



# COMBATTING CORRUPTION IN MINING APPROVALS

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Assessing the risks in 18 resource-rich countries

**Transparency International is a global movement with one vision: a world in which government, business, civil society and the daily lives of people are free of corruption. With more than 100 chapters worldwide and an international secretariat in Berlin, we are leading the fight against corruption to turn this vision into reality.**

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Combatting corruption in mining approvals:  
assessing the risks in 18 resource-rich countries

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The research, language, views, conclusions and strategies outlined in this document have been created by Transparency International and Transparency International Australia and are not necessarily endorsed by the BHP Billiton Foundation or the Australian Government.



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## MINING FOR SUSTAINABLE DEVELOPMENT

Transparency International's Mining for Sustainable Development Programme (M4SD) addresses where and how corruption can get a foothold in the mining approvals process – we are combatting corruption before ground is even broken.

The Programme has two phases:

### Phase I: Assessing Corruption Risks

National chapters from 18 resource-rich countries completed risk assessments to understand the nature and sources of corruption risks in mining approval processes. Their findings form the basis of this report. The Mining Awards Corruption Risk Assessment (MACRA) Tool was developed specifically to conduct these assessments.

### Phase II: Addressing Corruption Risks

National chapters will develop and implement action plans to prevent the corruption risks identified in Phase I. They will work with key stakeholders – in government, civil society, local communities and the mining industry – as part of national, regional and global strategies to build trust, improve transparency and accountability, and positively influence behaviour change of all actors in the mining sector. The Programme will advocate for the strengthening of national and international policy and practice, and existing mining transparency initiatives, to enhance the contribution of mining to sustainable human development.

M4SD is led by Transparency International Australia, as the host chapter of a Global Thematic Network Initiative (GTNI), put into practice by Transparency International national chapters, and supported by the Transparency International Secretariat.

It is funded in Phase I by the BHP Billiton Foundation and the Australian Government through the Department of Foreign Affairs and Trade (DFAT).

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## Abbreviations

<b>CDA</b>	Community Development Agreements
<b>DRC</b>	Democratic Republic of the Congo
<b>ESIA</b>	Environmental and social impact assessment
<b>EITI</b>	Extractive Industries Transparency Initiative
<b>FPIC</b>	Free, prior, informed consent
<b>ICMM</b>	International Council on Mining and Metals
<b>IGF</b>	Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development
<b>M4SD</b>	Transparency International's Mining for Sustainable Development Programme
<b>MACRA Tool</b>	Transparency International's <i>Mining Awards Corruption Risk Assessment Tool</i>
<b>NRGI</b>	Natural Resource Governance Institute
<b>PEPs</b>	Politically exposed persons
<b>PNG</b>	Papua New Guinea
<b>SOE</b>	State-owned enterprise
<b>TI</b>	Transparency International

## Glossary of terms

The specific terminology used to describe elements of the mining approvals regime differs from country to country and even within countries, depending on the sub-national jurisdiction.

This report uses the following meanings for these terms:

- **Licence** refers to the instrument used by a government authority to grant a mining company the right to engage in exploration or mining activities (“mining rights”). In some jurisdictions, a licence may be required for prospecting.

Depending on the jurisdiction, a mining licence may also be referred to as a lease, permit, title, right, concession or claim.

- **Licensing authority** refers to the government authority responsible for granting the mining licence.

Some countries have a dedicated agency in charge of licensing (for example, the *Agencia Nacional de Minería* in **Colombia** and the *National Minerals Agency* in **Sierra Leone**). In other jurisdictions, the mining ministry is responsible for processing and approving licence applications or bids.

- **Mining cadastre** refers to the register of all mining licences, including information and documents related to the licences. It also includes the cadastral maps that visually plot the boundaries of the licence areas. The **cadastre portal** is an online, interactive platform used in some jurisdictions for handling licence applications, paying fees and submitting documents. The mining cadastre and cadastre portal are usually managed by the licensing authority.
- The **mining approvals regime** refers to the entire system that governs decision-making about whether, who and under what conditions to permit exploration or mining activities.

It is made up of the applicable laws and regulatory framework, administrative institutions, the mining cadastre, mining licences and the other related licences and permits that are required before commencing exploration or mining activities, such as environmental approvals.

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# CORRUPTION RISKS IN MINING APPROVALS: LESSONS FROM 18 RESOURCE-RICH COUNTRIES

18 diverse jurisdictions across the world

5 of the world's top 20 mining-dependent economies, 14 of the top 40

11 members of the Extractive Industries Transparency Initiative (EITI)



Countries in the study\*

Emerging mining economies e.g., Mongolia, Kenya and Cambodia

Major mining economies e.g., Australia, Canada and South Africa

\*Armenia, Australia (Western Australia and Queensland), Cambodia, Canada (Ontario), Chile, Colombia, Democratic Republic of the Congo, Guatemala, Indonesia, Kenya, Liberia, Mongolia, Peru, Papua New Guinea, Sierra Leone, South Africa, Zambia and Zimbabwe



# EXECUTIVE SUMMARY

**Transparent and accountable mining can contribute to sustainable development. This begins with corruption-free approvals – the very first link in the mining value chain when decisions are made about whether, where, and under what circumstances to permit mining, including who is awarded licences or contracts.**

Corruption in mining approvals can result in environmentally unsound and socially destructive mining projects being approved, rights to a country's mineral wealth being granted to unqualified or unethical operators, and politicians or government officials taking advantage of their position to profit from their interests in the sector. Corruption at the start of the mine lifecycle compromises the rest of the process – impairing how operations are monitored and regulated, undermining the collection of taxes and royalties and damaging the mining industry's social licence to operate.

Transparency International has assessed the risks that can lead to corruption in 18 resource-rich countries to identify the warning signals as early as possible. This report demonstrates where and how corruption can get a foothold in mining approvals processes before ground is even broken. It presents examples from a range of diverse countries and identifies important roles for government, the mining industry and civil society to identify, prevent and mitigate these risks.

Our research shows that vulnerabilities to corruption exist in mining approvals regimes across the world, irrespective of their stage of economic development, political context, geographic region, or the size and maturity of their mining sectors. This report draws on real examples to highlight exactly what happens on the ground, identifying both critical risks and the efforts currently in place to mitigate them.

To present a truly global picture of risks in mining approvals processes, the examples in this report are drawn from a broad range of contexts: major mining economies such as Australia, Canada and South Africa; emerging mining economies such as Cambodia and Kenya; and 11 members of the Extractive Industries Transparency Initiative (EITI).

The report serves as a useful guide to lawmakers and regulators, companies and civil society organisations – regardless of their location – to assess and enhance the transparency, accountability and integrity of the mining approvals regime in their own countries.

## Understanding corruption risks

To understand the corruption risks identified and assessed in the 18 countries, Transparency International has framed a series of six questions that help identify *where* and *how* an approvals regime is vulnerable to corruption. The answers to these questions can help target the underlying causes of corruption, informing key players on how to take effective preventative action *before* corruption occurs.

Change starts by asking these questions.

### 1. Who benefits from mining approval decisions?

Decisions about whether to approve a particular mining project must put the public interest first, and conflicts of interest need to be declared and addressed.

If not properly controlled, the movement of staff between industry and government (revolving doors) can lead to personal interests taking precedence over the public good. This risk is evident in **Peru**, where staff in the licencing authority are employed on precarious and short-term contracts, tempting them to handle licence applications in a way that will maximise their future employment opportunities in the mining industry. The licencing authority has recognised this is a problem and set out the steps it will take to mitigate these risks. See Chapter 1, page 20.

### 2. How ethical and fair is the process for opening land to mining?

Decisions about which land is opened to mining and under what conditions have flow-on effects for the integrity of licencing decisions and other mining-related approvals.

If rules for opening land to mining are not clear or transparent, investors can take advantage of decision-makers' discretion and offer bribes in exchange for access to land. In **Indonesia** reforms to the national Mining Law introduced an opaque system for auctioning mining zones. The lack of clear procedures and criteria allegedly enabled a provincial governor to allocate forested areas to mining and issue licences there in exchange for kickbacks. The governor is currently under investigation by the national Corruption Eradication Commission (known as the KPK). See Chapter 2, page 32.

### 3. How fair and transparent is the licencing process?

A fair and transparent licencing process has clear rules and an effective licencing authority, with a complete and accurate register of licences (mining cadastre). If licence information in the mining cadastre

is incomplete, licencing officials can manipulate applications and breach the "first come, first served" principle, the standard approach for granting licences.

Various features of the licencing process in **Zimbabwe** make it susceptible to corruption: the cadastre is paper-based, which limits public access and makes it vulnerable to tampering. The duration and timing of each step of the licencing process is at the discretion of licencing staff. As a result, cases have emerged where the timing of applications has allegedly been manipulated to preference certain applicants. Zimbabwe is moving to adopt an online cadastre portal to process licence applications, which may address some of these issues. See Chapter 3, page 40.

### 4. Who gets the right to mine?

Governments need to conduct effective due diligence on the past conduct and compliance, financial resources, beneficial owners and technical capacity of licence applicants and their principals. Otherwise, companies can provide misleading information, resulting in mining rights falling into the hands of unqualified investors or speculators. Inadequate due diligence can enable companies with a history of corruption, tax evasion or money laundering to enter a country's mining sector.

In **Australia**, the mining states of Western Australia and Queensland have limited mechanisms for due diligence investigations. Requirements for compliance disclosure are limited to the activities of mining companies in Australia. Several companies that have been granted licences in Australia have been investigated or charged with corruption or criminal offences overseas. See Chapter 4, page 54.

### 5. How accountable are companies for their environmental and social impacts?

Effective verification of environmental and social impact assessments (ESIAs) is needed to guard against the risk that licence applicants will knowingly provide incorrect information about the potential impacts of their projects.

This research found that most government authorities lack the capacity to verify the contents of ESIs. In **South Africa**, the Department of Mineral Resources is responsible for approving ESIs and issuing environmental authorisations in the new streamlined approvals process for mining companies. However, the Department lacks the necessary capacity and expertise and its failure to perform its environmental duties has led to multiple legal actions and an increased burden on the courts. See Chapter 5, page 60.



## 6. How meaningful is community consultation?

Ensuring genuine consultation and negotiations with communities is critical to securing the legitimacy of mining approvals. If there are no clear, binding requirements for consultation, it is more likely that the duty to consult will be ignored or carried out superficially.

In **Cambodia**, there are still no formal guidelines on who should be invited to participate in community consultation on social and environmental impacts or how agreements should be reached and officially recorded. One community reported that they felt past consultations had been convened in bad faith by the responsible government body, which only notified community members on the day of the consultation, ultimately manipulating the consultation in favour of the mining licence applicant. See Chapter 6, page 70.

### Addressing corruption risks

Measures to address these risks must be tailored to the relevant context – there are no one-size-fits-all solutions. However, the country examples presented in this report reveal that all mining sector stakeholders have clear roles to play in enhancing transparency and accountability to combat corruption in mining approvals.

**Government – lawmakers, senior government officials and licencing authority officials** as the custodians of a country's mineral wealth have a critical role in:

- **Setting clear, transparent and effective rules and criteria** for mining approvals processes
- **Guaranteeing public access to information** about mining and mining-related approvals processes and decisions
- **Establishing meaningful opportunities** for affected communities and civil society **to participate** in aspects of mining approvals that directly affect them
- **Making sure that the agencies** tasked with administering mining approvals have the **necessary institutional capacity** to effectively perform their functions
- **Conducting due diligence** on licence applicants and **their beneficial owners** to ensure that the country's resources are entrusted to genuine and qualified investors with a clean track record
- **Implementing effective mechanisms to identify, manage and reduce conflicts of interest** arising from government officials' personal interests in mining, revolving doors and mining-related lobbying and political donations

### Mining industry – companies and industry associations

wanting to develop a country's mineral resources have a significant role to play in ensuring their own operations are corruption-free and championing good practice within the industry by:

- **Being transparent about their operations**, including their subsidiaries, joint venture partners and beneficial owners, where they operate and their track record
- **Disclosing their project rights and obligations**, including contracts, negotiated licence conditions, environmental and social workplans and community development agreements
- **Committing to and conducting meaningful community consultation** by putting in place protocols to engage with legitimate community representatives
- **Going “beyond compliance”** where a country's licencing standards or disclosure requirements are lax and below best practice
- **Understanding corruption risk** in mining approvals in the countries where they operate and introducing internal integrity systems to prevent and detect corruption in their operations

**The public – civil society, the media and mining-affected communities** have an important role as accountability actors to scrutinise the decisions of government and the conduct of industry players by:

- **Observing the process** to understand how the mining approvals process is undertaken and where the process is vulnerable to corruption risk
- **Scrutinising approvals outcomes and decisions** so they can hold government and the mining industry to account
- **Taking up meaningful opportunities to participate** in aspects of mining approvals that directly affect them

Change must happen where mining approvals take place – at the national and sub-national level – and with support from global and regional initiatives. Transparency International will continue to work with key stakeholders to control corruption risks in different contexts. This will provide evidence about what works, what doesn't work and why, and in doing so paint a more complete picture of what's needed to make the mining approvals process corruption-free.

# INTRODUCTION: CORRUPTION RISKS IN MINING APPROVALS

In 2016, a grand jury in **Liberia** indicted top government officials on charges of bribery for conspiring to amend key laws to enable a London-listed company, Sable Mining SBLM.L, to get rights to one of the world's richest iron ore deposits – the Wologozi Mountain Range.<sup>1</sup> Documents leaked to Global Witness, the international civil society organisation that made the exposé, allege that over US\$950,000 was used to pay off top government officials and their relatives.<sup>2</sup>

In 2015, on the other side of the world in the coal-rich **Australian** state of New South Wales former Mining Minister Ian MacDonald and another minister at the time, Eddie Obeid, were charged with corruption in a case involving mining licences.<sup>3</sup> An inquiry by the state's Independent Commission Against Corruption (ICAC) found that the ministers had conspired in granting a coal exploration licence over Mr Obeid's property. The Obeid family stood to make over US\$23 million from the corrupt deal and were accused of hiding their interest in the mining projects through complex and opaque company structures.

In examining the mining approvals regime in the state, the ICAC concluded,

...the corrupt conduct uncovered by the Commission ...cannot simply be put down to a rogue minister for mineral resources. The state arrangements that relate to coal provided an opportunity not found in other parts of government for individuals to engage in corrupt conduct.<sup>4</sup>

What do these two cases from two very different jurisdictions have in common?

Despite the stark contrast between the resource-rich West African nation and the mining giant of the Pacific, the mining approvals regimes in both jurisdictions were vulnerable to corruption.

**This report examines what makes mining approvals vulnerable to corruption and what governments, companies and communities can do to prevent corruption before it occurs.**

Transparency International investigated corruption risks and the underlying causes of corruption in mining approvals in 18 diverse jurisdictions. Assessing the systemic corruption vulnerabilities in mining approvals is the first step to developing effective solutions to target and prevent corruption *before it occurs*.<sup>5</sup>

1. J. Harding Giahvue, "Liberia grand jury indicts Sable Mining, officials for bribery", Reuters (web), 26 May 2016.

2. Global Witness, "The Deceivers" (web). Available at: [www.globalwitness.org/thedeceivers](http://www.globalwitness.org/thedeceivers). Accessed 14 August 2017.

3. U. Malone, "Eddie Obeid, Moses Obeid and Ian MacDonald committed to stand trial on conspiracy charges," ABC News (web), 30 May 2017.

4. ICAC, *Reducing the opportunities and incentives for corruption in the state's management of coal resources* (Sydney: Independent Commission Against Corruption, 2013): 6. Obeid and MacDonald were committed to trial in May 2017.

5. The Natural Resource Governance Institute has examined the red flags that indicate that corruption in licencing has occurred: A. Sayne, A. Gillies and A. Watkins, *Twelve red flags: Corruption risks in the award of extractive sector licenses and contracts* (Washington DC: Natural Resource Governance Institute, 2017).

This report provides information for action to address corruption risks and supports the work of:

- **Extractive industry transparency and good governance actors:** global civil society organisations, multilateral institutions and initiatives, research institutions and donors who support governments to improve the governance of their country's mining sector
- **Government policy-makers and regulators:** national mining ministries, licencing authorities, regional initiatives for good governance (e.g. African Mining Vision) looking to reform and strengthen their mining approvals regime
- **Industry participants and investors:** mining companies, industry associations, development and commercial banks, other industry investors (e.g. export finance corporations) who want to reduce their exposure to corruption risk and champion best practice
- **Civil society and other interested local organisations:** national EITI multi-stakeholder groups and local NGOs who are working to fight corruption and hold government and industry to account to ensure that citizens enjoy the benefits of their country's mineral resources

## WHY MINING APPROVALS?

Corruption at the start of the mining value chain – in mining approvals – can have negative political, environmental, social and economic impacts that damage sustainable development and, like a domino effect, undermine good governance in the rest of the value chain.

Figure 1. Mining value chain.



(Adapted from: World Bank, Extractives Industries Value Chain.)

Countries with robust approvals regimes can attract higher quality investments from major players who avoid corruption-prone jurisdictions, improve economic returns to their citizens and reduce rates of social conflict around mining projects.

In contrast, corruption in mining approvals can lead to environmentally unsound and socially destructive mining projects being approved, rights to a country's mineral wealth being granted to unqualified or unethical operators and politicians or government officials taking advantage of their position to profit from their interests in the sector.

**The social licence of the mining sector depends first and foremost on a transparent and accountable approvals regime that effectively controls corruption risks.**

While there has been some focus on mining approvals within broader extractive sector transparency efforts, this study is the first to assess in-depth the underlying causes of corruption in mining sector approvals

regimes. This focus on the start of the value chain contributes to building a more complete picture of good governance, transparency and accountability throughout the entire mining value chain.

### What is corruption?

Transparency International (TI) defines corruption as **“the abuse of entrusted power for private gain”**. This recognises that all actors in the mining approvals process – not just government officials – have the potential to engage in corrupt conduct.

## Organisations and initiatives working to improve the governance of extractive industries

### Global initiatives

A number of global initiatives and organisations work to improve oil, gas and mining sector governance.<sup>6</sup> The most well-known initiative in this area is the **Extractive Industry Transparency Initiative** (EITI). The EITI provides a global standard for good governance of oil, gas and mineral resources. To oversee compliance with the standard, member countries must establish a multi-stakeholder group comprising of representatives from industry, civil society and government.

### Strengthening civil society

The global civil society coalition, **Publish What You Pay**, works on transparency issues throughout the entire extractive industries value chain to support civil society to hold government and industry to account. International organisations such as **Oxfam** also work in this way and have been influential in the extractives sector for many years supporting communities to defend their rights. **Action Aid** also plays an important role on the global stage in promoting community interests.

### Improving industry standards

Industry standards that encourage mining companies to improve their sustainability performance also include transparency and good governance targets, such as the *Sustainable Mining Principles* of the **International Council on Mining and Metals** (ICMM). Some development banks, too, are raising the bar through their lending conditions – for example, the **International Finance Corporation's** (IFC) industry clients must commit to disclosing contracts and their payments to government.<sup>7</sup>

### Supporting governments

Groups like the **World Bank**, **Natural Resource Governance Institute** (NRGI), **Organisation for Economic Co-operation and Development** (OECD) and the **Intergovernmental Forum on Mining Minerals, Metals and Sustainable Development** (IGF) work with governments of resource-rich countries around the world to help them improve the laws, regulations and institutions that govern their extractive sectors.

6. See Annex 5 for information on the work of these organisations specifically on mining approvals.

7. International Finance Corporation, "IFC's priorities in oil, gas and mining". Available at [www.ifc.org/wps/wcm/connect/industry\\_ext\\_content/ifc\\_external\\_corporate\\_site/ogm+home/priorities](http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/ogm+home/priorities). Accessed 10 August 2017.

## METHOD

### Country-led research

This report analyses the findings of 18 individual country risk assessments conducted over a nine-month period by Transparency International national chapters in diverse, resource-rich countries.<sup>8</sup>

The national chapters investigated the mining approvals regime in their country, or selected sub-national jurisdiction(s), to understand where it is vulnerable to corruption and to assess the likelihood and severity of the resulting corruption risks.

The mining approvals regime refers to the entire system that governs decision-making about whether, who and under what conditions to permit exploration or mining activities.

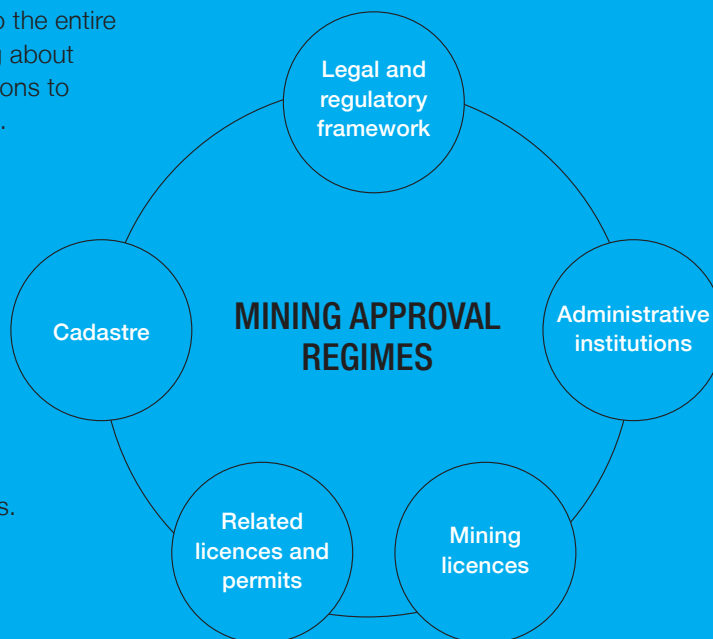
It is made up of the applicable laws and regulatory framework, administrative institutions, the mining cadastre (register of licences and map of licence areas), mining licences and the other related licences and permits that are required before commencing exploration or mining activities, such as environmental approvals or community consultation obligations.

### Mining approvals regimes

The mining approvals regime refers to the entire system that governs decision-making about whether, who and under what conditions to permit exploration or mining activities.

It is made up of the applicable laws and regulatory framework, administrative institutions, the mining cadastre (register of licences and map of licence areas), mining licences and the other related licences and permits that are required before commencing exploration or mining activities, such as environmental approvals or community consultation obligations.

Source: Adapted from Ortega Girones, 2009.

