining or other law making it illegal for any individual linked to an armed group to be involved in extraction or trade in natural resources.

This should cover not only the official security services, but also **semi-official groups like the Afghan Local Police (ALP), as well as completely informal (but officially tolerated) armed groups**, like the militias operating with US Special Forces. Members of these groups and their close relatives should be prohibited **not just from holding a license, but from extracting minerals, trading or processing them, and providing security** for these operations. The current law does prohibit senior members of the Defence and Interior ministries from bidding for concessions, but it does not cover informal groups and only forbids ownership of a license.

>> The Afghan government is responsible for protecting mine sites and pipelines but **should avoid, wherever possible, using military force to do so**. Militarization would identify mines and the communities around them as a target for insurgents and could contribute to increased violence. Responsibility for security should remain with **specially trained units of the Afghan National Police (ANP) that are fully accountable under the civilian and criminal codes of Afghanistan** for the use of force.

These units should operate and be trained under strict conditions that incorporate recognised best practice, especially the **Voluntary Principles on Security and Human Rights**.¹⁷ The legal commitment to the principles should be backed up by an agreed and published process for implementation, including full reporting requirements and independent monitoring. It should be supplemented by an independent system, overseen by credible third parties, to investigate and address complaints and any abuses by security forces around mines. The government could also establish a mechanism overseen by a credible independent third party to record and regularly publish the **origins, sources and intensity of violence around extractive operations**.

>> **Consultation on security for mining operations**. Even if they come from the official units like the Afghan Public Protection Force (APPF), the introduction of fighters from outside a local area can cause significant tensions with local people, particularly if they are from a different political or ethnic group: the risk of conflict is very real. The EIDF could counter this by setting out a clear commitment to consult local communities on security arrangements (without giving them a veto) and to establish lines of communication to prevent incidents and handle them when they do happen.

5. SOCIAL, ENVIRONMENTAL, AND CULTURAL IMPACTS

Social, cultural or environmental impacts can easily undermine the benefits of extraction and help to create conflict, making it correspondingly important to put in place the best possible measures to assess and reduce this impact. Key points for the EIDF could include:

>> As noted above, the potential social, environmental, cultural and human rights impacts of a project, and plans to mitigate them, should **be an important factor in deciding which company should win an extractives contract** – and whether extraction should happen at all. Impacts should be properly assessed and plans developed before a license is granted, through a thorough, open, and independent process, including local public hearings and other measures to ensure those affected are informed and can voice their concerns. There may be scope for the state to commission parts of this work to reduce duplication among bidding companies and increase the efficiency of the process, and some aspects (like final agreement of a CDA) may take place after a license is granted. Whoever pays for the work, safeguards must be in place to ensure the experts or consultants carrying it out are competent and genuinely independent.

>> Impacts should be **effectively monitored** after a contract is signed, and the government should carry out **regular (and sometimes unscheduled) inspections** of mining sites. Assessments and management plans should be **regularly updated**, with participation from local communities.

>> Environmental assessments should consider cumulative environmental effects across all mining projects, and there should be a presumption against projects that are likely to do major environmental damage. The EIDF could also reiterate the government's commitment to **careful management of water** and other resources, which respects the rights of local inhabitants, **minimises the impact of mining on the environment**, and avoids conflict with local communities over land and resources. Companies should not have an unlimited right to use water (or any other resource).

- >> Contracts should by law include provision for **clean-up and rehabilitation of mining sites** after closure. This can be very expensive: suitable bonds or escrow accounts should be a mandatory part of contracts from the outset to cover post-closure expenditure and remediation (and indeed all other potential project costs).
- >> There should be a clear, independent role for the **National Environmental Protection Agency (NEPA)**, including NEPA approval for extraction permits (as set out in the Environmental Law), and a clear remit for NEPA to inspect mining sites and review environmental impact reports.
- >> Cultural or heritage impacts (like the risk to archaeological sites) should be a significant factor of the decision to exploit, and the EIDF should ensure that where mining does go ahead, contracts include detailed measures to minimise and mitigate archaeological impacts, for example by imposing conditions on the area and method of exploitation.

