



MATERIALS EFFICIENCY RESEARCH GROUP

ANALYSIS OF ASM MONGOLIA REGULATIONS

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1. INTRODUCTION

This analysis intended to make a contribution to the development of the SAM project's position related to proposed ASM legal instruments.

During the mission in May of 2008 the consultant identified that the SAM team did not have an analytical position concerning the regulations that were been issued, despite the fact that the project has a very specific role in regulatory and policy area (see component one of the project).

At the moment, the reasons for this situation are not clear but it may be a combination of factors related with the SAM project's involvement in the elaboration of such regulations, confusion about the roles of the SAM project and the government and a lack of knowledge or strategy on what to do and not to do to promote a process of legalization and formalization of ASM.

The consultant's view is that it is essential that the SAM project has an analytical position in regard to the policies, programs and regulations promulgated and others that will be issued during the SAM project's duration.

To be able to develop such position about the government acts related with ASM it will be important that the SAM project team;

1. Develop a participatory process (identifying concerns and recommendations) with different ASM stakeholders - in particular the ASM miners;
2. Identify the lessons learned from other countries' experiences;
3. Develop a vision about what the project would like to achieve in the policy and regulatory component of the project.

2. OVERVIEW OF THE STATUS OF REGULATIONS

The first regulation that specifically deals with legalization of ASM was promulgated in 2001 under the Minister for Trade & Industry entitled "Provisional Regulation on Non-industrial Mining of Minerals". This regulation (Directive 33) was effective for one year and was re-promulgated again through Directive

53. The Provisional Regulation was intended for application until a law would be adopted to regulate ASM activities.

Additional regulations were promulgated in regard to “Certain Measures Against Illegal Gold Mining” (Resolution 87, 2004) with the objective of eliminating illegal gold mining in protected areas and “Certain Measures Towards Development of Geology and Mining Industries (Resolution 103, 2002) with the objective of developing the regulatory conditions for ASM legalization. As result of these regulations a draft law was prepared but is still in the process of being approved.

A more deep analysis needs to be done to identify the lessons learned from the implementation of these regulations, but the study “Improving the Legislative Framework for the Informal Mining Sub-sector in Mongolia” offers an initial generic commentary. The report comments that *“these regulations were successful to some extent regulating only some of the activities of artisanal miners. However, their inconsistency with laws such as Minerals Law, Law on Civil Registration, Tax and Environmental Laws and Labour law”* means that there is not yet an adequate comprehensive regulatory mechanism.

At beginning of 2008 the Government once again promulgated several regulations because the ASM law was still not approved. These approvals included the Program on the Development of Artisanal and Small Scale Mining up to 2015, the Temporary Regulation on Artisanal and Small Scale Mining Operations, the Regulation of Coal Artisanal Mining in Nalaikh District, the Regulation of Artisanal and Small Scale Mining operations and a ban on mercury.

As noted above, an analysis needs to be done to compare the two packages of regulations and what lessons from the first set of regulations were incorporated in the second round of regulations. At this time we can say that the second round of regulations have a more holistic approach in the sense of incorporating more dimensions of ASM. This approach has helped to create the basic conditions for ASM to initiate the process of legalization and the political conditions for ASM recognition as an economic sector that distances itself from being just an activity of subsistence. That said, it is still a long way from recognition as a real part of the mining sector.

3. ANALYSIS OF MONGOLIA REGULATIONS PROMULGATED IN 2008

Before the analysis of specific regulations it is important to acknowledge and understand the challenges of legalization and formalization of ASM.

