

## ACCOUNTABLE MINING

# TACKLING CORRUPTION RISKS IN MINING

## BUSINESS INTEGRITY

**Having effective systems in place to detect, prevent and manage corruption risks is a business imperative**

### THE CHALLENGE OF CORRUPTION IN MINING SECTOR LICENSING

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

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

### EXAMPLES FROM RECENT INVESTIGATIONS

#### Alleged corruption at the licensing stage:

- Anti-bribery authorities commenced investigation of a company's payment of US\$10.5 million to a third-party agent who the company had engaged to negotiate its rights to a major iron-ore project in Africa.<sup>3</sup>
- News reports indicated a possible bribery investigation into a major company's mining deals with a foreign businessman in a conflict-ridden country. The businessman is a friend of the president and suspected of using bribes to secure mining titles in the country.<sup>4</sup>
- After taking over a company that held the rights to one of the world's largest rutile deposits, the acquiring company discovered information indicating alleged bribes had been used to secure the rights they had inherited with the acquisition. The company disclosed the information to anti-corruption investigators.<sup>5</sup>

## WHY CORRUPTION RISK IS AN ISSUE FOR BUSINESS

Foreign bribery and anti-corruption laws are getting tougher. Strict and wide-reaching laws not only criminalise the conduct of corrupt actors, but also the companies they work for and company directors for failing to prevent bribery and corruption.<sup>6</sup> Having effective systems in place to detect, prevent and manage corruption risks is a business imperative.<sup>7</sup>

Aside from legal sanctions, allegations of corrupt activity can severely damage a company's reputation and bottom line. When the United States Department of Justice issued one of the world's largest mining companies with a subpoena for documents as part of a possible corruption and money-laundering investigation, the company's share price plunged. The news wiped almost US\$8 billion off its market value – an amount that far exceeds any penalty imposed under the U.S. Foreign Corrupt Practices Act.<sup>8</sup>

The consequences of being associated with corruption allegations may continue to be felt well into the future as potential partners and investors seek to distance themselves from tainted companies because of the reputational cost and the potential to inherit liability for their conduct (successor liability). In the 21st century, responsible business conduct is not just an optional extra, it is a non-negotiable part of business, demanded by consumers and investors alike as evidenced by comments from one of the world's biggest mining investors:



**Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society.**

Larry Fink, CEO Blackrock.<sup>9</sup>

## WHAT CAN BUSINESS DO?

Businesses can take three key steps to mitigate the risks of corruption when securing exploration and mining rights and approvals:

1. **Assess the risks:** know the environment you are operating in, the regulatory processes involved, and your corruption risk exposure.
2. **Conduct due diligence:** know who you're dealing with before engaging agents and third parties, acquiring assets and acquisition targets, or establishing joint ventures.
3. **Embed pro-integrity measures:** implement and champion leading standards for anti-corruption, responsible business conduct and transparency, including in joint ventures and dealings with third parties.

### Transparency International's guidance for business

Transparency International has developed several resources which outline the expectations of responsible business in relation to anti-corruption measures:

#### Business Principles for Countering Bribery (2013)

developed in consultation with a range of major companies and non-corporate representatives.

#### 10 Anti-corruption Principles for SOEs (2018)

developed through a multi-stakeholder process involving state-owned enterprises (SOEs), academics and governance experts.

#### Adequate Procedures – Guidance to the UK Antibribery Act (2012)

provides guidance on good practice anti-bribery systems that constitute “adequate procedures” and includes checklists and other practical resources.

## THE ROLE OF MINING ASSOCIATIONS

Mining associations and national chambers of mines have a critical role to play to enhance transparency and reduce corruption risks among their members by:

- Making sure that their performance standards are consistent with the highest level of integrity and anti-corruption practice and are enforced.
- Hosting trainings and practice group discussions for members.
- Setting a strong tone committed to pro-integrity and responsible business conduct.