6. FINANCIAL AND TAX ISSUES

Managing the flow of revenue from extractive operations, and setting out strong rules for tax and financial issues, is important to ensure the full benefit of mining reaches the government budget and that funds are not diverted or misused. Measures that could be included in the EIDF include:

- >> **Transparent management of revenues**, including project-level disclosure of production data and of all payments between companies and governments, in either direction. The Afghan government is to be commended for signing up to the Afghan Extractive Industries Transparency Initiative (AEITI): it should ensure all necessary steps are quickly taken to achieve validation, according to the new EITI Standard.¹⁸ Further measures could include independent audits of revenues and of production operations, and tracking revenues from natural resources after they reach the Afghan government.
- >> The EIDF could include a commitment to **create clear rules for the setting, calculation and payment of royalties**, to help ensure they are transparent, and based on the full and fair value of the minerals extracted. A fair mechanism, set out in law, would help 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 – for example through ‘transfer pricing’ between two related companies.¹⁹ This should include a statement that royalties will be calculated based on the true sale value of a mineral receivable ‘at the mine gate’ in an arm’s length transaction where the purchase price is not influenced by any special relationship or arrangement between the parties.
- >> The EIDF could include a commitment to ensure that not just royalties but taxes, fees, signing bonuses and all other **income from extractive activities is paid into a single, easily controllable Treasury account**, making it more difficult to divert and hide these funds. These payments should be clearly broken down by project and the information made publicly available. Collecting income in a single account, and publishing all payments and revenues from it, will make accounting easier and lower administrative costs.

>> The EIDF could discuss the creation of a **Sovereign Wealth Fund** or a natural resources trust fund to invest and manage mining and oil revenues, following the example of Norway and other countries. Such a fund could help ensure a lasting benefit from mining revenues, but could also be vulnerable to abuses. The EIDF should set out a clear commitment to proceed only on the basis of strictly controlled rules and limits, a clearly defined structure, and complete transparency, set out in dedicated legislation and incorporating best practices like the Santiago Principles.²⁰

>> Companies have sometimes used “thin capitalisation” to avoid taxes – that is, they borrow heavily to invest in the project rather than raised money directly from investors, and then count the interests payments as an expense to reduce their liability for taxes. For this reason the EIDF could **set out a maximum debt-to-equity ratio** of no more than 3:1.

7. OVERSIGHT

Strong, independent oversight is critical to prevent abuses that rob the Afghan people of the benefits of natural resources. With care, it can be structured so as to minimise the burden on legitimate activities while still remaining effective. Suggestions for the EIDF include:

>> **Parliament** should not be required to approve extraction contracts except in exceptional circumstances (like the extraction of radioactive minerals). However, their role in **scrutinising, investigating and debating** mining activities should be recognised and reinforced. In particular, the Ministry of Mines should make regular reports to parliament with details of mining activities, development plans, contracts, and revenues, which should be subject to debate. Parliament’s right to demand any information that is not commercially sensitive should also be formally recognised, with the limits of what is “commercially sensitive” narrowly defined.

>> The Afghan government should consider creating an independent **Mining Advisory Board**, including Afghan and international experts and representatives from business, civil society, and local communities. Such a Board would need to be carefully structured to ensure its independence and to strike the right balance between inclusion, impartiality and practical effectiveness, but it could play a very valuable role by providing independent input and scrutiny and bringing a wider group of stakeholders to the table – while preserving the leading role of the Ministry of Mines in shaping policy and monitoring extraction. Possible functions for the Board could include:

- Review draft contracts and make suggestions to address any potential weaknesses.
- Review mining operations – perhaps once every two years, or sooner where some major source of tension or concern arose.
- Review auditors to ensure they are impartial and competent.
- Review the consultants who carry out Environmental and Social Impact Assessments, to ensure their competence and honesty, and that there is no bias toward the mining companies which normally pay for this work.
- Review and approve environmental and social impact reports.
- Review decisions to designate information as confidential.
- Ensure bidding processes are fair, effective and properly implemented.

