Transparency in extractive industry legislation

Recommendations for Kazakhstan's Code on Subsurface Use

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The Republic of Kazakhstan is preparing a new Code on Subsurface and Subsurface Use. As part of this process, the government developed and shared for comment a 'Concept' outlining key policy directions for the new Code. Over the years, IIED has supported and participated in dialogues on transparency and accountability in Kazakhstan and the Caspian region. This issue paper discusses ways to install robust transparency provisions in the new Code, making recommendations to take the Concept's policy directions to their full potential.

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Executive summary

The Republic of Kazakhstan is preparing a new Code on Subsurface and Subsurface Use. As part of this process, the government developed and shared for comment a 'Concept' outlining key policy directions for the new Code. Over the years, IIED has supported and participated in dialogues on transparency and accountability in Kazakhstan and the Caspian region. This issue paper discusses ways to install robust transparency provisions in the new Code, making recommendations to take the Concept's policy directions to their full potential.

The issue paper builds on IIED's track record of engagement with the extractive industry sector in Kazakhstan; on selective stakeholder outreach with industry, legal practice and the non-profit sector in the period January to March 2015; and on insights from developments in international practice. The paper makes the following recommendations:

Ensure compliance with the evolving Extractive Industries Transparency Initiative (EITI) Standard

- Ensure that the provisions of the new Code are in line with, and ensure compliance with, requirements under the evolving EITI Standard, including through entrenching in the Code the disclosure requirements and institutional arrangements needed for continued EITI compliance;
- In giving effect to the transparency provisions of the Concept, develop clearer definitions of transparency and related concepts (e.g. 'documents forming the base for subsurface use rights'), clearer mechanisms for ongoing disaggregated reporting and disclosure, and effective platforms for continued public dialogue multi-stakeholder engagement;
- Involve the multi-stakeholder platforms established as part of the EITI process in Kazakhstan in devising more effective mechanisms for public and community engagement, and integrate in the Code lessons learned from the EITI process in Kazakhstan.

Improve transparency of bidding processes

- Develop detailed requirements to ensure effective and transparent bidding processes, including:
  - Clear, effective and widely publicised rules to regulate the bidding process, applicable to all bidders;
  - Clearly defined pre-qualification and evaluation criteria;
  - Requirements for relevant authorities to provide written justification for their decisions, including award of licences/contracts and decisions to disqualify an applicant;
  - Requirements for disclosure of information on third parties involvement in securing the bid, and on any financial payments made to them;
  - Publication of tender documents, lists of pre-qualified companies and bid results at different stages of the bidding process, and access to bids after selection has been made.

Improve transparency and local consultation requirements around social and environmental impact assessments and management plans (ESIAs/ESMPs)

- Reframe public hearings requirements into continuous community engagement at all stages of project development, starting from pre-feasibility studies and prior to designating an area for extractive activity;
- Establish meaningful consultation requirements in ESIA/ESMP and investment approval processes, accompanied by arrangements to ensure integrity of process including requirements for ESIA consultants to be approved by an independent advisory board and requirements to disclose key documentation including draft ESIAs and ESMPs;

- Establish effective legal arrangements to reflect the outcome of local consultation processes, giving consideration to experiences with Community Development Agreements developed in several jurisdictions;
- Provide for the establishment of accessible, effective and culturally appropriate grievance mechanisms;
- Involve the multi-stakeholder platforms established as part of the EITI process in Kazakhstan in devising more effective mechanisms for public and community engagement;
- Link and align provisions on public hearings in the new Code with the relevant laws and regulations on local governance, sub-regional development and the environment.

Promote contract disclosure

- Develop arrangements for contract disclosure, covering at the very least contractual provisions on social and environmental issues;
- Address relevant supply chain reporting and transparency provisions for contractors and sub-contractors to enhance performance and accountability;
- Provide narrow definitions of exceptional situations where commercial confidentiality and national security imperatives apply.

Promote transparency of beneficial ownership

- Develop clear requirements to disclose beneficial ownership, addressing issues of conflict of interest and narrowly defining any exceptions;
- Harmonise linkages with public trading requirements embedded in other laws and regulations, removing unnecessary contradictions and loopholes.

Acronyms

BIC	Bank Information Centre
BIT	Bilateral investment treaty
CDA	Community Development Agreements
CSO	Civil society organisation
EITI	Extractive Industries Transparency Initiative
EITIM	Extractive Industries Transparency Initiative Mongolia
ESIA	Environmental and social impact assessment
ESMP	Environmental and social management plan
EU	European Union
ICSID	International Centre for Settlement of Investment Disputes
IIED	International Institute for Environment and Development
NEITI	Nigeria Extractive Industries Transparency Initiative
NSC	EITI National Stakeholder Council
OECD	Organisation for Economic Co-operation and Development
SEC	Securities and Exchange Commission
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law

Introduction

1

The Republic of Kazakhstan (hereinafter simply Kazakhstan) is preparing a new Code on Subsurface and Subsurface Use ('the Code'). The new Code will replace the Law on Subsurface Use of 2010. It will provide an integrated legal framework across the oil, gas, mining and minerals sectors. In developing a new Code, the government aims to promote more foreign investment and reduce the government's control over the extractive industry sector. The new Code will also regulate several other important issues, for example in the areas of transparency and environmental protection, and it is not yet clear how multiple policy goals will be reconciled.

