

# Constructing a Diagnostic Framework on Corruption Risks in Mining Sector Licencing

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**Key themes:** Governance and Regulation  
**Key countries:** General application  
**Completion:** June 2015

## Research aims:

This research sought to develop:

- a template for the consideration of the specific corruption risks in the licencing and contracting areas of mining
- some general principles that should be at the forefront of future discussions in this area

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# IM4DC Action Research Report



# Summary of Action Research Activity

## **Constructing a diagnostic framework on corruption risks in mining sector licencing**

For hundreds of millions of people living in resource-rich countries, mining has not delivered the widespread development benefits it could. The ultimate causes of this are many and varied; however, there is little doubt that corrupt practices have often played a part in these benefits not flowing through to the broader society. The awarding of mining licences at the beginning of the value chain is arguably the foundation for success or failure in whether mining delivers development; however, experience has shown that with huge sums involved and complex administration, mining sector licencing is particularly at risk of corruption.

Properly understanding where these risks lie is the crucial first step towards being able to minimise corruption in mining sector licencing. This discussion paper seeks to boost this understanding by bringing together several threads of analysis on corruption studies and mining sector governance and administration. The paper will form the basis of a planned expert multi-stakeholder workshop to construct a diagnostic framework for use by civil society to firstly understand corruption risks in a wide variety of jurisdictions and then advocate for solutions.

Breaking down mining sector licencing into its key components, each section of the paper contains two sets of suggested questions and an explanatory narrative. These contextual and indicator questions are treated as a starting point for how researchers might best utilise this information and how a diagnostic framework could be constructed. Specifically, a 'traffic light' approach is advocated, whereby questions on a specific issue be collated into a format that highlights where corruption risks may be at their greatest (red lights), through to areas that demonstrate very low corruption risks (green lights). This strikes a balance between being overly prescriptive and being overly descriptive.

As the focus of the paper is on corruption risks (as opposed to attempting to uncover actual corruption), the underlying principles for the questions are transparency, accountability and discretion. Asking these questions at each stage of the licencing process should ultimately allow relevant stakeholders to identify and target those areas that currently require the most attention. Making changes to improve the degree of transparency and accountability at any of these stages would improve the likelihood of mining contributing to development.



THE UNIVERSITY OF  
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AUSTRALIA**



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## **Action Research Discussion Paper**

**June 2015**

# **Constructing a diagnostic framework on corruption risks in mining sector licencing**

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## Executive Summary

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## Acknowledgements and Contributions

The authors gratefully acknowledge the financial support from the *International Mining for Development Centre* (IM4DC) in the development of this paper. In addition, we would also like to thank the following people for their expert comments and contributions throughout this process:

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Aasmund Andersen - Managing Director, *Resource Development Foundation*

Finn Heinrich - Research Director, *Transparency International Secretariat*

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The views expressed in this paper reflect those of the authors, and do not necessarily reflect the views of *IM4DC*, the University of Western Australia, or *Transparency International*. All errors are the responsibility of the authors.

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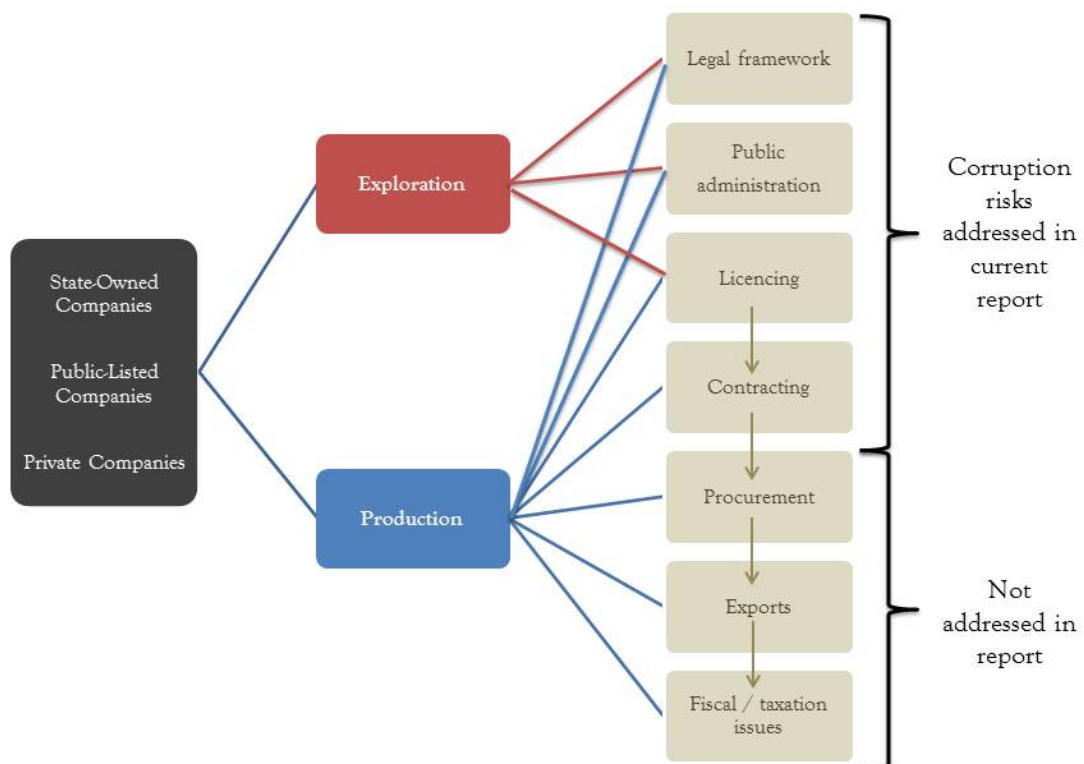
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## 1. Introduction

This discussion paper was undertaken to provide an intellectual foundation for a global *Transparency International* initiative aimed at analysing corruption risks in mining sector licencing. In this context, it will contribute to a planned workshop bringing together a variety of experts from fields such as anti-corruption, civil society research, mining administration and governance, investor and mining industry groups. The intended output of the workshop is a diagnostic framework that can be used by civil society and mining sector stakeholders to analyse, highlight and advocate on identified corruption risks in a wide variety of jurisdictions. To help facilitate this outcome, this paper highlights a number of key areas of risk with suggested contextual questions and, where possible, suggests detailed indicator questions according to key principles of transparency, accountability and discretion. Where this is not possible, the paper outlines the key challenges and discusses alternatives to indicator questions.

The paper focuses exclusively on licencing, including permits and contracts, in both exploration and production, but does not look at issues that occur later in the value chain, as outlined in Figure 1.

**Figure 1: The Mining Chain**



After discussing some of the important methodological issues in **Section 2**, the paper undertakes a very general overview of the institutional circumstances and integrity of the jurisdiction's administration in **Section 3**, which can be gathered from existing indices. Although by design these do not specifically relate to the mining sector, it may nevertheless provide some pointers to possible areas of particular concern that the researcher can then focus on with respect to the mining sector. It is also important for both researchers and consumers of final reports to have an understanding of context that may influence both corruption risks and efforts to implement corruption prevention strategies. This section also seeks to briefly explore the mining sector in general, covering general questions, such as the relative size of the sector in the economy and the types of minerals extracted.

**Section 4** gets to the heart of the corruption risks in licencing. The first part provides an overview of some general concepts, including a discussion on the important issue of company ownership. Whilst this helps provide context, it is also clear that this can represent potential corruption risks to the country, whether that be through obscure beneficial ownership, or through State-Owned Companies (SoCs), or private companies playing a dominant role in the extractive sector. This section is then effectively ordered sequentially, starting with the application processes, then moving through to awarding these licences, the writing of the eventual contracts and then finally the processes in place at the end of the licencing phase (which include the renewal, rescinding, annulment or cancellation of licenses).

**Section 5** discusses the differences in risks between the large-scale mining sector and small-scale or artisanal mining sector. Again, the extent to which researchers will incorporate this into their final diagnostic report will be very heavily dependent on the extent to which this globally important sector is prevalent in that particular jurisdiction.

Finally, **Section 6** provides concluding comments and some suggestions on the way forward.

## 2. Methodology

The overall approach of this discussion paper was to bring together **key anti-corruption principles and material** from groups such as Transparency International (TI), and combine this with analysis of **best-practice** in mining sector licencing. Some of the key input material sourced from TI included research frameworks on areas such as National and Local Integrity Systems, Climate Finance and conditional cash transfers, as well as Chapter analysis of their mining sectors and theoretical essays on sector specific typologies. Material from allied groups included articles on contract transparency, cutting edge work on spatial transparency and reports from anti-corruption bodies on previous scandals. Analysis and 'best-practice' papers from multi-laterals, particularly the World Bank but also the UNDP, were of some use to the paper. The approach also sought to incorporate aspects of the numerous licencing corruption scandals and the opinion of various experts. Whilst consideration was given to scandals in licencing, the paper does not refer specifically to any cases as many are still evolving and some have not been validated by courts or lack crucial details. This paper sought to have technical material revised and validated by experts with a wide range of experience, including in civil society, government, multi-laterals, industry and service providers. Whilst grateful for input from experts, all errors are the sole responsibility of the authors. It is envisioned that the workshop will extend this same general approach a step further to finalise the diagnostic framework.

This discussion paper utilises **Transparency International's definition of corruption**, "The abuse of entrusted power for private gain." The concept of 'entrusted' power rather than 'public' is an important concept for mining sector licencing, as there are key actors who are not state officials or company representatives but who nonetheless hold entrusted power, including community representatives or landholders. Although not explicitly stated in the framework, the concepts of **grand and petty corruption** provided an intellectual underpinning as both are prominent in mining sector licencing but in different areas and possess different drivers and ramifications. Although there is no clear cut distinction<sup>3</sup> (indeed, petty corruption undertaken systematically can cumulatively generate sums in excess of most grand corruption), petty corruption "refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services"<sup>4</sup>. As such, this tends to be driven more by *need* and is thus harder to eliminate via changes to systems. Grand corruption, which "consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good"<sup>5</sup>, tends to be driven more by *greed* and because of this, is more sensitive to change.

In assessing specific issues within an area as complex as mining governance, it is crucial that a strong set of guiding **principles** are developed in order to avoid becoming bogged down in debate over preferred governance models. When, as often occurs in mining governance, it was obvious that no 'perfect' or universal integrity model existed, reference back to the guiding principles of

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<sup>3</sup> <http://www.u4.no/articles/the-basics-of-anti-corruption/>

<sup>4</sup> [https://www.transparency.org/whoweare/organisation/faqs\\_on\\_corruption/2/](https://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/)

<sup>5</sup> [https://www.transparency.org/whoweare/organisation/faqs\\_on\\_corruption/2/](https://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/)

**transparency, accountability and discretion** allowed this discussion paper to sidestep ongoing arguments in mining governance and instead focus on the best outcomes.

**Transparency** plays a key role in the analysis of this paper. Simply put, a lack of transparency or opacity of processes, operations and decision-making will result in relatively high corruption risks, as the likelihood of corrupt acts being detected becomes much lower, thus changing the incentives of actors involved. However, it must be noted that mining is a technically complex field and there is limited technical knowledge outside of the industry, especially within watchdog agencies or civil society. Thus, making transparency a fundamental principle of mining sector licencing will reduce risks, especially if it is relevant, accessible, timely and accurate<sup>6</sup> but is by no means a 'silver bullet' to issues of corruption.

Many of the suggested indicator questions therefore relate to the availability and quality of information released by governments in the extractive sector. Whilst information does not of itself provide evidence of a low-corruption environment, its *absence* certainly points to corruption risks. At a minimum, it should raise concerns about the administrative capacity of the civil service if it is not able to provide this information. The other possibility, that the civil service is able but unwilling to release that information, begs the question as to why it is not being released. In addition, the benefits of having greater access to information are two-fold: on the one hand, more information is valuable in an economic sense, as it not only reduces informational asymmetries and promotes a more efficient allocation of resources, but also drives investment by raising the levels of certainty and security for investors. Secondly, publicly-available information can act as an accountability tool, by constraining the actions of politicians and public servants. Therefore, a number of questions assess whether information is available to outside parties, particularly in efficient online formats.

**Accountability** forms the second key component of corruption risk prevention in this paper and the principles utilised were broadly aligned with those expressed by the *Transparency Accountability Initiative*, in that actors are answerable for their actions and there is redress when duties are not met.<sup>7</sup> Within accountability, the third component of **discretion** is key. Discretion is a necessary component of mining sector licencing, whether in high or low governance jurisdictions, and also a key creator of corruption risks. This paper seeks to identify areas where discretionary powers can be limited or subject to more transparency. But assessing and understanding anti-corruption efforts is a sizeable academic field that has not yet resolved fundamental questions such as whether stand-alone anti-corruption bodies are more effective than a dispersed set of checks and balances. Thus, the suggested questions on integrity measures focus on the principles of transparency, accountability and discretion rather than assess whether the frameworks fit certain models of integrity systems.

The diagnostic framework suggested in this discussion paper has been designed to be undertaken by a small group of researchers, with varying degrees of existing knowledge of the country's mineral sector. There are a large number of questions that could be answered by a person or persons with limited knowledge of the extractive industry, because the questions require simple validation of the

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<sup>6</sup> <http://www.transparency-initiative.org/about/definitions>

<sup>7</sup> <http://www.transparency-initiative.org/about/definitions>

existence (or absence) of public information (see Section 2.1 below for details on this). However, the scope and nature of many questions means detailed input from specific sectoral experts will also be required. What mix of skills is ultimately used, and what are available (perhaps due to capacity restrictions and political environments) will obviously vary, and so throughout this paper references are made simply to the ‘researcher’ or ‘research group’.