## 1. Assess the corruption risks

### Know the environment you are operating in and your corruption risk exposure

Prudent project feasibility assessments consider matters beyond geological and commercial factors and assess the corruption risks. The corruption risk profile depends on the operating environment. A targeted and efficient system for risk assessment is proportionate and tailored to the country context, it does not attempt to assess all conceivable generalised corruption risks.

Transparency International has developed the **Mining Awards Corruption Risk Assessment (MACRA) Tool**,<sup>10</sup> a step-by-step guide to identifying vulnerabilities and corruption risks in the licence, permit and contract awards process. This tool can be applied and tailored to any operating context.

The MACRA Tool helps ask the right questions to determine corruption risk exposure – the first step in any corruption risk mitigation and management strategy. The tool contains a list and explanation of 80 common corruption risks. Adopting a tiered approach, it provides guidance on how to “triage” and identify the corruption risks most relevant to the circumstances and how to assess likelihood and impact of those risks.

Adopting a holistic approach to risk assessment, the MACRA Tool accounts for corruption risk factors in the legal framework, its implementation and practice, and the surrounding political and administrative context. This system-wide approach to corruption risk assessment captures risks in the environmental and social impact assessment process and community consultation, as well as the allocation of exploration and mining rights.



**The importance to the global mining industry of a transparent, objective and well-regulated licensing process cannot be overstated. By providing stakeholders with the means to identify weaknesses in the system and build the evidence base to push for reform, I believe this excellent tool will be extremely useful to anyone wishing to improve the licensing process in their jurisdiction.**

Tom Butler, CEO, International Council on Mines and Metals (ICMM).

## 2. Conduct due diligence

### Know who you are dealing with

A company’s exposure to corruption risk is also influenced by the decisions it makes about who to do business with. Companies can reduce these risks through proper anti-corruption due diligence on third parties, agents, potential joint venture partners and acquisition targets.

### Engaging third parties or intermediaries

While engaging the services of a third-party agent or advisor to help secure a mining licence may be unavoidable in some circumstances, doing so represents a significant corruption risk if proper due diligence is not undertaken.<sup>11</sup> Companies should always:

- Screen agents to see if they are related or closely connected with government officials or other “politically exposed persons” in order to determine if there are any red flags that require further investigation as part of risk-based due diligence.
- Only enter into contracts with third parties that have a robust anti-corruption programme and that have clearly disclosed their beneficial owners.
- Observe a cooling-off period before engaging a former licensing official or senior government decision-maker as a third party or agent after they leave office.
- Question, probe and scrutinise requests for upfront or extraordinarily large payments, or payment by unusual means such as into multiple, offshore or anonymous accounts, or as political or charitable donations.

### Acquisitions and joint ventures

Acquiring a project or company that has already secured all necessary licences and permits does not eliminate exposure to corruption risk. EY’s 2014 Global Fraud Survey of Company Executives found that as many as 57% of companies said they either ignored or infrequently performed checks on companies before they acquired them.<sup>12</sup> Taking ownership of an asset that is tainted with corruption can expose the acquiring company to significant risk if the misconduct continues after acquisition, and, potentially also exposes companies to successor liability in the courts.<sup>13</sup>

Fundamental checks:

- Did the target project/company obtain its rights and licences in full compliance with the law? The MACRA Tool can help indicate where there may be corruption red flags.
- What is the target company’s anti-corruption compliance history and character? Is this a company your business would want to be associated with?
- Who are the beneficial owners of the company?

### 3. Embed pro-integrity measures

Responsible business conduct is about demonstrating integrity as much as it is about reducing corruption risks. Merely paying lip service to “zero tolerance” anti-corruption policies and designing programmes on paper as a checkbox compliance exercise will ring hollow to investors, customers and regulators.