The adoption and subsequent implementation of the Code is raising new challenges. The transition from the existing complex system of government control tools, e.g. via the tax regime and the local content requirements embodied in the Law on Subsurface Use of 2010, to a more 'investor-friendly' Code will not be easy – not least because the reform may also require changes in other related legislation.

The proposed introduction of a licensing system holds much promise for improved accountability in Kazakhstan's extractive industry sector, as contract negotiation in conditions of asymmetrical information and often resulting in inconsistent terms can increase the risk of corruption and of deals that fall short of public expectations. At the same time, this transition from a contract- to a license-based system presupposes a significant level of maturity of Kazakhstan's legal system, as a comprehensive national legal framework would need to fully regulate extractive industry operations with minimal room for negotiation between companies and the state.

As part of the process to prepare the Code, the government developed a Concept of the Code on Subsurface and Subsurface Use ('the Concept'). The Concept outlines key policy directions for the drafting of the new Code, including in relation to its regime to promote transparency and accountability in extractive industries. Although the Concept does not specifically refer to the Extractive Industries Transparency Initiative (EITI) Standard or process, Kazakhstan has been committed to implement the EITI Standard since 2005. In spring 2015, the government shared the Concept with some relevant stakeholders for review and comment. The government approved the Concept in August 2015 and the draft Code is currently being developed.

Over the years, the International Institute for Environment and Development (IIED) has supported and participated in a number of dialogues on transparency and accountability in Kazakhstan and the Caspian region, engaging with government, industry and civil society. One project (2009-2011) focused on governance and sustainability issues related to the contracts in the extractive sector. The results of this project fed into the review and public consultations on the 2010 Law on Subsurface Use. Another project (2011-2012) supported dialogues on governance and accountability in the extractive industries in Azerbaijan, in Turkmenistan and in Kazakhstan at sub-regional level in Aktau (Mangistau).

This issue paper discusses ways to install robust transparency provisions in the new Code, making recommendations to take the Concept's policy directions to their full potential. The issue paper builds on IIED's track record of engagement with the extractive industry sector in Kazakhstan; on selective stakeholder outreach with industry, legal practice and the non-profit sector in the period January to March 2015; and on insights from developments in international practice.

The issue paper focuses on the following issues:

- Implementation of the requirements of the EITI;
- Transparency of bidding processes;
- Transparency and local consultation around environmental and social impact assessments and management plans (ESIAs and ESMPs);
- Public disclosure, in whole or in part, of subsoil use contracts, agreements and licenses;
- Beneficial ownership of subsoil users.

Some of these issues are directly connected to the new EITI Standard, which was expanded in 2013. Aspects of some of these issues build on principles reflected in Kazakhstan's existing national legislation. Yet other issues reflect cutting-edge thinking on transparency in extractive industries, and would require careful consideration in order to be properly addressed in the Code.

The remainder of the issue paper is structured as follows. The next section contextualises the reflection on the Concept and the Code in Kazakhstan's national and international context. The subsequent sections discuss the five focus issues outlined above. For each focus issue, the relevant section provides a short overview and synthesises highlights from international practice. The final section distils key recommendations and suggestions for next steps.

Transparency outlook: The national and international context

2

In 2005, Kazakhstan signed up to the EITI and achieved Candidate country status in 2007. Since then, Kazakhstan has been implementing the evolving EITI Standard. Civil society organisations (CSOs) have been very active in pushing forward this agenda. In 2013, Kazakhstan went through the EITI validation process, which involves verification of compliance with EITI requirements according to specific guidelines. In 2013, Kazakhstan was validated as an EITI Compliant country, i.e. it was confirmed to have met EITI requirements based on its reporting for 2011-2012. High-level political support and sustained preparation for the validation stage both contributed to the successful outcome of the validation process.

In May 2013 (i.e. after the reporting period on the basis of which Kazakhstan was validated as EITI Compliant), the EITI standard requirements were broadened to include new issues that importantly shape the degree of transparency in extractive industries, namely:

- Full disclosure of extractive industry revenues, including all material payments to government made by oil, gas and mining companies, and disaggregation of social payments and by company and revenue stream;
- Promotion of reporting at subnational/local level;
- Publicly accessible comprehensive reporting contributing to promotion of active debate;
- Specifications in reporting requirements such as the recommended disclosure of beneficial ownership.

To date, the government of Kazakhstan has appeared reluctant to expand the transparency mandate beyond the pre-2013 EITI Standard. The Concept does not cover the issues introduced by the 2013 revision to the EITI Standard. There is a widespread perception that any further advances on transparency are likely to come very incrementally. Decreased price of oil, the crisis in Russia and Ukraine and slower economic growth are all contributing to more conservative economic policies, including in the extractive industries. As the government strives to encourage investments in the sector; competitiveness and commercial advantage are likely to be prioritised in the near future.

Internationally, recent years have witnessed considerable advances in the legislation setting transparency requirements applicable to the extractive industries, but also some important setbacks. Advances include transparency-enhancing legislation adopted or being considered by countries hosting sizeable extractive industry sectors, for example Ghana, Liberia, Mongolia, Nigeria and Norway. They also include developments in some important home-country jurisdictions, i.e. the polities where extractive industry companies are listed or based.