A core component of the methodology is a proposed **‘traffic light’ framework of analysis**, whereby researchers can use the answers to questions to determine whether the corruption risks in that particular area are high (red), moderate (amber), or low (green). This therefore strikes a balance between being purely quantitative (for example, developing a numerical index based on ‘yes/no’ binary responses to questions), and being purely descriptive. If too descriptive, the report would run the risk of being difficult to interpret about where the focus should be going forward. The traffic light approach is a relatively simple way to highlight areas of the mining chain that warrant closer examination, and which will hopefully result in more targeted policy solutions. It should also prove a useful tool in the dissemination of the outcomes of the report, giving a clearer picture to civil society (who may not necessarily be mining industry experts), where the main corruption risks lie. This paper does not seek to dictate either the number of questions to be asked, or the proportion of responses that may constitute a red, amber or green flag. Although this will ultimately be the aim of this diagnostic tool, individual country circumstances will dictate different questions (and depth of questions). In other words, there is no ‘one-size-fits-all’ series of detailed questions that could be applied strictly to every jurisdiction across the highly varied and complex mining sector.

A distinction has also been made between questions that are designed to form a contextual picture of the mining sector, and those for use in a diagnostic framework of corruption risks. The **background or contextual questions** are not designed to be part of the ‘traffic light’ system, but are essentially for the research group to develop a broad understanding of the issue at hand, the influence upon general drivers of corruption, and to provide context for a lay person reading the document. The more important questions, of course, are the indicator questions of the diagnostic framework.

A second aspect of these questions relate to a distinction between **de jure** and **de facto** operations. Countries may have laws and regulations that appear, on the surface, to be fair and reasonable. The reality of how they are interpreted and implemented on a day-to-day basis may, however, be very different. By its very nature, of course, this runs the risk of becoming extremely subjective, and this paper therefore suggests employing a standard criteria for assessing whether actual practices are correlated with legal frameworks and regulations. In common with corruption risk assessments from other sectors, a baseline could be created for ‘evidence’ from one or more of these sources: (i) two official media articles (as opposed to blogs, or unsubstantiated opinion pieces), (ii) corroboration from an expert interviewee, (iii) publication of legal proceedings.

## 2.1. Conceptual Challenges

A number of underlying issues are important to any eventual framework but also problematic in their conceptualisation. Firstly, **government capacity and resources** play critical roles in determining the integrity of licencing systems, yet are notoriously difficult to assess and monitor using basic indicator questions. Wage levels are a key factor in whether officials engage in ‘need’ driven petty corruption and so an indicator could potentially be constructed using purchasing parity power figures to match ‘needs’ with costs of living in that jurisdiction. But as these would require significant

explanation to researchers and any consumers of the research, this paper utilises transparency of wage levels as a proxy for wage levels themselves. Exacerbating these resourcing issues, mining is a sector in which governments of all types struggle to retain staff with sufficient capacity levels, including jurisdictions which have a long history of mining and higher education in mining, such as Australia. In newer mining countries without educational institutions, the likelihood of high-capacity staff is even more diminished and increases the importance of effective systems and sufficiently resourced mining licencing bodies.

The **procedures and administrative systems** in place for the management of mining licenses are also equally hard to reduce to clear indicators. Strong procedures, structured work processes and systems in place may compensate to some degree for low human resource capacity and resources. Equally, poor systems may waste and discredit strong potential human resources. A common indicator used by World Bank projects is the number of days it takes to process a license application to an issued license. However, this general indicator fails to consider the different requirements for different license types (ASM, exploration, mining leases), and that speed in issuing the license may mean limited consultations with community representatives. Based on experience with poor mining license management, it could be argued that it is the rate at which government cancels non-compliant and expired license that is an equally strong indicator of governance, as time to approval.

The **treatment of exploration and production** issues varies according to jurisdiction and there is no one-size-fits-all for any potential diagnostic framework. This discussion paper treats exploration and production together, until the actual awarding of licences. For example, the section on applications deals with both exploration and production but the section on licence awarding is then broken down according to the main methods – ‘First come, first served’, auctions and negotiated contracts. However, complications arise when auctions are analysed, as exploration licences are frequently exclusive and come with the right to acquire a production license. A key tool that can help decide where to make divisions is the ‘workflow diagrams’ of licencing in each jurisdiction, as these provide a succinct picture of common and differing processes.

Another issue without a clear solution appropriate for all jurisdictions is the treatment of **Large-scale Mining (LSM) and Artisanal Small-scale Mining (ASM)**. Existing literature generally utilises this distinction but it may be more useful in some jurisdictions to divide analysis into a) **Industrial mining** that includes small-scale enterprises that undertake mechanised mining, and b) **Artisanal mining** that includes only those who work by hand or with extremely limited industrial tools, such as a generator or small excavator. However, the comparability of research across jurisdictions would be reduced if different categories were utilised. Key aspects to determine how to divide the research framework could include the laws of each jurisdiction, the relative size of each sector and impact upon the citizens of the jurisdiction. An overarching complicating factor however is that ASM suffers globally from a lack of concrete evidence about its activities, as it generally occurs sporadically in remote regions with large numbers of people working for relatively low (but cumulatively very significant) sums. It is worth noting here that one of the leading reports on ASM asserts that it “produces about 85% of the world’s gemstones... 20-25% of all gold... jobs and income for 20-30

million of the world's poorest people..." This is some ten times the employment figures for LSM.<sup>8</sup> To ensure that ASM receives sufficient attention, this discussion paper suggests that researchers firstly complete the LSM section then, when completing the ASM section, recycle relevant LSM questions and apply them to that sector.

The **unregulated ASM sector** (sometimes known as the illegal sector) presents another conceptual challenge. Once it is decided on where to make the division between small-scale and artisanal mining, a remaining challenge is how to diagnose corruption in a sector that occurs completely outside any system of governance. Or using TI's definition, if nobody has 'entrusted power' then how can corruption occur? This is further complicated by the fact that unregulated mining often occurs in governance 'grey areas', such as land owners or local chiefs issuing semi-official permits to local miners not endorsed by central government and thus considered illegal by law, or in conflict zones where governance systems are run by militia-led 'parallel states'. This highlights the link between formalisation and corruption – once miners are brought in to a system of regulation, the incentives for corruption can be analysed and changed where possible. But the reality is that very few formalisation efforts have been successful. Thus, this discussion paper limits itself to asking what evidence exists about what unregulated mining is conducted – minerals produced, numbers employed, smuggling, and so on.

### 3. Country and Sectoral Background

#### 3.1. Governance Indicators

Whilst the overall objective of this discussion paper is to suggest specific risks in mining sector licencing, it is nevertheless a useful exercise to put together some background material of the jurisdiction concerned. In particular, there are a number of well-known broad institutional indicators that can be used as an initial overview of the institutional situation of the country. A reasonable starting point would be to divide these existing measures into various institutional characteristics. For example, Box 3.1 includes some of the more well-known indicators that have (generally) extensive coverage across countries and time. It is certainly not the intent here to proclaim that low scores will necessarily dictate corruption risks in the mining sector *per se*, but it will enable the researcher to develop an overall view of the governance structure of the jurisdiction (including a broad overview of corruption risks from bodies such as Transparency International, and the World Bank).

Corruption risks, however, tend to be an outcome of institutional issues surrounding transparency, accountability and discretion and to that end, this paper has included measures that purport to measure the transparency of the political system, such as the existence of an independent and free press, as well as the openness of budgetary institutions.

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<sup>8</sup> <http://pubs.iied.org/pdfs/16532IIED.pdf>



### Box 3.1a: Potential Governance Indicators

#### **Political and civil liberties**

Freedom in the World (Political and Civil Liberties)

World Bank Governance Indicators – Voice and Accountability

POLITY Index

Freedom of the Press

*Reporteurs Sans Frontieres*

#### **Legal institutions**

World Bank Governance Indicators – Rule of law

International Country Risk Guide – Rule of law

World Justice Project Rule of Law Index

#### **Administrative / Bureaucratic institutions**

International Country Risk Guide – Bureaucratic Quality

World Bank Governance Indicators – Regulatory Quality

#### **Corruption**

International Country Risk Guide – Corruption

World Bank Governance Indicators – Control of Corruption

Transparency International – Corruption Perceptions Index

#### **Transparency / Accountability**

Open Budget Index (OBI) [International Budget Partnership]

Statistical Capacity Indicator (World Bank)

Although there is unlikely to be much merit in collating this material in to one overall ‘score’ for the country, in keeping with the methodology employed throughout the paper, it may be worthwhile for the researcher to ‘traffic light’ these results. Box 3.1b gives the example of Papua New Guinea, where data from many of the sources listed in Box 3.1a have been taken for 2010. Rather than highlighting the scores, we have listed the country’s ranking within each of these indices in 2010, and have ascribed colours depending on which percentile the country is ranked (of the countries with available data for that year). Green is used if the country is ranked in the top third, amber if it’s in the middle third, and red if it is in the bottom third. Researchers are of course under no obligation to follow this exact methodology, nevertheless, it should be possible at the end of this particular section to be able to give a brief summary of that country’s relative position in international governance-related rankings.

### Box 3.1b: Papua New Guinea Governance Rankings, Selected Indices, 2010

	Papua New Guinea Rank, 2010	Number of countries in index, 2010	
CPIA (transparency and accountability)	20	79	Green
Economic Freedom Index	133	187	Red
Freedom House Press	150	203	Red
Political Rights (Freedom House)	115	201	Yellow
Civil Liberties (Freedom House)	84	201	Yellow
Control of Corruption (World Bank Governance Indicators)	190	210	Red
Regulatory Quality (World Bank Governance Indicators)	141	210	Red
Rule of Law (World Bank Governance Indicators)	174	212	Red
Corruption (International Country Risk Guide)	124	141	Red
Law and Order (International Country Risk Guide)	102	141	Red
<i>Reporters Sans Frontieres</i>	134	175	Red
Open Budget Index	27	94	Green
Democracy Indicator (Polity IV)	101	162	Yellow
Statistical Capacity Indicator	128	142	Red
Corruption Perceptions Index (Transparency International)	155	178	Red

### 3.2. Integrity Context

Researchers can also potentially take advantage of more detailed assessments of corruption, for example Transparency International's *National Integrity System Assessments* (NISA).<sup>9</sup> To date, some 38 countries have had their institutions 'mapped' in terms of their broad governance institutions. If the country in question has already been through this process, then there is quite a lot of background context that can be gleaned from these. Even if the country has not yet gone through this process, researchers may be able to take some of the issues addressed within the NISA framework, and adopt some of these as issues that may be relevant for this study. Box 3.2 includes some of the potential areas researchers may want to include. Of most interest here are issues that relate to discoverable information, such as the existence and efficacy of Freedom of Information Laws, as well as whether or not the country has any whistle-blower protection laws. Again, these only form part of the background to the specific issue of corruption risks in mining sector licencing, but it still important to understand the degree to which citizens have the rights and opportunities to access government information.

<sup>9</sup> See <https://www.transparency.org/whatwedo/nis>

### Box 3.2 National Integrity Systems Assessment (NISA)

For the following questions, please refer to the country's 'National Integrity Systems Assessment' report to answer the below. *[If not, use other sources or conduct desk research to answer.]*

Does the country have Freedom of Information laws?

Does this law include an appeal mechanism, such an Ombudsman?

In practice, is there evidence these FoI laws are complied with?

Are there laws regulating lobbying?

Is there any evidence of enforcement or prosecutions based undertaken based on these lobbying laws?

Is disclosure of assets / interests required of ministers?

In practice, is there any evidence of enforcement of requirements, and sanctioning of non-compliance?

In the legal framework, is there whistle-blower protection legislation?

Is there any evidence that whistle-blowers are protected as per the legislation?

Does the country have an anti-corruption statutory body?

Does this anti-corruption body release statistics on investigations, prosecutions, etc?

In practice, is there evidence that this body has been effective?

This initial section is designed largely to obtain an overall picture of the general corruption risks that have already been identified by previous research. It may also provide pointers as to which aspects of the institutional landscape may pose the greatest risks within the mining sector. For example, if there are consistent 'red flags' from questions relating to the legal framework, then this could be a guide for the research group to focus on that area specifically within the mining sector.

### 3.3. Mining Sector Overview

Narrowing the focus somewhat, researchers can also potentially take advantage of work previously undertaken to help provide some broad institutional context for the mining sector itself. The two main sources that purport to look directly at the issues specific to the extractives sector are the Fraser Institute's *Survey of Mining Companies*<sup>10</sup>, and the *Resource Governance Index*,<sup>11</sup> put together by the Natural Resource Governance Institute. Again, whilst much of the information gathered from these two sources may not directly be attributable to the licencing and contracting areas, there are

<sup>10</sup> <https://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/mining-survey-2013.pdf>

<sup>11</sup> <http://www.resourcegovernance.org/ra>

many overlapping areas of interest. However, it should be noted that at least one of these surveys does not take in to account all stakeholders, and as with the NISAs, not all countries are covered by these two surveys.<sup>12</sup> If the country being assessed is not currently included in one or both of these indicators, the researcher has the option of picking specific questions that address similar issues from these indicators (after consulting with the two institutions). Box 3.3 lists some examples of questions asked in both indicators. As can be seen, many of these could be thought of as providing background information on mining sector licencing.