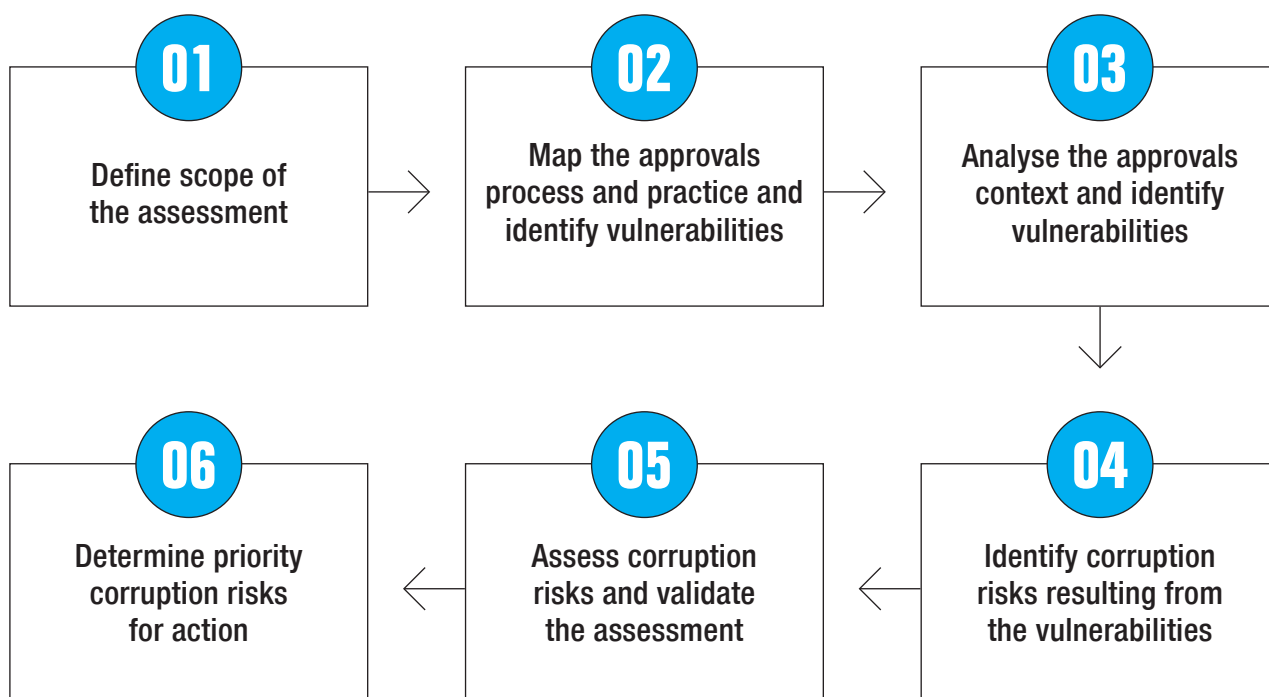


8. A list with links to the country assessments can be found in Annex 1 and further information on the participating countries and their performance in different mining indices in Annex 4.

## The MACRA Method

Each chapter used the risk assessment method developed for Transparency International – the Mining Awards Corruption Risk Assessment (MACRA) Tool.<sup>9</sup> This tool provides a rigorous and consistent approach to identifying and assessing corruption risks in diverse contexts. All national chapters followed the same steps when conducting their research. The research method generated nationally meaningful data to inform advocacy by producing information for action at the country and jurisdiction levels.

Figure 2. Steps in the MACRA tool



Each country assessment followed the same series of steps to: (1) define the scope of the assessment (2) map the approvals process, what happens in practice, and identify vulnerabilities to corruption in each (3) analyse the context in which mining approvals take place and identify vulnerabilities to corruption (4) select and adapt the most relevant corruption risks arising from the vulnerabilities from a set of common risks in the MACRA Tool, (5) systematically analyse each selected risk in terms of its likelihood and potential impact, and (6) determine priority risks for action.

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9. M. Nest, Mining Awards Corruption Risk Assessment Tool (Berlin: Transparency International/Transparency International Australia, 2016). Unpublished document. A second edition of the tool is published alongside this report.

# TRANSPARENCY INTERNATIONAL SUSTAINABLE DEVELOPMENT PROGRAM JULY 2017, PORT DI

## STATE CAPACITY GROUP

- ▷ Discretionary Discretionary
- EIA
- Verification



## BROAD STAKEHOLDER ENGAGEMENT

The data collection methods employed by researchers varied based on their context, but all used a range of primary and secondary sources. Every researcher invited representatives from industry, government civil society and community groups to participate in interviews, focus groups and workshops. Many researchers conducted field visits to mining regions.

Stakeholders from different sectors validated the risk assessments in workshops or individual meetings and the results were compiled into national reports, as listed in Annex 1.

Across the 18 countries in this study, Transparency International chapters engaged with over 750 stakeholders from a range of sectors. A further 250 individuals participated in validation and review of the risk assessments.

The MACRA Tool enables researchers to focus the assessment in a way that is meaningful to their context; it does not require researchers to respond to a standardised survey about prescribed aspects of the approvals process. Each national chapter determined the specific aspects of the approval regime they would include in the scope of their assessment, worked with local stakeholders and assessed the risks to best meet local needs. The wealth and quality of qualitative data generated by the 18 country assessments is testament to the strength and rigour of the research. The method is detailed in Annex 2.

This participatory research approach enabled Transparency International chapters to obtain the views of a range of key stakeholders about the causes, nature and impact of corruption risks in mining approvals. This approach was fundamental to establishing dialogue and strengthening the partnerships required for effective mitigation of corruption risks in this area.



**As experience shows, coalitions between different groups (citizens and elites) at different levels (local, national, and international) tend to be the most effective ones to bring about change.**

Chapter 11: From transparency to accountability through citizen engagement, World Bank (2017)<sup>10</sup>

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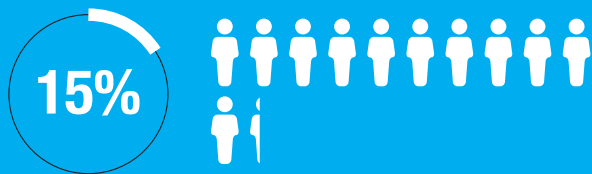
10. World Bank, *World development report 2017: Governance and law* (Washington DC: World Bank, 2017): 250.



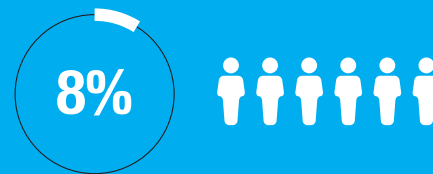
Figure 3. Participants in this study by sector

 = 10 participants

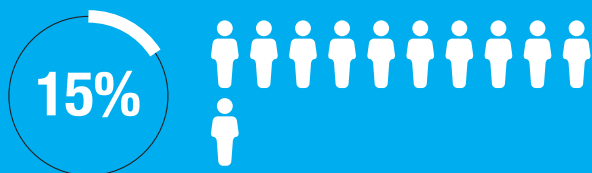
**CENTRAL/NATIONAL GOVERNMENT**



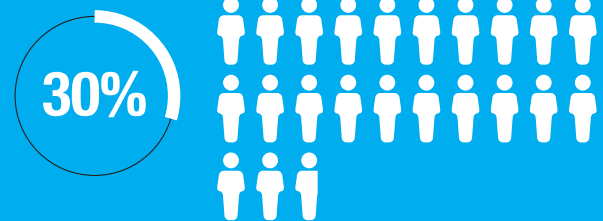
**PROVINCIAL OR LOCAL GOVERNMENTS**



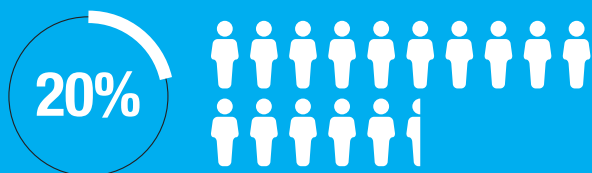
**MINING COMPANIES AND  
INDUSTRY ASSOCIATIONS**



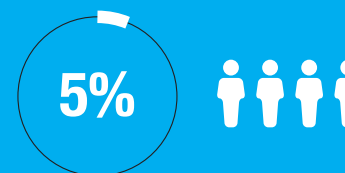
**LOCAL COMMUNITIES**



**NON-GOVERNMENTAL AND  
CIVIL SOCIETY ORGANISATIONS**



**ACADEMIA**



**OTHERS, INCLUDING FROM THE MEDIA,  
CONSULTANTS, LAWYERS, GEOLOGISTS ETC.**



## RESULTS

The rich qualitative data collected by Transparency International chapters shows that vulnerabilities to corruption exist in mining approvals regimes across the world, irrespective of their stage of economic development, political context, geographic region or the size and maturity of their mining sectors. A total of 140 distinct types of corruption risk were assessed.<sup>11</sup>

As the MACRA Tool is not intended to produce detailed quantitative comparison between these risk assessments, qualitative analysis of select corruption risks was chosen as the most appropriate method for drawing meaningful conclusions from the results, rather than producing an index or ranking. Seven specific risks were identified as the most prevalent and severe from an analysis of the aggregate country results.<sup>12</sup>

Figure 4. Top seven corruption risks

Corruption risk from the MACRA Tool	Countries that assessed this risk
What is the risk that community leaders negotiating with a mining company will not represent community members' interests?	Armenia, Australia, <b>Cambodia</b> , Colombia*, <b>Kenya</b> , Mongolia*, <b>Peru</b> , <b>PNG</b> , <b>Sierra Leone</b> , <b>South Africa</b> , <b>Zambia</b>
What is the risk there is no verification of the accuracy or truthfulness of environmental impact assessment (EIA) reports?	<b>Armenia (x2)</b> , Australia, <b>Guatemala</b> , <b>Kenya</b> , Mongolia*, Peru, <b>PNG</b> , <b>South Africa</b> , <b>Zimbabwe</b>
What is the risk that mining laws have been, or will be if reform is planned, written to favour private interests before the public interest?	<b>Armenia</b> , Colombia, <b>DRC</b> , <b>Guatemala</b> , <b>Indonesia</b> , Liberia, Peru, <b>PNG</b> , <b>Zimbabwe</b>
Assuming consultation with communities or landholders is required, what is the risk that negotiations for landholder or community agreements can be manipulated?	<b>Cambodia</b> , <b>Canada</b> , Colombia*, <b>Kenya</b> , Mongolia, <b>Peru</b> , <b>PNG</b> , <b>Sierra Leone</b>
What is the risk that criteria for awarding licences etc will not be publicly knowable?	<b>Armenia (x2)</b> , <b>Cambodia</b> , <b>Chile</b> , <b>Kenya</b> , <b>Sierra Leone</b> , <b>South Africa</b>
What is the risk that applicants for licences etc will be controlled by undeclared beneficial owners?	<b>Armenia</b> , <b>Cambodia</b> , <b>Colombia</b> , <b>Indonesia</b> , <b>Kenya*</b> , <b>Mongolia</b> , <b>Zambia</b> , <b>Zimbabwe</b>
What is the risk that in practice there is no due diligence on applicants' claims regarding their capacity and financial resources?	<b>Cambodia</b> , <b>Indonesia</b> , <b>Kenya</b> , Mongolia, <b>PNG</b> , <b>Sierra Leone</b> , <b>Zimbabwe</b>

### KEY:

- Country\*** The national chapter assessed the risk as part of a group of risks.
- Country (x2)** This risk appeared twice in the assessment, e.g. because it was identified in more than one of the approvals processes examined in that country.
- Red** The national chapter rated this risk as "very high".
- Blue** The national chapter gave this risk a score of 1 "very low" with a "virtually impossible" likelihood of occurring.

11. Most of these risks can be found in the Transparency International *Mining Awards Corruption Risk Assessment Tool* (Berlin: Transparency International/Transparency International Australia, 2nd edition, 2017). Others were formulated by the chapters in response to the specific vulnerability identified in their country.

12. Refer to Annex 3 for more details on the results.

## UNDERSTANDING CORRUPTION RISKS

As some of the individual corruption risks were similar, Transparency International chapters and experts analysed the relationships between the risks at a global workshop. In order to obtain a more accurate view of the risk profile, the corruption risks were clustered by theme and categorised into five key aspects of the mining approvals regime – the political and administrative context, land allocation, licencing and contract negotiation, environmental and social impact assessment, and community consultations. This risk mapping exercise revealed a number of corruption risk hotspots (see Figure 5).

To interrogate the data further in this report, we used six key questions to highlight what the country assessments show about *where* and *how* an approvals regime can be vulnerable to corruption:

1. **Who benefits from mining approval decisions?**
2. **How ethical and fair is the process for opening land to mining?**
3. **How fair and transparent is the licencing process?**
4. **Who gets the right to mine?**
5. **How accountable are companies for their environmental and social impacts?**
6. **How meaningful is community consultation?**

Answering these questions helps uncover the underlying causes of corruption risks in mining approvals, informing efforts to take preventative action *before* corruption occurs.

In response to each of these questions, this report presents what we learned from assessing the mining approvals regimes of 18 countries. It analyses examples from the country-led research to explore the source and nature of corruption risks in different countries. The report summarises the lessons emerging from this analysis by highlighting the mechanisms already in place or that are needed to mitigate some of these corruption risks.

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**Government, industry and civil society in any country can use these questions and examples as a starting point for understanding corruption risks in their own context and to guide them in building corruption-free mining approvals regimes.**

**Change starts by asking these questions.**

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Figure 5. Corruption risk hotspots

Element of the approvals regime	Question for understanding corruption risks	Corruption risk hotspots
<b>Political and administrative context</b>	<b>1. Who benefits from mining approval decisions?</b>	<p>Corruption is more likely to occur when:</p> <ul style="list-style-type: none"> <li>• Regulations on political donations and lobbying are weak</li> <li>• The real owners or beneficiaries of licence applicants are not disclosed</li> <li>• Senior public officials don't declare assets or interests in mining companies</li> <li>• Controls on revolving doors are inadequate</li> </ul>
<b>Land allocation</b>	<b>2. How ethical and fair is the process for opening land to mining?</b>	<p>Corruption is more likely to occur when:</p> <ul style="list-style-type: none"> <li>• Land rights are poorly protected and not properly registered</li> <li>• Rules and criteria for opening land to mining are not clear or transparent</li> <li>• Register of land rights is incomplete or uncoordinated with other land use registers</li> </ul>
<b>Mining licence application and approval</b>	<b>3. How fair and transparent is the licencing process?</b>	<p>Corruption is more likely to occur when:</p> <ul style="list-style-type: none"> <li>• Steps in the licencing process are unclear</li> <li>• Information in the licence register is missing or not publicly available</li> <li>• The licencing authority is under-resourced</li> <li>• Decision-making criteria are unclear or decisions are vulnerable to ministerial interference</li> </ul>
<b>Environmental and social impact assessment</b>	<b>4. Who gets the right to mine?</b>	<p>Corruption is more likely to occur when:</p> <ul style="list-style-type: none"> <li>• Due diligence on licence applicants is inadequate</li> <li>• Controls to deter licence stockpiling are ineffective</li> <li>• Regulation and disclosure of licence transfers are weak</li> </ul>
	<b>5. How accountable are companies for their environmental and social impacts?</b>	<p>Corruption is more likely to occur when:</p> <ul style="list-style-type: none"> <li>• Verification of ESIA's is inadequate</li> <li>• Criteria for environmental approval decisions are not clear or transparent</li> <li>• ESIA reports are not publicly available</li> <li>• Enforcement of licence conditions is weak</li> </ul>
<b>Community consultation</b>	<b>6. How meaningful is community consultation?</b>	<p>Corruption is more likely to occur when:</p> <ul style="list-style-type: none"> <li>• Rules for consultation are not clear</li> <li>• Consultation only occurs with local elites</li> <li>• Information about the project or its potential impacts is not accessible to community members</li> <li>• Community agreements are not publicly available</li> </ul>



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# POLITICAL AND ADMINISTRATIVE CONTEXT

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# 01


## WHO BENEFITS FROM MINING APPROVAL DECISIONS?

For mining to benefit a country's citizens and support sustainable development, the legal, regulatory and administrative framework must be designed to ensure that approval decisions put the public interest first.

### Measures to ensure mining approvals benefit the public – lessons from country assessments

- ✓ Obligation on politicians and senior officials to declare their assets and interests in mining, these are verified and there is an up-to-date and publicly available register of declarations
- ✓ Beneficial ownership disclosure requirements to ensure licence applicants disclose who really owns and ultimately profits from their companies, for example through a publicly available register of beneficial owners of mining companies
- ✓ Cooling off periods, an obligation to declare past employment, and government integrity systems to control the potential adverse impacts of personnel moving from the public service to industry and vice versa (revolving doors)
- ✓ Improved working conditions for staff in the licencing authority to reduce their incentives to seek secondary employment in the mining industry
- ✓ A register of lobbyists and effective regulations for mandatory disclosure of all lobbying activities and political donations





Corruption can result from systemic weaknesses in the political and administrative context surrounding mining approvals that allow conflicts of interest to be concealed.

Two questions highlight the contextual risks that make corruption more likely:

- **To what extent can decision-makers personally benefit from mining approval decisions?**
- **To what extent do decision-makers privilege private sector interests to the detriment of the public interest?**

### **1.1 TO WHAT EXTENT CAN DECISION-MAKERS PERSONALLY BENEFIT FROM MINING APPROVAL DECISIONS?**

In corruption-free mining approvals regimes, government officials involved in making decisions about whether to award a mining licence are not able to personally benefit from their decision. Any potential conflicts of interest that could result in decision-makers abusing their positions for personal gain must be controlled appropriately.

The approvals regimes in many countries we studied lack the mechanisms necessary to prevent and manage conflicts of interest, leaving the door open for senior officials, politicians and other politically exposed persons (PEPs) to abuse their position and pursue their personal interests.

Undeclared and unmanaged conflicts of interest undermine public trust in government authorities. They cast doubt on the government's ability and

willingness to manage the country's mineral resources for the public good and can undermine the legitimacy or social licence of the mining sector. Aside from being unethical, unmanaged conflicts of interest may create an uneven playing field by giving PEPs priority access to minerals or requiring companies to partner with PEP-controlled entities. This has the potential to drive away investors who may be better qualified to develop the mineral resources, representing a loss of potential revenue to the state.

#### **Who are “politically exposed persons (PEPs)”?**

PEPs are individuals who are entrusted with prominent public functions such as politicians, senior government officials or public servants, members of the judiciary, important political party officials or executives of state-owned companies. It also includes their immediate family members and close associates.

Apart from the political and economic impacts, mining projects that personally benefit government officials may be unnecessary or poorly executed and have devastating impacts on local communities and the environment.

## Undisclosed mining interests

### CORRUPTION RISK

#### Politicians and senior government officials don't declare their assets or interests in mining companies

A public register of decision-makers' assets and interests in the mining industry is fundamental to avoiding conflicts of interest in mining approvals.

The Marange diamond fields in **Zimbabwe** are an example of senior public officials holding interests in mining. When discovered in 2006, the Marange fields were celebrated as the biggest diamond discovery in generations, but in 2016 the Zimbabwean President claimed that the country had been robbed of US\$15 billion in diamond revenues.<sup>13</sup>

The mines are owned by a number of companies in joint venture arrangements with state-owned companies. Separate reports from the Zimbabwean Parliamentary Portfolio on Mines and Energy and the Canadian NGO, Partnership Africa Canada, reveal the extent to which senior officials, including retired military and security personnel, hold interests in mining companies operating in Marange, as well as the role of the Minister of Mines, Obert Mpofu, in granting licences to dubious applicants.<sup>14</sup>

In **Armenia**, investigative journalists uncovered information indicating that the former Minister of Nature Protection had granted licences to open dozens of mines to companies owned by his family members.<sup>15</sup> The ownership and shareholders of these companies was hidden via a complex web of corporate entities registered outside of Armenia. While parliamentarians have a legal duty to declare their assets and income in Armenia, this arrangement could be concealed as the companies were registered in the names of the minister's family members. The case only came to light as a result of investigation by journalists.

### MITIGATING THIS RISK

To mitigate the risk of conflicts of interest, public bodies in **Colombia** have a legal duty to keep registers of the assets and income of their staff. However, these declarations are not always updated or verified thoroughly.<sup>16</sup> Moreover, these requirements only apply to public officials and do not extend to the many consultants engaged by the state to assist in carrying out government functions, particularly in the area of mining and environmental approvals.

13. K. Kuwaza, "Mugabe interview confirms Chiadzwa diamond looting", *Zimbabwe Independent* (web), 11 March 2016.

14. Parliamentary Portfolio on Mines and Energy, *First report of the Portfolio Committee on Mines and Energy on Diamond Mining (with special reference to Marange Diamond Fields)* (Harare: Parliamentary Portfolio on Mines and Energy, 2013); Partnership Africa Canada, *Reap what you sow: Greed and corruption in Zimbabwe's Marange Diamond Fields* (Ottawa: Partnership Africa Canada, 2012).

15. All statements in this example are based on: A. Grigoryan, "Assessment of corruption risk in mining awards in Armenia" (Yerevan: Transparency International Anticorruption Center, 2017); *Chorrord Inqishkhanutyun* (newspaper), iss. N649, 5 October 2014; E. Baghdasaryan, "Vardan Ayvazyan's business project", HETQ (newspaper) (web), 26 March 2007.

16. Transparencia por Colombia, *Índice de Transparencia Municipal. Resultados 2008-2009* (Bogotá: Transparencia por Colombia, 2010).

## Hidden beneficial owners

### CORRUPTION RISK

#### **No disclosure of the real owners or beneficiaries of mining companies that are applying for a licence**

Knowing who really owns and ultimately profits from the companies seeking to obtain a mining licence (the “beneficial owners”) is essential to detecting and controlling potential conflicts of interest.

In six of the countries assessed, there is a high risk that licence applicants will be controlled by undeclared beneficial owners, often using complex corporate vehicles registered in offshore locations.

As the cases of **Armenia** and **Zimbabwe** demonstrate, disclosure of beneficial ownership is critical to uncovering who is behind mining investments and unearthing undeclared conflicts of interest.