In the European Union (EU), for example, transparency requirements were significantly enhanced by a new Accounting Directive passed in 2013. The Directive requires companies listed on EU based stock exchanges and large unlisted companies based in the EU to disclose their payments to governments for oil, gas, minerals and timber, disaggregated by country and by project.

This EU legislation is inspired by the US Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. There are nevertheless some differences. For instance, EU rules apply to both listed and unlisted large extractive and logging companies, whereas US rules apply to the US-listed companies or those required to file an annual report with the Securities and Exchange Commission (SEC).

Frequently cited setbacks include slow progress in passing the regulations necessary to implement the Dodd-Frank Act, which led to Oxfam America filing a lawsuit against the SEC over unlawful withholding of a rule implementing the Dodd-Frank Act. Important sections of the US petroleum industry have strenuously opposed the implementation of the Dodd-Frank transparency requirements, or lobbied for watering down those requirements.

Developments in home-country legislation can have implications for resource-rich countries, as major EU and US companies are active in Kazakhstan and the wider Caspian region. Therefore, advances and setbacks in the implementation of transparency requirements in the EU and the US can affect opportunities for greater transparency in Kazakhstan.

It is also important to note, however, that the landscape of extractive industry operators active in Kazakhstan is changing rapidly. Chinese investments are growing in Kazakhstan and Central Asia, as elsewhere in the world. One emerging challenge concerns alignment between regulatory regimes in the extractive sector and establishing more advanced transparency requirements applicable to all companies. National companies should not be exempted from these requirements, and should help set up the benchmarks instead. Multi-stakeholder dialogue, especially at sub-regional level, and encouraging full payments disclosure and reporting from all companies, including national companies, would be beneficial and stimulating for improving local governance and accountability.

In this context, transparency requirements in Kazakhstan's national legislation become particularly important to create a level-playing field for investors that favours transparency and accountability. Although the government of Kazakhstan may have concerns that encourage a more conservative approach in the short term, establishing entry points in the Code for expanding the transparency agenda will prove an increasingly pressing concern in the long run – including in order to shift from partial to full compliance with the new EITI Standard.

Kazakhstan's implementation of the EITI Standard

3

Passing EITI Validation in 2013 was an important win for Kazakhstan's EITI national stakeholders. Achieving compliance with EITI 2012 reporting requirements, and going beyond those requirements to integrate aspects of the new EITI Standard, took significant effort and dedication on the part of the EITI National Stakeholder Council (NSC) and CSOs – both those involved with the NSC and those operating outside the NSC.

The timing of Validation coincided with revisions of some investor-state contracts and with the government's sustained push for companies to comply with the new set of regulations on financial reporting, local content and the environment. The government was also eager to showcase tangible progress on accountability, all of which contributed to its active support for the validation process.

In 2013, while the new EITI Standard was still evolving, government support promoted disaggregated reporting by company and detailed reporting on social investments. National reports cover over 170 companies – from very large companies to small and medium enterprises.

Some issues remain problematic within and outside the NSC. Debates over CSO representation on the NSC and sustained lobbying from companies to delay compliance are significant examples. Also, there has been an important push, supported by donors such as the World Bank and Soros Foundation Kazakhstan, for better public outreach and increased public understanding of EITI reporting, so that reporting can be better used in public debates and advocacy. This ongoing process is improving public perceptions and even recognition of the EITI process in Kazakhstan.

National legislation can help to implement the EITI in important ways – for example, ensuring that any confidentiality requirements that may be included in national law do not prevent disclosure; institutionalising national bodies and platforms to implement the EITI and facilitate multi-stakeholder engagement; or establishing legal requirements for information to be disclosed.

Therefore, clear transparency provisions in the new Code are essential in advancing Kazakhstan's commitment to implementing the EITI Standard. In this regard, the Concept states the following:

The principle of openness of the subsurface use operations, prescribed by the 2010 Law on Subsurface, will be replaced by the principle of 'transparency of the government agencies' activities and access to information'. Implementation of this principle will envision the government obligation to ensure access of any interested parties/stakeholders, including via relevant Internet resources, to:

(i) Information concerning conditions of tender bidding processes for provision of the right to subsurface use and contents of the resulting decisions;

(ii) Information about compliance with the bidding conditions for concluded contracts (i.e. contracts that won the bid in question);

(iii) Decisions of the relevant government bodies concerning provision, changes and termination of the subsurface use rights;

(iv) Documents forming the base for subsurface use rights;

(v) Geological information of non-confidential nature; and

(vi) Reports about compliance of subsurface users with contract and license conditions.

Each one of these points will require further elaboration as well as alignment with, and possible amendment of, other relevant laws. Yet it is clear that points (i) and (ii) are concerned with transparency of the bidding process, which is discussed in greater detail in the next section. It is also clear that the 'transparency principle' has been defined rather selectively and that it will need significantly more granular provisions for this principle to be applicable in practice.

For instance, an explicit reference to the EITI Standard, and to the policy imperative for Kazakhstan to ensure continued compliance with this standard, would be helpful in spelling out the actual content and implications of the 'transparency principle'. In recent years, several countries have adopted EITI-relevant legislation (see Box 1). An explicit reference to EITI compliance would also convey a strong policy message and compound Kazakhstan's continued commitment to the EITI.

Further, point (iv) is framed in very general terms and would need to be more clearly defined. For example, it would be helpful to clarify that the 'documents forming the base for subsurface use rights' include subsurface use contracts, agreements and licences. In any case, clear definitions are in order. The subject of contract disclosure is further addressed in section 4 below.