This section can also provide some general data on the mining sector within the country. Much of this is publicly available, and simply builds a picture of the important extractive resources for that country, as well as the country's dependence on this sector.

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<sup>12</sup> The *RGI* currently covers 58 countries, whilst the *Survey of Mining Companies* spans 112 jurisdictions across 83 countries.

### Box 3.3 Overview of Mining Sector

#### **General questions on mining sector not elsewhere covered:**

According to the latest data available at this time, what is the relative contribution of specific minerals and energy resources to GDP? To exports? Please list.

Are there statistics available about the composition of the sector by company size, origin and/or ownership structure?

Are companies from any one other country highly represented in the sector?

Are there existing natural resource corruption cases involving companies from the country above?

Is there evidence of the home country government prosecuting corrupt behaviour abroad?

Looking ahead, are there any minerals present that are predicted to feature in emerging technologies, such as cobalt, lithium, other 'rare earths' minerals?

Looking ahead, is undersea mining a possible feature?

#### **Questions from the Resource Governance Index**

How are mineral resources taxed? (For example, unit based royalties, ad valorem royalties or profit-based taxes)

Has the jurisdiction adopted a rule or legislation that provides for disclosure of information in the mining sector?

Source: <http://www.resourcegovernance.org/rqi>

#### **Questions from the Fraser Institute's Survey of Mining Companies**

What percentage of respondents considered the legal system as a deterrent to investment?

What is the score for the Policy Perceptions Index?

What is the score for the Best Practice Mineral Potential Index?

What is the score for the Investment Attractiveness Index?

What was the score for the quality of the geological database in the country?

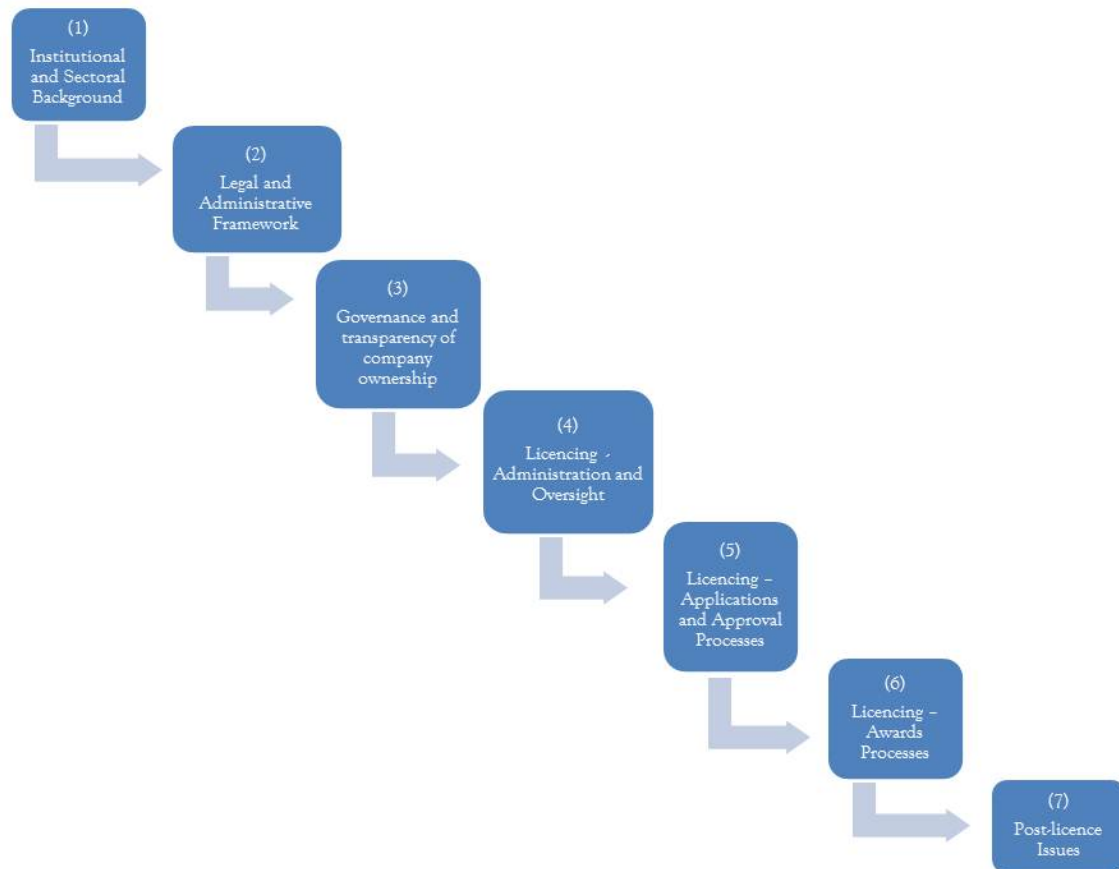
Source: <http://www.fraserinstitute.org/research-news/display.aspx?id=22259>

## 4. Developing a Diagnostic Framework for Corruption Risk

The major component of this section revolves around licencing and contracting corruption risks. This section is designed sequentially whenever possible (for example, legal and administrative issues, through to licencing applications and approvals, and then on to production licencing) (Figure 4). The intent here is that, having identified the broad context in which the relevant parties operate, it

should be possible to map out the chain of corruption risks, and identify key links in the chain where corruption risks are at their greatest (conversely, it should also be able to highlight areas of strength as well).

**Figure 4: Overview of Areas Covered, Large Scale Mining (LSM) and Artisanal and Small-Scale Mining (ASM)**



## 4.1. Legal and Administrative Framework

The existence of a formal, secure and open **legal framework** is obviously a crucial factor in reducing corruption risks. Legislation that is poorly designed, with significant loopholes (whether by design or by omission), provides the opportunity for corrupt behaviour to flourish. The legal framework also incorporates the regulatory framework, as well as the commercial contracts drawn up in the sector. In theory, within this broad framework, the constitutional framework could be considered the most difficult aspect to change, followed by laws drawn up in the legislature, bureaucratic regulations and, finally, contracts (*Resource Governance Institute, 2015*). Although this distinction is obviously not absolute, it nevertheless provides a useful starting point. As a rough rule of thumb, the more complete the legislative and regulatory framework, the less detail is required in specific mining contracts, as many of the terms are applied across the board. Gaps in the legislative framework, therefore, may give rise to increased corruption risks, because of an increase in the chances that each specific contract need be negotiated directly.

Another area within the legal framework that influences the context of corruption risk is where **jurisdictional issues** may arise. These risks could be through 'grey areas' between different levels of government, such as uncertainty over ownership between provincial and federal governments. Or it could be jurisdictional in the sense of inter-departmental, where conflicting legislation may exist between the mining sector and, for example, environmental protection legislation. There may also be jurisdictional issues within the mining sector, either through different levels of government (state versus federal), or between administrative bodies (for example, between mining legislation and environmental protection legislation). It is not necessarily going to be the case that these represent specific corruption risks *per se*, and can actually represent the 'healthy tension' required for a system of checks and balances, but they can certainly help the researcher in terms of context.

There is also an issue with respect to ownership as it relates to the **potential for expropriation** (either of property and/or licences). A country that has a history of indiscriminate or inconsistent expropriation is a signal, at a minimum, of likely past corrupt practises. But it also increases the risks today, even if it is never actually carried out. For example, the mere threat of expropriation may be used to increase payments from mining companies to the government (or specific persons within that government). It can also act as a driver for corruption by increasing the '**insecurity of tenure**' which is a fundamental problem for investors that they may seek to solve through corrupt means, while also reducing the likelihood of high-integrity companies investing in the jurisdiction.

Whilst there are many potential questions that can be asked in these areas (see Box 4.1), researchers can also independently investigate corruption risks through publicly-released information on the legal framework that may (or may not) exist. Often, it is **the absence of information** that should provide cause for concern, and here we also provide some guidance on what information a researcher can look for in order to see where the corruption risks may lie. Obvious examples may be the publication and appropriate dissemination of the relevant Mining Acts and associated regulations, but also whether there is any legislation *requiring* information on mining issues to be published.

Legal and regulatory frameworks should also be considered in conjunction with an understanding of the ability of government institutions to **enforce** it. Institutions with poor capacity struggle to implement even the most basic parts of its regulations, and likewise, newly-introduced advanced regulations may take years for government to enforce, or actually be unrealistic to enforce in the

near-term. Regulations in many poor countries are written by international consultants on short-term assignments, often applying experience from elsewhere that may not be practical to implement in the local context, or that create corruption risks when not accompanied by high levels of accountability.

Consent and consultation are complex issues within the legal framework that are addressed later in the discussion paper. 'Free, Prior and Informed Consent' (FPIC) is a concept that has gained significant traction in recent years and represents industry best practice but has not been adopted in many jurisdictions. Thus, questions below relate to the *principles* of FPIC, rather than the official, specific framework.

Finally, as with the previous sections, researchers should also be cognisant of the fact that previous surveys and research may also provide information on corruption risks in this area. The *Resource Governance Index*, for example, has a number of questions on the legal framework within countries.

#### Box 4.1: Legal and Administrative Framework

<b>Background issues for context:</b>	
Is there a clear legal definition for ownership of mineral rights? ( <i>Resource Governance Index</i> )	
Are there known cases where this legal framework clashes with, or is not aligned with other laws? [For example, <i>environmental protection legislation</i> ]	
What level(s) of government have jurisdiction over the mining sector? (Federal / state / provincial)	
If there are multiple jurisdictions with respect to the mining sector, are the respective legal responsibilities clearly defined?	
<b>Questions on potential corruption risks:</b>	<b>Corruption Risk Concept</b>
Are the principles of 'Free, Prior and Informed Consent' embedded in the legal framework?	<b>A</b>
Are there protections from expropriation in the legal framework?	<b>D</b>
In practice, have there been recorded examples of expropriation by governments? *	<b>D</b>
Are the Acts and / or regulations available to the public:	
In paper form only?	<b>T</b>
Online?	<b>T</b>
Does the mining department or relevant body, have a mission statement / guiding vision / policy statement on mineral resource allocations?	<b>T</b>
If so, is this mission statement / guiding vision / policy statement available publicly and/or online?	<b>T</b>
Does legislation or regulation exist to promote the publication of mining sector information?	<b>T</b>

*T = transparency, D = discretion, A = accountability*

\* Here, 'in practice' is defined as: a baseline be created for 'evidence' from one or more of these sources: (i) two official media articles (as opposed to blogs, or unsubstantiated opinion pieces), (ii) corroboration from an expert interviewee, (iii) publication of legal proceedings.



## 4.2. Governance and Transparency of Mining Company Ownership

### 4.2.1. Beneficial Ownership Issues

Beneficial ownership describes “...the ‘natural’ person(s) who, directly or indirectly, ultimately own(s) or control(s) a corporate entity, a licence or other property”<sup>13</sup>. Bodies such as the EITI are moving towards requiring countries to maintain a publicly available register of beneficial ownership of extractives licences, a process that is still on-going in many countries. In large part this is because most countries do not have legislation requiring beneficial owners to be named. Nevertheless, in an ideal world, information on the beneficial owner of mining entities would be easily discoverable and transparent. Often this is not the case, as the ‘true’ owners are hidden behind shell companies and other obscure financial vehicles. The major corruption risk cited is essentially that the beneficial owner of a mining entity may ultimately turn out to be a part of the political or bureaucratic regime, or at least a close associate of a person with significant power in the mining bureaucracy.

Aside from questions around whether or not the beneficial owners have to be declared on any licence applications, there are also issues in terms of the transferability of those licences from one entity to another. The more transparent this process is, the lower the risk of ‘back door’ corruption, whereby licences are transferred to (potentially) obscure parties. The issue here is not whether or not licences should be transferable (in the interests of a fair, well-functioning market, licences *should* be transferable), but rather that this process be open to scrutiny. If transfers occur, then the identity of the party in receipt of the licence should be discoverable (and that this be the true owner).

#### Box 4.2.1: Beneficial Ownership Issues

<b>Background issues for context:</b>	
Are mining licences transferable at all times, or are there restrictions?	
<b>Questions on potential corruption risks:</b>	<b>Corruption Risk Concept</b>
Do the 'beneficial owners' have to be declared on licence applications?	T
Is a register of beneficial ownership maintained by the Department?	T
If so, is the register publicly available?	T
If the ownership details on a licence are changed, is this change made public?	T

*T = transparency, D = discretion, A = accountability*

*\* Here, 'in practice' is defined as: a baseline be created for 'evidence' from one or more of these sources: (i) two official media articles (as opposed to blogs, or unsubstantiated opinion pieces), (ii) corroboration from an expert interviewee, (iii) publication of legal proceedings.*

<sup>13</sup> As defined by the EITI [https://eiti.org/glossary#Beneficial\\_ownership](https://eiti.org/glossary#Beneficial_ownership)

### 4.2.2. State-Owned Companies

When it comes to examining corruption risks in the extractive sector, the issue of State-Owned Companies (SOCs) should be a first order priority. The mere existence of an SOC in a country's mining sector does not of itself mean that corruption will automatically exist. Norway and Chile are two obvious examples where SOCs operate as a mechanism through which the revenues from extractive industries are distributed to the broader community through state ownership. Nevertheless, there are also numerous examples of SOCs that have acted in an opaque manner, where the benefits accrue to relatively few people. This can take the form of outright theft, executives receiving material benefits or political elites corruptly diverting incomes to build or maintain a political power base.<sup>14</sup>

This obviously has implications outside the narrow confines of licencing and contracting issues, and so we have made a number of suggestions below (see Box 4.2.2) that go somewhat outside the scope of this issue. Nevertheless, it is important that the researcher develop a good understanding of the role (if any) and governance of SOCs within the country, which is what many of these questions are designed to do. The first issue to be addressed addresses the scope of the SOCs within the country: whether they are involved in all stages of exploration and production; and whether the SOC is involved purely in the extractive sector, or whether it is also involved in activities outside this domain (for example in infrastructure provision, civil construction, or in the provision of public services, such as schools or health facilities). The rationale behind this is that the more entwined the company is across multiple markets, and the more power it therefore has, the greater the risks of corruption. It is also important to understand the governance structure of these SOCs. Even when an SOC is notionally independent of the government, it may still be highly politicised, with board members and/or executives being appointed by the government.

