

H.E. Sarwar Danish

Vice-President of the Islamic Republic of Afghanistan

Kabul, Afghanistan

June 11, 2018

Excellency,

We are writing to thank you for your work on revising the Afghan Mining Law, and to ask for it to contain the strongest possible protections against corruption and conflict.

As civil society organizations working on humanitarian, development and governance issues in Afghanistan, we are deeply concerned about the threat posed by abuses around Afghanistan's natural resources. The sector funds armed groups, insurgents, and corrupt strongmen, undermines stability, and is providing a fraction of the benefit it should either to the Afghan people or to the government's budget. We are very grateful that the current draft of the new law has several points which improve on current legislation. However, there are significant gaps which threaten to deeply undermine its effectiveness. The most important of these include:

**1. Single transparent sub-account** Transparency of payment and production data is critical to reducing corruption. Arguably the most important measure the law should take is to create a mechanism for the publication of this data which is automatic, accessible, and difficult to subvert; which publishes individual payments linked to specific contracts and justifications; and is embedded in law. A single transparent sub-account would be a uniquely effective way to achieve this without diluting the primacy and protections of the Treasury Single Account or AFMIS. (Sub-accounts for revenue are already widely used: this would simply require that one be used for all extractive sector payments, and make it public.)

*The government made a very welcome commitment to putting such a structure in place in the national anti-corruption strategy.* But while the draft law mentions a sub-account, it leaves out key elements needed for it to be effective. We respectfully ask that the new law require that all extractive sector payments be made to a single dedicated sub-account of the Treasury Single Account *as a condition for their receipt*, and that the Ministry of Finance should be required to publish this account in full at least quarterly, along with necessary supporting information to establish the justification for the payments and link them to specific contracts.

**2. Audits** The draft has no requirement for SOEs and larger mining companies to undergo annual, independent, published audits. Mandatory public audits would be of major help in exposing corruption, especially within SOEs, and we strongly urge you to include them.

**3. Beneficial ownership** Transparency over the real owners of mining contracts is also vital. While there is a very welcome mention of beneficial ownership, it is unclear whether companies must publish it as a condition of holding or applying for a license – and as part of the bidding process, when it is most needed. There is also no obligation to maintain it up to date if ownership changes, meaning a corrupt actor could simply acquire a stake once a contract was granted.

**4. Community benefit** Giving communities a benefit from local mines is important both as a matter of justice and to create an incentive for them to support legal mining. It is positive that the draft law still allocates 5% of mine revenues to develop mining areas, but this is a rather limited amount: we would suggest that it might be 10%, following the Indian example (this is

essential if some support is to go to the provincial level as well as local communities). The law should also give local communities control over what projects the funds are used for, subject to reasonable safeguards (one way to do this in practice would be to channel funds through Community Development Councils). The role of women in this allocation should be explicitly guaranteed (and we urge the government put in place a wider strategy to ensure they benefit from mining overall). Community Development Agreements are also mentioned in the law but must be enforced, and should apply to higher-value contracts even if the area is less than 1km<sup>2</sup>. Finally, the law should also require not just Afghan but local employment as the first preference, where adequate local skills exist or can reasonably be created.

**5. Community rights** The law does not grant local communities any rights to take part in negotiations over mining operations. Even the right to object to mining within less than 200m can be over-ridden by a government Ministry without recourse. There is no requirement for Free, Prior and Informed Consent (FPIC). Rights such as the right to compensation only apply to land owners, not to users. A careful balance is needed, but again, our fear is that weak protections could help create support for illegal extraction and armed groups.

**6. Contracts** While we fully recognize the need for the government to occasionally issue single-source contracts, the danger of abuses is higher in these circumstances. The law should set out that single source bidding should be used only in a specific set of circumstances, that a decision to proceed with it should be open to challenge and review (including from the public). The government should consider creating an independent ombudsman to review contract decisions.

**7. Move to a license-based system** The law only allows allocation of contracts by bidding. Moving towards a license system, where key contract terms are included in the law, could have very significant benefits in preventing corruption. The law should allow for a shift towards this – so long as there are very clear protections in place to ensure companies are qualified and to prevent abuses. In the meantime, the very welcome requirement for model contracts should be strengthened by specifying that these shall be used as the initial basis for contract negotiations.

**8. Transparency of the bidding process.** There is welcome mention of transparency of the bidding process but no mention of what this means in practice. It should be specified to include protections such as timely and appropriate public consultation; publication of the tender documents, winning bid documents, bid evaluation reports, and a summary of the substantive terms of all losing bids, etc. There should also be a requirement in Chapter Four that partners in mining contracts be 'fit and proper' persons. This standard test is incorporated into other financial regulation documents but should also be applied for mining. Finally, the law should clarify that baseline geological data will be publicly accessible, to ensure a level playing field.

**9. Transfer pricing:** The law has no explicit prohibitions in place to prevent transfer pricing.

Excellency, your government has made a number of strong and very welcome commitments to strengthen mining governance, and you personally made a major contribution to transparency with your work on the Access to Information Law. We would be very grateful if you could use your influence to ensure these points and other protections are fully included in the new mining law. We would also welcome the opportunity to meet with you to brief you on these and other issues around extractives. Would it be possible to arrange such a meeting before the draft law is finalized?

Sincerely,

- AABRAR
- Abdul Hai Gardezi Council
- Afghan NGOs Coordination Bureau
- Afghanistan Civil Society Forum
- Afghanistan Justice Organization
- Afghanistan Research and Evaluation Unit
- AMAL Foundation
- Aynak Council
- Ariana news Agency
- CEN
- Cordaid
- FETWO
- Frogh e Mili Jawanan
- Global Witness
- Ghazni Zarkashan Shura
- Hajigak Council
- HRRAC
- Afghan Anti-Corruption Network
- Hajigak People's Shura
- HMC
- Hold
- Integrity Watch Afghanistan
- Kilid Group
- L.C.S.O
- Logar Civil Society
- Mis-e-Aynak Council
- NMA
- Pajhwok Afghan News
- PEWO
- Quba
- Rangeen Kaman Network
- TEO
- The Welfare Association for the Development of Afghanistan (WADAN)