The Concept includes almost nothing on 'institutional' issues concerning public/stakeholder engagement, which is a crucial aspect of the EITI process. Point (vi) presumably covers a whole range of reporting on compliance with contract obligations, but again is very unspecific, including on the access and disclosure mechanisms that the Code will establish.

BOX 1. PUSHING THE BOUNDARIES OF EITI: INTERNATIONAL EXPERIENCES

Nigeria, a major oil-producing country in Africa, established a precedent by passing a landmark Nigeria Extractive Industries Transparency Initiative (NEITI) Act in 2007, thereby institutionalising the EITI through national legislation. The Act establishes an autonomous body to drive implementation of the EITI in Nigeria, the NEITI. The Act also establishes an institutional platform for multi-stakeholder engagement.

The country produced an exemplary first EITI report covering 1999-2004 amidst widespread criticism of its corruption record. Implementation of the EITI was further strengthened by the existence of statutory institutional structures, though it has been pointed out that there is little evidence that improved transparency has yet resulted in better governance and accountability (Shaxson, 2009). Attempts to implement EITI at the local level (e.g. Bayelsa state) have been challenging and incomplete but the effort is still ongoing.

Other countries adopted legislation that pushes the boundaries further. The Liberia Extractive Industries Transparency Initiative Act of 2009 presents similarities with NEITI but goes beyond its Nigerian equivalent in important respects – for example, requiring disclosure of investor-state contracts (see below).

Ghana's Petroleum Management Act of 2011 includes several provisions on 'transparency, accountability and public oversight' – making transparency a 'fundamental principle' of the law and establishing a multi-stakeholder oversight body. However, these legislative provisions contain few specifics for EITI purposes and allow publicly held information to be classified as confidential.

Mongolia made significant progress advancing its EITI agenda, disclosing revenues collected at provincial and local levels, including environmental remediation costs, social payments and fines. More than 1500 companies submitted reports in 2012. While the Minerals Law includes references to transparency and government regulations govern the functioning of national EITI structures, a concern about ensuring sustainability and country ownership of the national EITI process is now driving efforts to develop a new Extractive Industries Transparency Initiative Mongolia (EITIM) Law, or a package of amendments to the existing laws. This reform would further institutionalise the EITI process in Mongolia.

The UK has finally joined EITI and was admitted as a candidate country in 2014. The first reporting by the UK extractive companies is being made in mid-2015, with the first full EITI report due in April 2016. The country has been the primary initiator and supporter of the EITI.

UK EITI reporting will likely be consistent with the EU Accounting Directive soon to be implemented in all EU countries. However, there are important differences between the UK EITI and EU Directive processes. For example, the latter establishes mandatory disclosure requirements, while the UK EITI is based on voluntary disclosure. Also, the EU Directive applies to companies above specified size thresholds and covers government payments worldwide, while the UK EITI focuses on payments to the UK government and applies to all operators. Finally, the EU Directive does not involve the multi-stakeholder engagement that is at the heart of the EITI.

Sources: Bianchi and Peters 2013; Wilson and Van Alstine 2014; www.eiti.org; and legislation cited.

Kazakhstan's EITI Compliance took a decade to build and develop. Reforming legal and institutional structures inevitably took time. It also took time for informed and well-organised CSO networks to develop the necessary expertise on the subject of disclosure, reporting, industry standards and accountability practices. The current trajectory for EITI implementation in the country includes plans for the localisation of reporting practices and increased accountability at regional level (Ospanova et al, 2013).

This process requires continuity of commitment as well as stronger foundations in the national legislation. The new Code provides an opportunity better to integrate the most relevant and recent developments of the EITI process in Kazakhstan into the national legal framework. This includes clearer definitions of transparency and related concepts, clearer mechanisms for reporting and disclosure, and effective platforms for continued public dialogue multi-stakeholder engagement. All of these have been painstakingly redefined through the EITI process not only in Kazakhstan but also internationally.

Recommendations

- Ensure that the provisions of the new Code are in line with, and ensure compliance with, requirements under the evolving EITI Standard, including through entrenching in the Code the disclosure requirements and institutional arrangements needed for continued EITI compliance;
- In giving effect to the transparency provisions of the Concept, develop clearer definitions of transparency and related concepts (e.g. 'documents forming the base for subsurface use rights'), clearer mechanisms for ongoing disaggregated reporting and disclosure, and effective platforms for continued public dialogue multi-stakeholder engagement;
- Involve the multi-stakeholder platforms established as part of the EITI process in Kazakhstan in devising more effective mechanisms for public and community engagement, and integrate in the Code lessons learned from the EITI process in Kazakhstan.

Transparency of bidding processes

4

Kazakhstan has made significant efforts to increase transparency of the public procurement process. Public procurement rules have been revised to include provisions for transparency and accountability. Addressing corruption in public procurement has been an ongoing process. The Code provides an important opportunity for building on and further advancing these efforts.

The bidding process and associated transparency issues have been addressed in detail by the new EITI Standard, which specifically lists the measures that countries must take for achieving candidate status, ensuring validity of the process, ensuring compliance and passing through validation. It is now widely recognised that a transparent bidding process, including publication of bid materials such as tender protocol, pre-qualification guidelines, lists of qualified applicants and bid results, forms an integral part of the contracting process. These developments are part of wider trends to improve transparency in investor-state relations, which have also affected international investment treaties and investor-state arbitration (see Box 2).