In the case of the Marange diamonds in **Zimbabwe**, better regulation and disclosure of the beneficial owners of companies who obtained rights to mine in Marange could have brought to light the interests of serving military and police officers and even the Defence Secretary. Instead, the true owners hiding behind the veil of opaque corporate structures were uncovered by international organisations including Global Witness.<sup>17</sup>



**In six of the countries assessed, there is a high risk that licence applicants will be controlled by undeclared beneficial owners, often using complex corporate vehicles registered in offshore locations.**



### MITIGATING THIS RISK

By 2020, EITI member countries must require companies active in their extractive sector to fully disclose their beneficial owners. This includes companies applying for or bidding for licences. The EITI standard incorporates the obligation to identify politically exposed persons as part of beneficial ownership disclosure. A number of countries assessed, such as **Colombia, DRC, Indonesia, Mongolia, Liberia, PNG, Peru, Sierra Leone** and **Zambia** have developed Beneficial Ownership Roadmaps, showing the steps that they will take to achieve this goal.<sup>18</sup> In many of these cases, the countries plan to establish a public register of beneficial owners.

## Weak controls on revolving doors

### CORRUPTION RISK

#### **Lack of controls on revolving doors creates conflicts of interest**

Controlling the movement of staff between positions in government and industry (“revolving doors”) is important for managing potential conflicts of interest and ensuring that senior government officials and public servants do not lose sight of who they ultimately serve.

Revolving doors describes the movement of people between legislative and regulatory positions in government to industry and vice versa. Transferring personnel can have benefits by bringing technical expertise into government and regulatory expertise into industry. However, significant controls are required to prevent government officials from making decisions that favour industry and ensure that current and former government officials do not disclose privileged information to their private sector counterparts.

17. Global Witness, *Diamonds: A good deal for Zimbabwe?* (London: Global Witness, 2012).

18. EITI, “Beneficial ownership roadmaps”. Available at <https://eiti.org/publication-types-public/beneficial-ownership-roadmaps>. Accessed 8 August 2017.

In **Peru**, this risk is heightened due to the precarious nature of public service contracts in the mining licencing authority (known as INGEMMET). Contracts typically last a mere three to six months with renewal dependent on the recommendation of higher ranking public servants.<sup>19</sup> The salaries for these positions are less than equivalent roles in the private sector.<sup>20</sup> With insecure employment, some contractors inevitably face temptations to maximise their opportunities for work in industry when assessing the technical reports and operations of companies.



### MITIGATING THIS RISK

In its Institutional Corruption Elimination Plan 2014-2016, **Peru's** INGEMMET has recognised that this situation makes it vulnerable to corruption and has set out steps to prevent these risks from occurring. These include requiring contractors and employees to submit a legal declaration that they do not work with private companies related to INGEMMET and improving and strengthening its transparency systems and access to information to allow tracking of any complaints made.<sup>21</sup>

This example also indicates that addressing the poor working conditions – short-term contracts, insecure employment and low wages – that may drive public servants to seek secondary employment in the private sector is also essential to tackling an underlying cause of this risk.

In **Chile** two mechanisms control this risk: first, a statutory duty of faith and loyalty to the public service and second, the mandatory six-month cooling off period during which ex-government officials or authorities cannot work in a private organisation monitored by the entity in which they formerly served.<sup>22</sup>

A consistent pattern or culture of revolving doors involving high-ranking public servants and policy-makers can change the dynamics and culture within government bodies from the top-down, creating an environment where government officials make decisions that favour private sector interests instead of serving the public.

Examples of revolving doors involving senior government officials and even ministers were identified in a number of the countries studied.



**While these cases do not necessarily involve corrupt or improper conduct, they serve to show that there is a generalised pattern of close relationships between industry and individuals occupying the highest ranks of government decision-making.**

Over time, the constant rotation of personnel between the public and private sectors, especially those in high-ranking positions, can blur the lines between public and private sectors, making it harder for lawmakers and decision-makers to clearly identify the public interest when performing their duties.

19. Interview with a public official by Proética (TI Peru), Lima, 2017.

20. R. Madrid and M. Avila, *Peru – Mining awards corruption risk assessment* (Lima: Proética, 2017): 43-44.

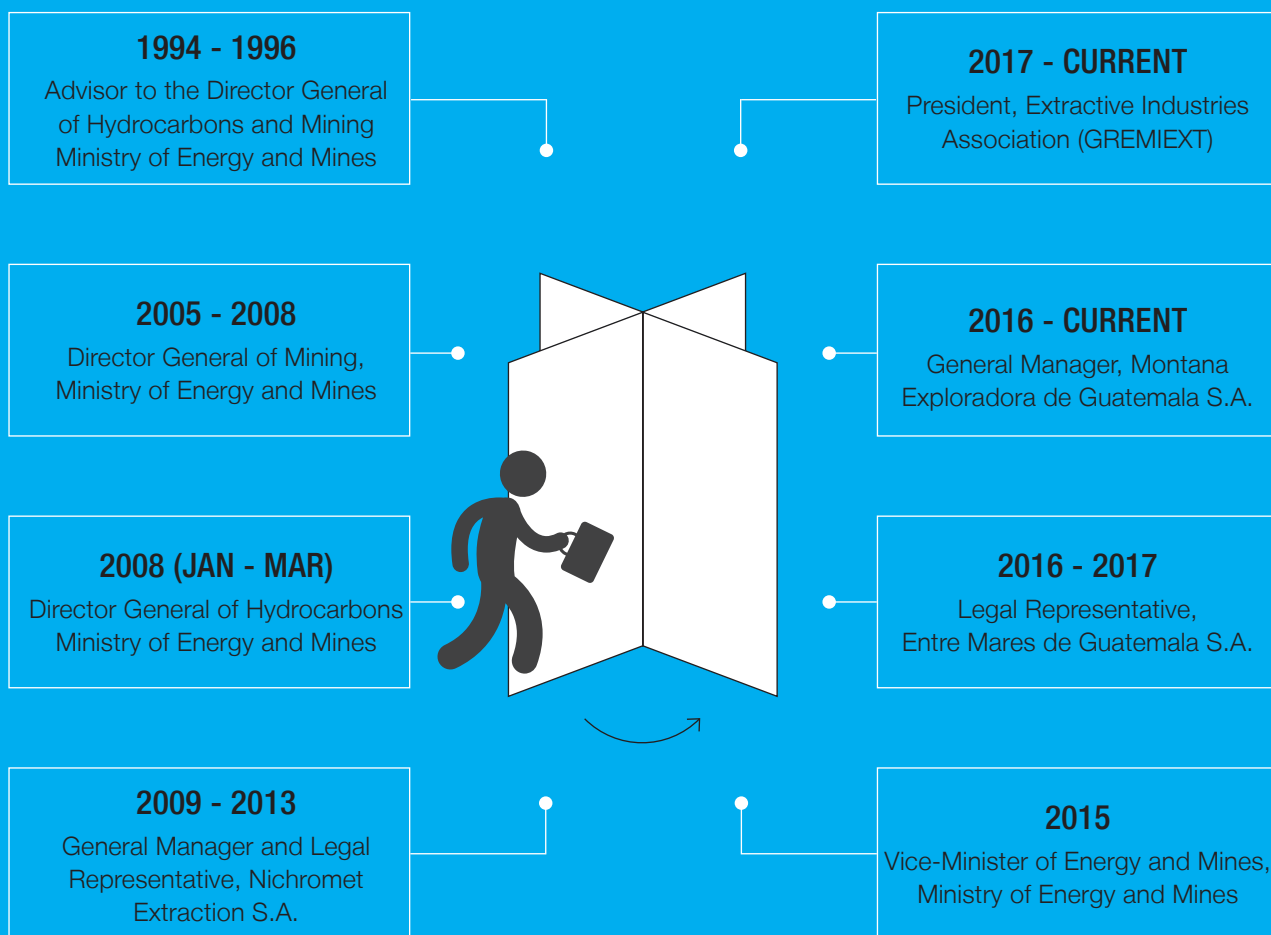
21. Madrid and Avila, TI Peru report, 2017: 44.

22. Ley Orgánica Constitucional sobre Bases Generales de la Administración del Estado. Párrafo 4, artículo N° 58. Ley N° 18.575.

In **Guatemala**, the case of Alfredo Gálvez Sinibaldi is a telling example of the movement of political elites between the government and the private sector and back again. Gálvez worked in the Ministry of Energy and Mines as Director General of Mining (2005-2008) before taking on the role as manager of a mining company, Nichromet S.A., between 2009 and 2013.

He then returned to government where he served as Vice-Minister of the Ministry of Energy and Mines between 2015 and 2016. Gálvez is currently general manager of Montana Exploradora de Guatemala S.A. – a subsidiary of the Canadian company, Goldcorp – and president of the Extractive Industries Association.<sup>23</sup>

Figure 6. Revolving doors in Guatemala



23. G. García and J. Lopez, *Riesgos de corrupción en el otorgamiento de derechos mineros en Guatemala* (Guatemala City: Acción Ciudadana, 2017): 44-45.



## MITIGATING THIS RISK

Scrutiny by civil society can play an important role in ensuring revolving doors do not lead to conflicts of interest. In **Chile**, the School of Journalism at the Universidad Diego Portales set up a website called *La Puerta Giratoria del Poder* (“the revolving doors of power”) that depicts the employment information of the 400 highest ranking public officials in the last two administrations. The website highlights the movement between the public and private sectors, with the aim of empowering civil society to monitor and hold these individuals to account.<sup>24</sup>



**Over time, the constant rotation of personnel between the public and private sectors, especially those in high-ranking positions, can blur the lines between public and private sectors.**



## MITIGATING THIS RISK

Establishing integrity systems and fostering a culture of commitment to integrity can help prevent and mitigate the risk of public servants and politicians putting private sector interest before the public interest. They have been effective in the Department of Mines and Petroleum in the state of **Western Australia**, which is responsible for granting mining licences.<sup>25</sup>

Integrity systems are “the interconnecting institutions, laws, procedures, practices and attitudes that promote integrity and reduce the likelihood of corruption in public life”.<sup>26</sup> Key features of integrity systems include codes of conduct, whistleblower protection, stakeholder and community engagement policies, fraud and corruption control plans, and more generally, accountability institutions to investigate and prosecute allegations of corruption such as ombudsmen, auditors and law enforcement authorities. These general institutional mechanisms are an important complement to specific controls to prevent and manage conflicts of interest.

24. Universidad Diego Portales – Escuela de Periodismo, Centro de Investigación Periodística (CIPER). Available at [www.lapuertagiratoria.cl](http://www.lapuertagiratoria.cl).

25. H. Langley, *Corruption risks: Mining approvals in Australia* (Melbourne: TI Australia, 2017): 17.

26. Transparency International cited in Accountability Round Table, “Corruption – our policy”, [www.accountabilityrt.org/wp-content/uploads/2010/08/Corruption-Our-Policy.pdf](http://www.accountabilityrt.org/wp-content/uploads/2010/08/Corruption-Our-Policy.pdf).

## 1.2 TO WHAT EXTENT DO DECISION-MAKERS PRIVILEGE PRIVATE SECTOR INTERESTS TO THE DETRIMENT OF THE PUBLIC INTEREST?

A subtler but equally insidious “conflict of interest” occurs when policy-makers and decision-makers – who should be serving the public interest – become fixated on attracting and securing investment in mining *as an end in itself*, at the expense of other economic, environmental and social interests. When this happens, they may skew laws and policies to favour private sector interests to the detriment of the public and there may be an implicit pressure within government departments to adopt a “mining at any cost” attitude when evaluating licence applications.

In doing so, policy-makers and government officials lose sight of their mandate to administer the country’s mineral wealth in a way that benefits the citizens of the country. The OECD refers to this as “policy capture”.<sup>27</sup> In other words, while there may not be any apparent corruption risks at the time of deciding on a particular licence application, this *systemic vulnerability* means that the entire process has been biased in favour of private sector interests from the outset – in conflict with government’s duty to the public. As a result, approval decisions may be contrary to what is in the public interest. This can lead to social conflict and protest that disrupt mining activities. More generally, policy capture undermines public trust in government and erodes democratic values.

The cumulative impact of revolving doors, industry lobbying and political donations creates a real risk of policy capture.

### Conflicting institutional mandate

#### CORRUPTION RISK

##### **The decision-making body has a conflicting mandate**

The risk of policy capture increases where the licencing authority is also responsible for promoting investment in mining.

In the state of Queensland Australia, the Coordinator-General is responsible for facilitating the approvals process for major mines and infrastructure projects and is also responsible for promoting investment and economic development in the state. This competing and potentially conflicting mandate may influence the way in which the Coordinator-General exercises decision-making powers in the environmental approvals process – a risk that is exacerbated by the lack of guiding decision-making criteria in the legislation.<sup>28</sup> The Coordinator-General has given environmental approval to several projects that were subsequently rejected by the Federal Environment Minister or the Queensland Land Court.<sup>29</sup>

### Weak controls on lobbying

#### CORRUPTION RISK

##### **Lack of transparency and controls on lobbying by interest groups**

Lobbying by interest groups is an important part of political life in all countries. More transparency and disclosure about lobbyists and their activities can prevent powerful lobby groups from having undue influence over government policy and decisions about mining.

27. OECD, Preventing policy capture – Integrity in public decision making (Paris: OECD, 2017). Transparency International provides a similar definition for “state capture”, being the “disproportionate and unregulated influence of interest groups on decision-making processes where special interest groups manage to bend state laws, policies and regulations through practices”: Transparency International, “State capture: An overview” *Anti-Corruption Helpdesk* (Berlin: TI, 11 March 2014).

28. C. McGrath, “The Queensland bilateral”, *Queensland Environmental Reporter* 2002/2003, vol. 8(33) 145:150.

29. Department of the Environment and Energy, Australian Government, “EPBC Act, Public notices and invitations to comment, Traveston Dam – the Federal process” (December 2009); *New Acland Coal Pty Ltd v Ashman (No 4)* [2017] QLC 24; C. McGrath, “One stop shop for environmental approvals messy backward step for Australia”, *Environmental Planning and Law Journal* 31(164), 2014:179-180; *Hancock Coal Pty v Kelly and Department of Environment and Heritage Protection (2014)* 4 QLC 12; L. Letts, “The Alpha Coal case: Xstrata rehashed? Not so quickly”, *Australian Resources and Energy Law Journal* vol. 33(2) 2014: 254.

Nine countries identified the risk that “mining laws have been, or will be if reform is planned, written to favour private interests before the public interest”. This risk was assessed as “very high” in six countries. A common source of this risk was the lack of transparency of lobbying activities and political donations. Where meetings happen behind closed doors or political donations are made in secret, it is difficult for accountability bodies, the public and media to follow the money and chain of influence to determine whether mining laws and policies or a particular approval decision have been unduly influenced by interest groups.



### MITIGATING THIS RISK

Beyond the mandatory registration of lobbyists, disclosure of *lobbying activities* can help to prevent lobbyists from having undue influence over mining laws and licencing decisions. Greater transparency of lobbyists’ interactions with government enables greater public scrutiny, which can keep the behaviour of governments and lobbyists in check.

In **Colombia**, a Bill – still before Congress – contains a number of provisions to ensure that all relevant interest groups get equal access to policy-makers. The measures proposed include a requirement on lobbyists to disclose the purpose of their visit or meeting, and a duty on public bodies to keep a register of their meetings with lobbyists, including the purpose of the meeting and whether the discussion turned to a particular area of public policy that could interest other stakeholders.<sup>30</sup>

In **Chile**, controls on lobbying have been in place since 2014. These regulations require government authorities to disclose all meetings held with and requested by lobbyists, as well as details of trips and gifts from lobbyists. In practice, however, there are loopholes in the law: neither meetings requested *by the government* authority nor meetings ostensibly for the purpose of discussing “technical matters” need to be disclosed, both of which can become opportunities to influence policy.

While disclosure regulations can help, the pervasive culture of revolving doors increases the risk that the mining industry will have undue influence over mining laws and policies. Industry lobbyists who have previously worked in government have the advantage of understanding the internal workings of government departments and also have the connections and networks in government to effectively lobby in favour of the mining industry.

In **Australia**, the practice of former politicians, political advisors and senior government officials moving to well-paid positions and working as lobbyists after leaving politics is particularly common. As of September 2016, 191 of all 538 lobbyists (35 per cent) listed in the Australian federal lobbyist register were former government representatives.<sup>31</sup> Even the most high-ranking public officials are involved in this practice: two individuals who served as Minister for Resources in different government administrations – Martin Ferguson and Ian MacFarlane – both left politics to take on roles as lobbyists for the oil and mining sectors.<sup>32</sup>



### MITIGATING THIS RISK

Stricter monitoring and cooling off periods for government officials wanting to become mining industry lobbyists are necessary to prevent potential or perceived conflicts of interest, which are currently outside the reach of Australia’s anti-corruption laws.<sup>33</sup>

30. N. Lopez, “Esta es la norma para controlar el ‘lobby’ empresarial en el Estado”, *Portafolio* (web), 8 February 2017.

31. G. Rennie, “The revolving door; Why politicians become lobbyists and lobbyists become politicians”, *The Conversation* (web), 26 September 2016.

32. “Greens’ claims over Ferguson lobbying are in the ballpark”, *ABC Fact Check* (web), 14 October 2013; A. Henderson, “Former resources minister Ian MacFarlane says new mining job complies with code of conduct”, *ABC News* (web), 26 September 2016.

33. Rennie, 2016.



## Undisclosed political donations

### CORRUPTION RISK

#### **Lack of transparency and poor regulation of political donations**

Disclosure and strong regulation of political donations and campaign financing can reduce the risk of political donations being used as a vehicle to garner favours from government officials.

In **Indonesia**, where provincial governments are responsible for mining approvals and there is poor control and oversight of campaign funds, mining companies have reported that political contestants in provincial elections have demanded donations to support their campaigns in exchange for preferential treatment in the licence process should they be elected.<sup>34</sup>

In **Armenia**, allegations by journalists that a local subsidiary of Lydian International Ltd made donations of around US\$256,000 in 2014 to the politically connected “Luys Foundation”<sup>35</sup> may warrant further investigation to determine whether the donations were potentially connected with an attempt to influence government mining policy. Armenia’s Prime Minister at the time was an executive board member of the foundation and the subsidiary’s gold mine had been stalled for a number of years due to problems with its environmental impact assessment and management

plan. Environmental laws at the time banned mining in the area, which was the habitat of rare and endangered species. In July 2014, government regulations were amended to allow the species to be transferred to another location.<sup>36</sup> The Amulsar mine was awarded an environmental permit in October and the project was granted full approval in November 2014.<sup>37</sup>

### MITIGATING THIS RISK

Publishing the identity of donors and their donations to political parties and affiliate groups is imperative to enable the public to “follow the money” and hold decision-makers to account.

Beyond disclosure, the design and implementation of regulations on who can donate and how much, is important to maintaining the integrity of government. For example, in **Australia**, political donations are poorly regulated: foreign donations are permitted, donations can be split into smaller amounts and paid to different branches of the same political party to avoid the disclosure threshold and there is considerable delay in the publication of donation data by the regulator, the Australian Electoral Commission.<sup>38</sup>

34. Researcher’s personal communications with mining company officials, TI Indonesia, Jakarta, 9 February, 17 March and 24 May; M. Nahar and U. Ridi, *Mewaspadai Ijon Politik Pertambangan pada Pemilu Kada Lembata*, *Jatam*, 7 February 2017. Available at [www.jatam.org/2017/02/07/mewaspadai-ijon-politik-pertambangan-pada-pemilu-kada-lembata-2017](http://www.jatam.org/2017/02/07/mewaspadai-ijon-politik-pertambangan-pada-pemilu-kada-lembata-2017); M. Nahar, “Ijon Politik Tambang” *Kompa* (web), 6 March 2017; E. Yuntho, “Korupsi di sektor pertambangan”, *Kompas* (web), 16 September 2016.

35. “Luys” foundation 2014 annual report, reported in Ecolur, “Meeting of CAO/IFC with SOS Amulsar Group in Yerevan” (web), 11 May 2016.

36. Armenian Government Decision N 781-N on “Establishing the procedure of utilization of items of flora for their protection and reproduction in natural conditions.”; S. Petrosyan, “Armenian environmentalists in uproar over government plan to replant endangered flora at Amulsar Gold Mine”, *HETQ* (web), 23 October 2014.

37. Lydian International, “Lydian receives comprehensive mining right approval for Amulsar Gold Project Toronto” [Press Release], Toronto, 27 November 2014.

38. M. Sawyer, “Australia trails way behind other nations”, *The Conversation* (web), 2 June 2016; A. McGhee, “The missing millions: Political donations likened to money laundering”, *ABC News* (web), 1 February 2017; N. Evershed, “Political donations: Where Australia’s political parties get their money”, *The Guardian* (online) 10 February 2017; A. Gartell, “Loophole will allow donations made in dying days of federal election to stay secret”, *Sydney Morning Herald* (web), 31 January 2017.



# LAND ALLOCATION

## **2. HOW ETHICAL AND FAIR IS THE PROCESS FOR OPENING LAND TO MINING? 34**

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# 02

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## 2. HOW ETHICAL AND FAIR IS THE PROCESS FOR OPENING LAND TO MINING?

Decisions about *which land* is opened to mining and *under what conditions* must be fair and ethical to maintain the integrity of subsequent licencing decisions and other mining-related approvals.

### Measures to ensure land is opened to mining in an ethical and fair way – lessons from country risk assessments

- ✓ Clear criteria and transparency in processes for opening land to mining
- ✓ A clear and fair role for local authorities in land use planning and mining approvals
- ✓ A complete, up-to-date and coordinated register of land uses and rights
- ✓ Clear land rights in law that also are protected in practice



Where there is corruption in dealings with land then landholders, particularly disadvantaged customary owners and women, can be cheated out of their property by speculators, mining companies or even traditional leaders (see Chapter 6 on community consultation).<sup>39</sup> Speculators may also extort mining companies seeking to access the land subject to their mining licence. Corruption at this stage can result in sensitive areas of socio-economic, ecological or cultural importance being opened inappropriately to mining.

Corruption in government decisions about opening land to mining compromises the rest of the approvals process, even if subsequent licencing decisions are transparent and apparently corruption-free.

Investigating the following two questions helps identify and address the risks that create opportunities for corruption to occur in decisions to open land to mining:

- **How clear and transparent is the process for opening land to mining?**
- **How well protected are interests and rights to land?**

## 2.1 HOW CLEAR AND TRANSPARENT IS THE PROCESS FOR OPENING LAND TO MINING?

### Unclear rules for opening land

#### CORRUPTION RISK

##### **Rules and criteria for opening land to mining are not clear or transparent**

Where government discretion in decisions about which areas to open to mining is kept in check by clear rules and decision-making criteria, it is less likely that the decisions of government officials will be influenced by personal interests or favour particular parties in exchange for personal benefit.