With specific reference to the issue of licencing, questions need to be asked about whether or not an SOC receives differential treatment in the process, relative to private sector firms. This is both in terms of the legislation and regulations, but also in the practical implementation of licenses. Evidence that the SOC receives preferential treatment in this process may be an indicator of corruption risks, because a non-discriminating licencing process should be the hallmark of a well-functioning governance structure.

A further issue, again not directly attributable to the licencing process, is the degree of transparency in the operations of the SOCs. For example, are they subject to the same reporting requirements as publicly listed companies, with the requisite requirement to produce audited accounts, and publish financial statements?

Information on the independence of these SOCs will be a crucial determinant of corruption risk. If, as described above, the SOC is independent of the government, and is required to be as open and transparent as publicly listed companies, then the corruption risks are significantly reduced. However, if the SOC is tied closely to the operations of the government, and is highly politicised in terms of its actions and operations, then the corruption risks are substantially higher.

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<sup>14</sup> This is above and beyond the economic waste accruing from these entities not being driven by a profit motive, and therefore having bloated and expensive bureaucracies.

## Box 4.2.2: State-Owned Companies

<b><u>Background issues for context:</u></b>	
Are State-Owned Companies (SOC's) active in the following mining sector activities?	
- Exploration	
- Operations / Production	
- Equity Partner	
Are mining SoCs from this jurisdiction ranked in the Resource Governance Index? If so, what is the score?	
Are SoCs wholly owned by the government? Or is there mixed ownership? Please list the companies with mixed ownership and percentage of ownership.	
Has there been a history of privatisation of mining companies?	
If so, was there evidence of corruption during these processes?	
<b><u>Questions on potential corruption risks:</u></b>	<b>Corruption Risk Concept</b>
If multiple roles are performed by the state, are they performed by the same organisation responsible for licencing?	<b>A</b>
Do SoCs provide subsidies or other 'quasi-financial' services / activities that aren't 'core business' for a mining company? <i>For example, SoCs have previously expanded to include projects in civil construction, tourism, infrastructure or social service provision.</i>	<b>A</b>
If so, is information made available about these activities?	<b>T</b>
Is there any evidence of SoCs retaining (and / or stockpiling) prime licences?	<b>D</b>
By law, do domestic SoCs receive the same or differential legal treatment to other mining companies?	<b>D</b>
In practice, is there evidence that domestic SoCs receive the same or differential treatment to other mining companies?	<b>T</b>
Do reporting requirements differ from that of a publicly listed company? This includes annual reports, international accounting standards, information on production figures and assets held.	<b>T</b>

<b><u>What of the following categories of information are made available to the public?</u></b>	
Governance arrangements	<b>T</b>
Organisational Structure	<b>T</b>
Board Composition	<b>T</b>
Remuneration packages (for board members and senior executives)	<b>T</b>
Register of pecuniary interests (for board members and senior executives, and their close family)	<b>T</b>
Are the board members political appointees?	<b>A</b>

*T = transparency, D = discretion, A = accountability*

*\* Here, 'in practice' is defined as: a baseline be created for 'evidence' from one or more of these sources: (i) two official media articles (as opposed to blogs, or unsubstantiated opinion pieces), (ii) corroboration from an expert interviewee, (iii) publication of legal proceedings.*

Over the past twenty years or so, there has been a significant rise in the privatisation of former SOCs, notably in many transition countries. Unfortunately, these privatisations have often been little more than a transfer of ownership from the state to favoured members of the regime, which has created its own series of problems. In other words, whilst the company may ostensibly be privatised, the mining sector licencing process is still skewed towards these firms, who gain a material advantage from these relationships with the government. Depending on the circumstances therefore, there may be some merit in collecting some information on this issue, as it can help develop a picture of the current licencing arrangements (for example, whether there is a level playing field in licencing applications and approvals).

A better understanding of the roles of SOCs in the country will be of great benefit to teasing out many of the corruption risks within mining sector licencing.

#### **4.2.3. Domestic Versus Foreign Ownership**

The treatment of foreign entities in the mining governance structure can also be a major determinant of corruption risk. The first issue surrounds whether there is a level playing field in the application and approval processes for foreign versus domestic companies. If there is discrimination, then the opportunities for corruption are going to be elevated. If possible, researchers should try to look beyond the wording of any legislation on this issue (which may purport to having a non-discriminatory policy), to the de facto application of this legislation (that is, what is the actual experience of the implementation of this legislation?).

A second issue addresses the potential situation where the government has either formal or informal requirements that any mining activity by foreign entities have a joint venture with a local firm (including SOEs). The mere existence of such a requirement does not, of itself, imply corrupt activities. Therefore, questions should also be directed towards domestic local companies, in terms of whether they have any overt connections to the government, or specific members of that government. That is, the requirement of having domestic involvement in the ownership and operations of a mine may simply be a case of an attempt to further employment opportunities for

citizens, and to ensure at least some of the profits from the activity remain within the country. However, it is certainly the case that this requirement may merely allow a small number of well-connected citizens to enjoy the returns from these mines, with little benefits flowing to the broader community. Box 4.2.3 offers some suggestions on potential questions, however it is certainly going to be the case that the nature and scope of these questions will be heavily dependent on the specific circumstances of the jurisdiction in question.

It is also important to gather information on who these foreign entities are, particularly with respect to their ownership (publicly listed versus SOC). If, for example, there is a significant presence from a foreign country's SOCs, then it may well be prudent to gather information on these entities, including the governance structures in that SOCs country of origin, as well as any documented evidence of these entities' operations in other countries. An SOC that has a documented history of corrupt activities in their home country or elsewhere in the past would certainly raise some red flags as to its operations within the country being reviewed.

### Box 4.2.3: Domestic Versus Foreign Ownership

<b><u>Background issues for context:</u></b>	
Are there 'local content' provisions specifically contained within these joint ventures?	
Are SOCs from other jurisdictions present in the mining sector?	
Is there evidence that the operation of these foreign SOCs have previously been associated with corrupt practices in other countries?	
<b><u>Questions on potential corruption risks:</u></b>	<b>Corruption Risk Concept</b>
By law, are foreign and local companies treated differently in mining sector licencing?	<b>D</b>
In practice, is there evidence that these laws are complied with or contravened? *	<b>D</b>
In the legal framework, are foreign companies required to partner with local companies?	<b>D</b>
If so, is there evidence that the local partner companies are owned by, or have links with the political elite? *	<b>D</b>
With respect to local content provisions (if any), are there any safeguards in place to promote competitive tendering?	<b>A</b>
With respect to local content provisions (if any), is information on the ownership of these local companies available to the public?	<b>T</b>

*T = transparency, D = discretion, A = accountability*

*\* Here, 'in practice' is defined as: a baseline be created for 'evidence' from one or more of these sources: (i) two official media articles (as opposed to blogs, or unsubstantiated opinion pieces), (ii) corroboration from an expert interviewee, (iii) publication of legal proceedings.*

### 4.3. Licencing – Administration and Oversight

This section focuses more narrowly on the licencing system, focusing firstly on the legal and administrative framework, and then hones in on more technical matters: the cadastre department managing the licenses; application processes; approval processes; consultation processes; and the renewal / cancellation / annulment / transfer / relinquishment of licences. This section follows the sequence of mining sector licencing (for example, contextual frameworks, through to approvals, and then on to licencing) and the intent here is that it should be possible to map out the chain of corruption risks, and identify key links in the chain where corruption risks are at their greatest (conversely of course, it should also be able to highlight areas of strength as well).

A key first step to effectively exploring corruption risks in this area is a comprehensive understanding of the **structure of the key organisations**, including the respective roles, responsibilities, reporting lines and funding issues. The overall structure varies significantly between jurisdictions, as does the division of the four key responsibilities of licencing and regulation: resource allocation; environmental regulation; land access; and health and safety, and this has significant implications for incentives to corrupt behaviour. Constructing a **simple organisational diagram** that includes these factors would create this knowledge in a succinct format and allow researchers to effectively analyse and then communicate to a non-expert audience the risks that arise from such a structure.

As an example of the importance of organisational structure to corruption risks, in some jurisdictions the cadastre department is tasked with performing nearly all actions involved with licencing, but its operational budget is not adequately aligned with the volume of licenses it manages. The resultant low capacity, morale and wages could be a key driver for corruption, particularly petty corruption by lower level officers that process significant amounts of information but for very little pay. In some jurisdictions the alternative is to allow cadastre agencies to retain a portion of fees, which can result in a conflict of interest and incentives to grant a high number of licences. Conversely, in many jurisdictions the cadastre unit acts as simply a ‘clearing house’ for applications and approvals are made by a committee or similar lead by the Department of Mines, meaning the largest part of risks reside there. For negotiations of major mining agreements, the President’s office or a Parliament committee may be directly involved, with little involvement of the cadastre in this part of the licensing process.

Examples of organisational diagrams are included in Annex 1. Researchers could include other flows beyond funding, responsibilities and role, or even include different actors if it seemed likely that these influenced the capacity, funding, accountability or discretion levels of the licencing body(ies).

#### 4.3.1. Legal and Administrative Framework

This section analyses the corruption risks created in the following areas: conflict between the legal frameworks at different levels and areas of government, decentralisation, transparency of regulations, transparency of official’s interests and the difficulty in assessing capacity and resource levels.

An important issue is that of **conflicting laws**. For example, in a number of jurisdictions, more than one level of government issues licences. This may be because different levels of government are deemed more suitable to oversee specific minerals of national importance or approve mines of a certain scale and type of operation. If more than one level of government does issue licences, it is important that the triggers are very clear in the legal framework to ensure that there is certainty for

investors and less 'grey areas' for corrupt public servants to exploit. Any uncertainty instantly creates a corruption risk as private sector actors may be incentivised to secure the asset via corrupt means and public servants may see an opportunity to exploit. A previous case study highlights a jurisdiction where three levels of government issued different types of licences and it appeared that state-level officials could quickly assign a mining title to a business associate when the federal-level licencing body enquired about availability. The result of the corruption was that mining companies would be forced to purchase the licence from the business associate.<sup>15</sup>

Beyond the issuing of licences, related legal frameworks on issues such as **environmental regulation or laws on indigenous or traditional land ownership** can incentivise corruption. For example, if one jurisdiction requires that operations that impact underground water, endangered wildlife or indigenous landholdings are referred to Federal bodies, the company may be incentivised to corruptly influence whether the State / Provincial level officials refer the case. The discretion given to the entrusted government official is abused for personal gain, a classic case of corruption. Mining operators may have their license cleared from one institution, but retain a non-compliant status with other required regulatory bodies. The occurrence of conflicting laws is growing as jurisdictions undergo decentralisation, especially in South-East Asia and Latin America. Even under normal circumstances, it is normal for companies to require three license processes before starting mining production; acquiring the mining lease from the Ministry of Mines or equivalent, the environmental license from the Environmental Protection Agency or equivalent and then the operating permit from the mines inspectorate. The government bodies responsible may not be well coordinated and the protracted delays increases risk for corruption to be used as the deadline to become compliant nears.

**Decentralisation processes within the Department of Mines / cadastre agency** are also important. A number of jurisdictions have established regional offices in an effort to have a presence in mining regions, and often to encourage formalisation of the ASM sector. Without a regional presence, the long travel to the capital represents a significant cost for artisanal miners and makes it more likely they will operate illegally. If the regional offices accept applications for licences they can be effective and boost confidence in the licencing system. Key to implementation in regards to licencing integrity is the clarity of roles and rules, resourcing, oversight and communication method / timeliness. Research and experts highlight regional offices that were not adequately resourced after establishment, or closely overseen, nor were all parties regularly brought together to ensure a consistent interpretation of rules and standards. As a result, regional office staff used their own interpretations and standards, creating uncertainty that lowered transparency and accountability and that could be exploited by corrupt actors in industry or the public service. In order to run their operation, regional offices may be allowed to use certain license or monitoring fees to cover their costs, but this revenue may be subject to mismanagement. Regional offices are supposed to cover remote areas and frequently be present in mining areas to verify information. Thus, transportation resources and communication linkages with the central office are key to providing accountability. Even for small-scale licenses, there can considerable delays in communicating an application to the

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<sup>15</sup> <http://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-9531-8>

national head office. Competing applications could be submitted in the capital by other business associates before applications from remote offices are officially received.

The availability of **regulations and terms and conditions** determines the levels of transparency and discretion available to public servants in conducting their work. In low capacity jurisdictions, regulations that govern the detail of licencing processes and licence terms and conditions are only available in paper format after paying a fee, and are sometimes vague and buried in complex procedures. If these are available online and free of charge, a wider circle of actors will have an awareness on what should be done and an objective set of criteria on which to judge decision-making by public servants.