Developing a regulatory framework to increase local content has been a key concern for the government to ensure that local businesses and the local labour force can participate more fully in international oil and gas supply chains. To this end, the government has developed an elaborate system of regulations and requirements. In part, this policy was intended as a response to recurring labour disputes, e.g. in Zhanaozen and Tengiz (Ospanova et al, 2013). Installing transparency requirements in bidding and contracting processes could help to maximise the hoped-for outcomes of this legislation.

Given the importance of the bidding process in the governance of extractive industry operations, there is a strong case for entrenching transparency provisions on bidding directly in the law, rather than subsequent regulations. This would involve establishing clear,

BOX 2. TRANSPARENCY IN INTERNATIONAL INVESTMENT LAW AND INVESTOR-STATE ARBITRATION

Transparency appears to be an emerging trend in international investment law, both in terms of how governments are expected to behave in their relations with investors and in terms of the process of international arbitration itself.

A small number of bilateral investment treaties (BITs) feature clauses requiring transparency of host country measures (e.g. articles 10-11 of the US-Rwanda BIT of 2008). Depending on the treaty, this may include requirements for the government to publish laws and regulations, publish proposed measures or ensure transparency in administrative proceedings.

These transparency requirements apply to state conduct toward investors, rather than toward the general public. They can promote transparency but also raise questions. For example, some treaties require governments to provide foreign investors opportunities to comment on proposed legislation, in contexts where citizens may not have comparable rights under national law.

There have been developments towards greater transparency in investor-state dispute settlement. Several recent bilateral and regional investment treaties include provisions on the publication of documents and awards as well as procedures for the submission of civil society briefs.

The revision of the International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Rules in 2006 increased transparency in ICSID arbitration. The Rules on Transparency in Treaty-Based Investor-State Arbitration developed by the United Nations Commission on International Trade Law (UNCITRAL) also represent an important advance.

The UNCITRAL Rules on Transparency apply as a default to investor-state arbitrations filed under investment treaties concluded after 1 April 2014. The 2014 Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration promotes application of the UNCITRAL Rules on Transparency to disputes brought under pre-2014 investment treaties.

Source: Cotula and Tienhaara, 2013, with additions.

effective and widely publicised rules to regulate the bidding process, applicable to all bidders; clearly defined pre-qualification and evaluation criteria; requirements for relevant authorities to provide written justification for their decisions, including award of licences/contracts and the decision to disqualify an applicant; and publication of tender documents, lists of pre-qualified companies and bid results at different stages of the bidding process, and access to bids after selection has been made (Global Witness, 2013, with adjustments).

Effective mechanisms for remedy and enforcement are very important to make transparency requirements work. This would include criminal charges for egregious violations. In Kazakhstan, anti-corruption legislation has been strengthened over the years. Yet enforcement mechanisms still appear weak and selective. Effective requirements for disclosure of information on third parties involvement in securing the bid, and on any financial payments made to them, would help reduce risk of corruption (Global Witness, 2014).

Recommendations

- Develop detailed requirements to ensure effective and transparent bidding processes, including:
  - Clear, effective and widely publicised rules to regulate the bidding process, applicable to all bidders;
  - Clearly defined pre-qualification and evaluation criteria;
  - Requirements for relevant authorities to provide written justification for their decisions, including award of licences/contracts and decisions to disqualify an applicant;
  - Requirements for disclosure of information on third parties involvement in securing the bid, and on any financial payments made to them;
  - Publication of tender documents, lists of pre-qualified companies and bid results at different stages of the bidding process, and access to bids after selection has been made.

Transparency and local consultation around ESIAs and ESMPs

5

In Kazakhstan, the Environment Code of 2007 and sectoral legislation require public hearings as part of the process to conduct environmental and social impact assessments (ESIAs) and design environmental and social management plans (ESMPs). The Environment Code mentions the principle of free, prior and informed consent (FPIC), but FPIC does not constitute a regulatory requirement in Kazakhstan.

Over the past decade, there has been much debate about the quality of public hearings and local consultations, both in relation to extractive industry operations in general, and with specific regard to ESIAs/ESMPs. CSOs have raised important concerns, particularly in relation to the implementation of legislative requirements. In many cases, consultations and public hearings are organised by local authorities. Invited stakeholders do not always represent the diversity of the population or expertise, or have an opportunity to be informed or prepared in advance. Wider outreach and well-designed information campaign are often lacking.

Issues of legislative design are also at stake. For example, legal requirements to hold public hearings focus on the imperative for authorities to 'hear' concerns. But they do not necessarily entail that feedback provided must be addressed or even incorporated in the ESIA framework. In addition, the very concept of 'public hearing' suggests one-off events rather than iterative dialogue processes. The fact that ESIA studies are typically carried out by consultants contracted by the companies creates potential for significant conflicts of interests.

Legislative requirements could be considerably strengthened by reframing public hearings into continuous community engagement at all stages of project development, starting from pre-feasibility studies and prior to designating an area for extractive activity. International trends also reflect growing efforts to ensure quality in public and community engagement, reflected for example in the growing use of the term of art 'meaningful consultations', growing guidance on implementing FPIC and growing recognition of the importance of effective grievance and recourse mechanisms (see Box 3).