Reforms in **Indonesia** to the national Mining Law in 2009 introduced a system of auctioning licences in designated “mine work areas”. The process by which the mine work areas are determined is not transparent. Upon recommendation of a national minister, provincial governor or district mayor of a nominated area, the Ministry for Energy and Mineral Resources surveys the nominated land and determines the boundaries of the mining zone. Within the zone, different areas are allocated to large-scale mining, small-scale mining and mining by the state. Other parts of the zone are reserved for conservation purposes. This determination must be ratified by Parliament, but clear procedures and criteria have still not been developed to guide parliamentary deliberation and ratification.<sup>40</sup>

39. This section deals primarily with government decisions to allocate land to mining and resolve land use conflicts. Negotiations with communities for access to land and compensation, as well as the duty to consult and obtain free, prior and informed consent (FPIC) in the case of indigenous and communal land are an important part of this process and are dealt with in Chapter 6 on community consultation.

40. K. MacDonald, *The risk assessment of corruption in the awarding of mining permits in Indonesia* (Jakarta: Transparency International Indonesia, 2017).

The government and parliamentary processes for converting and opening reserved land to mining are also opaque – both on paper and in practice – and there is no scope for public scrutiny or public consultation and participation. There is a high risk that decision-makers will abuse their discretion, evidenced by investigations into members of the Indonesian Parliament in relation to the corrupt granting of mining licences<sup>41</sup> and the arrest of the provincial governor of Southeast Sulawesi for opening protected forest areas to mining in exchange for kickbacks.<sup>42</sup>

### Unclear land use planning roles

#### CORRUPTION RISK

##### **No clear or fair role for local authorities**

Local authorities that have a clear and appropriate role in decisions about whether and under what conditions mining should occur in their territory are less likely to misuse other land zoning mechanisms available to them to corruptly prevent or facilitate mining.

In **Mongolia**, local governors are involved at a late stage in the licencing process and the scope of their role is not clear. They are given limited information about the licence application and the criteria on which they can deny licences are poorly defined, meaning that national authorities can easily challenge their decisions.

Without an effective role in the licencing process, local authorities and even local citizen assemblies have sought to have potential mining sites declared as Locally Protected Areas (LPAs) by the Ministry of Environment and Tourism to prevent the allocation of pending licences.<sup>43</sup> LPAs are approved more quickly than exploration licences can be awarded. Since 2013 the percentage of Mongolian territory covered by LPAs has increased from 3.2 per cent to 15.7 per cent.<sup>44</sup> While the LPAs have a noble purpose – to reserve land to protect “special needs” – poor oversight means that they can be improperly used or abused in exchange for favours from licence applicants or their competitors.

#### MITIGATING THIS RISK

In **Mongolia**, two initiatives would address this situation: first, involving the governor and local assemblies in land use planning, particularly in discussions about the pros and cons of opening areas to exploration and mining; and second, defining a clear role and decision-making criteria for local governors in the licencing process that are appropriate to their position in Mongolia’s system of government and their capacity.<sup>45</sup>

41. See, for example, Anti-Corruption Clear House (ACCH), *Kasus of Adriansyah* (Jakarta: KPK, 2015).

42. A. Gabrillin, “Gubernur Sulawesi Tenggara Nur Alam Ditahan KPK”, *Nasional Kompas* (web), 5 July 2017.

43. Interview with former MRPAM employee by TI Mongolia, Ulaanbaatar, 10 March 2017.

44. R. Biastoch, *Mineral licensing corruption risk assessment Mongolia* (Ulaanbaatar: Transparency International Mongolia, 2017): 62.

45. Biastoch, TI Mongolia Report, 2017: 29.

## 2.2 HOW WELL PROTECTED ARE INTERESTS AND RIGHTS TO LAND?

### Insecure land rights

#### CORRUPTION RISK

##### Unclear and insecure land rights

A legal framework that clearly defines and protects surface (land) rights is necessary to reduce the incentive of licence applicants to inappropriately induce mining authorities to ignore issues relating to conflicts with landowners and occupiers or to resolve them in their favour.

In **Zimbabwe**, insecure property rights have increased the risk of mining-related corruption and conflict in farming regions, with some farmers believing they are losing out to mining. The farmers, however, are a vocal and influential constituency of the ruling party and have the right to petition the Permanent Secretary to reserve their land from prospecting. One parliamentary official commented to the researchers that:

During public consultations on the MMAB [Mines and Minerals Amendment Bill], some farmers complained that some miners began prospecting on their farms without their approval or consultations. On the other hand, miners complained that some farmers once they realised that there was a possibility of minerals on their land, they would apply that their land be closed for prospecting and later decide to apply for a mining licence [themselves].<sup>46</sup>

The appeals to the Permanent Secretary's broad discretionary powers open the door to corrupt influence by all parties. Instead, it would be better to ensure that property rights are clear and enforceable to avoid protracted conflicts and political favouritism.

In **Cambodia**, mining licences have been abused by some investors to forcibly obtain access to land with detrimental consequences for the local communities.<sup>47</sup> This is primarily due to the lack of community understanding of the rights assigned under a mining licence – there is a general lack of awareness among the public that mining licences only convey rights to explore and extract minerals, not title to land. When communities are unaware of the scope of their land rights or how to enforce them, dishonest investors can take advantage of them.

#### MITIGATING THIS RISK

**Kenya** has recently taken steps to protect customary land rights. In interviews, communities in Kitui and Taita Taveta counties recounted stories of mining companies encroaching on community lands beyond their licence areas.<sup>48</sup>

The enactment of the *Community Land Act 2016* and introduction of implementing regulations is expected to protect communities' land rights by formalising title to "community land" (customary land) and establishing a Community Land Registrar.

The establishment of a dedicated institution, the National Land Commission,<sup>49</sup> to oversee the formalisation of title, registration of all land, land use planning and to manage unregistered community land is another measure to secure landholder rights and mitigate this risk.

46. N. Mukwakwami, *Corruption risk assessment of mining awards in Zimbabwe* (Harare: TI Zimbabwe, 2017).

47. Ministry of Mines and Energy. Presentation in Extractive Industry Governance Forum. Phnom Penh, 31 January 2017.

48. Focus groups interviews with communities in Kitui and Taita Taveta counties by TI Kenya, January – May 2017.

49. National Land Commission, "Mandate and functions". Available at: <http://landcommission.go.ke/article/mandate-functions>.

## Incomplete land rights register

### ⚠️ CORRUPTION RISK

#### Incomplete and uncoordinated register of land use and rights

Good quality land use data can reduce the risks associated with a lack of clarity around land rights. Accurate, coordinated and publicly available land use data reduces the risk that all parties – communities, government, civil society and the licencing authority – can be deliberately misled about conflicting land uses and rights.

With 86 per cent of its territory held by customary owners and all mining leases located on customary land, this issue is particularly important in **Papua New Guinea**. For customary owners in PNG, the absence of coordinated geospatial data is significant, as it means that the government may grant mining licences over areas it is unaware contain important land and water resources.

In **Indonesia**, gaps in the cadastre and lack of coordinated geospatial data mean that surface rights and the status and borders of customary (“adat”) rights and protected nature reserves are not clear. The cadastral system in Indonesia covers only 35 per cent of the country, mainly in the urban areas of the island of Java.<sup>50</sup>

While in 2017 the government produced a map of both coal and mineral deposits (Minerba) and another relating to energy and mineral resources,<sup>51</sup> not all data are publicly accessible and the mining cadastre is not coordinated with the registries of other departments such as forestry and agriculture. This creates the risk that licence holders will seek to abuse their licence to get access to land for purposes for which they have no right.

The national anti-corruption agency (*Komisi Pemberantasan Korupsi* or KPK) found that 40 per cent of violations of “Clean and Clear” rules by licence holders stemmed from their non-compliance with licence boundaries or encroaching on protected areas.<sup>52</sup> Further, in 2012 the Supreme Audit Board found that 26 mining licence holders in Sumatra had engaged in illegal mining or unlawful forestry activities.<sup>53</sup>

### 🛡️ MITIGATING THIS RISK

Measures to penalise non-compliant licence holders for abusing their licences to unlawfully obtain access to land can send a strong message to others intending to use their licence for unlawful purposes.

In **Cambodia**, the Ministry for Mining and Energy (MME) has led a concerted effort to improve **monitoring and enforcement** of compliance with the terms of exploration licences and environmental laws.<sup>54</sup> In 2016, the Ministry cancelled 45 mining licences for non-compliance.<sup>55</sup>

50. P. van der Eng, “After 200 years, why is Indonesia’s cadastral system still incomplete?”, in J. McCarthy, and K. Robinson (eds.) *Land and development in Indonesia: Searching for the people’s sovereignty* (Singapore: ISEAS-Yusof Ishak Institute 2016): 227.

51. Ministry of Energy and Mineral Resources, “ESDM One Map”, available at <http://geoportal.esdm.go.id/monaresia/home/>.

52. KPK, *Laporan hasil Kajian Sistem Pengelolaan Penerimaan Negara Bukan Pajak (PNBP) Mineral dan Batubara* (Jakarta: KPK, 2013); KPK, *Gerakan Nasional Penyelamatan Sumber Daya Alam* (Jakarta: KPK, 2015).

53. BPK. “BPK Temukan Penyimpangan Atas Pengelolaan PNBP dan DBH Sektor Pertambangan” [Press release], 13 April 2012.

54. Ministry of Mines and Energy, Cambodia, Decision No.0153 on Creation of working group for monitoring and auditing exploration, operation, and construction mineral activities, 2 April 2015.

55. Ministry of Mines and Energy. Presentation in EIGF Forum, 31 January 2017.







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# MINING LICENCE APPLICATION AND APPROVAL

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# 03

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## HOW FAIR AND TRANSPARENT IS THE LICENCING PROCESS?


In most of the countries studied, rights to engage in exploration and mining activities are generally granted via a *licence* where the conditions attached to the rights are prescribed in legislation.<sup>56</sup> The licencing process usually follows the same main stages: application, evaluation and approval (or rejection).

### Measures to ensure mining licence applications are handled fairly and transparently – lessons from country risk assessments

- ✓ Clear and transparent licencing rules and evaluation criteria
- ✓ A well-resourced, competent and independent licencing authority
- ✓ An effective system for managing cadastral and licence application data
- ✓ Publication of licences and licence details
- ✓ Transparency in the negotiation process, where agreements or contracts are used

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56. Colombia and Armenia grant mineral rights via contract, but as the terms of the contract are prescribed by law and are largely not negotiable, they are included in this analysis.



Some jurisdictions may also use agreements or contracts in some circumstances to set out licence holder rights and obligations – as is the case, for example, in the Democratic Republic of the Congo, Mongolia, Liberia and Western Australia. Agreements are more vulnerable to corruption precisely because of the higher levels of discretion and lack of transparency and oversight involved in negotiations.<sup>57</sup> This is illustrated by the vulnerabilities in negotiating “state agreements” in Western Australia and joint venture agreements in the Democratic Republic of the Congo, discussed below. The lack of transparency also makes agreement-making more difficult to assess. The Mongolian assessment deliberately excluded “contracts for deposits of strategic importance” as neither the contracts nor information about the negotiation process is publicly available.<sup>58</sup>

Investigating the following three questions about the laws, regulations and institutional setting for awarding licences helps identify and address the risks that create opportunities for corruption in the handling of licence applications:

- **How clear are the rules that set out the steps in the licencing process?**
- **How well equipped is the licencing authority to handle licence applications?**
- **How accountable are decision-makers for their approval decisions?**

## Awarding mineral rights: Licences, contracts or something in between?

In a pure licencing regime, legislation sets out all terms and conditions as well as the application requirements and decision-making criteria in the licencing process. The same rules apply to all licence holders.

By contrast, in a pure contract regime, all licencing conditions and obligations for a particular project, including the payment of royalties and taxes, local content requirements and environmental obligations are negotiable.

In reality, most countries lie somewhere on a spectrum between these two extremes, with

some terms negotiable in some contexts, particularly when approval is granted to open a mine and build ancillary infrastructure. In **Peru**, *stabilisation agreements* may be used for projects over a certain value to “freeze” the fiscal conditions to which the mining company is subject. These agreements aim to attract investment in the mining sector.

In most resource-rich countries, there is a trend away from negotiated contracts towards licencing regimes for the allocation and regulation of mineral rights, partly as an effort to improve governance and transparency.<sup>59</sup>

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57. D. Kienzler et al, *Natural resource contracts as a tool for managing the mining sector* (Hannover: Bundesanstalt für Geowissenschaften und Rohstoffe, 2015): 26-28.

58. Biastoch, TI Mongolia report, 2017: 16.

59. Kienzler, 2015: 7.

### 3.1 HOW CLEAR ARE THE RULES THAT SET OUT THE STEPS OF THE LICENCING PROCESS?

#### Unclear licencing rules

#### CORRUPTION RISK

##### Steps in the application and evaluation process are not clear

Rules that clearly set out the application requirements and steps in the licencing process reduce the scope for uncertainty and confusion that can be exploited by dishonest staff at the licencing authority or investors to solicit/offer bribes, facilitation payments or other benefits in exchange for preferential treatment.

Clarity in the licencing process begins with transparency about which areas are open to mining. Where there is no transparency, government authorities can selectively disclose information about available mining areas to favour certain parties in return for personal benefits. It also creates an incentive for prospective licence applicants to offer inducements in exchange for preferential access to the information.

Previously in **Cambodia**, parties interested in exploration would contact the Ministry of Mining and Energy (MME) directly to get information about which areas were open to mining, which gave parties who obtained that information an unfair advantage and created opportunities for them to influence the MME not to release that information to potential competitors.



#### MITIGATING THIS RISK

As part of its commitment to improve the governance of the approvals process, the government of Cambodia has recently introduced a system to make access to information about eligible mining areas more transparent and fair.<sup>60</sup> From now on the MME in Cambodia will publicly call for applications in areas that have been opened to mining. The public announcements on its website and its Facebook page will include the GPS coordinates, maps, contact details and timeline.<sup>61</sup>

#### Community access to information about areas open to mining

Measures to ensure that the public are aware of areas with mining potential and open to mining are also important to protect unwitting landholders and holders of customary land from predatory behaviour by speculators. In **Kenya**, speculators have cheated community members, leaving them without land for subsistence and other socio-economic activities.<sup>62</sup> Kenya has long been plagued by land speculation, not only in mineral-rich areas. A projects manager from a mining company reported that communities are often not informed about upcoming exploration activities, which makes it easy for those who have that information to exploit their ignorance and make an offer to buy the land from them at well below its market value.<sup>63</sup> The Kenyan National Land Commission is aware of this issue and plans to develop regulations to protect communities against exploitative behaviour.<sup>64</sup>

60. M. Kim, *Cambodia's mineral exploration licensing process: Governance risk assessment* (Phnom Pen: Transparency International Cambodia, 2017).

61. Ministry of Mines and Energy (Cambodia). "Announcement 003 on Open of Mining Area for Mineral Exploration", 18 April 2017.

62. Interview with the Natural Resources Director at the National Land Commission by TI Kenya, Nairobi, 2017; Interview with the Kitui County Secretary for Mining and Environment by TI Kenya, Kitui County, 12 January 2017.

63. Interview with mining company project manager, by TI Kenya, Nairobi, 2017.

64. Interview with the Chairperson of the National Land Commission by TI Kenya, Nairobi, 24 April 2017.

An unclear, cumbersome or complex application process creates the opportunity for deliberate mishandling and manipulation of licence applications. Where there is no other workable option to obtain a licence but to engage in corrupt practices to speed up or simplify the application process, responsible mining companies may choose not to invest in the country. This risk was not high across the countries studied. In the countries where it was present, it was due to complexity in the legal or regulatory framework arising from overlapping roles of government authorities and changing legal requirements.

For example, changes in **South Africa** to streamline the elements of mining approvals by introducing the “One Environmental System” and make the Department of Mineral Resources the authority responsible for environmental approvals have created regulatory uncertainty and confusion for the mining industry, particularly given that implementing regulations are still outstanding.<sup>65</sup> A major producer complained about “lengthy red tape and a multitude of departments overseeing permits” and that the “changing environmental and regulatory laws has resulted in extended delays”.<sup>66</sup>

In **Indonesia**, changes to the law and delays in implementing these changes have created regulatory uncertainty and vulnerabilities to corruption. According to mining companies surveyed for the Fraser Institute’s *2016 Policy Perception Index*, Indonesia is currently ranked among the 10 least attractive jurisdictions for mining investment due to the changing regulatory environment.<sup>67</sup>

The Mining Law has been revised nine times following review by the Constitutional Court and regulations from 2010 have already been revised four times. As the Indonesian mining cadastre is decentralised, meaning that licences are awarded by provincial governments, lack of clarity in the national law can result in the provincial-level implementing regulations and procedures that favour certain interests. The national anti-corruption agency, the KPK, alleges that this occurred in the province of Southeast Sulawesi, where the governor, Nur Alam, allegedly abused local regulations to allocate forested areas to mining and then issue mining licences (IUPs) over these areas in exchange for kickbacks or rewards.<sup>68</sup> The governor is currently under investigation by the KPK for his alleged role in the unlawful allocations and licence awards.<sup>69</sup>

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65. Interview with mining company by Corruption Watch (TI) South Africa, Johannesburg, 10 March 2017; Interview with South African Human Rights Official by Corruption Watch (TI) South Africa, 12 April 2017.

66. Fraser Institute, *Survey of Mining Companies 2013* (Vancouver: Fraser Institute, 2014): 61.

67. Fraser Institute, *Survey of Mining Companies 2016* (Vancouver: Fraser Institute, 2017): 24.

68. A. Gabrillin, “Gubernur Sulawesi Tenggara Nur Alam Ditahan KPK”, *Nasional Kompas* (web), 5 July 2017; interviews with government officials by TI Indonesia, in Samarinda, 9 April 2017, in Balikpapan, 10 April 2017, and in Kendari, 18 April 2017; Interviews with miners and professional associations by TI Indonesia, Jakarta, 24 May 2017.

69. Gabrillin, 2017.

### 3.2 HOW WELL EQUIPPED IS THE LICENCING AUTHORITY TO HANDLE LICENCE APPLICATIONS?

The institutional capacity of the licencing authority – in terms of human resources, funding and its technological capability to manage the cadastre maps and application process – has an influence on corruption risks in handling licence applications.

#### Lack of institutional capacity

##### CORRUPTION RISK

##### The licencing authority is under-resourced

Where the licencing authority has adequate funding, personnel and technical capacity, the likelihood of bottlenecks and delays in processing is reduced, which reduces the incentive of applicants to offer bribes or facilitation payments.

In **South Africa**, lengthy delays have led to many companies suing the Department of Mineral Resources, the responsible licencing authority, under the *Promotion of Administrative Justice Act 2000* in order to achieve compliance with timelines.<sup>70</sup> According to a senior executive at the Chamber of Mines, one of the main reasons for the delays in processing licence applications was the mining authority's lack of capacity.<sup>71</sup> The department has repeatedly acknowledged its limitations.<sup>72</sup>

An official stated recently:

Currently there is an issue of capacity, we can't work on all the applications due to lack of manpower. Posts are frozen. We need more people, as long as there is a backlog, corruption will always be there, where there is chaos it is easier to hide. Despite the fact that we send motivations requesting more capacity, nothing happens.<sup>73</sup>

#### South Africa – decentralisation can exacerbate vulnerabilities

A decentralised licencing regime can exacerbate the problem as regional offices tend to be less well-resourced than their central government counterparts.

*Different regions of the Department of Mineral Resources (DMR) operate differently, and have different requirements from applicants. The Limpopo regional office is quite bad, whereas the Free State regional office is quite pedantic and meticulous.*

*(Senior staff member, mining company).<sup>74</sup>*

*We were advised that in a particular province, there is a huge backlog of applications, almost 600 applications have not been attended to.*

*(Staff member, Department of Mineral and Resources).<sup>75</sup>*

70. Interview with senior official from mining company by Corruption Watch (TI) South Africa, Johannesburg, 13 December 2016.

71. Interview with Executive at South African Chamber of Mines by Corruption Watch (TI) South Africa, Johannesburg, 13 December 2016.

72. D. McKay, "DMR manpower constraints just part of problem", *Mining Mx* (web), 1 October 2013; DMR Deputy Director General of Mineral Regulation said that greater funding was required to improve the system, Parliamentary Monitoring Group on Mining; Minutes, 8 March 2017.

73. Interview with DMR staff member by Corruption Watch (TI) South Africa, Johannesburg, May 2017.

74. Interview with Mining Company by Corruption Watch (TI) South Africa, Johannesburg, 10 March 2017.

75. Interview with DMR staff member by Corruption Watch (TI) South Africa, Johannesburg, May 2017.



Staffing constraints are also a problem in **Colombia's** National Mining Agency (ANM by its initials in Spanish). In 2015 it had only 14 staff in the licencing department,<sup>76</sup> yet it received 1,424 new licence applications, responded to 1,005, and at the end of the year had 7,781 applications still pending resolution.<sup>77</sup> There are examples of licence applications that have taken five, seven and in one case 11 years to process. In its own corruption risk assessment for 2016, the ANM found that the risk of favouritism in responding to licence applications was “probable”.<sup>78</sup>

## Technological flaws in application system

### CORRUPTION RISK

#### **Technological flaws or inadequacies in the online application system**

An online application system can improve processing times and avoid the corruption risks associated with face-to-face applications. By providing transparent information about the status of their applications, it can also reduce uncertainty and the incentive of licence applicants to engage in corrupt behaviour to speed up processing of their application.

As is common practice in mining,<sup>79</sup> all countries in this study grant licences on a “first come, first served” basis; although many also have provisions for competitive tender when geological potential is known. An effective system or platform for handling licence applications will ensure equal access, guarantee the “first come, first served” principle by date-stamping applications and secure the confidentiality of applications.<sup>80</sup>

Most countries in this study use an online application system or some sort of interactive cadastre portal. Corruption risks arise where the licencing authority does not have the technological capacity to establish or manage an effective online application system.

**Mongolia** recently announced plans to change its online application system after experiencing severe problems with a system that was exclusively administered by a third-party company, Accense IT Support, with little government oversight. The system was subject to gaming by applicants, who had no realistic chance of submitting applications without making use of third-party computer scripts to submit information.