As with almost all of the countries that have ASM activities, Mongolia is facing the difficult challenge of legalization of ASM. A study completed in 2000 that analyzed 18 countries concludes that the major part of the ASM sector is still illegal. The report recognized that there has been an increase in the numbers of countries that have specific regulation for ASM but that these regulations are not effective in promoting the economic development of the sector or solving some of the social and environmental problems associated with it. (UNEP, 2000)

The analysis of these processes also shows that these processes were not very successful for several reasons, including,

- difficulty in distinguishing ASM from other mining activities,
- difficulty in defining and categorizing the different activities of ASM,
- difficulty to understand the differences between the legalization of large scale mining and ASM,
- lack of clarity about the objectives of the legalization process,
- lack of consideration of the different dimensions of the process of legalization,
- lack of integration of the legalization process into a broader process of formalization,
- lack of integration of the legalization process into a national plan of poverty alleviation, or other national plans,
- lack of involvement and participation of the miners and their organizations in the elaboration of the laws and regulations,
- regulations based on a command and control approach and not on community participation and market mechanisms, and finally
- the characteristics of the mineral resources that ASM extract that are in a profound “open access” situation that make a effective control and protection very difficulty.

This means that it is not only Mongolia that it is facing challenges and difficulties to regulate ASM but that it is a common problem. Nevertheless it is a problem that needs to be resolved and can be resolved.

The following comments about the promulgated regulations in Mongolia have the objective of contributing to the development of SAM project’s critical vision of the regulations which can create the conditions to contribute to improvements in the regulations.

Note that the author does not read Mongolian and while all the documents were translated, they are not official translations from the regulations. This means that in some cases the author analysis can be wrong, inappropriate, or out of context because of problems in the translation.

3.1 GOVERNMENTAL RESOLUTION NO: 71, 2008. APPROVAL OF SUB-PROGRAM ON DEVELOPMENT OF ARTISANAL AND SMALL SCALE MINING UP TO 2015

The resolution has the advantage of defining a long term program for ASM in Mongolia and integrating different ASM activity dimensions (such as environment, health, technology, social issues, labour and safety, organization and economics) into one vision through three main objectives:

1. Organise informal miners as miner-user groups or Nukhurlul, and to establish a model for ASM;
2. To transform informal ASM into a legalized and economically efficient ASM within the mining sector, promoting the use of best practices and technology and maintaining safety procedures in ASM; and
3. the reduction of unemployment and poverty by re-organization of informal miners as cooperatives or miner-user groups, or Nukhurlul, enabling them and their families to obtain social services including health, education and social care.

The program has the additional merit of defining phases, specific criteria or outcomes, governmental structures responsible for program implementation and generic attribution of responsibilities.

The program also has some aspects that raise concerns such as the second goal or objective of the program. The program seeks “*to develop small-scale mining in phases using a model of ASM which can exploit the used mineral deposits of mining companies or non-industrial reserves of a company’s licensed*

area, artificial deposits such as tailings left behind from mining activities and deposits that do not provide for economically beneficial, efficient and incident-free extraction with small-scale machinery, facilities and progressive technology.

Two aspects of this sentence raise some concerns - one is related with the idea of the model of ASM and the second is the idea that ASM can only exploit what is not economically feasible for other mining activities.

The first concern is related with the introduction of the model approach to formalizing and legalizing ASM activities. Models are based on a set of pre-defined concepts and ideas and by the definition are in opposition to flexibility, innovation and diversity.

These three words: flexibility, innovation and diversity, are possibly the most important ones that define the characteristics of any action for ASM because of the complexity and diversity of the ASM phenomenon.

ASM needs a long term vision that will be achieved gradually and will function as a guide for all stakeholders. ASM does not need models that are like a straight jacket and that promote a monolithic view about what can be achieved without taking into account the diversity of the socio-economic relations of ASM activities.

The second concern is related with the vision that ASM only can work in deposits that are not feasible or economic to other mining activities. The third concern is the idea of institutionalizing and legalizing the ASM activities in areas that have an environmental and social legacy of the mining activities. Beneath these concepts about ASM deposits, the ASM activity cannot improve or develop and always will be a marginalized activity or at the best a subsistence activity as opposed to an economic sub-sector of the mining industry.