Recommendations

Well thought-out requirements in the Code can help improve quality in local and public engagement for subsoil use activities in Kazakhstan. Specific recommendations include:

- Reframe public hearings requirements into continuous community engagement at all stages of project development, starting from pre-feasibility studies and prior to designating an area for extractive activity;
- Establish meaningful consultation requirements in ESIA/ESMP and investment approval processes, accompanied by arrangements to ensure integrity of process including requirements for ESIA consultants to be approved by an independent advisory board and requirements to disclose key documentation including draft ESIAs and ESMPs;
- Establish effective legal arrangements to reflect the outcome of local consultation processes, giving consideration to experiences with Community Development Agreements developed in several jurisdictions;
- Provide for the establishment of accessible, effective and culturally appropriate grievance mechanisms;
- Involve the multi-stakeholder platforms established as part of the EITI process in Kazakhstan in devising more effective mechanisms for public and community engagement;
- Link and align provisions on public hearings in the new Code with the relevant laws and regulations on local governance, sub-regional development and the environment.

BOX 3. COMMUNITY ENGAGEMENT IN THE EXTRACTIVE INDUSTRIES: INTERNATIONAL TRENDS

There is widespread acceptance that the quality of consultation processes matters a great deal. The term 'meaningful' consultation is used in a wide range of international standards and guidelines. For example, the United Nations Guiding Principles on Business and Human Rights specifically use the term 'meaningful consultation' in the context of due diligence processes. The Organisation for Economic Co-operation and Development (OECD) is finalising its guidance for meaningful stakeholder engagement in the extractive sector.

Yet different people have defined 'meaningful' consultation in different ways, including definitions by the United Nations, the World Bank, the Bank Information Centre (BIC), the OECD and other international bodies. Some stakeholders rate highly the following definition developed by the BIC:

'Meaningful consultation is defined as a process involving all project stakeholders, affected peoples, including concerned NGOs that is explained in a stakeholder participation plan and:

(i) begins early and is carried out on an ongoing basis throughout the project cycle;

(ii) provides timely disclosure of relevant and adequate information understandable and readily accessible to affected people;

(iii) is free of intimidation or coercion;

(iv) is inclusive and responsive to marginalized groups, with attention to gender;

(v) enables incorporation of all relevant views of affected people and other stakeholders into decision making;

(vi) includes persons with disabilities, and

(i) includes a comprehensive discussion of environment and social issues, including benefits.'

There is growing guidance on ways to implement FPIC in relation to extractive industry projects. Some states have integrated FPIC requirements into national legislation (for example, the Philippines), though often with shortcomings in implementation.

There is also growing experience with developing Community Development Agreements (CDAs) negotiated between companies and communities. These agreements should reflect the outcome of community engagement processes, for example through provisions that allow communities to participate in the benefits generated by the project e.g. through community development funds. National law in several countries requires developers to conclude CDAs with local communities as part of the investment approval process. Very diverse legal regimes involving use of CDAs apply for example in Australia, Ghana, Mongolia and Papua New Guinea.

Emerging international best practices also include development of grievance mechanisms relevant in rural community settings where institutions for dispute resolution may have both traditional and externally-adopted dimensions. Typically, institutions and processed need to be established or adjusted for community grievances to be heard, assessed, addressed and ultimately resolved. The Guiding Principles on Business and Human Rights provide specific guidance on remedies and grievance mechanisms.

Sources: OECD, 2015; Buxton and Wilson, 2013; Wilson and Blackmore, 2013; Wilson et al, forthcoming.

Public disclosure of subsoil use contracts, agreements and licenses

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In Kazakhstan, the debate over public disclosure of subsoil use contracts has been going on for the past two decades. Disclosure of the large contracts concluded in the 1990s has formed the object of particularly heated debate. The EITI process addressed some of the concerns about lack of transparency in the extractive sector and gradually established some new entry points and platforms for this debate.

With regard to contracts, however, concerns about commercial confidentiality and/or national security have so far overridden the arguments made in favour of public disclosure. Commercial confidentiality and national security might well be relevant in special cases. In practice, however, both government and industry have resorted to these arguments quite liberally.

When the Law on Subsurface Use of 2010 was being developed, many legal and technical experts supported partial contract disclosure, particularly disclosure of contractual provisions on environmental protection and social/public investments. Although the 2010 Law did not provide for disclosure, there was a strong consensus at the time that it should be possible to address this issue in the new generation of contracts.

There is now growing international support for the presumption that, in principle, contracts should be disclosed. International guidance, including the United Nations Principles for Responsible Contracts, calls for the disclosure of contract terms unless compelling reasons require otherwise.

In recent years, several countries have disclosed subsurface use contracts, showing that disclosure is possible. Examples include the Democratic Republic of Congo,[1] Guinea,[2] Liberia,[3] Peru,[4] and Timor Leste.[5] Additional contracts have become available through open-access global databases.[6] In some jurisdictions, contract disclosure is a legal requirement under national law – for example, in Liberia under the Liberia Extractive Industries Transparency Initiative Act of 2009. As discussed, this law was developed to establish the national process relating to the Extractive Industry Transparency Initiative. But its scope was also broadened to include agriculture and forestry (see Box 4).