Moreover, the company was marred by allegations that weaknesses in the system meant that the order in which applications were to be processed could be changed and confidential information leaked.<sup>81</sup> While this system was an improvement on the previous face-to-face, paper-based system – which was both unworkable and easily manipulated – it had multiple features that made it vulnerable to corruption.

The application system in **Colombia** exhibits a number of vulnerabilities to corruption. The online system does not enable applicants to see what stage of processing their application is at. According to one interviewee, the only way to check the status of applications is to enquire directly with somebody in the licencing authority.<sup>82</sup> This is confirmed by a 2015 survey of licence holders, which found that the quality of information available on the status of applications was low.<sup>83</sup> The research uncovered allegations that officials in the licencing agency have solicited facilitation payments to process applications.<sup>84</sup>

76. Agencia Nacional de Minería. *Estudio Previos del Proceso Número 00106 de 2016* (Bogotá: Agencia Nacional de Minería, 2016): 3.

77. Agencia Nacional de Minería. *Informe de Gestión 2015* (Bogotá: Agencia Nacional de Minería, 2016): 13.

78. Agencia Nacional de Minería. *Mapa de Riesgos de Corrupción-V2* (Bogotá: Agencia Nacional de Minería, 2017).

79. E. Ortega Girones et al., *Mineral rights cadastre* (Washington DC: World Bank, 2009): 33.

80. Summarised in Biastoch, TI Mongolia report, 2017: 23-24.

81. Biastoch, TI Mongolia report, 2017: 23-24.

82. Interview, Transparencia por Colombia (TI Colombia), Bogota, 12 June 2017.

83. Unidad de Planeación Minero Energético (UPME) “Encuesta Referenciada de Titulares Mineros y Bateria de Indicadores para la planeación y seguimiento de la política del sector minero en Colombia.” (Bogotá: UPME, 2015).

84. Expert interviews by Transparencia por Colombia (TI Colombia), Bogota, 24 April 2017.

## Incomplete mining cadastre

### ! CORRUPTION RISK

#### Information in the mining cadastre is incomplete or inaccurate

A complete and accurate register of licences and the areas to which they apply is important to ensure that the first come, first served rule is respected. This avoids conflicts between competing licence applicants and licence holders, and reduces the possibility that they will resort to corruption to have conflicts resolved in their favour.

The cadastre is a means of fixing and mapping the physical boundaries of the licences using cartographic and geodetic techniques.<sup>85</sup> Most of the countries in this study have online mining cadastre maps. Regardless of whether the cadastre is hosted online or on paper, the licencing authority must provide a comprehensive and efficient system for information and document management to achieve clarity and transparency for licence applicants and for the sake of accountability to the public.

Zimbabwe's cadastre is paper-based which limits public access and makes it vulnerable to tampering.<sup>86</sup> The Minister of Mines, Walter Chidhakwa, has acknowledged that poor management of the current cadastre has led to many conflicts due to the granting of overlapping mining licences.<sup>87</sup> According to a cadastre official at the Ministry of Mines, the duration and timing of each step of the licencing process is at the total discretion of licencing staff, enabling them to manipulate the timing of applications received to preference certain applicants.<sup>88</sup>

The impact of this vulnerability is evident in the pattern – as reported by the head of a small scale miners' association – of legal disputes about the true "first applicant", arising coincidentally after existing licenceholders discover high-grade ore deposits within their licence area.<sup>89</sup> The insecurity of mining rights, among other factors, makes Zimbabwe the ninth least attractive mining jurisdiction for investment, according to the Fraser Institute's 2016 survey of mining companies.<sup>90</sup> Zimbabwe is moving to adopt an online cadastre and application system, which may reduce some of these risks.<sup>91</sup>

85. Ortega Girones et al., 2009: 17.

86. Interview with Rodney Usai, former Ministry of Mines official by TI Zimbabwe, Harare, 15 April 2017; Interview with Ministry of Mines official by TI Zimbabwe, Gweru, Zimbabwe 15 March 2017.

87. Walter Chidhakwa. "Address by the Minister of Mines and Mining Development at the 77th Chamber of Mines of Zimbabwe AGM." Victoria Falls. 2016. Available online: [www.chamberofminesofzimbabwe.com/wp-content/uploads/2016/05/CHAMBER-OF-MINES-2016-SPEECH.pdf](http://www.chamberofminesofzimbabwe.com/wp-content/uploads/2016/05/CHAMBER-OF-MINES-2016-SPEECH.pdf); See, for example, a recent dispute where this was in issue: *Zimba v Mining Commissioner & Others* (HC 4620/12) [2016] ZWHHC 09, 13 January 2015. Available online: [www.zimlil.org/zw/judgment/harare-high-court/2015/9-0](http://www.zimlil.org/zw/judgment/harare-high-court/2015/9-0)

88. Interview with Ministry of Mines official by TI Zimbabwe, Harare, January 2017.

89. Interview with Head of Sustainable Mining Development Trust by TI Zimbabwe, Bulawayo, 14 March 2017.

90. Fraser Institute, 2017.

91. Spatial Dimension, "FlexiCadastre selected as Zimbabwe's new Mining Cadastre System", *Spatial Dimension* (web), 24 February 2016.

### 3.3 HOW ACCOUNTABLE ARE DECISION-MAKERS FOR THEIR APPROVAL DECISIONS?

The degree to which those who approve or reject licence applications are accountable for their decisions depends on the clarity and transparency of decision-making criteria, their independence from political interference and the degree of public access to information about the licences awarded.

#### Unclear criteria for licence approval

#### CORRUPTION RISK

##### **Decisions of licencing staff are not regulated by clear evaluation criteria**

Clear and transparent evaluation criteria serve as a check on decision-makers' discretion and reduce the scope for external or political interference, which can unduly influence the decision-making process in favour of particular interests.

The opportunity for arbitrariness in licencing decisions can jeopardise the integrity of the approvals framework and undermine fairness in the process. Where approval decisions are not regulated by clear and publicly available criteria, certain applicants may be favoured over others in exchange for gifts or bribes. This situation can drive away investors.

In **Colombia**, the publicly available terms of reference do not specify the technical requirements that mining companies must demonstrate in order to obtain a mining licence.<sup>92</sup> This limits the scrutiny that members of the public can bring to bear on the information submitted by mining companies and on the licencing authority's decision about whether to grant them title to the mining concession.

In **Cambodia**, the lack of publicly available criteria for evaluating applicants' technical and financial capacities and work program creates the risk that the licencing staff may abuse their discretion to solicit bribes or gifts from applicants, or that licence applicants will seek to induce a favourable outcome.



#### MITIGATING THIS RISK

Technical training and measures to enhance supervision of staff have now been put in place in **Cambodia**. These measures may reduce the risk of discretion being exercised for corrupt purposes. The publication of successful applicants will also enable scrutiny of the licencing decision by the public and third parties. These measures go some way to mitigating the risk, but introducing publicly available criteria would make the process more transparent and accountable.<sup>93</sup>

92. Expert interview, Transparencia por Colombia (TI Colombia), Bogota, 9 May 2017.

93. Kim, TI Cambodia report: 60-61.

## Scope for political interference

### CORRUPTION RISK

#### Licencing decisions are vulnerable to political interference

Institutional arrangements that safeguard the independence of the licencing authority reduce the opportunities for ministers and senior bureaucrats to interfere with the decision-making process to preference or discriminate against different parties.

Where senior government officials can interfere in licencing decisions or licencing staff are appointed by politicians, there is a risk that political interests or pressure rather than objective or technical criteria could dictate licencing decisions. This situation can also enable PEPs to abuse their discretion to pursue personal interests.

In the case of **Zambia**, a licencing committee is responsible for evaluating applications, granting licences and amending the terms and conditions of licences.<sup>94</sup> Not only are the ministerial members of the committee appointed by the Mining Minister, but the Minister also has the power to intervene and decide contrary to the committee, subject only to the requirement to provide

the committee with a statement of the reasons. This level of discretion creates the risk that power will be abused. This has happened in the recent past. In 2015, an ex-Mining Minister was convicted of abusing his position by interfering with the licencing process to facilitate the award of prospecting licences to a Chinese mining company, Zhongui International Mining Group.<sup>95</sup>

In **Mongolia**, tender bids are assessed by a technical committee comprised of members of the Mineral Resource, Petroleum Agency of Mongolia (MRPAM). The lack of clear criteria for the assessment of technical documents, leaves the process vulnerable to manipulation. A former member of the committee reported being pressured on one occasion by senior officials to skew the technical assessment in favour of a particular bidder.<sup>96</sup> External controls to promote accountability are also weak as there is poor disclosure of the winning bid, and unsuccessful bidders and their bids are not disclosed.<sup>97</sup> The risk that tenders could be misused to favour or discriminate against bidders can jeopardise the entire approvals process. Low participation in tenders may be evidence of a generalised lack of confidence in the process.<sup>98</sup>

### MITIGATING THIS RISK

**Chile's** licencing system is unique in that licences are awarded by judges, on the advice of a technical body, SERNAGEOMIN. Although licencing is conducted through the judiciary, it is still an administrative process, so the key features are relevant to other jurisdictions. This system provides a degree of stability to the approvals regime because of a number of features: first, the process is transparent, as all information regarding the status of the application and the decisions of the judges is available online both to applicants and the public. Second, the judges are independent and removed from political pressures of government.

94. *Mines and Mineral Development Act 2015*, s6.

95. "Zambian ex mines Minister found guilty of Corruption", Reuters (web), 26 February 2015.

96. Interview with former MRPAM employee by TI Mongolia, Ulaanbaatar, 16 February 2017.

97. Biastoch, TI Mongolia report, 2017: 37-39.

98. Biastoch, TI Mongolia report, 2017: 34.

## Lack of transparency in contract negotiations: Examples from the Democratic Republic of the Congo and Australia

Where mining projects are approved via contract negotiations the accountability risks are significant.

In the **DRC**, state-owned enterprises (SOEs) have traditionally held most of the mining rights in commercially exploitable and profitable deposits. As a result, companies commonly obtain mining rights by entering into joint ventures with one of the SOEs. The opaque conditions under which joint venture agreements are negotiated undermines the strict licencing procedures in the 2002 Mining Code. Analysis has shown that the deals made by Congolese SOEs between 2010 and 2012 have cost the country over US\$1 billion.<sup>99</sup> On average, the state sold assets at a sixth of their commercial market value, enabling the overseas buyers to make massive windfall gains.<sup>100</sup>

Almost none of the agreements concluded arose out of a call for tenders to identify the best qualified partner. Negotiations were conducted behind closed doors with no disclosure of the negotiating terms and incomplete disclosure of the agreements, despite a 2011 decree requiring all transfer, sale or lease of the country's natural resources to be published within 60 days.

In **Australia**, contract negotiations between the state and mining companies are not always transparent. In Western Australia, "state

agreements", ratified by an Act of Parliament are used for major infrastructure projects. Until 2000, many major mining projects in Western Australia were established under state agreements. These agreements operate for the life of the mining project and can only be modified with the consent of both parties.

Despite the significance of these agreements, negotiations are not transparent. The public cannot access information about the terms of negotiation and there are no publicly available procedural guidelines to indicate the process by which negotiations should be conducted. Once signed, state agreements are presented to Parliament for ratification, which can take place in a relatively short time. There are few checks and balances as there is no meaningful parliamentary involvement in the terms of the agreement or opportunities for public participation. The agreement cannot be challenged in the courts.<sup>101</sup>

While there have been no reported cases of corruption in the context of state agreements in Western Australia, the cumulative effect of political discretion in decision-making, the lack of transparency of negotiations and the high stakes given the value of the projects makes the process for negotiating state agreements susceptible to corruption.

99. K. Watkins et al., *Equity in extractives: Stewarding Africa's natural resources for all* (Geneva: Africa Progress Panel, 2013): 100-101.

100. Watkins et al., 2013: 100-101.

101. Langley, TI Australia report; 22-24.

## No publication of licences

### ! CORRUPTION RISK

#### Licences are not disclosed

For the licencing process to be accountable, licences must be published and key details of all licences made publicly available: who holds the licence, when it was awarded, the period for which it is valid, the coordinates of the licence area, the work program and any negotiated conditions.

Where the licence or key licence details are not publicly available and accessible in the mining cadastre, the public and affected parties will not know who has been granted a mining licence or under what conditions, which makes it harder to detect whether there has been corruption in the licencing process on the part of licencing officials, senior government officials or mining companies.

The publication of licences and work programs can also enable members of the public to hold licence holders to account for compliance with the conditions of the licence.

Close revision of **Colombia's** mining cadastre found numerous gaps and missing information. This conclusion was supported by an expert informant who said, “despite all efforts made by the national agency, the mining cadastre is still not up-to-date. That is, it does not correspond to the situation in real time. When looking at it, you don’t have complete clarity that the area it reflects is correct, or that all the information is there.”<sup>102</sup> The Auditor-General has found that there are delays in registering various documents related to the processing of licence applications.

The gaps in the cadastre have undermined efforts to monitor PEPs. In 2011 the Secretary for Infrastructure in the Colombian province of Santander, Mauricio Mejía Abello, claimed to have sold and transferred the rights to a mining concession in compliance with his duties as a serving member of the provincial government.<sup>103</sup>

Investigation in the cadastre as part of this study revealed that the process for transferring title to the concession had commenced, but it was not clear whether the transfer had been concluded as the publicly available documentation in relation to the concession was incomplete. As such, it was not possible to identify who currently holds the title to the concession in order to confirm whether Mejía had indeed completely relinquished his interest in the mining concession.<sup>104</sup>

102. Expert interview by Transparencia por Colombia (TI Colombia), Bogota, 19 May 2017.

103. See, “Polémica por Secretario de Santander que tendría contrato de concesión con la Nación”, *Vanguardia* (web), 19 August 2016.

104. A. Puertas Velasco and A. Muñoz Criado, *Mapa de riesgos de corrupción en el otorgamiento de títulos mineros y licencias ambientales* (Transparencia por Colombia, 2017), annex.



# 04

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## WHO GETS THE RIGHT TO MINE?

Licensing authorities must conduct effective due diligence checks to verify the claims of licence applicants so there is no incentive for applicants to provide inaccurate or misleading statements about their financial resources or technical capacity. If the licence authority does not investigate licence applicants, unqualified, under-resourced and undesirable players may be granted rights to mineral resources.

### Measures to ensure that only genuine, qualified and compliant applicants get mineral rights – lessons from country risk assessments

- ✓ Effective due diligence on financial resources, technical capacity and compliance history and corruption track record of licence applicants and their beneficial owners
- ✓ Regulatory mechanisms to deter stockpiling to reduce the risk that speculators will seek to obtain mining licences
- ✓ Effective regulation of licence transfers to ensure that the government's due diligence mechanisms are not bypassed





Without investigation to ensure licence holders possess the requisite technical or financial resources, licences may be acquired and accumulated for the purposes of speculation, rather than conducting mining activities, or unqualified licence holders may be unable to efficiently develop the mineral resource. Both outcomes result in a loss of revenue to the state.

Unqualified and under-resourced licence holders are less likely to be able to comply with environmental and social obligations, including mine site rehabilitation, which leaves the state exposed to the costs of environmental clean-up.

Failure to conduct due diligence on the compliance history and past business conduct of applicants creates the risk that a country's resource wealth will be entrusted to non-compliant, unethical actors with a track record of corruption, money laundering, tax evasion or human rights violations.

Investigating the following two questions helps to identify and address the risks that create opportunities for corruption related to the qualifications, character and intentions of the licence applicant:

- **How thorough are checks done on licence applicants and their beneficial owners?**
- **How effective are regulations to control stockpiling of licences and licence transfers?**

## 4.1 HOW THOROUGH ARE CHECKS DONE ON LICENCE APPLICANTS AND THEIR BENEFICIAL OWNERS?

### Inadequate due diligence

#### CORRUPTION RISK

##### **No mechanism in place for investigating past conduct and compliance or for verifying claims about financial resources or technical capacity (due diligence)**

Checks to verify applicants' claims about their financial resources and technical capacity reduce the risk that applicants will deliberately provide false information and that unqualified and under-resourced actors will be granted rights to mineral resources. Investigation into compliance history and conduct is important to screen out undesirable applicants.

Inadequate due diligence on applicants' financial resources and technical capacity and their past conduct and compliance history was one of the most common sources of risks identified across the countries in this study. This risk was identified across all regions and mining economies.

Due diligence mechanisms are weak across the Kenyan government.<sup>105</sup> According to a retired public servant, evaluation of licence applications by the former licencing authority (a new agency was opened in July 2017) did not look beyond the information provided by the applicant: integrity checks were not carried out and the law did not contain any guidelines to direct how checks should be done.<sup>106</sup>

In 2012, the Kenyan government claimed that it was losing billions of dollars as “briefcase companies” – without the capacity to undertake work – were obtaining exploration licences for speculative purposes and selling them at prices much higher than the licencing fee charged by the government.<sup>107</sup> The new institutional arrangements and laws enacted in 2016 may remedy some of the problems the country has experienced in this regard. However, as one regional expert cautioned, the true test will be in how effectively the law is implemented to ensure that only genuine and serious operators are granted licences.<sup>108</sup>

In **Australia**, the mining states of Western Australia and Queensland have limited mechanisms for due diligence investigations into the backgrounds of mining companies and their principals.<sup>109</sup> While applicants are required to disclose their record of environmental compliance as part of the ESIA process, this disclosure is limited to their activities in Australia. Similarly, when considering whether to grant “foreign investor approval”, the Foreign Investment Review Board refers only to the investor’s compliance with Australian laws. There are several examples in Australia of both foreign and Australian companies that have been granted licences even though they have been investigated or charged with corruption or other criminal offences overseas.<sup>110</sup> The beneficial ownership of mining companies operating in Australia is also unknown. The current framework inhibits the Australian government’s ability to expose and disrupt illicit financial benefits from tax evasion, money laundering or bribery flowing into or through the companies operating in Australia.<sup>111</sup>



#### MITIGATING THIS RISK

Requiring licence applicant companies to disclose their beneficial owners is essential to checking the technical qualifications, financial resources and the character of the individuals behind the companies applying for a licence, particularly as many companies operate through subsidiaries and joint venture arrangements. The risk of inadequate due diligence is compounded where beneficial ownership is not transparent or effectively regulated.

105. Interview with Land and Livelihood Lead at ActionAid Kenya by TI Kenya, Nairobi, March 2017; Interview with a lawyer from the Institute for Law and Environmental Governance by TI Kenya, Nairobi, April 2017.

106. Interview with former employee from Ministry of Mining Cadastre Department (formerly called Commissioner of Mines Department) by TI Kenya, Nairobi.

107. G. Omwenga, “Sh300bn lost as briefcase firms hold onto mining rights”, *Daily Nation* (web), 26 May 2012.

108. Interview with Extractives Regional Manager, Adam Smith International by TI Kenya, Nairobi, 4 April 2017.

109. Expert interviews by TI Australia, Perth, December 2016; Brisbane, March and May 2016; *Mining Act 1978* (WA); *Mineral Resources Act 1989* (Qld); *State Development and Public Works Organisation Act 1971* (Qld).

110. “Shenhua executives under investigation for corruption”, *Australia Mining* (web), 7 August 2015; “Fortescue’s largest shareholder in Chinese corruption probe”, *Financial Review* (web), 12 November 2015; M. Santhebennur, “Brockman chief faces corruption charges”, *Australian Mining News* (web), 16 September 2011; “Glencore under scrutiny for heavy fiscal fraud gets straight into LNG business” *Ship 2 Shore* (web), 17 June 2013 “Adani being investigated for alleged involvement in \$US4.4bn coal pricing scandal”, *The Guardian* (web), 7 April 2016; Environmental Justice Australia, *A review of the Adani group environmental history in the context of the Carmichael coal mine approval* (Melbourne: Environmental Justice Australia, 2015).

111. Langley, TI Australia report, 2017: 50-52.

## 4.2 HOW EFFECTIVE ARE REGULATIONS TO CONTROL STOCKPILING OF LICENCES AND LICENCE TRANSFERS?

### Scope for licence stockpiling

#### CORRUPTION RISK

##### **Companies can stockpile licences without doing any work**

Effective controls to prevent stockpiling of licences can also help deter speculators from seeking to acquire mining licences. These measures help to maintain the integrity of the approvals regime and prevent licence holders from abusing their rights.

Accumulating licences undermines the very purpose of the licence to promote exploration and development of mineral resources and may be misused to engage in speculative activity and block projects with the aim of obtaining an economic benefit.

In **Chile**, the Mining Code does not impose any obligation on licence holders to actually engage in exploration or mining-related activity. This has enabled individuals to obtain mining licences with the sole purpose of extorting property developers and other project proponents<sup>112</sup> or blocking mining and infrastructure projects. Indeed, analysis of the mining cadastre in 2013 concluded that a half of all production licences were concentrated in the hands of a mere 20 legal and natural persons.<sup>113</sup>



112. "Derechos urbanos y mineros en pugna por malas prácticas", *El Mercurio* (web), 21 May 2006.

113. CIPER. *Mineros de papel: Quiénes son los 20 mayores dueños de concesiones mineras* (Santiago: CIPER, 2011).



## Accumulating licences undermines the very purpose of the licence to promote exploration and development of mineral resources.

Major mining companies also accumulate and sit on multiple mining concessions as a strategy to secure exploration areas from competitors or speculators.<sup>114</sup> In the mineral rich northern regions of Chile, up to 70 per cent of the land is covered by mining concessions.<sup>115</sup> Despite this, less than 10 per cent of that land is the site of any real mining activity.<sup>116</sup> Regulatory interventions are necessary to discourage the practice of stockpiling by non-bona fide investors.<sup>117</sup>



### MITIGATING THIS RISK

The practice of stockpiling in **Mongolia** is also quite prevalent.<sup>118</sup> If not kept in check, this could cause problems as the sector grows. Mongolia, like other jurisdictions, has two mechanisms to control the risk of stockpiling.

The first is escalating licence fees that increase over time, which create a disincentive to hold on to licences without doing any work. The requirements associated with this rule are “unambiguous, easily enforced and easily monitored”.<sup>119</sup> While the government has attempted to increase the fees, the current level may still be too low to deter stockpiling.