This vision can also promote the idea that ASM is a second class mining activity which can, in turn, generate all kind of distorted relations between the mining sector and ASM (ranging from the simple exploitation of the work force or disadvantaged economic relations to a situation of violation of the basic human rights). The situation related with rubies and jade in Burma is of course an extreme case but serves as a wake up call for all government about the consequence of ASM regulation without the attribution of direct rights to ASM miners which allowed for the formation of a class of intermediaries between the ASM miners and “holder of the mining title or license.”

Finally, but no less important, these concepts can create a mining sector mentality where the concept of restoration and decommissioning never have a place (particularly for the industrial mining) because of the ongoing potential of mine sites becoming ASM deposits at some point in the future.

The identification of deposits for ASM extraction activities is of course an important part of the definition of ASM and it is what the Resolution 71 Sub-program is trying to do. The suggestion here is to define the ASM deposits in a positive way. This means for example in the case of gold - secondary deposits (alluvium, eluvium and colluviums) and the superficial primary deposits (not more than 30 m). In both cases the law can also define different types of ASM that correspond to different legal and environmental

standards. The different types of ASM can be defined by volume of production or volume of material processing (but not by technology used).

Another aspect that raises some concerns is Action 11.5 referenced in Objective 3 whose intent includes reducing the participation of women in ASM operations. The participation of woman in ASM activities in Mongolia is very impressive - around 50% according to the report “*Small-scale mining in Mongolia - A survey carried out in 2004*”. The reasons and the intentions for reducing women’s participation in the sector are not very clear at this time, but of course there are generic arguments about “protection of the woman” from hard and dangerous work that definitely are characteristics of any mining activity.

A powerful argument can be made that if women (and men) had alternatives they would not in fact engage in this type of work. The women are engaging because they need to and ASM activities allow for a better life than the other accessible economic alternatives. The objective *per se* of reduction the participation of the woman in ASM may not a bad objective if that means a government mandate for the creation of other work opportunities for woman but if this approach is a channel for legal restriction for women to work in ASM then it is more problematic. It is when the limits between what is protection and what is segregation or exclusion become unclear. This issue will be addressed again in the regulation 72.

3.2 Governmental Resolution No: 72, 2008. Temporary Regulation on Artisanal and Small Scale Mining Operations

This regulation is the most important piece of regulation in terms of creating the basic framework for the process of ASM legalization.

The fact that it is a temporary regulation provides the desirable flexibility for the dynamic between implementation and improvement - something that is rarely established but it is very valuable particularly in ASM where the routes for legalization are not so clear or obvious.

To fully use this advantage, it will be important that the government creates the condition to learn from the successes and challenges of regulation implementation and to incorporate them into the new ASM law or in the subsequent regulations.

Another interesting aspect of this regulation is the fact that it defines rights and obligations for all relevant ASM stakeholders (local self-governing and administrative organizations, state administrative organizations, miners and respective organizations).

The regulation is a good starting point but is not surprising that it has some points of concern. It will be interesting to see if the following points bring problems in the process of implementation:

A) THE DEFINITION OF ARTISANAL AND SMALL SCALE MINING

The regulation states that “*Artisanal and small scale mining*” (ASM) means the Partnerships that made contracts with Sum/District Governors according to this temporary regulation will overburden and extract with hand tools or small scale technology the amounts of ore or minerals per a day as stated below:

- Extract up to 25 tons of ore, or coal and fluorspar per day;
- Overburden and extract up to 200 m³ per day in case of use of placer deposits;

To full understand this definition, two additional definitions are necessary and also are part of the same regulation:

Partnership - means a group of people, who are organized into unregistered Partnerships based on cooperation agreements according to the Article 481.1 of the Civil Code, engage in ASM according to this temporary regulation;

Small scale technical equipment- means the mechanical apparatus and machinery with internal combustion engine capacity up to 500 m³;

This definition of ASM raises concerns about building in limits to ASM activities. The concern centres around the definition that ASM always will be *hand tools or small scale technology*. It is important to ensure a definition that allows the ASM activity to progress as an economic activity. To achieve this it is important to have a system in which the activity can evolve - including technologically. One approach could be to define different types of ASM based on the amount of ore extracted **with progressive environmental, social and economic obligations**.