A basic tenet of anti-corruption is that government officials should not have conflicts of interest in the sector they oversee. The questions below include a possible proxy indicator for this risk - whether **officials are required to disclose** financial interests in the mining sector, or possibly are banned from holding a financial interest in mining companies, and whether these requirements are enforced.

One practice mentioned in 'best practice' guides is that there should be channels of communication between the general public and the licencing body, to facilitate communication on questionable practices. Although by no means a panacea to corruption, a formal mechanism such as a 'hotline', appeals process or simply an open service-oriented cadastre unit could raise levels of accountability in some circumstances – such as where licences are issued in indigenous reserves.

The final key area in this section reinforces the point made in 'Conceptual Challenges' – that **capacity and resourcing** are key components of a high-integrity administration but are extremely hard to assess in an effective manner. Several proxy indicators could theoretically be included here, with one possibility exploring the availability of information on pay scales on public servants, as below. Other alternatives include obtaining expert opinions from internal staff to the Mining Department or industry stakeholders.



### Box 4.3.1: Legal and Administrative Framework

<b><u>Background issues for context:</u></b>	
Does more than one level of government issues mining sector licences?	
If so, are there well-defined legal triggers that clearly delineate legal authority?	
Does the central mining department (or equivalent) have regional offices that are able to accept licencing applications?	
If so, are the roles of these regional offices clearly delineated in the legal framework?	
Are regional offices linked with the head office via real-time IT communications?	
<b><u>Questions on potential corruption risks:</u></b>	<b>Corruption Risk Concept</b>
Within the legal framework, are there conflicts between federal and state/provincial mining legislation pertaining to mining sector licencing?	<b>A</b>
If yes, are there practical examples of these legal conflicts.*	<b>A</b>
Is information available on the pay scales for public servants at the Department of Mines (or equivalent)?	<b>T</b>
Are all public servants in the Department of Mines (or equivalent) required to disclose any financial interests in mining-related companies?	<b>T</b>
If so, is there evidence of this mechanism functioning effectively or not? *	<b>T</b>
Is there a recorded (and widely available) gifts register, whereby gifts being given to (or from) mining companies are required to be declared?	<b>T</b>
Are there formal mechanisms for citizens / interested stakeholders to voice concerns with the department of mines and / or cadastre body? (e.g. a government Ombudsman)	<b>A</b>
If the answer is yes, is there evidence that these mechanisms are in operation? *	<b>A</b>
According to the legal framework, are terms and conditions of licences publicly available? [This includes items such as work programme obligations, time and deadlines, duration, obligations, tax arrangements, qualification standards and compliance procedures.]	<b>T</b>
In practice, are terms and conditions publicly available? *	<b>T</b>
Are these terms and conditions available online?	<b>T</b>

T = transparency, D = discretion, A = accountability

\* Here, 'in practice' is defined as: a baseline be created for 'evidence' from one or more of these sources: (i) two official media articles (as opposed to blogs, or unsubstantiated opinion pieces), (ii) corroboration from an expert interviewee, (iii) publication of legal proceedings.

### 4.3.2. Oversight and Discretion

One crucial issue in both the application and approval phases of the licencing regime surrounds the degree of discretion held by public servants and/or politicians. For example, whether the relevant minister has the right to veto the awarding of a contract ‘in the public interest’. The corruption risks here are fairly self-evident, and rise with the degree of discretion involved. As with many of the issues discussed in this paper, there are two elements to this: whether this discretion is overtly contained within the legislative or regulatory structure (that is, whether a minister *can* veto a company’s application), and whether this is actually exercised in practice (a minister *has* vetoed a company’s application). The mere existence of a clause in the legal framework that potentially allows this is not of itself a practical problem, if that veto is very rarely, if ever, invoked, or the terms under which a minister can veto an application are clear and consistently applied. However, widespread use of a poorly-worded or vague law may raise serious questions over the potential corruption risks, either in terms of companies feeling the need to engage in bribery to ensure this veto is not invoked, or from unsuccessful companies engaging in bribery to attempt to have the veto employed. On the other hand, the Minister may delegate responsibility to approve small-scale licenses and permits to middle-level managers, or otherwise be a bottleneck for approval, equally raising the risk for discretionary behaviour.

The second issue here relates to the degree of oversight in the licencing approval process. Oversight improves accountability mechanisms, and makes it less likely corrupt activities can occur.

#### Box 4.3.2: Oversight and Discretion

<b>Questions on potential corruption risks:</b>	<b>Corruption Risk Concept</b>
In the legal framework, do Ministers or others have rights to veto or to 'act in the interests of the state' or otherwise high levels of discretion?	<b>D</b>
In the legal framework, is authorisation required from other government departments or other levels of government (Environmental protection or similar) before the granting of exploration licences?	<b>A</b>
If so, in practice does evidence exist that the above process is not followed? *	<b>A</b>
Is there a system for appeals against decisions by the authority in charge of awarding exploration licences?	<b>D</b>
If so, in practice, is there evidence of companies appealing decisions through the courts? *	<b>D</b>
Are landholder agreements with local citizens relating to exploration published online?	<b>T</b>

*T = transparency, D = discretion, A = accountability*

\* Here, ‘in practice’ is defined as: a baseline be created for ‘evidence’ from one or more of these sources: (i) two official media articles (as opposed to blogs, or unsubstantiated opinion pieces), (ii) corroboration from an expert interviewee, (iii) publication of legal proceedings.

### 4.3.3. Cadastre Agency

Cadastres are official registers of land and ownership, and mining cadastres are crucial in the regulation and administration of mining land and licence information. Their exact role and structure varies across jurisdictions but it is the primary organisation in issuing licences in most jurisdictions, and the key gate-keeper in nearly all others. Thus, the cadastre agency's structure, degree of autonomy, funding sustainability and sources and degree of transparency are key to preventing corruption risks.

**Technology and transparency** are especially important for cadastre agency integrity. There is a wide technological spectrum of mining cadastres – at the low technology / capacity end, some cadastre agencies are still working on paper maps, supplemented by excel spreadsheets. Obviously it is extremely difficult to effectively administer, oversee or have public scrutiny of land and licence information in this scenario. At the high capacity / technology end of the spectrum, cadastre information is in electronic format with geo-detic formats that link in with other government departments and global standards, and a large amount of information is publicly accessible online. In recent years, a number of cadastres have been upgraded to an electronic format that is often online but, disappointingly, not always publicly available, simple or easily accessible, which are crucial measures to raise transparency. When cadastre upgrades do take place, it is important that any existing overlaps / inaccuracies are addressed to ensure certainty and confidence in the system.

Technology can also be utilised to **reduce discretion** of public servants by introducing an automated system for deadlines on items such as licence renewals, rescindment of exploration licences and payments of fees and charges. Even better practice would be if this information is overlaid on to a publicly available cadastre, as it would seriously discourage speculation or stockpiling of licences by corrupt actors who could otherwise bribe cadastre officials to avoid taxes or rescindment conditions.

Transparency can also be boosted by ensuring that as the level of technology improves, the **data formats are aligned with other government bodies and global formats**. As an example, it has been discovered that in West Kalimantan in Indonesia, a number of mining and logging licences have been issued in areas where these activities are not allowed, such as nature / indigenous reserves. A civil society group only discovered this by overlaying maps from several different government departments and then combining this with GIS data taken by drone flights. If the cadastres for forestry, national parks, indigenous reserves were linked, interoperable or even on the same database, the possibility of this overlap occurring (whether or not through corrupt means) would be significantly reduced. Also important for interoperability is the **geo-detic format**, specifically GPS compatibility, as any member of civil society or the public could verify licencing accuracy by using an inexpensive hand-held device on the ground.

Another form of transparency is the **cadastre agency being open to the public about its operations** by releasing statistics on the industry, licences and its own work. Also important is transparency about administrative issues such as fees and charges (covered in the next section), while a number of important statistical categories are listed in the questions below.

A number of operational issues are crucial to determining the risks of cadastre agencies, some of which were covered in the previous section on organisational structure. Firstly, **funding must be sustainable** and if at all possible, **free of conflicts of interest**. There is no 'best practice' for funding – ideally the central government could be relied upon to provide sufficient funds at regular intervals to fund operations. However, in many jurisdictions this doesn't occur so it may be preferable that fees

and charges, such as land usage taxes and application fees, are retained by the cadastre agency. To work effectively however, this would likely require a stabilisation fund from the central government during 'bust' periods and also opens the agency up to claims of conflict of interest as it would be funded by the very industry it seeks to regulate. But this scenario could be better than unsustainable funding because staff must be sufficiently paid and resourced to attract and retain staff with sufficient capacity. Retention of staff is exacerbated by the propensity of the mining industry to 'poach' government staff during boom times and even high governance regimes such as Western Australia have had to implement schemes to boost the wages of Mines Inspectors. The difficulty in assessing whether staff are adequately paid and resourced is addressed in the questions below.

The **levels of autonomy** should also be analysed but once again, there is no best practice because '**separation of powers**' within a Department of Mines (or equivalent) can also result in enclaves that are more easily subject to manipulation. Finally, as mentioned in the previous section, introducing a level of automation in to the operations can reduce the level of discretion possessed by public servants.

## Box 4.3.3: Cadastral Agency

<b><u>Questions on potential corruption risks:</u></b>	<b>Corruption Risk Concept</b>
Is cadastral information formatted in paper or electronic format?	T
Is cadastral information available to the general public in paper or electronic format?	T
Is cadastral information available to the general public online?	T
Have licences been reviewed since the last upgrade of cadastre, and overlaps / inaccuracies / conflicts been addressed?	A
Is the cadastre GIS based and GPS compatible?	T
Is mapping coordinated with other land management organisations (such as agriculture and forestry), including geo-detic format compatibility?	T
Is GIS information available to the public from land management agencies across government?	T
Is the cadastre specifically built for mining?	T
Is the cadastre agency subject to volatility through arbitrary funding decisions by politicians / bureaucracy?	D
Are there any potential conflicts of interest involved in the sources of funding?	A
Is there any evidence of actual conflicts of interest involved in the sources of funding? *	A
Can the agency be considered to be operationally autonomous?	A
Is information available on the pay scales for public servants at the cadastre agency?	T
Does the cadastre system involve automated control of duration and timing of each step of process? For example, deadlines for payments or renewals of licences.	D
Does the cadastral body and / or Department of Mines publish statistics on any of these items:	
- licences	T
- distribution percentage for different types of licences by number	T
- geology and minerals based on previous exploration	T
- pending licences	T

- newly granted	T
- valid licences	T
- cancelled / annulled licences	T
- surface occupied by licences	T
- income generated by surface rental fees	T
Are statistics available for the number of applications and the number of licences granted?	T

*T = transparency, D = discretion, A = accountability*

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#### 4.4. Licencing - Application and Approval Processes

This section addresses the significant impacts that application processes have on determining corruption risks and focuses on the transparency of processes and statistics as well as the ability to conduct business online rather than in person.

This section also reinforces one of the 'Conceptual Challenges' mentioned at the beginning of the paper – at what point should **exploration and production licences** be treated separately? This paper treats exploration and production application processes together but in some jurisdictions it may be better to divide them. This issue only grows in importance (and complexity) in the following sections on award processes for two reasons: a) the different methods of awarding licences have very different risks profiles, and b) some of the award methods combine exploration and production, such as auctioning well-explored blocks in mature mining areas.

It is important that researchers build a solid understanding of licence types, and in common with the organisational diagrams mentioned previously, it is suggested that **workflow diagrams of application processes** be constructed for each type of licence, as they would be effective devices for analysis, pinpointing risk areas and communicating with stakeholders at a later date. Examples are included in Annex 2. In high governance jurisdictions such as Western Australia, these workflow diagrams are produced by the licencing body to offer transparency and clarity to potential investors.

As a general rule, good governance dictates that governments **provide forms for free** rather than charging a range of different small fees for services like getting a copy of the correct application forms. Making forms accessible online is the best way to achieve this. Similarly, ensuring that private sector / government interactions and transactions can occur online, including electronic payment systems helps significantly reduce the number of opportunities for corruption. The integrity advantages made possible by advances in online commerce and e-government are somewhat ameliorated by the fact that mining remains a complex industry with subjective decisions to be made, so any reduction in interactions will partly reduce opportunities for petty corruption in particular, but may not have a huge effect on grand corruption.

**Moving transactions online** also means that cadastres could make this information publicly accessible, increasing transparency. For example, pending licences, rejected applications, payments due / made and deadlines could all be made accessible to the public and thus improve public oversight.

Finally, a requirement that applicants demonstrate sufficient capacity and financial resources is a legitimate strategy by governments to reduce speculative or frivolous applications or licence holders that lack the capacity to undertake works. However, it is also a mechanism that can be used by corrupt actors to manipulate the process from within government, and so it is key that some sort of assessment of the mechanism is undertaken, as well as ensure that the thresholds and results are as transparent as possible. Some level of speculation is a necessary part of market-mechanisms of mobilizing and allocating efficient investment capital but risks arise when there is no disincentive for politically-connected actors to hold vast swathes of land under 'exploration' indefinitely. Updating the status of licences in a timely manner is a key component of anti-speculation regimes.