The second mechanism is minimum exploration expenditure, which requires companies to meet and report on a minimum level of spending on exploration every year. Verification and enforcement of this requirement is more difficult, particularly due to the state’s limited capacity for inspection,<sup>120</sup> but it is easier for regulators to check reporting on expenditure rather than actual exploration activities.

Early drafts of an amendment to the law contemplated the introduction of relinquishment requirements (whereby mining companies must surrender a defined fraction of the exploration licence area on a periodic basis). Mandatory relinquishment encourages exploration, as companies will only want to surrender the areas they have determined to have low potential and be unprofitable. Ultimately these provisions were not enacted.<sup>121</sup>

114. E. Moya Díaz, P. Carcamo and M. Monardes, *Riesgos de corrupción en concesiones mineras y otorgamiento de permisos ambientales: El caso de Chile* (Santiago: Chile Transparente, 2017): 37.

115. “Sistema de concesiones en Chile: El acceso a la propiedad minera”, *Minería Chilena* (web), 10 June 2014.

116. CIPER, 2011.

117. C. Quinzio, “Incentivemos la exploración minera” *El Mostrador* (web), 22 March 2017.

118. Biastoch, TI Mongolia report, 2017: 66-67.

119. Biastoch, TI Mongolia report, 2017: 66.

120. Interview with Head of Division of an un-named Ministry by TI Mongolia, Ulaanbaatar, 6 March 2017; Interview with former head of undisclosed agency by TI Mongolia, 3 September 2017.

121. Minter Ellison, *High level overview: Amendments to the Minerals Law* (2006) (Ulaanbaatar: Minter Ellison, 2014).

## Unregulated licence transfers

### CORRUPTION RISK

#### **Licence transfers are not regulated or disclosed**

Regulating licence transfers between private parties can safeguard against the subversion of due diligence requirements and can make it more difficult for licence holders to engage in speculation.

Licence transfers are a legitimate part of a licencing regime as they can encourage small companies to take on the commercial risks of exploration in the expectation that if they make a discovery they will be able to sell their rights to larger and better-capitalised companies.<sup>122</sup> However, effective regulation and disclosure is required to ensure that transfers do not undermine the licencing process.

Several features of the transfer regime in **Mongolia** make it vulnerable to abuse.<sup>123</sup> First, disclosure of transfers is inadequate. There is no up-to-date licence transfer data on the government website.<sup>124</sup> Second, it is possible to transfer newly issued exploration licences, which facilitates acquisition of licences for speculative purposes. Third, while the government charges transfer fees, the fees are MNT 2.5 million (US\$ 1,000) less than the application fee for an exploration licence. This may encourage companies to obtain licences directly from other companies rather than the state. Finally, the licence buyer is not subject to the same minimum qualification requirements or due diligence as the original licence applicant. Moreover, transfers are confirmed by the relevant authority in five days, which does not allow time for verification.<sup>125</sup>



### MITIGATING THIS RISK

The Mongolian assessment concluded that regulating licence transfers to require timely disclosure, imposing transfer fees that are commensurate with standard licence fees and subjecting transferees to the same qualification requirements as licence applicants could reduce the risk of a secondary market for licences emerging and guard against the entrance of unqualified and undesirable licence holders into the mining sector.<sup>126</sup> These measures are important to protect the government's authority and control of the mining approvals regime and help ensure that its due diligence mechanisms are not subverted.

122. C. Krakoff, *Sector licensing studies: Mining sector* (Washington DC: World Bank, 2011): 10.

123. Biastoch, *TI Mongolia report*, 2017: 68-70.

124. While details of the parties, licence number and date of transfer were recorded in Mongolia's last EITI report, this results in a delay in publication of up to a year.

125. *Minerals Law of Mongolia 2006*, Article 49.6.

126. Biastoch, *TI Mongolia report*, 2017: 70.

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# ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT

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## HOW ACCOUNTABLE ARE MINING COMPANIES FOR THEIR ENVIRONMENTAL AND SOCIAL IMPACTS?

As part of the mining approvals regime, mining companies must usually obtain *environmental approval*. This involves assessing the potential negative environmental and social impacts of their proposed activities and developing an approved management and impact mitigation plan, which then forms part of the terms and conditions of the licence.<sup>127</sup>

### Measures to ensure mining companies are accountable for their environmental and social impacts – lessons from country assessments

- ✓ Adequate institutional capacity for effective verification of ESIA
- ✓ Clear and transparent criteria for environmental approvals
- ✓ Effective public access to information including ESIA reports and related documents, impact management plans and compliance performance to enable public scrutiny of the approvals process and government performance of its duty to monitor and enforce compliance
- ✓ Institutional capacity and will to monitor and enforce compliance

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<sup>127</sup>. Licence holders may also be required to update assessments and work plans during the lifespan of the mine.



Verification of environmental and social impact assessments (ESIAs) makes it more likely that project proponents will give decision-makers and the public reliable and accurate information about the nature and severity of their potential impacts and reduces the risk that deliberately misleading statements or omissions will be provided. This supports sound decision-making about licence applications and appropriate licence conditions.

Without accurate and verified information, government authorities, affected communities and civil society are not able to make an informed judgement on the appropriateness of the mining project or the mitigation and management measures proposed, which may be inadequate to prevent environmental damage and social harm. The absence of truthful information also hinders community members from participating meaningfully in consultation.

Investigating the following questions helps identify and address the risks that can create opportunities for corruption in the environmental assessment and approval process:

- **How thorough and effective is verification of environmental and social impact assessments (ESIAs)?**
- **How accountable are government authorities for their decisions to approve or reject ESIAs?**
- **How well can the relevant government authority monitor compliance with licence obligations and conditions?**

Public participation is a fundamental part of the ESIA process, which is dealt with in detail in Chapter 6 on community consultation.



## How the ESIA process ensures mining approvals support sustainable development

An ESIA system is typically made up of the following elements:

- Laws, rules or policy that set out how the ESIA process is to be conducted
- The assessment activities as carried out by the project proponent
- Government oversight of the process and review and verification of the assessment
- Public participation
- Government decision to approve or reject the ESIA and grant the requisite environmental approval<sup>128</sup>

The stage of the mine life cycle at which an ESIA is required differs depending on the country. In some cases, an ESIA is required as part of the application for an exploration licence. In most

cases, however, it is not required until the mining company applies for a mining licence. In some cases, mining licences are granted without environmental approval, but the mining company must conduct an ESIA and obtain approval before commencing operations; for example in **Mongolia** and **Zimbabwe**.

A country's mining approvals framework can only support sustainable development if it effectively imposes licence conditions that require companies to manage negative environmental and social impacts. An effective and credible mining approvals framework will screen out environmentally and socially unsound projects.<sup>129</sup> If ESIA's are done too late into the project lifecycle their value and effectiveness is reduced.

128. United Nations University, "Open Educational Resource on Environmental Impact Assessment, based on the UNEP ESIA Training Manual", 2007. Available at [http://ESIA.unu.edu/course/index.html%3Fpage\\_id=101.html](http://ESIA.unu.edu/course/index.html%3Fpage_id=101.html)

129. United Nations University, 2007.

## 5.1 HOW THOROUGH AND EFFECTIVE IS VERIFICATION OF ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENTS (ESIA)?

### Lack of institutional capacity

#### CORRUPTION RISK

##### **The relevant government authority doesn't have the skills or resources to verify the contents of the ESIA**

Effective verification of the ESIA makes it more likely that a licence applicant will provide a robust and accurate assessment that does not contain misleading or fraudulent statements or that omits critical information.

In all the jurisdictions examined, the government is responsible for verification and approval of the ESIA (or the relevant environmental permit or authorisation), rather than an independent third party. The risk of no or inadequate verification of the veracity and accuracy of the ESIA is one of the most common and serious risks identified in the countries in this study. The main cause of this risk is the government's lack of institutional capacity – a lack of quality and coordinated geo-spatial information, financial, human and technical resources.

In **PNG** and **Chile**, the lack of coordinated and complete geospatial information covering geographic and human features is a key reason for the state's inability to effectively verify ESIA's.

In **Chile**, errors in one particular ESIA<sup>130</sup> were not detected by the relevant authority and only came to light through a parliamentary inquiry.<sup>131</sup> These errors included references to communities that did not exist. The absence of any coordinated database of geographic and social features such as the location of different communities has left the Chilean environmental authority completely dependent on the information supplied by the project proponent.<sup>132</sup>

When coupled with a lack of resources and technical capacity, this has led to verification being treated as a checklist exercise against the terms of reference for the assessment instead of a thorough interrogation of the details of the assessment report.<sup>133</sup> This vulnerability is exacerbated by the absence of any criminal or civil sanctions for providing false information or omitting important information in the development of the ESIA.<sup>134</sup>

In **South Africa**, an attempt to streamline the approvals process for mining companies saw the creation of the "One Environmental System" in 2014 whereby the Department of Mineral Resources (DMR) became responsible for approving ESIA's, issuing environmental authorisations and monitoring and enforcing compliance with their conditions for mining projects. Both a South African public interest environmental law centre and two mining company representatives expressed deep reservations about the capacity, knowledge and expertise of DMR staff to perform this role.<sup>135</sup> The DMR's failure to perform its environmental duties has led to multiple legal actions and increased the burden on the courts to ensure that the DMR does its job.<sup>136</sup>

130. This report uses "ESIA" as a standard term to refer to the environmental and social impact assessment and approval process as the exact term differs by jurisdiction. Many of the country assessments refer only to "EIAs".

131. "Diputada Molina: Las compensaciones que ha ofrecido el proyecto de torres de alta tensión son irrisorias" *El Observador* (web), 14 November 2016.

132. Moya Díaz, TI Chile report, 2017: 57.

133. Moya Díaz, TI Chile report, 2017: 58.

134. Moya Díaz, TI Chile report, 2017: 59.

135. Interviews by Corruption Watch (TI) South Africa with Centre for Environmental Rights, Cape Town, 9 February 2017; mining company representative, Johannesburg, 10 March 2017; and mining company representative, 12 April 2017.

136. J. Yeld, "GroundUp 'Critical court showdown on mining and environment'", *News24.com* (web), available at 17 February 2017.

The qualifications of ESIA reviewers was raised as a red flag in **Colombia**. There, both the national environmental agency (ANLA) and the regional authorities (CARs) rely heavily on private consultants for technical review of ESIA and monitoring compliance. While this is not an issue in itself, there are two problems with the way consultants are engaged to perform these functions. First, they are hired for short, specific tasks and are not bound by the same disciplinary controls as public servants, which makes it difficult to manage potential conflicts of interest. Second, there is a risk that under-qualified consultants are being hired.

In 2016, the Auditor-General found that ANLA was not conducting checks on the professional qualifications and experience of the contractors it was hiring.<sup>137</sup> In the case of the largest CAR – in the department of Cundinamarca – which has 1,800 contractors to help manage its workload, the Auditor-General found that rigorous selection and screening processes were absent, leading to the hiring of inappropriately and inadequately qualified consultants.<sup>138</sup> While the capacity of environmental authorities may be overstretched, current practices put the quality of the verification process at risk. The reliance on contractors who also work for potential project proponents further creates a significant risk of conflicts of interest.



### MITIGATING THIS RISK

Where the relevant government authority cannot perform its job adequately due to lack of funding, introducing fees or a levy for the assessment may be an option to bolster its economic resources. This measure was in place in **Kenya** until the government scrapped the fees on which the Kenyan National Environment Management Authority relied and also scaled-down the funding allocated to the authority.<sup>139</sup>

Even in **Australia**, where environmental authorities are relatively well funded, the complex environmental and economic modelling employed by project proponents make it difficult for government authorities to verify a project proponent's ESIA.

In a recent decision regarding a coal mine, the Land Court in the state of Queensland found that the environmental authority had approved the proponent's ESIA even though it contained severe inadequacies. It found that approval should not have been given and recommended that the mining licence not be granted.<sup>140</sup> However, the Court acknowledged that, unlike the environmental authority, it had the benefit of access to expert opinion and technical assessment in reviewing the ESIA and cross-examination of the proponent. In a separate case, the Land Court found that economic modelling provided by the proponent of a large-scale coal mine, Adani Mining Pty Ltd, had overstated the number of jobs that would be created by the mine: the proponent had claimed that the mine would create 10,000 full time equivalent jobs, the Court accepted expert advice based on alternative modelling that the figure would be closer to 1,206.<sup>141</sup>



### MITIGATING THIS RISK

The threat of a legal challenge and a strong judicial system as in the example of the Queensland Land Court may deter dishonest or exaggerated claims in ESIA and provide important checks and balances to the verification process. However, legal action can be costly and in Queensland, **Australia**, must be funded by the objectors themselves; usually landholders, affected communities or public interest groups.

Moreover, while this is an important accountability mechanism, it does not address the underlying problems in the government administration of the environmental assessment and approval process.

137. Expert Interviews by Transparencia por Colombia (TI Colombia), Bogotá, 9 May 2017; Contraloría General de la República. *Informe de Auditoría Autoridad Nacional de Licencias Ambientales-ANLA Vigencia 2015* (Bogotá: Contraloría General de la República, 2016).

138. Contraloría General de la República. *Informe de Auditoría Corporación Autónoma Regional de Cundinamarca-CAR* (Bogotá: Contraloría General de la República, 2016).

139. Interview with the ESIA Lead at the National Environment Management Authority (NEMA) by TI Kenya, Nairobi, 20 February 2017.

140. *New Acland Coal Pty Ltd v Ashman* (No 4) [2017] QLC 24 at [575].

141. R. Campbell "Fact check: Will Adani's coal mine really boost employment by 10,000 jobs", *The Australian Business Review* (web), 31 August 2015; "Adani coalmine would not deliver jobs and royalties promised, land court hears", *The Guardian* (web), 27 April 2015; P. Frost, "Adani's economic outlook makes no sense", *The Morning Bulletin* (Rockhampton) (web), 29 April 2015.

## 5.2 HOW ACCOUNTABLE ARE GOVERNMENT AUTHORITIES FOR THEIR DECISIONS TO APPROVE OR REJECT ESIA'S?

### Unclear criteria for environmental approval

#### CORRUPTION RISK

##### **Lack of clear and transparent criteria for environmental approval**

Clear and transparent criteria are required to ensure that verification of ESIA's is duly done and to control the discretion of public officials to ensure their decisions about whether to approve the content of ESIA's and associated management plans are not subject to political interference.

**Mongolia** does not have clear criteria or processes for evaluating ESIA's, so the level of scrutiny over ESIA's can vary greatly. According to an interviewee, examination of the assessor can last minutes or hours and there are no clear criteria to guide verification.<sup>142</sup> ESIA's released under freedom of information laws were found to be of low quality, sometimes copied from other assessments, without even changing the names of key stakeholders.<sup>143</sup>

While the law is reasonably clear in **Chile**, technical review is vulnerable to political interference as final approval rests with the Committee of Ministers, chaired by the Minister for the Environment and comprising the Ministers for Energy, Mines, Health, Agriculture and Economy. The Committee's decision-making power is not bound by strict criteria and as a result accountability is low. This means that the final decision may be based on political, not technical, criteria.

There are numerous examples of projects in **Chile** that had received unfavourable technical reviews but were later approved by the Committee.<sup>144</sup> One particular case involved the approval of a property development that would benefit the family of a fellow politician. It raised questions about whether the Committee's decision was subject to external influence or if they were peddling favours.<sup>145</sup>

In 2014 in **Zambia**, the then Minister of Lands and Natural Resources, Harry Kalaba, overturned the decision of the Zambia Environmental Protection Agency to deny Australian mining company, Zambezi Resources, environmental approval to open a copper mine in the Lower Zambezi National Park, one of the world's most sensitive ecosystems.<sup>146</sup> An independent report on the company's ESIA had found that it had "grossly failed to meet US or international standards for environmental assessments".<sup>147</sup> While Zambia's mining law was amended in 2015, it is not clear whether the ESIA process continues to be vulnerable to political interference.

142. Interview with employee of GreenTrends (environmental consultancy) by TI Mongolia, Ulaanbaatar, 12 April 2017.

143. Interview with representative of the Open Society Forum (OSF) by TI Mongolia, Ulaanbaatar, 30 January 2017.

144. Moya Diaz, TI Chile report, 2017: 54-56.

145. "Medioambiente: Exigen al Comité de Ministros aclarar por qué aprobó proyecto inmobiliario de Puchuncaví que había sido rechazado por Comisión Evaluadora Ambiental Regional", *Radio Allen* (web), 12 August, 2016.

146. M. West, "Out of Africa, problems for Zambezi Resources", *Sydney Morning Herald* (web), 8 February 2014.

147. West, 2014.

## Undisclosed ESIA reports

### CORRUPTION RISK

#### **The ESIA report and related documents are not publicly available**

The risk of political interference to favour particular parties or for personal gain is reduced when the public can access the ESIA and related documents to hold decision-makers to account.

**Peru** set up an online portal called SEAL for submission, processing and publication of ESIA reports and related documents in 2011. While at the time this was a welcome development to improve access to information, there have been delays in the full implementation and roll out of the system, which has undermined confidence of both industry and civil society in the system.

### MITIGATING THIS RISK

In response, the director of the **Peruvian** environmental authority, SENACE, reported this year that the authority is currently evaluating the system and looking to introduce a new, more effective, accessible and transparent system.<sup>148</sup> This will include publishing the full ESIA reports and the technical opinions of specialist government agencies, not just the final resolutions.<sup>149</sup>

Given the highly technical nature and length of ESIA reports, it is not sufficient that the reports are publicly available. For the public to be able to participate effectively and to hold both government decision-makers and project proponents to account, the information must be presented in a way that they can understand. This issue is dealt with in Chapter 6 on community consultation.

## 5.3 HOW WELL CAN THE RELEVANT GOVERNMENT AUTHORITY MONITOR COMPLIANCE WITH LICENCE OBLIGATIONS AND CONDITIONS?

### Weak monitoring and enforcement

### CORRUPTION RISK

#### **The relevant government authority doesn't have the skills or resources to monitor and enforce compliance**

When governments have robust systems for enforcing compliance with licence conditions, this deters applicants from committing to environmental and social obligations on the expectation that they will be able to escape compliance.

When government authorities don't have the skills, resources or political will to monitor and enforce compliance, measures may be included in companies' environmental and social work plans that they have no intention or capacity to carry out. In this way, the ESIA can become a meaningless "tick-box exercise", undermining public confidence in the legitimacy of the approvals regime and creating the risk of serious environmental and social harm. This risk was common in a number of countries.

148. Interview with the Head of SENACE, Patrick Weiland, by Proética (TI Peru), Lima, February 2017.

149. SENACE Round Table, "Ruta a la Integridad: El valor de la ética en la evaluación del ESIA", 23 May 2017.



## ESIA can become a meaningless ‘tick-box exercise’, undermining public confidence in the legitimacy of the approvals regime and creating the risk of serious environmental and social harm.

In **South Africa**, lack of compliance with licence conditions has been particularly evident in the context of social and labour plans (SLPs). Approval of an SLP is part of the requirements of a mining licence application. During the South African Human Rights Commission’s National Hearing on Mining, the Department of Mineral Resources admitted that it did not have systems in place to oversee the implementation of SLPs.<sup>150</sup>

This has resulted in cases like the Marikana platinum mine, where, according to research by the University of Witwatersrand, the mining company, Lonmin, built only three of the 5,500 houses it had committed to build for miners and their families.<sup>151</sup> While pointing out that cooperation of municipal authorities is necessary for companies to give effect to their commitments under the SLPs, a senior executive at the Chamber of Mines admitted, “Even when these plans are agreed with, SLP’s are submitted, mining companies haven’t been good with complying with these SLP’s, they do it begrudgingly”.<sup>152</sup>



### MITIGATING THIS RISK

Institutional reforms in **Chile** have been important to mitigate the risk of non-compliance and strengthen monitoring and enforcement of licence holder obligations. In 2010 the Office of the Environmental Superintendent was established with the responsibility for implementing and coordinating monitoring and enforcement of various environmental laws, including work plans approved as part of the environmental approvals process.

The Superintendent has set up an online system that gives free and public access to information about project environmental obligations, performance and compliance.<sup>153</sup> It has also established an inter-departmental and agency network for monitoring and enforcement of environmental laws and obligations.<sup>154</sup>

The Superintendent has proven to be effective in penalising non-compliance in the mining sector, imposing sanctions on companies such as Minera Nevada SpA,<sup>155</sup> a subsidiary of Barrick Gold, including suspension of its operations, and on Luminar Copper for failing to implement measures to control the pollution of groundwater.<sup>156</sup>

150. Interview with the South African Human Rights Commission by Corruption Watch (TI) South Africa, Johannesburg, 12 April 2017.

151. University of Witwatersrand – Centre for Applied Legal Studies, “Social and Labour Plans”, available at [www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/](http://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/).

152. Interview with the Senior Executive at the Chamber of Mines by Corruption Watch (TI) South Africa, Johannesburg, 13 December 2016.

153. Superintendencia del Medio Ambiente Gobierno de Chile (SMA), “Sistema Nacional de Información de Fiscalización Ambiental”. Available at <http://snifa.sma.gob.cl/v2>.

154. SMA, “Que es la red nacional de fiscalización ambiental?” Available at <http://renfa.sma.gob.cl/index.php/que-es-la-renfa>

155. SMA, “SMA sanciona y paraliza obras de Pascua Lama por incumplimientos ambientales”, 24 May 2013. Available at [www.sma.gob.cl/index.php/noticias/comunicados/241-smasanciona-a-pascua-lama-por-incumplimientos-a-su-rca](http://www.sma.gob.cl/index.php/noticias/comunicados/241-smasanciona-a-pascua-lama-por-incumplimientos-a-su-rca)

156. “SMA aplica segunda mayor multa de la historia a minera Caserones”, *Pulso* (web), 18 March 2015.

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# COMMUNITY CONSULTATION AND NEGOTIATIONS

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## HOW MEANINGFUL IS COMMUNITY CONSULTATION?

A core pillar of sustainable development is public participation. Genuine and meaningful consultation with communities is fundamental to ensuring that mining contributes to sustainable development.

Measures to ensure that consultation with communities is meaningful and fair – lessons from country assessments

- ✓ Clear, binding process and principles to set minimum standards for the content, timing, participants and mode of consultations (addressing the questions of What? When? Who? How? and Why?)
- ✓ Transparency in the conduct of negotiations and the consultation process
- ✓ Publication of agreements and other outcomes of community engagement

Engagement with local communities can occur at different stages of the approvals process and can take different forms. Mining companies and government often engage with communities via third parties such as lawyers and consultants. Controlling the scope for corruption and manipulation of these interactions by all parties – company representatives, consultants, government officials *and* community representatives – is essential. Indeed, one of the most common risks across the 18 assessments was the risk that “community leaders do not represent community interests”.