It is important to **embed** pro-integrity measures and a robust anti-corruption programme in the business DNA.<sup>14</sup> Companies that demonstrate responsible business conduct:

- Properly resource training on the company’s anti-corruption programme, policies and procedures; and ensure these are meaningful, implemented, evaluated and continuously improved.
- Get to know the reality on the ground for staff in country operations and deliver ongoing training in country offices and subsidiaries on the company’s anti-corruption policies and procedures.
- Make sure that third parties and contractors are clear on the company’s anti-corruption and integrity expectations.
- Establish and maintain secure whistle-blower and complaint mechanisms.
- Publish information about their anti-corruption and pro-integrity programmes.
- Commit to transparency and disclose information about the company’s operations, corporate structure, beneficial owners, subsidiaries and holding companies.<sup>15</sup>
- Finally, senior executives publicly and proudly champion business integrity and anti-corruption.

Combatting corruption is everybody’s business and it is also good for business – companies with strong anti-corruption programmes have been found to outperform others by over 10 per cent in what has been termed the “ethics premium”.<sup>16</sup>

Responsible mining companies demonstrate responsible business conduct throughout the project lifecycle. This starts before ground is broken, at the time when they seek to secure exploration or mining rights.

#### Endnotes

1. OECD, *Foreign bribery report*, (Paris: OECD, 2014): 8.
2. OECD, *Corruption in the extractive value chain: Typology of risks, mitigation measures and incentives*, (Paris: OECD, 2016).
3. F. Wild and T. Biesheuvel, “Former Lazard banker’s home raided in Rio Tinto probe” Bloomberg (web) 15 March 2018.
4. F. Wild and S. Ring, “Glencore may face U.K. bribery probe over Congo dealings” Bloomberg (web) 18 May 2018.
5. N. McKenzie and R. Baker, “Iluka Resources caught up in African bribery scandal” The Age (web) 15 August 2017.
6. The UK Antibribery Act and US Foreign Corrupt Practices Act have broad jurisdiction that can capture conduct by multinationals that are not even listed in those countries.
7. On the business case see Transparency International, *The benefits of anti-corruption and corporate transparency*, working paper #01/2016 and Transparency International, *The case for implementing the 10 anti-corruption principles for state-owned enterprises*, (Berlin: Transparency International, 2018).
8. T. Biesheuvel and F. Wild, “Glencore drops after U.S. orders documents in corruption Probe”, Bloomberg (web) 3 July 2018.
9. A. Sorkin, “BlackRock’s message: contribute to society, or risk losing our support” New York Times (web), 15 January 2018.
10. M. Nest, *Mining Awards Corruption Risk Assessment Tool*, (Berlin: Transparency International, 2nd ed, 2017). See also A. Sayne, A. Gillies and A. Watkins, *Twelve red flags: Corruption risks in the award of extractive sector licenses and contracts*, (New York: Natural Resource Governance Institute, 2017). For over 60 country-specific examples of how the top corruption risks manifest in 18 resource-rich countries, see L. Caripis, *Combating corruption in mining approvals*, (Berlin: Transparency International, 2017).
11. See, Transparency International UK, *Managing third party risk: Only as strong as your weakest link*, (London: 2016); World Economic Forum, *Good practice guidelines on conducting third-party due diligence*, (Geneva: 2013).
12. EY, *13th Global Fraud Survey*, 2014: 19.
13. The scope of successor liability differs depending on which laws apply. On successor liability under the US FCPA, see, eg, Allen & Overy, “Completing the deal: recent cases illustrate the benefits of corruption-related due diligence and remediation” (web) 7 April 2017..
14. Transparency International has developed a range of good practice guides for companies. See, eg, *Adequate Procedures – Guidance to the UK Antibribery Act, 2012*; *Business principles for countering bribery*, 2013.
15. For best practice transparency and disclosure practices, refer to principle 3 of Transparency International’s *10 Anti-Corruption principles for State-Owned Enterprises*.
16. Ethisphere, “Ethisphere Institute announces 135 companies honored as world’s most ethical companies” (web) 12 February 2018.

The Accountable Mining Programme thanks Naomita Royan, Senior Associate, Baker McKenzie and Katja Bechtel, Head of Business Integrity, Transparency International for commenting on an earlier draft. M4SD is responsible for the contents of this factsheet.