Another important dimension of contract disclosure concerns extractive industries supply chains. It is often contractors and sub-contractors, rather than the holder of subsoil use rights, that generate the most direct impacts on affected people and the environment. Yet debates on contract disclosure have typically focused on disclosure of primary investor-state contracts. Supply chain transparency would require a special set of rules for disclosure.

Recommendations

- Develop arrangements for contract disclosure, covering at the very least contractual provisions on social and environmental issues;
- Address relevant supply chain reporting and transparency provisions for contractors and sub-contractors to enhance performance and accountability;
- Provide narrow definitions of exceptional situations where commercial confidentiality and national security imperatives apply.

BOX 4. WHAT NATIONAL LEGISLATION CAN DO TO PROMOTE TRANSPARENCY: LESSONS FROM LIBERIA

In Liberia, petroleum, agriculture and forestry contracts are approved by parliament and are publicly available online. This situation has much to do with Liberia's recent history. In 2003, a peace agreement put an end to more than a decade of conflict. A transitional government came to power that signed several large investment contracts, including for mining and agriculture. There were allegations of corruption. When some of the contracts were leaked, some commentators felt that the government had agreed to terms that were not in the best interests of the citizens of Liberia.

In 2006, a democratically elected government took office. The new government wanted to signal a clear break with past practices. It made it a priority to renegotiate the contracts awarded by earlier governments. In addition, parliament passed the Liberia Extractive Industries Transparency Initiative Act in 2009. This law provides that investment contracts for agriculture, mining, petroleum and forestry operations must be made publicly available. Contracts for natural resource investments in Liberia can now be downloaded from the official Liberia Extractive Industries Transparency Initiative website (www.leiti.org.lr).

Source: Ford and Tienhaara, 2010, with additions.

[1] http://mines-rdc.cd/fr/index.php/contrats-des-ressources-naturelles/contrats-miniers and http://mines-rdc.cd/fr/index.php/contrats-des-ressources-naturelles/contrats-petroliers.
[2] http://www.contratsminiersguinee.org/.
[3] http://www.leiti.org.lr/contracts-and-concessions.html.
[4] http://www.perupetro.com.pe/relacioncontratos/.
[5] http://www.laohamutuk.org/Oil/PSCs/10PSCs.htm.
[6] http://www.resourcecontracts.org/.

Beneficial ownership of subsoil users

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The EITI Standard 2013 specifically recommends that implementing countries maintain 'a publicly available register of the beneficial owners of the corporate entities that bid for, operate or invest in extractive assets, including the identity(ies) of their beneficial owner(s) and the level of ownership'. While this is a recommendation, there is also a requirement for governments and state-owned enterprises to disclose their level of beneficial ownership in oil, gas and mining. According to the EITI Standard, however, publicly listed companies and their wholly-owned subsidiaries are not required to disclose.

Disclosure of beneficial ownership (i.e. of the ultimate owners of a business, or significant portions of it) is an important part of an overall system of accountable governance for subsoil use. Among other things, disclosure of beneficial ownership is instrumental to ensuring the effectiveness of provisions on contract disclosure and transparency in the bidding process. Disclosure can also help to fight corruption, as opaque corporate structures could hide conflicts of interests and improper relations.

While companies operating in Kazakhstan that file to stock exchanges (typically, large well-established industrial enterprises) are already required to disclose at least some information on beneficial ownership, other companies are not, and rarely disclose this information voluntarily. The government of Kazakhstan has been considering legislating this requirement and establishing a clear set of rules for exceptions. The new Code provides a good opportunity to advance on this issue.

In practice, it is often possible to devise complex corporate structures and shell companies to obscure real beneficiaries. But well thought-out legislation can help. Legislative drafting could draw e.g. on the practices listed in a checklist compiled by Global Witness (2012). For instance, rules applicable to the pre-qualification bidding stage can require disclosure by candidates (be it a sole operator or a member of a consortium) of their ultimate beneficial ownership and related audited accounts. For requirements to be effective, they should also apply to companies that take over existing extractive industry projects. Information on beneficial ownership should be made available to the public.

The risk that bidders might pay bribes via third parties can also be addressed through requirements to disclose the nature of their relationships with hired consultants, agents and local partners, including the identities of the ultimate beneficial owners of these service providers as well as full details of payments or other benefits provided.

Recommendations

- Develop clear requirements to disclose beneficial ownership, addressing issues of conflict of interest and narrowly defining any exceptions;
- Harmonise linkages with public trading requirements embedded in other laws and regulations, removing unnecessary contradictions and loopholes.

Summary of recommendations

8

I. Ensure compliance with the evolving EITI Standard

- Ensure that the provisions of the new Code are in line with, and ensure compliance with, requirements under the evolving EITI Standard, including through entrenching in the Code the disclosure requirements and institutional arrangements needed for continued EITI compliance;
- In giving effect to the transparency provisions of the Concept, develop clearer definitions of transparency and related concepts (e.g. 'documents forming the base for subsurface use rights'), clearer mechanisms for ongoing disaggregated reporting and disclosure, and effective platforms for continued public dialogue multi-stakeholder engagement;
- Involve the multi-stakeholder platforms established as part of the EITI process in Kazakhstan in devising more effective mechanisms for public and community engagement, and integrate in the Code lessons learned from the EITI process in Kazakhstan.