If community consultation or negotiations are manipulated, done in bad faith or avoided despite legal duties to consult, this can lead to the destruction of livelihoods and violation of human rights.

Corruption undermines the credibility and legitimacy of the consultation process, the resulting agreements and, by extension, the company’s social licence to operate. It can give rise to conflict between the community and the mining operator, leading to major disruptions to mining activities.

Investigating the following questions helps identify and address the risks that can lead to corruption in community consultation:

- **How clear are the rules for consultation with communities?**
- **How transparent are community consultations and the resulting agreements?**

## Involving communities in mining approvals

Elements of the approvals regime that should involve affected communities include:

- Land use planning and decisions to open land to mining (see Chapter 2).
- When companies seek access to customary land or privately held land. This usually takes the form of *negotiations* with the object of achieving agreement for access in exchange for compensation.
- ESIA processes – usually in the form of *consultation* to inform communities about potential adverse and positive impacts of mining activities (see Chapter 5) and *negotiations* about mitigation measures and sometimes compensation.
- Community development agreements (CDAs): in some jurisdictions, licence holders have a legal obligation to *negotiate* development agreements with affected communities.
- When the state has obligations to indigenous and tribal groups under domestic law, or international obligations under *ILO Indigenous and Tribal People’s Convention 169* or the *UN Declaration on the Rights of Indigenous Peoples*, to consult with the indigenous groups to obtain their free, prior and informed consent (FPIC) before adopting any measures that may affect them.



## 6.1 HOW CLEAR ARE THE RULES FOR CONSULTATION WITH COMMUNITIES?

### Unclear rules for consultation

#### CORRUPTION RISK

##### **Lack of clear, binding guidance on the process and principles for the consultation process**

A clear, legally binding process and standards providing guidance on what constitutes appropriate consultation will safeguard against the risk that affected communities are deliberately bypassed, or consultations done as a formality and not in good faith.

Numerous best practice standards for community consultation have been developed by different global institutions, such as the ICMM's *Good Practice Guidance on Indigenous Peoples and Mining* (2015)<sup>157</sup> and the OECD's *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (2017).<sup>158</sup>

While these voluntary standards and guidelines are important and useful, the fact that risks persist in this area indicates that such standards alone are not sufficient. This is particularly important because many junior and privately held mining companies may not be members of industry associations with binding standards. A legally binding framework and measures at the national level consistent with relevant international obligations are necessary to prevent and mitigate risks relating to community consultation and negotiations at the national level.

In **Guatemala**, this is a major risk. The country has not implemented its obligations under the ILO Convention 169 to obtain the free, prior and informed consent of indigenous groups before taking any measures that may directly affect them (FPIC duty). After pressure from human rights bodies, the government attempted to regulate the consultation process in 2011, although it did so without consulting or involving indigenous communities. Indigenous groups successfully sought a court order to invalidate the regulations.<sup>159</sup>

The Constitutional Court held that the government had to provide for the active participation of indigenous groups in developing the regulations and that the regulations should set out the body responsible for convening the consultations, the form in which consultations should take place and their legal effect. The Court also held that indigenous communities should participate through authorities or institutions that they recognise as being representative and legitimate. In July 2017, the Ministry for Labour published a guide on consultation with indigenous groups, but Congress has not yet developed binding regulations.<sup>160</sup>

Several mining licences issued by the state have been suspended by the Court due to the state's failure to carry out FPIC consultations.<sup>161</sup> The Chamber of Commerce has urged the government to provide regulatory certainty by stipulating the requirements for conducting FPIC consultations in law.<sup>162</sup>

157. "ICMM member companies must implement the ICMM *Sustainable Development Framework* as a condition of membership [which includes commitments to FPIC with indigenous peoples]... Members must also report in line with the Global Reporting Initiative's (GRI) *Sustainability Reporting Framework* and obtain independent external assurance that the ICMM commitments are being met": ICMM, "Indigenous peoples and mining position statement", May 2013. Available at: [www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement](http://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement)

158. OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Paris: OECD, 2017).

159. Sentencia n° 1072-2011 de Corte de Constitucionalidad de Guatemala, 24 November 2011.

160. "Guatemala lanza guía para consultas a pueblos indígenas establecidas por OIT" *Prensa Libre* (web), 18 July 2017.

161. Sentencia del 23 de noviembre del 2015. Expediente 5712-2013, Derecho minero San José III, Montana Exploradora (Goldcorp).

162. Chamber of Commerce, "Cacif demanda reglamentar el Convenio 169 para dar certeza jurídica", Cámara de Industria de Guatemala (web), 1 February 2017. Available at: <http://cig.industriaguatemala.com/2017/02/01/cacif-demanda-reglamentar-el-convenio-169-para-dar-certeza-juridica/>

In **Cambodia**, despite some positive changes to the mining approvals process, there are still no formal guidelines on *who* should be invited to participate in community consultation on social and environmental impacts or *how* agreement should be reached and officially recorded. If the legal framework for consultation cannot be accurately defined and understood, there is a real risk that the consultation process will be circumvented. Indeed, community members from Koh Sror Lav reported that they felt past consultations had been convened in bad faith by the responsible government body, which only notified community members on the day of the consultation, ultimately manipulating the consultation in favour of the licence applicant.<sup>163</sup>

This risk was also rated “very high” for the province of Ontario in **Canada**. The Ontario risk assessment focused on the duty to “consult and accommodate” indigenous communities as part of mine closure plans, yet noted that the issues identified were applicable to other points in the mining approvals framework where consultation and accommodation are required. Stakeholders expressed concern that the duty to consult and accommodate remains unclear. The obligation to fulfil the duty is borne by the government, but aspects of the duty can be and are delegated to the private sector. Even though the provincial government has issued guidelines, policies have not resulted in legislative changes. The business sector has called on the federal government to clarify the duty to consult.<sup>164</sup> Without clear criteria, it is difficult for stakeholders and business to determine whether the duty to consult has been satisfactorily fulfilled, which makes it difficult to evaluate the process and hold parties to account.



## MITIGATING THIS RISK

In **Chile**, the primary obligation for community consultation arises in the context of developing an ESIA. Scope for participation of affected communities in this process is clearly set out in law, along with the state’s duty to facilitate the involvement of communities. In Chile, the courts have been effective in enforcing this duty against mining companies who have not taken steps to consult with communities, as in the case of the Invierno mine.<sup>165</sup>

## Consultation happens too late



## CORRUPTION RISK

### Consultation occurs too late in the approvals process

The *timing* of engagement with communities also determines whether it is meaningful and genuine. If consultation happens too late in the mine lifecycle – when the project and project conditions are a taken as a given – this enables project proponents to conduct consultation as a mere formality, without true engagement with the community.

In **Indonesia**, communities do not have a right to participate in decisions to open land to mining, or the award of exploration licences. Their first opportunity to engage in the process is through the ESIA process that occurs prior to the award of a mining licence. As a result, in *practice* some companies do not consult with communities at all due to the lack of government oversight and enforcement.<sup>166</sup>

163. Interview with representatives from Koh Sror Lav by TI Cambodia, 2017.

164. Canadian Chamber of Commerce, “Seizing six opportunities for more clarity in the duty to consult and accommodate process”, 16 September 2016. Available at [www.chamber.ca/media/blog/160914-seizing-six-opportunities-for-more-clarity-in-the-duty-to-consult-and-accommodate-process](http://www.chamber.ca/media/blog/160914-seizing-six-opportunities-for-more-clarity-in-the-duty-to-consult-and-accommodate-process).

165. S. Meersohn, “Corte ordena realización de consulta ciudadana sobre proyecto minero en Isla Riesco”, *Área Minera* (web), 18 March 2017.

166. Interviews by TI Indonesia with civil society organisations specialising in the advocacy for mining-affected communities in Samarinda, 9 April, 2017 and focus group discussions with civil society organisations in Samarinda, 15 May 2017 and in Kendari, 18 April 2017 and 12 May 2017.

In **Zimbabwe**, mining licences (“block of claims”) are granted without an ESIA, but the licence holder must conduct the ESIA and obtain relevant approval *before commencing operations*. This assumes a high level of compliance and good faith on the part of the licence holder. Moreover, at this stage of the process, it is too late for any meaningful participation and informed decision-making about the impacts of the mining project, or whether it should even proceed in the first place.

There have been cases in **Zimbabwe** where companies have started mining before complying with all relevant ESIA processes, including community consultation. In the case of the Chinese company Tapin Private Limited, the Environment Management Agency intervened to enforce compliance with environmental laws and required an ESIA to be conducted, but only after significant damage to the Umzingwane river system had already occurred.<sup>167</sup>

Similarly, in **Sierra Leone**, despite legal requirements that companies prepare an ESIA and duly consult affected communities prior to commencing mining activities, the experience of local civil society organisations and four different mining-affected communities revealed that enforcement is weak and in practice communities are often not involved in the ESIA process at all.<sup>168</sup> In the region of Lunsar, communities were involved after the fact in the “public disclosure” process when the mining project was already underway, which shifted the terms of negotiation to the details of local employment opportunities rather than the costs and benefits of the project.<sup>169</sup>



## MITIGATING THIS RISK

The timing of consultation affects corruption risks. *When* consultation occurs determines whether or not it is genuine and meaningful, and how easily the process is manipulated. Consulting with communities after a project has approval gives companies an even stronger bargaining position and undermines the legitimacy of the consultation process.

Recent changes to the law in **Cambodia** mean that from now on, public consultation will happen earlier in the lifecycle of a mine, *before* the exploration stage and as part of the ESIA requirements in the application process for an exploration licence.

In 2016 in **Colombia**, the Constitutional Court invalidated a series of administrative decrees that created “strategic mining areas” over numerous sites on the grounds that the government had failed to consult with indigenous and Afro-descendent communities living in the designated areas. Even though no licences had yet been granted, the Court held that the duty to consult arose in relation to the act of allocating land to mining.<sup>170</sup>

167. N. Bhebe, “EMA stops Umzingwane mining activities”, *NewsDay* (web), 26 January 2013.

168. Focus group interviews by TI Sierra Leone with communities in Koidu (Kono District), Lunsar (Port Loko District), Tongofields (Eastern Sierra Leone), Rutile (Moyamba District), February – March 2017.

169. Interview with Chief Alfred A. Kamara by TI Sierra Leone, Lunsar, March 2017.

170. Corte Constitucional, 9 de junio de 2016, Sentencia T-766/15.

## Consultation only happens with local elites

### ! CORRUPTION RISK

#### Consultation only occurs with local elites

Genuine and meaningful community consultations occur with members of the affected community or their legitimate and genuine representatives, not just with local leaders who may seek to manipulate negotiations for personal benefit rather than truly represent the community interest.

In focus group interviews, community members in a number of countries complained that local leaders and chiefs often abuse their position for personal benefit at the expense of the community they are meant to represent.

In **Kenya**, six different community groups in the mining counties of Kitui, Kwale and Taita Taveta asserted that those chosen to represent them, including as representatives on formal community land committees, “end up being compromised through bribery, gifts or being offered jobs at the company”.<sup>171</sup> At the same time, the community members said they were not aware of how consultation should progress or be structured, or their rights in the process.

In **Sierra Leone**, small-scale and large-scale mining licence holders, which meet certain production thresholds are required to prepare and implement a Community Development Agreement (CDA) with primary host communities. These licence holders must allocate at least one percent of gross revenue from the previous year to the activities contained in the CDA. Focus group discussions in four mining regions revealed that community members are not aware of the existence of CDA negotiations.<sup>172</sup> This suggests either that there has not been compliance with the CDA obligations or that negotiations involving mining companies and community representatives (Paramount Chiefs, local politicians or members of the Community Relations Committee) are proceeding behind closed doors.

### Community members don't feel that their leaders represent them

*Politicians and local leaders of their county have always marginalized them in decision making processes of concession benefits. (Community members, Fuamah District, Liberia (Bong Mine), 28 April 2017)<sup>173</sup>*

*Chiefs and traditional leaders and headmen never look at the plight of its people. (Community members, Kabwala and New Israel community, Zambia, 11 November 2016)<sup>174</sup>*

171. TI Kenya researcher's report from focus groups with six community groups in Kitui, Kwale and Taita Taveta counties January to May 2017.

172. Focus group interviews by TI Sierra Leone with communities in Koidu (Kono District), Lunsar (Port Loko District), Tongofields (Eastern Sierra Leone), Rutile (Moyamba District), February to March 2017.

173. R. Makor, *Corruption risks assessment and analysis in the award of mining licenses and concessions in Liberia* (Center for Transparency and Accountability in Liberia, 2017).

174. E. Kangamungazi, *Enhanced transparency and accountability in the awarding of mining sector permits, licenses and contracts* (Transparency International Zambia, 2017).



Identifying “the community” and genuine representatives of the community is something that many mining companies have found difficult. A representative from a mining company in **South Africa** voiced frustration with the government’s lack of guidance on the matter:

The issue of traditional leaders is a contentious issue for everyone, not just mining houses, government needs to regulate the issue of traditional leaders better and how one should consult with the Council (Kgoro). At this stage mining houses are not sure who are community leaders, and legislation does not govern this properly and so government is not playing its role in order to streamline the legislation.<sup>175</sup>

The issue is made more complex in relation to indigenous groups and other communities that have not been formally recognised. In **Peru**, lack of accurate information about indigenous and tribal groups and their lands makes it difficult to determine whether the FPIC duty is triggered in the first place. According to one civil society representative, this is due to the state’s failure to take steps to recognise all indigenous groups.<sup>176</sup>

In the **Canadian** Province of Ontario, there is no transparency around criteria for determining which Indigenous Peoples should be consulted, making it difficult for stakeholders and the company itself to know whether the duty to consult has been adequately fulfilled.<sup>177</sup>

## The curious case of the *Nueva Esperanza de Mollepiña* community in Peru

In **Peru**, an indigenous community declared in 2013 that it no longer recognised itself as an indigenous group and was not affected by the Angostura mine.<sup>178</sup> In this case, a licence had been granted to the mining company on the basis that it would consult with the community to obtain their free, prior and informed consent before commencing exploration or mining activities, as required by law.<sup>179</sup>

Instead of this process, the mining company and the community negotiated a private agreement for use of the land. When the community later renounced its indigeneity, the Ministry for Energy and Mines authorised the Canadian mining company, Aguila American Gold Ltd, to proceed with exploration, on the basis that the FPIC obligation no longer applied.

Given the vulnerability of community negotiations to manipulation, the possibility that the FPIC duties could be subverted as a result of a private agreement is concerning.

175. Interview with mining company by Corruption Watch (TI) South Africa, 10 March 2017.

176. Interview with Javier Jahnce, Executive Secretary of *Muqui Red de Propuesta y Acciones by Proética* (TI Peru), Lima 10 April 2017.

177. D. Chimisso dos Santos, *Assessment of corruption risk in mining awards in Canada* (Ottawa: TI Canada, 2017).

178. M. Soto Palacios, “Consideraciones para la implementación del derecho a la consulta previa en el Sector Minero”, *Revista Derecho & Sociedad* 40, 2013: 143-151.; M. Huaco Palomino, “Un nuevo efecto perverso de la actual configuración del acuerdo previo: La anulación del Sujeto Indígena: caso del Proyecto Minero Angostura” 28 November 2013. Available at <http://marcohuaco.blogspot.pe/2013/11/caso-del-proyecto-minero-angostura-un.html>.

179. The legality of this provision may be in question as a result of a recent decision by a Constitutional Court to nullify a petroleum licence in the Amazon that was granted without consultation of indigenous groups during the ESIA process: Juzgado Constitucional 4° Distrito Judicial de Lima. Resolución n° 13 Lima, 28 marzo 2017. Expediente n° 32365-2014.

**MITIGATING THIS RISK**

The better community members understand their rights, the more effectively they can participate in land negotiations or consultation about mining projects, which makes manipulation by elites or companies less likely. In Kitui County, **Kenya** community members are participating in an education programme to learn about the consultation process, their rights and effective methods of engaging with mining companies and their representatives.<sup>180</sup>

## 6.2 HOW TRANSPARENT ARE COMMUNITY CONSULTATIONS AND THE RESULTING AGREEMENTS?

### Inadequate project information

**CORRUPTION RISK**

#### **Community members do not understand information about the project or its potential impacts**

Where community members understand the purpose of the consultation process and understand information about the project and its potential impacts, they can participate more effectively, making it is less likely that the consultation process will be manipulated for corrupt purposes.

Effective and meaningful participation requires that information about the project and its potential impacts is communicated in a way that can be understood by the public, particularly by the potentially affected communities. In many of the countries assessed, the highly technical and lengthy documents produced as part of ESIA's prevent communities from participating fully in the consultation process.

The grievances against mining companies expressed by many community members who participated in the focus group discussions held in **Kenya** largely related to the lack of information provided to them during the early stages of the mining project and poor consultation processes.<sup>181</sup>

According to members from civil society and the mining industry, the lack of legitimacy of the ESIA process in **Peru** has been one of the major causes of social conflict that has dogged the mining sector.<sup>182</sup> One mining company representative argued that ESIA reports are by their nature technical, voluminous and not intended as instruments to inform the public. Instead, the representative argued, the government has the responsibility to translate the studies into a form that the public and local communities can understand.

In response to the crisis of legitimacy stemming from the “encyclopaedic ESIA’s”, the environmental authority, SENACE, convened a multi-stakeholder roundtable in May 2017 to look at the steps it could take to improve the integrity, transparency and public participation in the ESIA process.<sup>183</sup>

180. Interview with Research Officer, Extractive Sector Observatory by TI Kenya, Nairobi, 13 April 2017.

181. Transparency International Kenya, *Corruption risk assessment in mining awards. Focus: Kitui, Taita Taveta and Kwale counties* (Transparency International Kenya, 2017).

182. Interview with Epifanio Baca Tupayachi, economist at the NGO *Propuesta Ciudadana*, by Proética (TI Peru), Lima, May 2017; Interview with mining company representative, Lima, 2017.

183. SENACE, “Principales conclusiones de la mesa redonda de 24 de Mayo 2017: ruta a la integridad: el valor de la ética en la evaluación de ESIA.” July 2017. Available at [www.senace.gob.pe/wp-content/uploads/2017/07/Mesa-Redonda-conclusiones.pdf](http://www.senace.gob.pe/wp-content/uploads/2017/07/Mesa-Redonda-conclusiones.pdf)



## MITIGATING THIS RISK

The **Peruvian** environmental authority has committed to a number of measures, including improving quality control and screening of company ESIA's, enhancing transparency by ensuring all project related ESIA's and technical reports are easily accessible online, improving accountability to communities by ensuring they understand the projects, impacts and environmental management measures, and introducing a code of conduct and ethics training for staff.<sup>184</sup> These positive measures demonstrate the improvements that can be made when the relevant actors are committed and willing to change.

### No publication of agreement



## CORRUPTION RISK

### No disclosure of the resulting agreement

The outcomes of consultation, compensation agreements, resettlement packages and community development agreements must be publicly available and accessible to provide a check on the negotiating process and to ensure that parties commit to obligations that they intend to fulfil.

In **Chile**, any agreement between landholders or communities and the mining proponent, for example for compensation or use of water resources, are considered to be private matters outside of the regulatory framework.<sup>185</sup> While the law requires proponents to inform the environmental authority if they commence negotiations with landholders or communities for compensation or mitigation of environmental impacts, there is no transparency around the negotiation process or outcome. The representative of a mining company said of an agreement the company had recently reached with a community, "You could say that we are buying goodwill, and I could say, we are".<sup>186</sup>



## MITIGATING THIS RISK

In **Sierra Leone**, as a result of the efforts of local civil society organisations and with the support of international organisations, the National Minerals Agency has taken steps to improve transparency and promote effective compliance with CDA requirements. The agency has also established the "Sierra Leone Resource Contracts" portal on its website. Seven mining lease agreements have been uploaded so far and in future all related agreements, including CDAs, will be published on the website.<sup>187</sup> It has also developed a draft model CDA based on the provisions contained in the Mines and Mineral Act 2009.<sup>188</sup>

184. SENACE, 2017.

185. "Barrick Gold alcanza acuerdo con comunidades diaguaitas para reanudar el proyecto Pascua Lama", *El Mostrador* (web), 28 May 2014.

186. Interview with mining company representative by Chile Transparente (TI Chile), Santiago, 12 January 2017.

187. National Minerals Agency, "Sierra Leone's mining agreements live on *resource contracts*" [press release] 23 February 2016. Available at [www.nma.gov.sl/home/resourcecontracts](http://www.nma.gov.sl/home/resourcecontracts).

188. National Minerals Agency, "NMA and partners sensitize mining communities on CDA" [press release] 15 September 2015. Available at: [www.nma.gov.sl/home/nma-and-partners-sensitize-mining-communities-on-cda/](http://www.nma.gov.sl/home/nma-and-partners-sensitize-mining-communities-on-cda/)

# CONCLUSION

**Corruption risks are present in mining approvals regimes across the world – irrespective of the country’s stage of economic development, political context, or the size and maturity of its mining sector.**

But corruption is not inevitable: taking preventative action to reduce the opportunities for corruption is fundamental to ensuring that mining makes a positive contribution to sustainable development. Understanding the sources of corruption is the key to developing and implementing effective solutions.

This report pinpoints some critical gaps in mining approvals regimes from across the globe and poses six key questions as a starting point for stakeholders to understand corruption risk in their context and identify relevant mitigation measures.

