



Learning from the EITI: Lessons for Effective Country-By-Country Data Disclosure Requirements

Context

Catholic organisations have been involved in the Extractive Industries Transparency Initiative (EITI) process since its beginning and have been central to its achievements. CAFOD was one of the NGO members of the original working group; Michel Roy, of Secours Catholique-Caritas France, was an EITI international board member for four years and Eelco de Groot of Cordaid is a current board member. Misereor has been supporting several of its partners e.g. in Cameroon and the Republic of Congo in their engagement in EITI structures and activities. Our involvement in the EITI is based on the idea that natural resources exploitation should primarily benefit the people living where natural resources are extracted and contribute to the development of the whole country¹. Support for the EITI by the Catholic Church was clearly expressed in Pope Benedict XVI's message to the authorities in Luanda during his African visit in 2009 and more recently in the intervention of Mgr. Portella at the EITI global Conference in Paris. At a national level, Catholic NGOs are part of local EITI multi-stakeholder committees and Publish What You Pay coalitions.

This briefing highlights both the valuable contributions made by EITI and our critique of the initiative. Rather than just replicating EITI, it is essential that EU mandatory disclosure requirements build on the lessons learned to date. The review of the EU Transparency Directive is the perfect opportunity to introduce a country-by-country disclosure obligation for companies from the extractive sector listed on the EU markets as a first step to disclosure requirements for all companies. Disclosure requirements of disaggregated payments and other key data on a country-by-country basis will promote good governance and accountability from a much broader range of governments and businesses.

¹ See : Pope Benedict XVI's message to the political and civil authorities and to the diplomats, in Luanda, March 20, 2009 (http://www.africamission-mafr.org/discours_pape_angola.htm#1).

A brief overview of the EITI process

The Extractive Industry Transparency Initiative (EITI) is a global multi-stakeholder initiative that promotes revenue transparency by monitoring and reconciling company payments and government revenues at the country level. The process is overseen by participants from government, companies and civil society at the national and international level. The EITI Board and the International Secretariat oversee the EITI methodology internationally.

Once a country publicly endorses the EITI, this country becomes a ‘candidate country’ and has forty-two months (according to the latest rules) to implement the initiative at its national level. The requirements include the publication of an audited report providing information of payments made by corporations and those received by the government. A validator must certify the quality of the EITI process in the country and produce a report for the EITI international Board. If all EITI indicators are met, the Board of directors can promote the country to ‘compliant’ status. Under the new EITI rules, if a country is not able to become compliant within the 42 months, it will be delisted from the list of EITI implementing countries².

EITI has made significant progress but after eight years coverage is still limited. At present there are 35 implementing countries³ of which 11 are EITI compliant⁴. 24 other countries have achieved EITI candidate status⁵. Overall 27 countries have disclosed their payments and revenues in some form of EITI Report. Many countries have signalled their intention to implement the EITI, and are working towards EITI implementation. Civil society groups continue to lobby for more countries to join the EITI, especially significant states in the North such as Canada, the US, Netherlands, and emerging economies such as China, India, Brazil and Mexico. However a number of resource-rich countries such as Angola, Burma and Cambodia have signalled that they will not join the initiative.

Civil Society Organisations’ involvement in the EITI

Civil society groups were the co-creators of the EITI, which was launched by the UK government as a direct response to the Publish What You Pay movement. The involvement of the civil society within the EITI process and the design of EITI rules is the cornerstone of this multi-stakeholder initiative. EITI indicators 2 and 6 are clear illustrations of CSO involvement. Without CSOs, the EITI would not exist⁶. In some circumstances, such as in the Republic of Congo and Gabon, activists have supported the initiative even at great personal risk. CSOs appreciate the important contributions that EITI has made to transparency such as in the case of Liberia.

² That was the case for Equatorial Guinea.

³ <http://eiti.org/implementingcountries>.

⁴ Azerbaijan, Central African Republic, Ghana, Kyrgyz Republic, Liberia, Mongolia, Nigeria, Niger, Norway, Timor-Leste and Yemen.

⁵ Afghanistan, Albania, Burkina Faso, Cameroon, Chad, Democratic Republic of Congo, Republic of Congo, Côte d’Ivoire, Gabon, Guatemala, Guinea, Indonesia, Iraq, Kazakhstan, Mali, Mauritania, Madagascar, Mozambique, Peru, Sierra Leone, Tanzania, Togo, Trinidad and Tobago and Zambia.

⁶ For further information on the way CSO took place/can take place within the EITI process, please consult http://www.revenuewatch.org/files/DD-final_wc.pdf.