Independent expert panels have played a useful role in other countries, for example Indonesia.²¹ In Afghanistan, one possible solution could be to broaden the mandate and membership of the existing **International Advisory Panel**. This body has played a useful role in providing expert advice on mining contracts, but has a narrow technical membership and limited independence and transparency. Another option could be to strengthen and extend the mandate of the EITI **Multi-Stakeholder Group (MSG)**, although certain functions, like reviewing contracts or confidentiality, might require a more limited panel to avoid direct conflicts of interest.

>> As discussed above, **community monitoring** has great potential both to help the MoMP in its oversight role and to reduce the risk of conflict with local communities. The EIDF could also include a general commitment to ensure that the necessary processes and capacity are in place to implement and monitor contract terms and the legal obligations of companies and the government. This should include safeguards against conflicts of interest, for example between the oversight and investment facilitation roles of the Ministry of Mines.

>> The EDIF should make clear that obligations like transparency, labour standards, local employment, and environmental safeguards **apply to all sub-contractors and service providers** as well as to the license-holder. It could also include reasonable limits on stabilisation clauses, which lock in place the laws in force at the time a contract is signed, to ensure that improved governance, social, environmental and human rights standards can be applied to existing contracts – as is the norm in many countries.²²

>> In any project with an investor owned in whole or in part by a foreign government, there is the risk that the principle of **sovereign immunity could become an obstacle** to the Afghan government bringing an action against the company. The government should make a contractual waiver of any sovereign immunity rights a part of all mining licenses.

>> Staff or outside advisers working with the Afghan government on a mining project should be **prohibited from subsequently working for a company counterpart** on the same project. The Afghan government should also consider enforcing a broader rule that staff or advisers with relevant responsibilities must wait a year (for example) before going to work for mining companies that are (or may become) active in Afghanistan.

8. APPLICATION OF BEST PRACTICE

International standards are no substitute for capacity and political will on the part of the Afghan government. However, the Afghan government could consider making a general commitment in the EIDF that for each aspect of extractives policy, it would seek to apply the best and most up-to-date available international standards and principles. Different standards have different strengths, but the following are among those that could usefully be referenced:

- The International Finance Corporation (IFC) Sustainability Framework
- The International Council on Mining and Metals (ICMM) Sustainable Development Principles
- The Natural Resource Charter
- The UN Human Rights Council (UNHRC) Guiding Principles for Business and Human Rights (UNGPs)
- The Model Mine Development Agreement of the International Bar Association
- The Voluntary Principles on Security and Human Rights
- The Organisation for Economic Cooperation and Development (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas
- The Guidebook for Evaluating Mining Project Environmental Impact Assessments produced by the Environmental Law Alliance Worldwide
- The International Association for Impact Assessment (IAIA) guidelines
- The Framework for Responsible Mining
- The Santiago Principles

ENDNOTES

¹ The Tokyo Mutual Accountability Framework (TMAF) commits Afghanistan to the “development of an Extractive Industries Development Framework that governs Afghanistan’s natural wealth through an accountable, efficient and transparent mechanism which builds upon and surpasses international best practices.” At the Senior Officials Meeting which took place in Kabul in July 2013 as part of the TMAF, the Afghan government reaffirmed “its commitment to the preparation and implementation of a comprehensive and effective development framework for the Extractive Industries, including measures incorporating international best practice on social, environmental, as well as on community engagement.” “Tokyo Mutual Accountability Framework,” July 8, 2012 http://www.mofa.go.jp/region/middle_e/afghanistan/tokyo_conference_2012/tokyo_declaration_en2.html (accessed February 17, 2014); “Afghan Government reinforces comprehensive extractives sector commitment,” Global Witness, July 4, 2013 <http://www.globalwitness.org/library/afghan-government-reinforces-comprehensive-extractives-sector-commitment> (accessed February 18, 2014)

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global witness

Global Witness is a UK-based nongovernmental organisation which investigates the role of natural resources in funding conflict and corruption around the world.

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