#### Box 4.4: Licencing – Application and Approval Processes

<b><u>Background issues for context:</u></b>	
How many types of licence are there? (construct a workflow diagram for each – See Annex 2 for an example of this)	
<b><u>Questions on potential corruption risks:</u></b>	<b>Corruption Risk Concept</b>
Is information on the licencing process available to the public?	<b>T</b>
If information about the licencing process is publicly available, is the information available in a workflow model/diagram?	<b>T</b>
Are applicants for licences required to demonstrate sufficient capacity and financial resources?	<b>D</b>
If so, in practice, is there evidence that these processes have been circumvented in awarding licences? *	<b>D</b>
In practice, is there evidence that any companies have been excluded from licencing processes? *	<b>D</b>
Are application forms publicly available / online?	<b>T</b>
Are application forms free? (If not, please state the cost in terms of local currency units)	<b>D</b>
Are application forms able to be submitted online?	<b>D</b>
Which steps of the application process are able to be done online?	<b>D</b>
Can payments be made online?	<b>D</b>
Are all applications registered? Or only successful ones?	<b>T</b>
Is there a system in place whereby companies can know at what stage of the process their application for a licence is, without engaging with agency personnel?	<b>D</b>
Is the information on application fees and charges available publicly and / or online?	<b>T</b>
Is information on whether the application fees and charges have been paid available online?	<b>T</b>
Is the current status of the application (e.g. pending / awarded) available online?	<b>T</b>

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#### 4.4.1. Consultation and Consent

Consultation and consent are complex and sensitive issues that have gained in importance in recent decades, particularly since the emergence of standards such as Free, Prior and Informed Consent (FPIC)<sup>16</sup>. It is important that consent and consultation are not conflated when looking at corruption risks and also that rapid evolution of consultation is noted, as this means that many legal frameworks currently lag behind what the most progressive actors in the sector are doing. Thus, there may be situations in which processes do not conform to FPIC principles and landholders appear to be victims of a moral injustice, but where no corrupt act undertaken. Researchers must ensure that 'scope creep' does not affect the research. Nonetheless, transparency in all aspects of the process will reduce the risks of corruption as well as risks to social licences and other considerations. Because corruption in this area could occur between a company and government official, or between a company and leaders of a landholder / indigenous / community group, transparency should be pushed for all parties, pre and post consultation.

Having a **transparent consultation process** can increase transparency and accountability because a variety of actors would have the opportunity to scrutinise licences, consultation and potentially negotiation processes. But the **consultation process itself can also encourage corruption**, as companies could be incentivised to bribe community leaders to receive good terms or government officials to bypass consultation requirements.

This section also highlights the risks of negotiation, something that will be explored in more detail in the section on Negotiated Contracts. If the terms and conditions for approval by local communities are standardised, there would be less items to negotiate, and arguably less discretion involved for all parties. If the final agreement can only be viewed by a small group of actors, the low level of transparency would create a large risk of the agreement being corruptly resolved.

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<sup>16</sup> <http://pubs.iied.org/pdfs/16530IIED.pdf>

### Box 4.4.1: Consultation and Consent

<b><u>Questions on potential corruption risks:</u></b>	<b>Corruption Risk Concept</b>
In the legal framework, are consultation processes with affected communities required for <u>exploration</u> licences?	<b>A</b>
In practice, is there evidence that these consultations have (or haven't) taken place in accordance with laws? *	<b>A</b>
Are companies required to publicly disclose who they have consulted with during permitting / licensing processes for mining operations?	<b>T</b>
In the legal framework, are consultation processes with affected communities required for <u>production</u> licences? What format must the process take?	<b>A</b>
In practice, is there evidence that these consultations have (or haven't) taken place in accordance with laws? *	<b>A</b>
Are terms and conditions for landholder agreements standardised across all mining projects?	<b>D</b>
Are landholder and community benefit agreements published online?	<b>T</b>
Are pending licences required to publicised?	<b>T</b>
If so, are they only required to be published in a print media outlet	<b>T</b>
If so, are they required to be published online?	<b>T</b>
Are the details of any compensation, whether that be with individuals, groups or communities, transparent and publicly available?	<b>T</b>

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### 4.4.2. Impact Assessments

Impact assessments provide the baseline for decision-making on potential risks and damage to environments and societies. They can also be used by pro-active companies to manage their project risks. Transparency and accountability levels can be raised if impact assessments are required by law, but the process can also create a corruption risk by potentially incentivising corrupt actors to circumvent requirements by bribing state officials and non-state actors such as indigenous groups, landholders or community leaders. The questions below include a number of de facto indicator questions to assess whether requirements for impact assessments are actually enforced.

## Box 4.4.2: Impact Assessments

<u>Questions on potential corruption risks:</u>	Corruption Risk Concept
In the legal framework, are <u>verified**</u> environmental impact assessments required for production licence applications?	D
In practice, is there evidence whether verified environmental assessments are actually required for production licence applications? *	D
In the legal framework, are <u>verified**</u> social impact assessments required for production licence applications?	D
In practice, is there evidence whether verified social impact assessments are required for production licence applications? *	D
Are social and environmental impact assessments published online?	T
If so, do those assessments identify who the company consulted during the process of developing the assessments?	T

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\*\* Verification here signifies that the report is peer reviewed and publicly accessible.

## 4.5. Licencing – Award processes

### 4.5.1. General Concepts

The method(s) that governments can use to award licences have different and significant impacts on corruption risks. This section firstly looks at general concepts related to awarding processes, and then focuses on the three main methods – 'First Come First Served' (FCFS), auctions and negotiated contracts. Whilst many jurisdictions use one method only, some may use one, two or all three of these methods in different scenarios. Key areas are: triggers for deploying different methods; certainty for investors; the level of information publicly available; oversight; and clarity on deadlines.

It is important that **clarity of 'triggers'** that determine which method is used are clear and known to the public. For example, several jurisdictions use FCFS but also utilise auctions for licences that have been cancelled, annulled or rescinded after thorough exploration. Other jurisdictions may mainly use FCFS but choose to negotiate special contracts for specific mineral types or large projects. Others use FCFS to issue exploration licenses, but then negotiate mineral development agreements (and the corresponding mining license or production license) if there is a mineral discovery. If triggers to deploy different methods are vague or opaque, corrupt officials could ensure that the licences are awarded using their favoured method. The clarity of triggers is also important in **jurisdictions that require approval from the legislature** for certain types of licences. Typically triggers for referral to the legislature are based on the size of operations or type of mineral to be exploited. Any oversight

mechanisms such as **legislative approval** requirements should raise transparency levels and are covered in the questions below.

The issue of re-awarding of licences that have been cancelled, annulled or rescinded has been the subject of much analysis in recent years following a number of scandals. In India, as result of the ‘Coalgate’ scandal the government cancelled multiple allocations of coal blocks and then re-auctioned them in a process with relatively high levels of transparency. In a major scandal in a different jurisdiction, licences were cancelled but then re-allocated via an allegedly corrupt process with high levels of discretion and opacity. If cancelled licences can be opaquely allocated, there is motivation for officials to cancel licences in the first instance. Hence the mining law describes the procedures for cancellation and are usually quite rigid. Conversely, a requirement for transparent allocation would reduce the incentives for corrupt cancellation.

Certainty for companies is a recurring theme of this paper and in this case, companies that undertake exploration need some surety that they will have the first opportunity to obtain a production licence if a viable mineral deposit is found. Any lack of certainty in this area will provide motivation for companies to secure the asset through corrupt means as well as raise the level of discretion available to public servants.

Finally, having **clear deadlines** should raise accountability by partly limiting the ability of public servants to extort applicant companies. However, it must be noted that expert input indicates that in many jurisdictions deadlines are not abided by regularly, if at all.

#### Box 4.5.1: General Concepts

<u>Questions on potential corruption risks:</u>	Corruption Risk Concept
If a combination of systems is used, is the trigger for the use of different frameworks made clear in the legal frameworks?	D
In the legal framework, is there first right of refusal or another form of certainty for holders of exploration licences to have first priority for a production licence?	D
In practice, is there evidence that the above process has been circumvented? *	D
In the legal framework, are the deadlines for decision making by the authority clear?	A
Is there are a clear and open process for re-awarding licences that have been cancelled or annulled?	D

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#### 4.5.2 'First Come, First Served'

This self-explanatory method is utilised in many jurisdictions, including high-governance jurisdictions like Australia and Chile, and is acknowledged for its simplicity. Superficially, this should lend itself to low corruption risks, but FCFS needs to be accompanied by strong administrative processes to ensure integrity. Key areas are: confidence in system of submissions of applications; transparency, particularly towards the public; mechanisms for considering conflicting applications in order of submission.

If companies do not have confidence that the timing of their applications will be respected, they will have motivation to secure their desired asset through corrupt means. For this reason, previous sections have discussed whether regional offices have real-time IT communications and the questions below explore whether the **system of submission** records time and order of applications, sometimes known as time-stamping. Supplementary to this issue, a strong mechanism is required to adjudicate on **applications that conflict** by overlapping geographically or being submitted at roughly the same time. Finally, **oversight** on both these processes can be supplied by being transparent to the public about the systems and mechanisms, as well as the reasoning behind decisions.

##### Box 4.5.2: First-Come, First-Served

<u>Questions on potential corruption risks:</u>	Corruption Risk Concept
Is there an automated system that records the time and order of application submission?	T
If so, are these records available to the public online?	T
Is there a mechanism in place to deal with conflicting / competitive applications?	A
Is the rationale for the eventual awarding of a conflicting / competitive licence made known to the public?	A

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#### 4.5.2. Auctions (or Tender-Bid / Competitive Bid)

Awarding licences via auctions is generally acknowledged as a process which has benefits in terms of transparency but that can incur high administration costs, require high capacity and is often not suited to mining, especially in areas with lower or uncertain levels of mineral exploration deposits. It is most likely to be used to re-award licences that have been cancelled or annulled, or in areas in which the geology is well explored and there are a number of interested parties. For this reason, few jurisdictions use the auction method exclusively.

**Transparency** is the key to auctions – both before and after the auction itself. This section focuses on what **information** governments publish, and there are a large number of categories of information that can be put online to provide transparency of the auction process, as listed in the questions below.

The transparency benefits of auctions can be undermined if the winner of the auction effectively 'wins' participation in contract negotiation, a process ripe with opportunity for corruption that will be analysed in the next section. **A model contract** and limited negotiations after the auction can limit the corruption risks associated with contract negotiation; however, it should not be assumed that auctions are not without their own corruption risks. Government officials that have knowledge about the auction can share that information with potential bidders at significant personal gain ("grand corruption"). Researchers may look for firms with ties to the political elite, especially local or regional firms that may have special access to important information about the auction process through political relationships.

Pre-qualification and bid evaluation are important to corruption risks in several ways. Firstly, they must be conducted as transparently as possible, which could include publishing pre-qualification applications and dividing bids into easily comparable components, usually under the headings of technical and financial criteria (bid evaluation) and capacity and/or track record (pre-qualification). Secondly, the composition of the bid assessment panel is crucial to avoid conflicts of interest and should be independent of the government of the day. Finally, it should be acknowledged that although cartel behaviour is much more feasible in the oil and gas sector, there is still a risk of corruption by companies that form cartels to collude and manipulate bidding mechanisms.

## Box 4.5.2: Auctions

<b><u>Questions on potential corruption risks:</u></b>	<b>Corruption Risk Concept</b>
Which of the following categories does the government publish in regards to mining licence auctions:	
- Type and rules of auction	<b>T</b>
- Pre-qualification criteria	<b>T</b>
- Geological Data	<b>T</b>
- Deadlines for each step of the process	<b>T</b>
- Technical and Financial specifications	<b>T</b>
Is negotiation required between the winning bidder and the government after the auction has been conducted? If not, how much negotiation occurs, in fact?	<b>D</b>
Is there a minimum number of bidders for an auction to occur?	<b>A</b>
Are bids evaluated in clear categories, i.e. technical and financial capability, history, and plans and capacity for the project?	<b>T</b>
Is the bid assessment board / panel composed predominantly of political appointees?	<b>A</b>
Are the rules of the auctions designed to prevent collusion / bid rigging?	<b>D</b>
Is there an independent external review of the auction process and final result?	<b>A</b>

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### 4.5.3. Negotiated Contracts

As highlighted by the increasing number of initiatives that focus on supporting developing country governments during negotiations with companies<sup>17</sup>, this area is fraught with corruption risks, particularly if conducted with opacity, asymmetrical knowledge / capacity or in exchange for infrastructure or other hard to value assets. This section focuses on the risks generated by opacity of negotiation processes and technical information, items that are not determined by legislation, opacity of final contracts and approval mechanisms.

It is of critical importance that before negotiations occur governments publish the following information: a review of the relevant legal framework, the roles and responsibilities of both parties in the negotiation, what items are up for negotiation, as well as the relevant technical and financial information. Each of these items would increase the levels of transparency. Ideally, only a small number of items in the contract would be open for negotiation, thus reducing the amount of discretion held by government officials.

If **'infrastructure swaps' or 'barter deals'** are negotiated in return for mining licences, the risks of corruption are increased because of the difficulty in assessing what return is gained. For example, the true value of a highway, bridge or power station can only be assessed with very technical analysis and after construction. This lack of transparency can create high discretion for the government officials involved.

**Transparency of contracts (Open Contracting)** is rapidly gaining credibility as a good governance initiative in the extractives sector, and for good reason. Publishing of ALL contracts and ALL relevant annexes online offers substantial transparency gains, as well as raising the accountability of the negotiating officials. Similarly, having external advisers or observers involved in the negotiation process would both help reduce the asymmetry of knowledge that places many governments at a disadvantage, and boost transparency of the process and outcomes.