II. Improve transparency of bidding processes

- Develop detailed requirements to ensure effective and transparent bidding processes, including:
  - Clear, effective and widely publicised rules to regulate the bidding process, applicable to all bidders;
  - Clearly defined pre-qualification and evaluation criteria;
  - Requirements for relevant authorities to provide written justification for their decisions, including award of licences/contracts and decisions to disqualify an applicant;
  - Requirements for disclosure of information on third parties involvement in securing the bid, and on any financial payments made to them;
  - Publication of tender documents, lists of pre-qualified companies and bid results at different stages of the bidding process, and access to bids after selection has been made.

III. Improve transparency and local consultation processes around social and environmental impact assessments and management systems

- Reframe public hearings requirements into continuous community engagement at all stages of project development, starting from pre-feasibility studies and prior to designating an area for extractive activity;
- Establish meaningful consultation requirements in ESIA/ESMP and investment approval processes, accompanied by arrangements to ensure integrity of process including requirements for ESIA consultants to be approved by an independent advisory board and requirements to disclose key documentation including draft ESIAs and ESMPs;
- Establish effective legal arrangements to reflect the outcome of local consultation processes, giving consideration to experiences with Community Development Agreements developed in several jurisdictions;
- Provide for the establishment of accessible, effective and culturally appropriate grievance mechanisms;
- Involve the multi-stakeholder platforms established as part of the EITI process in Kazakhstan in devising more effective mechanisms for public and community engagement;
- Link and align provisions on public hearings in the new Code with the relevant laws and regulations on local governance, sub-regional development and the environment.

IV. Promote contract disclosure

- Develop arrangements for contract disclosure, covering at the very least contractual provisions on social and environmental issues;
- Address relevant supply chain reporting and transparency provisions for contractors and sub-contractors to enhance performance and accountability;
- Provide narrow definitions of exceptional situations where commercial confidentiality and national security imperatives apply.

V. Promote transparency of beneficial ownership

- Develop clear requirements to disclose beneficial ownership, addressing issues of conflict of interest and narrowly defining any exceptions;
- Harmonise linkages with public trading requirements embedded in other laws and regulations, removing unnecessary contradictions and loopholes.

References

Bianchi A. and A. Peters, 2013. Transparency in International Law. Cambridge: Cambridge University Press.

Buxton, A. and Wilson, E., 2013. FPIC and the Extractive Industries: A guide to applying the spirit of free, prior and informed consent in industrial projects. IIED, http://pubs.iied.org/16530IIED.html.

Cotula, L., and Tienhaara, K., 2013. 'Reconfiguring Investment Contracts to Promote Sustainable Development', *Yearbook on International Investment Law & Policy 2011-2012*, Oxford: Oxford University Press, pp. 281-310, http://pubs.iied.org/G03528.html.

Ford, J. and Tienhaara, K. 2010. Too little, too late? International oversight of contract negotiations in post-conflict Liberia. International Peacekeeping 17(3).

Global Witness, 2014. Building for the Long-term: Avoiding the resource curse in Afghanistan. https://www.globalwitness.org/sites/default/files/library/long-term_building_report.pdf.

Global Witness, 2013. A Shaky Foundation? Analysing Afghanistan's draft mining law. https://www.globalwitness.org/campaigns/afghanistan/shaky-foundation/.

Global Witness, 2012. A Citizen's Checklist: Preventing Corruption in the Award of Oil, gas and Mining Licenses. https://www.globalwitness.org/sites/default/files/A%20citizens%20checklist%20EN%20Jan%202012.pdf.

OECD, 2015. Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector. Draft for comment. http://www.oecd.org/daf/inv/mne/OECD-Guidance-Extractives-Sector-Stakeholder-Engagement.pdf.

Ospanova S., Akhmadov I. and E. Wilson, 2013. EITI and Sustainable Development: Lessons and new challenges for the Caspian region. IIED, http://pubs.iied.org/16531IIED.html.

Shaxson, N., 2009. Nigeria's Extractive Industries Transparency Initiative: Just a Glorious Audit? Chatham House, https://eiti.org/files/NEITI%20Chatham%20house_0.pdf.

Wilson E., Best S., Blackmore E. and S. Ospanova, forthcoming. Meaningful community engagement in the extractive industries: Stakeholder perspectives and research priorities. IIED Sustainable Markets Group. IIED.

Wilson E. and E. Blackmore, 2013. Dispute or Dialogue? Community perspectives on company-led grievances mechanisms. IIED, http://pubs.iied.org/16529IIED.html.

Wilson E. and J. Van Alstine, 2014. Localising transparency: Exploring EITI's contribution to sustainable development. IIED, http://pubs.iied.org/16555IIED.html.

The Republic of Kazakhstan is preparing a new Code on Subsurface and Subsurface Use. As part of this process, the government developed and shared for comment a 'Concept' outlining key policy directions for the new Code. Over the years, IIED has supported and participated in dialogues on transparency and accountability in Kazakhstan and the Caspian region. This issue paper discusses ways to install robust transparency provisions in the new Code, making recommendations to take the Concept's policy directions to their full potential.

IIED is a policy and action research organisation working to promote sustainable development – development that improves livelihoods in ways that protect the environments on which these are built. Based in London and working on five continents, we specialise in linking local priorities to global challenges. In Africa, Asia, Latin America, the Middle East and the Pacific, we work with some of the world's most vulnerable people to ensure they have a say in the decision-making arenas that most directly affect them – from village councils to international conventions.

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