These observations imply that some of operations that start as artisanal may progress to small and eventually middle or even large scale operations. The regulation needs to acknowledge this reality and better enable it. Also, the idea that artesanal can evolve from hand tools to power tools can liberate the miners from many heavy and hard activities. In Canada, for example, the artisanal or small scale mining (in placers) is in fact very technologically intensive despite the fact that is a small family business.

Another potential problematic aspect is the fact that all ASM need to be organized into partnerships. The regulation does not provide flexibility for other forms of economic organization such as individuals, different types of companies, cooperatives, etc. In one of the Sums the authorities commented that it is a very fragile legal commitment. In MRPAM, the explanation was that only this type of organization allows for a very minimum requirement to function (as opposed to, for example, cooperatives which need to pay all kind of taxes and have a very heavy administrative requirements to exist as legal entities).

At this moment the author does not fully understand the idea of partnership in terms of the flexibility for internal economic and legal arrangements and in terms of attribution of rights and obligations. It is recognized that it is important that the regulation allows for a very simple legal organization to be holder of the ASM mining license but there still remains the concern about the specification of one type of legal economic arrangement. In countries, for example Brazil, where the regulation defines one type of legal entity to performance ASM activities what happens is that the miners have in fact two different types of organization: the legal version that is a fiction (only to accommodate the law) and another organization (informal and verbal) which is what defines the actual economic and work relations.

This situation is of course the worst situation for the miners because it allows all kinds of abuses without any chance of protection and the fictional situation creates an illusion that everything is fine and legal however the situation does not actually improve in terms of the miners and the contribution of ASM to the economy and the society.

B) LAND ALLOCATION (TO BE COMPLETED)

The obligation of government to do geologic surveys is a point of concern particularly when it is focused on the quantification of the deposits because this kind of survey can become very expensive with a little in the way of valuable results for the alluvial deposits. Nevertheless, these initiatives are creating a great expectation among the miners and local governments.

In terms of ASM deposits the regulation defines that, “The Land to be allocated to ASM Partnerships will be classified into three following categories:

1. Mineral deposits and occurrences that are economically inefficient for large scale mining in terms of their mineral reserves and quality;
2. Mined out areas those have no reclamation and tailings or technogenic deposits;
3. Land or areas from licensed mining sites to be used by ASM Partnerships under tripartite agreement among the License holder, Sum and Duureg Governor, and Partnership;

The regulation also defines the areas and land that are not allowed for ASM:

- Protected Areas protected according to respective legislations and the reserved land and land for special purposes as stated in the Articles 13 and 14 of the Mongolian Law on Minerals;
- Mineral exploration areas and the areas with special permits in cases of no contracts;
- Locally worshipped areas, mountains, hills, mountain passes, and the land, where cemeteries and *otor* or reserved pastures lie;
- Deposits, whose mineral reserves are identified and assessed, for large scale mining;\
- Land of urban settlements, villages, and other settled areas, land for common use, and the land owned and exploited by individuals, economic entities, and organizations for their needs;
- Areas with forest and water resources;
- Land used for road and facility networks;
- Hard rock deposits other than those stated in 9.1 and 9.2 of this temporary regulation;

3.3 RESOLUTION NO: 89, 2008. COAL ARTISANAL MINING NALAIKH DISTRICT GOVERNMENTAL

3.4 ORDER NO: 28, 2008. REGULATION OF ARTISANAL AND SMALL SCALE MINING OPERATIONS

4. CONCLUSIONS AND RECOMENDATIONS