Finally, it is important to assess what level of oversight is required during and after negotiations. Bringing in external experts to assist or observe the negotiation process would increase transparency. Requiring approval by a specially appointed commission or parliament should also be a requirement and would increase transparency and accountability of negotiating officials, as long as these members of these bodies do not have conflicts of interest.

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<sup>17</sup> <http://www.negotiationsupport.org/>



**Box 4.5.3: Negotiated Contracts**

<b><u>Questions on potential corruption risks:</u></b>	<b>Corruption Risk Concept</b>
Which of the following categories does the government publish before negotiations:	
- Review of relevant laws	<b>T</b>
- Roles and Responsibilities of companies and government	<b>T</b>
- the number of terms open to negotiation	<b>T</b>
- Technical and Financial specifications	<b>T</b>
Are the major terms and conditions of the contract open to negotiation?	<b>D</b>
Have 'barter deals' or 'infrastructure swaps' been negotiated?	<b>D</b>
If so, have post-award audits been conducted of the infrastructure provided?	<b>A</b>
Does the government publish the contract (and all annexes) after the completion of negotiations?	<b>T</b>
Is parliamentary or commission approval required?	<b>A</b>
If so, is the trigger for referral / approval clearly stated in the legal framework?	<b>A</b>
If approval is provided by a commission, are the members political appointments?	<b>A</b>
Has the government employed external experts to assist or observe the negotiation process?	<b>A</b>

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**4.5.4. Bonuses**

This section explores bonus payments, a feature in many jurisdictions. They essentially represent efforts by governments to receive some up-front payment for resources that may otherwise take several years to generate income via royalties or other forms of taxation. Several good governance guides highlight that bonuses are generally not effective in realising the best returns for resources in

mining.<sup>18</sup> Due to their one-off nature and the potentially high sums that can be involved, bonuses can be a significant driver of corruption, particularly if transparency is lacking on the negotiation process and where the money is directed to within (or external to) the government.

**Box 4.5.4: Bonuses**

<b><u>Questions on potential corruption risks:</u></b>	<b>Corruption Risk Concept</b>
If bonuses are a component of the licence award process, what type exist? (for example: signature bonuses, land use bonus, pre-payment bonus or other similar)	<b>D</b>
If the answer to any of the above is yes, are these bonuses made public, including the terms and conditions, technical information and negotiation process?	<b>T</b>

*T = transparency, D = discretion, A = accountability*

*\* Here, 'in practice' is defined as: a baseline be created for 'evidence' from one or more of these sources: (i) two official media articles (as opposed to blogs, or unsubstantiated opinion pieces), (ii) corroboration from an expert interviewee, (iii) publication of legal proceedings.*

## 4.6. Post-Award Issues

### 4.6.1. Renewal, Rescinding, Annulment and Cancellation of Licences

This area is important to preventing corruption in the awarding of licences due to the strong impacts on drivers for corruptly obtaining licences and improperly influencing public servants. Firstly, it is important that all requirements, deadlines and processes are clearly stated in the legal framework as this would reduce the levels of discretion available to public servants. **Clarity and transparency** in this area would also provide certainty to companies, removing the motivation to bribe or influence public servants in their decision-making.

Good governance agendas usually include measures to moderate speculation as it has distortionary affects and impedes an effective market. **Speculation** in the mining sector also creates incentives for corrupt behaviour. For example, if a company can stockpile numerous licences without having to pay fees, meet exploration investment benchmarks or regularly rescind land, it provides motivation to bribe licencing officials to obtain licences. Governments often are reluctant to cancel licenses gained through back-room deals even if they are old and have remained non-compliant for a considerable time due to potential political backfiring from high-level officials who gained from the deal made. Conversely, if a company believes it likely that they will be subject to the correct conditions according to law, the potential gains from corruptly obtaining licences is significantly lowered.

All processes and outcomes should also be open to public scrutiny online, as this would provide a further layer of transparency and further reduce the likelihood of companies corruptly obtaining licences for speculation purposes, and levels of discretion available to public servants in renewing, cancelling or enforcing rescindment conditions.

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<sup>18</sup> <http://documents.worldbank.org/curated/en/2011/01/13318233/sector-licensing-studies-mining-sector>

### Box 4.6.1: Renewal, Rescinding, Annulment and Cancellation of Licences

<u>Questions on potential corruption risks:</u>	Corruption Risk Concept
Are the requirements, deadlines and processes for renewal, cancellation or annulment clearly stated in the legal framework?	A
In practice, is there evidence that these deadlines, timing and processes are, or are not, abided by? *	A
Are the public / interested stakeholders able to see online when licences are liable for renewal?	T
In the legal framework, are there processes in place to prevent speculation? <i>(for example: escalating land rental fees, mandatory relinquishment conditions and similar)</i>	D
In practice, is there evidence that these processes have been circumvented? *	D
Are the results of this process available to the public?	T
According to the legal framework, are the conditions clearly stated for the rescinding, cancellation or annulment of licences?	D
In practice, is there evidence that these conditions are followed? *	D
Is information on for the rescinding, cancellation or annulment of licences available to the public?	T

*T = transparency, D = discretion, A = accountability*

\* Here, 'in practice' is defined as: a baseline be created for 'evidence' from one or more of these sources: (i) two official media articles (as opposed to blogs, or unsubstantiated opinion pieces), (ii) corroboration from an expert interviewee, (iii) publication of legal proceedings.

#### 4.6.2. Reporting, Compliance and Enforcement

This section shares commonalities with the previous section, in that post-licencing requirements (and enforcement) on reporting to the licencing body / Department of Mines can influence pre-licencing decision-making on whether to obtain licences corruptly.

**Reporting requirements** for licence holders are the first key area – high standards would raise the levels of accountability for licence holders, but only if there is accompanying enforcement. Categories of information that may be included in reporting requirements for exploration licences include expenditures on compensation, wages, surveys and exploration, land disturbance figures and rehabilitation liability estimates. Production licence holders may require other categories, including production quantities, rehabilitation expenditures, environmental management information, including tailings dams and waste processing. However, in common with previous sections, the reporting requirements could incentivise companies to bribe government officials or government

officials to extort bribes from companies. **Publishing the reports online** would add an additional layer of transparency and accountability and would also lower the possibility of officials extorting bribes to bypass enforcement of requirements.

**Box 4.6.2: Reporting, compliance, enforcement**

<b><u>Background issues for context:</u></b>	
List the reporting requirements for <u>exploration</u> licence holders (for example: expenditures on compensation, wages, surveys and exploration, land disturbance figures and rehabilitation liability estimates)	
List the reporting requirements for <u>production</u> licence holders (for example: production quantities, rehabilitation expenditures, environmental management information, including tailings dams and waste processing)	
<b><u>Questions on potential corruption risks:</u></b>	<b>Corruption Risk Concept</b>
In practice, is there evidence that the above <u>exploration</u> reporting requirements are complied with?	<b>D</b>
In practice, is there evidence that the above <u>production</u> reporting requirements are complied with?	<b>D</b>
Are these reports published and publicly available?	<b>T</b>
Does the legal framework make clear how compliance of these reporting requirements will be enforced?	<b>A</b>
In practice, is there evidence that compliance of these reporting requirements is enforced in a uniform manner?*	<b>A</b>

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## 5. Artisanal and Small-Scale Mining (ASM)

### 5.1. Regulated ASM

As stated in ‘Conceptual Challenges’ at the beginning of this discussion paper, the division between Artisanal, Small-scale Mining and Large Scale Mining is one that presents great difficulties, as it varies greatly between jurisdictions, and the research framework may actually be more effectively divided according to Industrial / Artisanal aspects. This paper follows that of much of the existing literature by only distinguishing between Large Scale (LSM) and Artisanal and Small-Scale Mining (ASM). But research in Ethiopia provides an example of how adopting this framework wholesale could create difficulties. Three types of licences are issued by three levels of government – large-scale by the Federal government, small-scale by the provincial government and artisanal (using hand tools only) by the local government (Plummer, 2012). In such a jurisdiction it is likely that research would be best conducted according to the three different licence types, and this is only reinforced by the fact that they are issued by three different levels of government.

A ‘conceptual challenge’ also arises when trying to make globally relevant statements about a sector that differs so markedly between jurisdictions and whose frameworks are vastly under-analysed in comparison to those of LSM. Partly this is because, despite producing 20-25% of world’s gold and employing ten times more people than LSM<sup>19</sup>, legal frameworks in many jurisdictions are either inappropriate (having been designed with LSM in mind), insufficient or entirely missing. In addition, the drivers behind ASM are intricate, complex and context dependent, which explains why very few jurisdictions have undertaken successful formalisation processes.

To ensure that ASM receives sufficient attention despite these obstacles, a series of suggested questions below are designed to illustrate the general context of regulated ASM in the jurisdiction. It is proposed that researchers supplement all ASM sections by recycling and adapting questions from the LSM section, whenever the answer for ASM is significantly different to justify this.

### 5.2. Industry Overview

This section focuses on what types of ASM are present, if the state plays a role in sales, whether there have been formalisation efforts and whether there is a strong foreign presence.

The first question focuses on the **characteristics of the industry**. As well as providing an understanding of numbers employed and size of the sector, it is useful to recognise that different minerals will impact corruption risks differently. For example, high value and portable minerals such as gold, silver and gemstones present in surface deposits are far more likely to drive corrupt behaviour than low value and large quantity minerals such as mineral sands for construction.

If states take a mandated, monopoly role in buying output from ASM miners, large risks result due to high levels of discretion for government officials and the potentially large financial sums involved. For example, in at least one jurisdiction, ASM miners are obligated to sell any diamond and gemstones to the state, a process that is allegedly highly corrupt and also regularly bypassed by the

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<sup>19</sup> <http://pubs.iied.org/pdfs/16532IIED.pdf>

selling of these minerals on the black market to smugglers. Whilst not strictly licencing issues, it is hard to conceive that licencing could be conducted with any sort of integrity in such a context.

Due to the cumulative and highly damaging potential effects of ASM, over the years many jurisdictions have attempted to induce or force ASM miners to formalise their operations. Yet few of these efforts have been widely successful, for a variety of reasons (see questions below in Box 5.1.1). A common challenge is to ensure that the landholders, often traditional land ownership by chiefs, have incentives to formalise the mining permits they issue to artisanal operators. Often the landowners' interests and incentives are not aligned with the central government. Several mechanisms of revenue redistribution from the capital to the mining areas have been tried in many countries to align incentives with central government and mining laws. The problem is that such redistribution schemes also add complexity to already overburdened governance systems, and when not implemented properly add more opportunities for corruption.

### Box 5.1.1: Overview of ASM

<b><u>Background issues for context:</u></b>	
Is regulated ASM present in the mining sector? This may be characterised as 'prospecting' or similar terms. If the answer is no, proceed to Section 5.2	
Has any research been conducted on the type of minerals, size of sector, value of trade, numbers employed? If so, what is the relevant information?	
Has any research been conducted on the funders of operations and purchasers of material produced? If so, what is the relevant information?	
Have there been government efforts to formalise the sector? When did they occur, on what basis were they supposed to be successful and how successful were they?	
Are there documented instances of conflict between LSM & ASM in the jurisdiction?	
<b><u>Questions on potential corruption risks:</u></b>	<b>Corruption Risk Concept</b>
Does the state play a role in the sale of minerals produced? (For example, in some states producers are obligated to sell to the responsible state agency.)	<b>D</b>

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## 5.3. Legal Framework

This section attempts to assess the level of corruption risk in the legal framework for ASM licencing. Without an adequate, appropriate legal framework, miners are incentivised to either remain outside the system (unregulated) or corruptly undertake transactions to be able to operate.

Several of the questions explore the corruption risks that can be created if the government creates monopolies or exemptions. For example, if only certain groups are entitled to a perceived advantage (lower fees, the ability to operate within ethnic reserves, or entitlement to licences), external actors

may be incentivised to either corrupt members of the entitled group or corrupt government officials to receive the same advantages.

Finally, it is suggested that researchers could supplement this section by recycling questions from the LSM section, where appropriate.

### Box 5.1.2: Legal Framework

<b><u>Background issues for context:</u></b>	
Does ASM have a separate legal framework? If the answer is no, proceed to 5.1.3	
<b><u>Questions on potential corruption risks:</u></b>	<b>Corruption Risk Concept</b>
Does the mining department / relevant body, have a specific mission statement / guiding vision / policy statement on mineral resource allocations for ASM?	<b>A</b>
Is it available to the public?	<b>T</b>
Are there exemptions from certain fees or charges (such as surface rents) for ASM miners?	<b>D</b>
Are certain groups, such as indigenous or disadvantaged groups, entitled to ASM licences in designated zones?	<b>D</b>
If ASM miners wish to join or form businesses, co-operatives or associations is it mandatory to join government-mandated bodies?	<b>D</b>
Is there any legal discrimination between domestic and foreign ASM operators?	<b>D</b>

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## 5.4. Licencing

This section explores the technical aspects of ASM licencing and seeks to compare it with previous questions on LSM. The rationale for each question will depend on whether there are significant differences between LSM and ASM. The final question relates to a strategy that is used in some jurisdictions to encourage ASM miners to obtain licences which, like many processes, can both reduce corruption by improving levels of transparency, and incentivise corruption of government officials.