This report does not offer a one-size-fits-all package of mitigation measures, but reveals clear roles for mining sector stakeholders to enhance transparency and accountability, and combat corruption in mining approvals:

## Government

**Lawmakers, senior government officials and licencing authority officials** have a critical role as the custodians of a country’s mineral wealth in:

- **Setting clear, transparent and effective rules and criteria** for allocating land to mining, the licencing process, community engagement and approving ESIA’s
- **Guaranteeing public access to information** about mining and mining-related approvals processes and decisions, including transparency and disclosure of licences, mining and community agreements, ESIA reports, company work plans and company compliance with their obligations
- **Establishing meaningful opportunities to participate** for affected communities and civil society in aspects of mining approvals that directly affect them; particularly when land may be opened to mining, in the ESIA process about potential environmental and social impacts of a project, and where there is a duty to consult or negotiate compensation agreements

- **Making sure that the agencies** tasked with administering mining approvals have the **institutional capacity** – economic resources, staff, skills and technology – to effectively perform their functions
- **Conducting due diligence** on licence applicants and their **beneficial owners** to ensure that the country’s resources are not entrusted to unqualified players or actors with a history of corruption or an undesirable track record, and implement regulatory measures to deter stockpiling of licences
- **Implementing effective mechanisms to identify, manage and reduce conflicts of interest** arising from government officials’ personal interests in mining, revolving doors between government and the mining industry, and mining-related lobbying and political donations

## Mining industry

**Companies and industry associations** wanting to develop a country’s mineral resources have a significant role to play in ensuring their own operations are corruption-free and championing good practice within the industry by:

- **Being transparent about their operations** particularly about their relationship with subsidiaries and joint venture partners, and disclosing their beneficial owners, where they operate, and their compliance and corruption track record
- **Disclosing their project rights and obligations** including mineral development agreements, negotiated licence conditions, environmental and social workplans, and community development agreements

- **Committing to and conducting genuine community consultation** by putting in place protocols to engage with legitimate community representatives who genuinely represent the community interest
- **Going “beyond compliance”** where a country’s licencing standards or disclosure requirements are lax and below best practice
- **Understanding corruption risk** in mining approvals in the countries where they operate and introducing internal integrity systems including whistleblower protection to prevent and detect corruption in their operations

## The public

**Civil society, the media and mining-affected communities** can play a critical role as accountability actors to scrutinise government’s performance of its legislative, administrative and regulatory duties and the conduct of industry players by:

- **Observing the process** in order to understand how land is opened to mining; how licences are granted and contract terms are negotiated; how community consultation is conducted and their rights as landholders or occupiers; how environmental assessment and approval takes place; and where the process is vulnerable to corruption risk
- **Scrutinising approvals outcomes and decisions** such as licences, mining and community agreements, ESIA reports, company work plans and company compliance with their obligations, so they can hold government and the mining industry to account

- **Taking up meaningful opportunities to participate** in aspects of mining approvals that directly affect them: particularly when land may be opened to mining, in the ESIA process about potential environmental and social impacts of a project, and where there is a duty to consult them as affected community members or negotiate compensation agreements

The specific nature of these roles and measures to be taken will differ from country to country.

Change must happen where mining approvals take place – at the national and sub-national level – and with support from global and regional initiatives. Transparency International will continue to work with key stakeholders to control corruption risks in different contexts. This will provide evidence about what works, what doesn’t work and why, and in doing so paint a more complete picture of what’s needed to make the mining approvals process corruption-free.

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# ANNEX 1: TRANSPARENCY INTERNATIONAL COUNTRY ASSESSMENTS

Country	Assessment
Australia	Langley, Helen, <i>Corruption risks: mining approvals in Australia</i> (Transparency International Australia, 2017).
Armenia	Grigoryan, Artur, <i>Assessment of corruption risk in mining awards in Armenia</i> (Transparency International Anticorruption Center, 2017).
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Democratic Republic of the Congo	Kabongo, Raymond and Cihunda, Joseph, <i>Rapport national sur l'évaluation des risques de corruption dans l'attribution des droits miniers en République Démocratique du Congo</i> (Ligue Congolaise de Lutte Contre La Corruption (LICOCO), 2017).
Guatemala	García, Guadalupe y López, Juan José, <i>Riesgos de corrupción en el otorgamiento de derechos mineros en Guatemala</i> (Acción Ciudadana, 2017).
Indonesia	MacDonald, Karunia, <i>The risk assessment of corruption in the awarding of mining permits in Indonesia</i> (Transparency International Indonesia, 2017).

Country	Assessment
Kenya	Transparency International Kenya, <i>Corruption risk assessment in mining awards. Focus: Kitui, Taita Taveta and Kwale counties</i> (Transparency International Kenya, 2017).
Liberia	Makor, Randall, <i>Corruption risks assessment and analysis in the award of mining licenses and concessions in Liberia</i> (Center for Transparency and Accountability in Liberia, 2017).
Mongolia	Biastoch, Richard, <i>Mineral licensing corruption risk assessment Mongolia</i> (Transparency International Mongolia, 2017).
Papua New Guinea	Burton, John, <i>Corruption risks in mining awards</i> (Transparency International Papua New Guinea, 2017).
Peru	Madrid, Rosana and Avila, Magaly, <i>Assessment of corruption risk in mining awards in Peru</i> (Proética, Peruvian Chapter of Transparency International, 2017).
Sierra Leone	Sandy, Dennis, <i>Mining contracts and licences awards corruption risk assessment report</i> (Transparency International Sierra Leone, 2017).
South Africa	Shivamba, Amanda, <i>Assessment of corruption risk in mining awards in South Africa</i> (Corruption Watch South Africa, 2017).
Zambia	Kangamungazi, Edmond, <i>Enhanced transparency and accountability in the awarding of mining sector permits, licenses and contracts</i> (Transparency International Zambia, 2017).
Zimbabwe	Mukwakwami, Norman, <i>Corruption risk assessment of mining awards in Zimbabwe</i> (Transparency International Zimbabwe, 2017).



# ANNEX 2: DETAILED RESEARCH METHOD

## COUNTRY-LED RISK ASSESSMENTS

This report is grounded in the findings of 18 individual country risk assessments conducted over a nine-month period by Transparency International national chapters in Armenia, Australia (Western Australia and Queensland), Cambodia, Canada (Ontario), Chile, Colombia, the Democratic Republic of the Congo, Guatemala, Indonesia, Kenya, Liberia, Mongolia, Papua New Guinea, Peru, Sierra Leone, South Africa, Zambia and Zimbabwe.

To ensure a consistent approach to the research globally, all country assessments followed a standardised method developed for Transparency International in collaboration with experts from multilateral institutions, major international non-governmental organisations and industry bodies – the *Mining Awards Corruption Risk Assessment* tool (MACRA Tool). An updated version of this tool is published along with this report.

Consistent with the method in the MACRA Tool, each country assessment followed the same series of steps to: (1) define the scope of the assessment (2) map the selected approval process(es) and what happens in practice, (3) analyse the context in which mining approvals take place, (4) identify vulnerabilities in the approvals process, practice and context, (5) identify the corruption risks resulting from the vulnerabilities from a set of common risks listed in the MACRA Tool, (6) systematically analyse each selected risk in terms of its likelihood and potential impact, and (7) determine priority risks for action.

The risk assessments were validated by stakeholders from different sectors in a workshop or individual meetings and the results compiled into national reports, as listed in Annex 1.

The data collection methods employed by researchers varied based on their context, but all used a range of primary and secondary sources and invited representatives from industry, government, civil society and community groups to participate in interviews, focus groups and workshops. Many researchers conducted field visits to mining regions.

Across the 18 countries in this study, Transparency International chapters engaged with over 750 stakeholders from a range of sectors. A further 250 individuals participated in validation and review of the risk assessments.

## Table 1.1 Research participants

A total of **751** individuals participated in the research process across the programme, through one-on-one interviews and focus group discussions.

An additional **250** people participated in the validation and review process.

Sector	Number	% of total
Central/national government	112	15%
Provincial or local governments	58	8%
Mining companies and industry associations	110	15%
Local communities, usually in focus groups	228	30%
Non-governmental and civil society organisations	154	20%
Academia	36	5%
Others, including from the media, consultants, lawyers, geologists etc.	53	7%
<b>Total</b>	<b>751</b>	<b>100%</b>

## Table 1.2 Field trips

Many researchers travelled to conduct interviews and focus groups

- Australia – 2 mining states: Western Australia and Queensland
- Cambodia – 1 mining province: Ratanakiri
- Chile – 1 mining province: Región de Atacama
- Guatemala – 2 mining provinces: San Marcos and Huehuetenango
- Indonesia – 2 mining provinces: South East Sulawesi, East Kalimantan
- Kenya – 3 mining counties: Kitui, Kwale and TaitaTaveta
- Liberia – 2 mining counties: Bong (Bong Mines and Gbarnga) and Nimba (Sanniquellie)
- Sierra Leone – 6 mining towns: Lunsar (Northern Region), Mobimbi and Mokañji (Southern Region), Koidu, Tongofields and Panguma (Eastern Region)
- Zambia – 3 mining provinces: Copperbelt, Southern and North Western provinces
- Zimbabwe – 2 provinces: Manicaland and Bulawayo Metropolitan to score risks.

## MINING APPROVALS PROCESSES ASSESSED

The MACRA Tool method does not require researchers to respond to a standardised survey about different aspects of the approvals process, but instead allows them to determine the scope of their assessment.

Virtually all TI chapters assessed on the processes for awarding both **exploration and production licences**. Most also considered the risks associated with **environmental impact assessment and approvals** and **community consultation requirements**. Some assessments looked at the processes for **opening land to mining**, and others at **negotiation of joint venture and mineral development agreements**.

**Table 2. Scope of country assessments**

<b>Mining approvals process or element assessed in this study</b>	<b>Number of Countries</b>	<b>Countries</b>
Process for awarding <b>exploration licences</b>	17	<b>All TI chapters</b> except for Canada
Process for awarding <b>production licences</b>	15	<b>Virtually all TI chapters</b> , except for Cambodia, Canada, Indonesia
<b>Environmental and Social Impact Assessment</b> process	14	<b>Most TI chapters</b> except for Canada, Liberia, Sierra Leone, Zimbabwe
Process for <b>consultation or agreement-making with affected communities</b>	16	<b>Virtually all TI chapters</b> , except for DRC and Zimbabwe
Process for <b>opening land to mining</b>	2	Cambodia, Indonesia
Process for negotiating <b>mineral development agreements</b>	1	Australia (“state agreements”)
<b>Joint venture agreements</b> and transfer of mineral rights between SOE (state-owned enterprises) and mining companies	1	DRC
Requirements for approval of <b>mine closure plans</b> , including financial assurance	1	Canada
Process for <b>determination and auction of mining areas</b>	1	Indonesia
<b>Option for competitive tender</b> (the state may choose to auction licences in areas where the geological resources of those areas is known)	3	Indonesia, Mongolia and Zambia
<b>Use of technology in the cadastre</b>	4	Colombia, Indonesia, Mongolia, South Africa

## VARIATION IN THE COUNTRY RESULTS

The research methods in the MACRA Tool generated nationally meaningful data to inform advocacy by producing information for action primarily at the country and jurisdiction level. The wealth of qualitative data generated by the 18 country assessments is a testament to the strength and rigour of the research.

Differences in the scope of the assessment, accessibility of key stakeholders and treatment of interconnected risks – whether they were assessed separately or bundled together – resulted in significant variation between countries in terms of the number of risks assessed and the depth of the assessment.

This means the country results do not represent a comprehensive assessment of all elements of a country's mining approvals regime. As such, the absence of a particular risk from a country's assessment, does not necessarily mean that it was not present, but that it was not identified in the elements of the approvals process examined in that country. It also means that the results of the corruption risk assessments are not directly comparable across countries, hence no attempt has been made to develop an index or ranking of countries with the most or least corruption-prone approvals processes.

## ANALYSIS OF COUNTRY RESULTS

Given the lack of standardisation in the scope and depth of the individual country assessments, qualitative analysis of select corruption risks was chosen as the most appropriate method for drawing meaningful conclusions from the results. Qualitative analysis allows the various dimensions of the risks to be examined in greater depth and context-specific nuance to be captured in what is a highly technical and complex field.

A total of 140 distinct types of corruption risk were assessed by the 18 countries in this study. In order to select the corruption risks for examination in this report, the aggregate country results were analysed to determine the most prevalent and severe corruption risks (see Annex 3).

However, as some of the risks were similar or closely related to others, it was necessary to group together similar risks to obtain a more accurate representation of the risk profile. The risks were clustered around common themes identified by Transparency International chapters and experts at a global workshop. These “risk clusters” were mapped against key aspects of the mining approvals regime – the political and administrative context, land allocation, licencing and contract negotiation, environmental and social impact assessment and community consultation. This risk mapping exercise enabled us to consolidate the most serious and prevalent corruption risks and identify the “corruption risk hotspots” presented in this report.

To interrogate the data further, we formulated six key questions to highlight what the country assessments reveal about *where* and *how* an approvals regime can be vulnerable to corruption:

- 1. Who benefits from mining approval decisions?**
- 2. How ethical and fair is the process for opening land to mining?**
- 3. How fair and transparent is the licencing process?**
- 4. Who gets the right to mine?**
- 5. How accountable are companies for their environmental and social impacts?**
- 6. How meaningful is community consultation?**

These questions not only guide the analysis in this report, but provide a useful framework for government, industry and civil society to begin to understand how the mining approvals regime in their context may be vulnerable to corruption and why it matters.

# ANNEX 3: CORRUPTION RISK ASSESSMENT RESULTS

The table below presents selected results from the 18 Transparency International country corruption risk assessments. The table presents the most common risks, defined as risks that were identified in seven or more countries. The risks that were assessed as “very high” in six or more of the countries are the most serious and common risks.

## KEY:

- Grey highlight** One of the seven most common and serious risks.
- Country\*** The national chapter assessed the risk as part of a group of risks.
- Country (x2)** This risk appeared twice in the assessment, e.g. because it was identified in more than one of the approvals processes examined in that country.
- Red** The national chapter rated this risk as “very high”.
- Blue** The national chapter gave this risk a score of 1 “very low” with a “virtually impossible” likelihood of occurring.

No. countries with this risk	Risk description	Countries that assessed this risk
11	What is the risk that community leaders negotiating with a mining company will not represent community members’ interests?	Armenia, Australia, <b>Cambodia</b> , Colombia*, <b>Kenya</b> , Mongolia*, <b>Peru</b> , <b>PNG</b> , <b>Sierra Leone</b> , <b>South Africa</b> , <b>Zambia</b>
10	What is the risk there is no verification of the accuracy or truthfulness of environmental impact assessment (EIA) reports?	<b>Armenia (x2)</b> , Australia, <b>Guatemala</b> , <b>Kenya</b> , Mongolia*, Peru, <b>PNG</b> , <b>South Africa</b> , <b>Zimbabwe</b>
9	What is the risk that mining laws have been, or will be if reform is planned, written to favour private interests before the public interest?	<b>Armenia</b> , Colombia, <b>DRC</b> , <b>Guatemala</b> , <b>Indonesia</b> , Liberia, Peru, <b>PNG</b> , <b>Zimbabwe</b>
8	Assuming consultation with communities or landholders is required, what is the risk that negotiations for landholder or community agreements can be manipulated?	<b>Cambodia</b> , <b>Canada</b> , Colombia*, <b>Kenya</b> , Mongolia, <b>Peru</b> , <b>PNG</b> , <b>Sierra Leone</b>
7	What is the risk that criteria for awarding licences etc will not be publicly knowable?	<b>Armenia (x2)</b> , <b>Cambodia</b> , <b>Chile</b> , <b>Kenya</b> , <b>Sierra Leone</b> , <b>South Africa</b>
8	What is the risk that applicants for licences etc will be controlled by undeclared beneficial owners?	<b>Armenia</b> , <b>Cambodia</b> , <b>Colombia</b> , <b>Indonesia</b> , Kenya*, <b>Mongolia</b> , <b>Zambia</b> , <b>Zimbabwe</b>
7	What is the risk that in practice there is no due diligence on applicants’ claims regarding their capacity and financial resources?	<b>Cambodia</b> , <b>Indonesia</b> , <b>Kenya</b> , Mongolia, <b>PNG</b> , <b>Sierra Leone</b> , <b>Zimbabwe</b>



No. countries with this risk	Risk description	Countries that assessed this risk
9	Assuming consultation with affected communities is required, what is the risk that the duty to consult or their free, prior, informed consent will be ignored as a result of corrupt practices?	Canada, Colombia*, Kenya, Liberia, Mongolia*, PNG, Sierra Leone, South Africa, Zambia
9	What is the risk that there will be inadequate monitoring of licence- and permit-holders and their obligations?	Chile, Colombia, DRC, Guatemala, Indonesia, Kenya*, Liberia, PNG, South Africa
9	What is the risk that the duration and timing of each step of the awards process can be manipulated?	Cambodia, Chile, Colombia, Guatemala, Liberia, Mongolia* Sierra Leone, South Africa, Zimbabwe
9	What is the risk that there is no due diligence on applicants' integrity, such as past lawful conduct and compliance?	Australia (x3), Cambodia, Kenya, Liberia, Mongolia*, PNG, Zimbabwe
7	Assuming consultation with communities or landholders is required, what is the risk that the legal framework for consultation is not publicly knowable?	Chile, Kenya, Liberia, Mongolia*, Peru, Sierra Leone, South Africa
7	What is the risk that the steps of an awards process will not be publicly knowable?	Cambodia, Canada, Chile, Kenya, South Africa (x2), Zimbabwe
7	What is the risk of external interference in the cadastre agency's awarding of licences etc?	Australia (x2), DRC, Guatemala, Kenya, Zambia, Zimbabwe

# ANNEX 4: COUNTRY PROFILES

**Table 1. Geographic distribution**

Region	Number of countries	Countries
Africa	7	Democratic Republic of the Congo, Kenya, Liberia, Sierra Leone, South Africa, Zambia, Zimbabwe
Latin America	4	Chile, Colombia, Guatemala, Peru
Europe and Central Asia	2	Armenia, Mongolia
Asia and Asia Pacific	6	Cambodia, Indonesia, Papua New Guinea, Australia (Queensland and Western Australia)
North America	1	Canada (Ontario)
<b>Countries in total</b>	<b>18</b>	

**Table 2. EITI membership**

Membership status	Number of countries	Countries
Members	11	Armenia, Colombia, Democratic Republic of the Congo, Guatemala, Indonesia, Liberia, Mongolia, Papua New Guinea, Peru, Sierra Leone, Zambia
Preparing to join	1	Australia
Not a member	6	Cambodia*, Canada, Chile, Kenya, South Africa, Zimbabwe
		* Although Cambodia is not a member of the EITI, the country's Extractive Industry Governance Forum provides a multi-stakeholder platform for governance of the Cambodian extractive industries.
<b>Countries in total</b>	<b>18</b>	

**Table 3. Mining Sector Profile**

<b>Mining sector feature</b>	<b>Number of countries</b>	<b>Countries</b>
<b>Major mining economies</b> , which are also home countries to major multinational mining companies	3	Australia, Canada and South Africa
<b>Emerging mining economies</b> , government has made mining an economic priority in the last decade	9	Armenia, Cambodia, Colombia, Guatemala, Indonesia, Kenya, Mongolia, Zambia, Zimbabwe
Countries with a <b>new licencing regime</b> or mining law (Licencing regime has changed within the last 10 years)	8	Armenia, Cambodia, Kenya, Indonesia, Liberia, Sierra Leone, Mongolia, Zambia
Mining law <b>is likely to change soon</b> (Amendment bills are before Parliament or could be drafted soon)	6	Cambodia, Colombia, Democratic Republic of the Congo, Mongolia, Papua New Guinea, Zimbabwe
<b>SOEs</b> are present	4	Chile, Indonesia, Papua New Guinea, Zimbabwe
<b>Mandatory state participation or stake</b> in new mining projects	2	Democratic Republic of the Congo, Zambia

**Table 3. Mining Sector Profile**

<b>Country</b>	<b>Mining Sector Governance</b> NRGI Resource Governance Index 2017	<b>Investment Attractiveness</b> Fraser Institute Policy Perception and Mineral Potential Index 2016	<b>Economic Dependence on Mining</b> ICMM Mining Contribution Index 2016
Armenia	N/A	N/A	High
Australia	Satisfactory*	High*	Very High
Cambodia	Poor	N/A	Low
Canada	N/A	High**	High
Chile	Good	High	High
Colombia	Satisfactory	Moderate	Moderate
Drc	Poor	Moderate - High	Very High
Guatemala	Poor	Moderate	High
Indonesia	Satisfactory	Moderate - Low	Moderate
Kenya	N/A	Moderate	High
Liberia	Poor	N/A	Very High
Mongolia	Satisfactory	Moderate - Low	High
Peru	Satisfactory	High	High
Png	Weak	Moderate	High
Sierra Leone	Weak	Moderate	Very High
South Africa	Weak	Moderate	High
Zambia	Weak	High	High
Zimbabwe	Failing	Low – Very low	High

\* Western Australia

\* Western Australia

\*\* Ontario

[www.resourcegovernanceindex.org](http://www.resourcegovernanceindex.org)

[fraserinstitute.org/categories/mining](http://fraserinstitute.org/categories/mining)

[www.icmm.com/romine/index](http://www.icmm.com/romine/index)

# ANNEX 5: EXTRACTIVE INDUSTRIES ANTI-CORRUPTION INITIATIVES AND RESOURCES

## MINING APPROVALS TRANSPARENCY INITIATIVES

**The EITI 2016 Standard** requires member countries to publish the rules and technical and financial criteria for licence allocations and transfers, as well as licence recipients and any non-trivial deviations from the law. Member countries are also required to keep a publicly available register of licences and encouraged to disclose resource contracts and licences.

**Natural Resource Governance Institute's *Natural Resource Charter Benchmarking Framework*** contains specific questions to help countries assess their licencing regimes against best practice benchmarks.

**Publish What You Pay (PWYP)** global coalition also promotes disclosure of extractive resource contracts and licences and wants the law to be transparent to help citizens understand company financial and environmental obligations and community entitlements. PWYP coordinates the civil society constituency of EITI.

**International Council on Mining and Metals (ICMM)** *Sustainable Mining Principles* are industry standards against which member companies must report.

**Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development's (IGF)** *Mining Policy Framework* has a dedicated chapter to help governments bring their mining approvals regimes into line with best practice. The IGF also assesses the mining governance framework of member countries.

**G7 Connex Initiative** supports host countries in their planning for, negotiation and monitoring of complex investment projects, with an initial focus on the extractive sector.

**OECD Policy Dialogue on Natural Resource-based Development** offers an intergovernmental platform where OECD and non-OECD producing countries, in collaboration with extractive industries, civil society organisations and academia, produce innovative tools and guidance to support governments to develop their natural resources in a sustainable manner. Work Stream IV of the Policy Dialogue specifically focuses on the issue of corruption in the extractive sector.

**World Bank Initiative, *Mining investment and governance review*** provides an assessment of countries' mining sector, including in licences, exploration and contracts, to support reform and transparency.

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