TACKLING CORRUPTION RISKS IN MINING

CONTRADICTORY LEGISLATION [PROTECTION OF SUBSOIL]

THE CHALLENGE OF CORRUPTION IN THE LICENSING OF SUBSOIL USE

Mining takes place in some of the most corruption-prone places on earth. According to the OECD, one in five foreign bribery cases involves the extractives industry.[1] Mining projects can span decades and involve hundreds of millions of dollars' worth of investment. Given these high stakes, there are strong incentives for corruption at the licensing stage of a mining project. Indeed, a study of over 130 corruption cases in the oil, gas and mining sectors found that one in four cases arose at the licensing stage.[2]

The discovery or suspicion of corruption in government decisions to grant licences for mining and exploration projects has significant consequences. It erodes public trust in the ability of government to manage the country's natural resource wealth. It erodes public trust in mining companies operating in the country. Corruption erodes trust and confidence in the mining sector as a whole.

ASSESS THE CORRUPTION RISKS

Transparency International has developed the Mining Awards Corruption Risk Assessment (MACRA) Tool[3], a step-by-step guide to identifying vulnerabilities and corruption risks in the licence, permit and contract awards process. This tool can be applied and tailored to any operating context. The MACRA Tool helps ask the right questions to determine corruption risk exposure – the first step in any corruption risk mitigation and management strategy. The tool contains a list and explanation of 80 common corruption risks. Adopting a tiered approach, it provides guidance on how to "triage" and identify the corruption risks most relevant to the circumstances and how to assess likelihood and impact of those risks. Adopting a holistic approach to risk assessment, the MACRA Tool accounts for corruption risk factors in the legal framework, its implementation and practice, and the surrounding political and administrative context. This system-wide approach to

1 OECD, Foreign bribery report, (Paris: OECD, 2014): 8.
2 OECD, Corruption in the extractive value chain: Typology of risks, mitigation measures and incentives, (Paris: OECD, 2016).
3 M.Nest, Mining Awards Corruption Risk Assessment Tool, (Berlin: Transparency International, 2nd ed, 2017).

corruption risk assessment captures risks in the environmental and social impact assessment process and community consultation, as well as the allocation of exploration and mining rights.

THE GAP IN LEGAL REGULATION

The absence of a particular regulation makes it possible to fill the gap in the course of enforcement of a law, at the discretion of the performer. The presence of a factor is evidenced by the absence of norms regarding a particular type of activity or the implementation of the function assigned to the institution.

The Subsoil Law (2018) requires three examinations in the preparation of geological and mining projects: for compliance with subsoil protection, industrial and environmental safety requirements.

The activities of mining companies in matters of environmental, industrial safety and protection of subsoil should be regulated by technical regulations, which have the character of regulatory legal acts. Until 2010, Soviet regulations were used. From January 1, 2010, the previous technical regulations in the field of industrial and environmental safety, as well as the protection of subsoil were canceled due to the adoption of a new edition of the Law «On Normative Legal Acts» on July 20, 2009.

As a result, there are currently no technical regulations in the field of subsoil protection. Today, de-jure, Soviet technical regulations have no legal force and cannot be applied to the activities of mining companies, but de-facto government bodies continue to be guided by them when examining documents and exercising control functions.

WHAT HAS BEEN DONE

In order to solve the problem, the Rules for the Protection and Use of Subsoil in the Development of Mineral Deposits of the Kyrgyz Republic were approved by the Order of the State Committee for Industry, Energy and Subsoil Use dated December 28, 2016 No. 1/2. However, due to a violation of the approval procedure, the above order was declared invalid.

The rules on the procedure for the examination of technical projects for the development of mineral deposits in terms of the subsoil protection and the formation of a report were approved by order of the State Committee for Industry, Energy and Subsoil Use No. 399 dated September 20, 2017 and were included in the register of the Ministry of Justice of the Kyrgyz Republic by order of October 6, 2017 No. 90.

However, in the absence of valid technical regulations, such an examination has no legal force.

RECOMMENDATIONS

It is necessary to carry out work on the development and introduction of legislative norms and rules in matters of protection and use of subsoil.

For government

- Conduct a detailed analysis of the legislation governing the issues of subsoil protection.
- Develop and introduce into the legislation standards for the protection of subsoil.

For Civil Society

- Conduct work to raise public awareness of the negative consequences of gaps in legal regulation.

For mining companies

- Actively express their position on the identified gaps in legal regulation, both directly and through various associations.

Transparency International Kyrgyzstan
207-17 Chokmorov street
Bishkek, 720010, Kyrgyz Republic

Phone: +996 312 455508
kyrgyzstan@transparency.org
www.transparency.kg