### Box 5.1.3: Licencing

#### **Background issues for context:**

Thinking of the treatment of ASMs versus LSMs, are there distinct differences between the two in terms of:

- the application process for licencing (exploration and/or production) *[If so, construct a workflow schematic for the application and approval process. For examples, see Annex 2.]*
- the approval process for licencing (exploration and/or production) *[If so, construct a workflow schematic for the country's application and approval process. For examples, see Annex 2.]*
- the administrative processes for exploration and/or production licencing (i.e. cadastre agency treatment)
- level of government (state/federal, etc.) that issues exploration and/or production licences
- the renewal of exploration and/or production licences
- the rescinding or annulment of exploration and/or production licences

Do mining wardens or similar exist in remote regions to facilitate ASM miners in obtaining licences?

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## 5.5. ASM – Unregulated

As stated in 'Conceptual Challenges', unregulated ASM presents great difficulties for corruption risk analysis because it occurs completely outside any system of governance. If nobody has 'entrusted power' then can corruption actually occur? Thus, questions on this area were limited to asking: (a) what evidence exists about what unregulated mining is conducted (minerals produced, numbers employed, smuggling and so on); (b) what the drivers are behind the persistence of unregulated mining, and (c) what the role is of the landholders in allowing mining to take place on their land.



### Box 5.2: ASM - Unregulated

#### **Background issues for context:**

Does unregulated mining occur in this jurisdiction?

If so, give any available information on:

- the type of minerals
- size of sector / numbers employed?
- value of trade
- the existence of any formally-defined 'conflict minerals' produced in this jurisdiction

What factors are cited as the main barriers to formalisation?

- formalisation costs (including both explicit costs and/or time)
- corrupt and/or low capacity bureaucracy
- red tape / complexity of processes
- the existence of armed conflict / militias
- other (please state)

Is there any evidence of foreign involvement in this unregulated sector (e.g. mining in disputed border areas).

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## 6. Concluding Comments

This discussion paper offers a template for the consideration of the specific corruption risks in the licencing and contracting areas of natural resource extraction. It should be made clear, however, that is a template only. The specific circumstances of a country dictate that a 'one-size-fits-all' approach to this issue would be less than futile. Nevertheless, there are some general principles that we believe should be at the forefront of future discussions in this area:

1. Whilst the exact questions asked within this framework will undoubtedly differ (and be refined over time), these questions should not just be seen as a purely qualitative exercise, with a purely discursive outcome. The risk here is that the exercise descends purely into a report on general points where countries 'could do better'. This framework is designed ultimately to have far more specificity than that, with the questions designed to pin-point precisely where countries have significant corruption risks. This will ultimately make it far easier to put forward specific proposals that will incrementally improve outcomes, be that in the area of legislative changes for example, or in terms of putting in place the statistical capacity to provide information to the public where none currently exists.
2. The traffic light approach therefore strikes a nice balance between a strictly quantitative ('index') approach, and one that is qualitative. The use of a traffic light system allows for a relatively easy exposition of the areas where corruption risks may be at their greatest. Whether that be within the legal framework, or the rules and regulations surrounding the licencing process (or, indeed, across both), identifying consistent 'red flag' areas will be of great benefit to international observers on the outside, but also to civil society on the inside. This methodology can highlight areas for civil society to focus on going forward, concentrating efforts on those specific aspects of licencing and contracting that appear to have the greatest need and scope for improvement.
3. Given the complexity of issues in this area, it is important to at least attempt to make a distinction between *de jure* and *de facto* operations. Countries may have laws and regulations that appear, on the surface, to be fair and reasonable. The reality of how they are interpreted and implemented on a day-to-day basis may, however, be very different. Whilst it is understandable that it may be quite difficult for researchers to actually quantify these differences, we have at least tried to put in place a set of consistent criteria for researchers to base this evidence on. Specifically, where questions exist that require the researcher to comment on the differences between these *de jure* and *de facto* operations, we have asked for a baseline of two official media articles, or corroboration from an expert interviewee, or publication of legal proceedings. While this is certainly not a foolproof methodology, we feel it is important to have some sort of consistent criteria to address this problem, because the corruption risks surrounding what is written in law, versus what is done in practice, are of considerable importance in the mining sector. Omitting or assuming away these inconsistencies would ultimately provide a significant distortion of the 'true' picture of corruption risks within a country's extractive sector.
4. This discussion paper places a good deal of emphasis on the availability, quality and quantity of information released by governments in the extractive sector. The benefit of this is that, whilst information does not of itself provide evidence of corruption, its *absence* may potentially add to corruption risks. The benefits of having greater access to information are two-fold: on the one hand, more information is valuable in an economic sense, by helping to

reduce informational asymmetries and promote a more efficient allocation of resources. Secondly, publicly-available information can act as an accountability tool, by constraining the actions of politicians and public servants. Both are important, and so both have been addressed within this framework. One of the benefits of asking whether information on a particular issue is available is that, in terms of corruption risks, it is not the actual information that is being assessed here, but rather whether the information exists in the first place. For the researcher, this provides a relatively straightforward methodology (either the information is available, or it is not). At the very least, it can point to capacity constraints within the bureaucracy that can be addressed by civil society through pressure for greater resources to go towards the collection and dissemination of this information.

5. Where possible, the paper tries to delineate between questions that relate to the *context* of the situation, versus questions that go more directly to the heart of corruption *risks*. Each of the major sections in this report therefore have a number of questions that attempt to give an overview of that particular issue, so that the researcher can essentially build a picture of the institutional context in which the country's mining sector operates. Given this context, we then turn to questions that specifically deal with the corruption risks that might eventuate out of this. Although debate may emerge over which specific issues constitute a corruption risk, this at least provides a framework through which to think about them.

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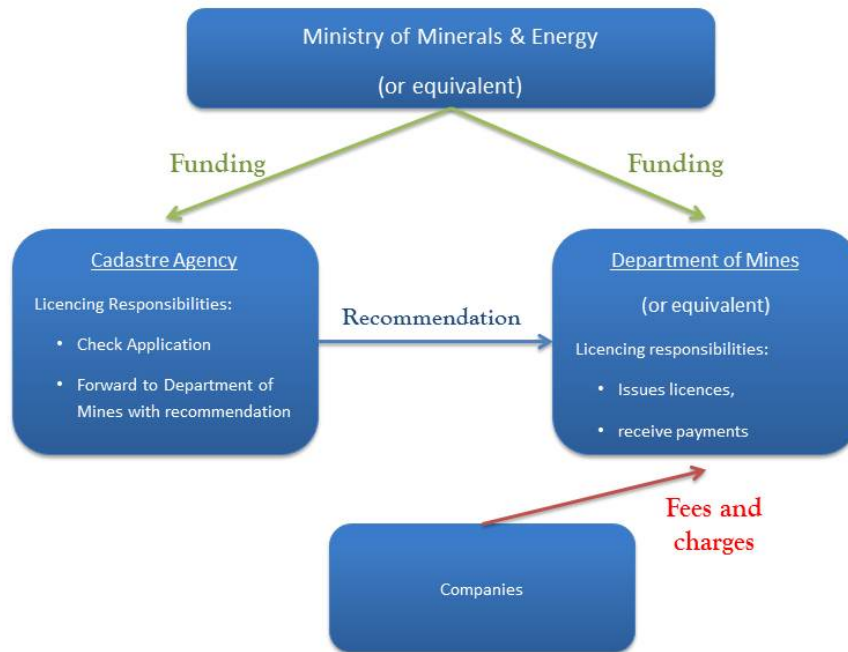
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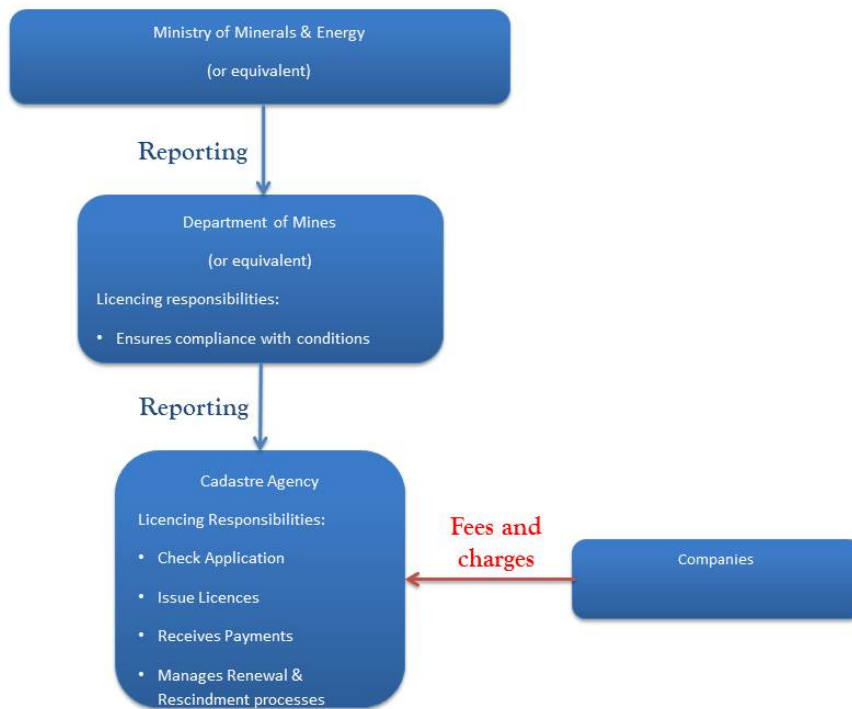
# Annexes

## Annex 1 – Hypothetical Organisational Structures

(A)

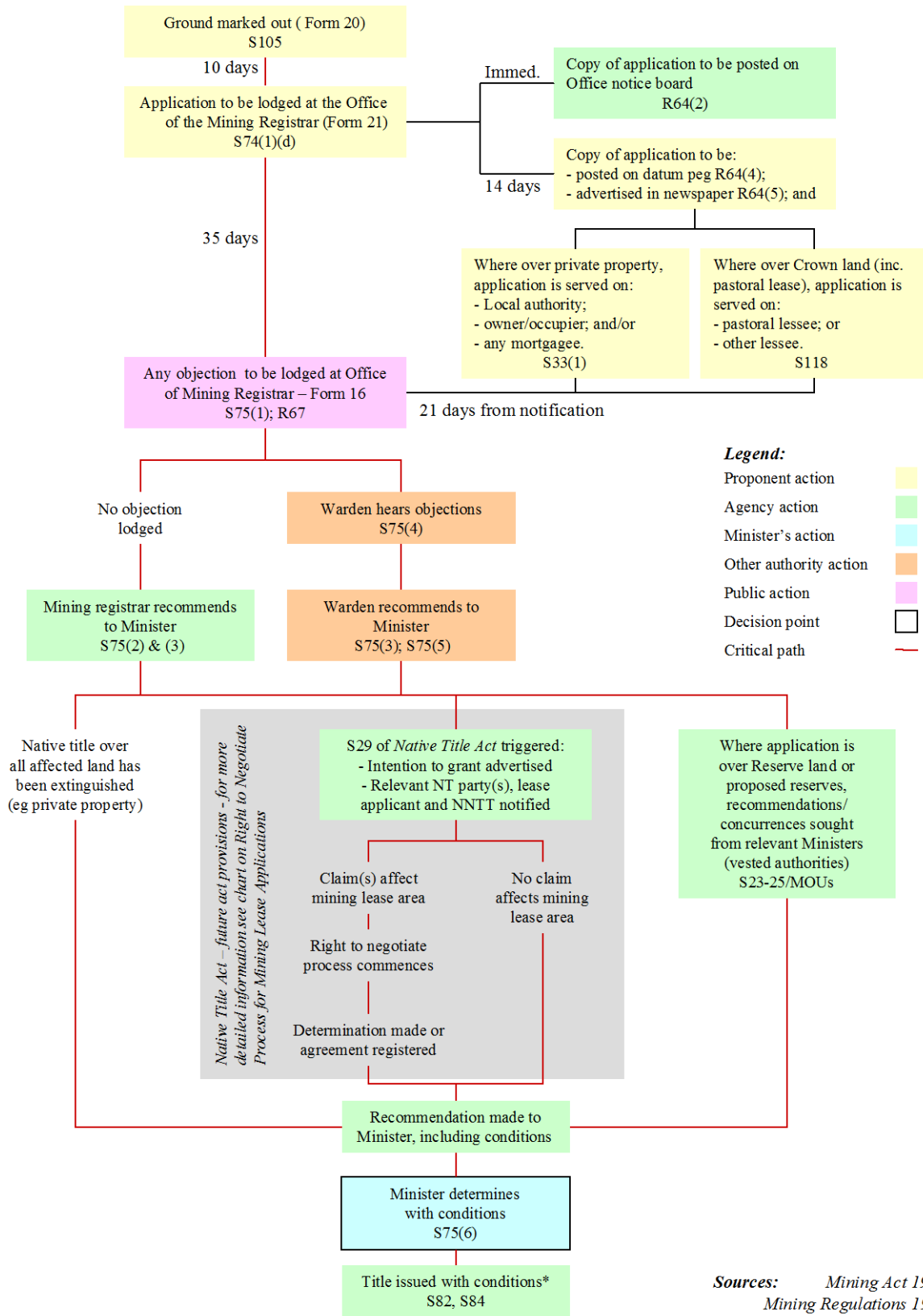


(B)



## Annex 2 – ‘Workflow’ from Western Australia

### Mining Lease Application



\* Schedule of endorsements and conditions draw lessee's attention to provisions of the *Aboriginal Heritage Act 1972*

**Sources:** *Mining Act 1978*  
*Mining Regulations 1981*  
*Native Title Act 1993*  
*Administrative MOUs*