Liberia: the benefits and limitations of the EITI

- During the Liberian civil wars, natural resources fuelled the conflict, providing funds to the parties involved. Liberian conflict spread to Sierra Leone. The UN Security Council imposed a ban on logging and diamond exports⁷, nevertheless several companies continued to import Liberian natural resources⁸.
- Post-conflict Liberia made tremendous efforts to promote transparency in the extractive industries. Liberia was the first African country to obtain the EITI “compliant” status in 2009 and a Freedom of Information Act was introduced in the Liberian legislation the same year. Liberia was the first country to cover forestry and the agricultural sector in an EITI report. The EITI process is enshrined in the Liberian law since 2009.
- The Liberian government renegotiated several extractive industries contracts to obtain better deals. This success in the renegotiation of Mittal Steel’s and Firestone’s contracts is well documented in a report by the Revenue Watch Institute⁹. The Liberian President, Ellen Johnson Sirleaf, quoted in this report, said that in these contracts, *“we were able, through our negotiation efforts, to secure stronger fiscal terms, increased revenues to the government, and additional employment opportunities for our people. (...) We aggressively pursued a better deal for Liberia, but we were also careful to make certain that the renegotiations did not threaten the viability of the companies’ investments and represented an opportunity for a better long-term working relationship between the companies and government.”*

While Liberia does represent a success story for EITI, Liberian civil society continues to keep its government under constant scrutiny, illustrated by its role in the negotiation of the China Union mining contract.¹⁰ In doing so it has faced two main problems¹¹:

1. Difficulty in determining the “just price” for natural resources.
2. Difficulty in determining the exact amount of raw materials exported as Liberian customs services are known to be understaffed and underpaid, putting the credibility of customs data at risk.

These difficulties could be overcome if accurate information were to be available from mandatory disclosure requirements which were not limited to payment data but also included production levels. This would allow comparison of export data declared by companies with custom authorities’ figures. Mandatory disclosure requirements would also make possible the creation of a user-friendly database¹², allowing Liberian civil society to have a better understanding of the raw materials’ “just price.”

⁷ United Nations Security Council Resolution 1521.

⁸ <http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=d37dcbe0-09a3-11df-87d5-49e413573e51>.

⁹ <http://www.revenuwatch.org/files/RWI-Getting-a-Better-Deal-final0226.pdf>.

¹⁰ http://www.globalwitness.org/sites/default/files/import/global_witness_and_green_advocates_joint_memorandum_on_the_china_union_agreement_february_2009.pdf and http://www.revenuwatch.org/files/RWI_Columbia_Draft_Analysis_of_China_Union_contract_fiscal_framework.pdf.

¹¹ Thanks to the Freedom of Information Act, the access to administrative documents and contracts is not an issue for the Liberian civil society.

¹² EITI figures are lacking of comparability, making the creation of such a database almost impossible. The comparability issue will be resolved by a reporting standard applicable to each country in the world.

The Liberian case illustrates some of the merits, but importantly also some of the limitations of the EITI. Equally, there are other factors which limit its effectiveness:

- **EITI is not a mandatory initiative:** The EITI is based on a voluntary participation of States¹³. Implementing countries decide what to include within the extractive industries scope, which companies to include or exclude from the EITI reports, define a materiality threshold¹⁴, or decide whether to aggregate/disaggregate data¹⁵. This freedom given to implementing countries is a part of EITI's success, but is also an important constraint for this initiative, because the data provided by businesses is not internationally comparable. Therefore, EITI is not yet an efficient global reporting standard. The EITI model also explains why the progress of the initiative has been slow and piecemeal in many countries. For example, civil society groups in Timor-Leste spent many months pressing for a disaggregated model of reporting in the face of resistance by oil and gas companies. However a number of those same companies were in fact already reporting on a disaggregated basis under EITI in Nigeria.
- **EITI data are imprecise and unverifiable:** As noted by Alexandra Gilles, from the Revenue Watch Institute, "if report quality and regularity improve, EITI data could contribute to an understanding of government take in specific countries. However, it will not provide all the information needed to compare different countries' take levels". Therefore, "using EITI data that is imprecise and not standardized makes conclusions about take even less reliable".
- **EITI data does not reveal whether the country is getting a fair deal:** With data quality unverifiable, civil society and even investors are unable to assess the fairness of contracts agreed between the government and extractive companies. It is very unlikely that investors are able to judge the impact of the businesses on local economic development and the likeliness of taxes renegotiation for example.

Zambia: An EITI candidate country makes the case for mandatory disclosure

At the time of writing Zambia has EITI candidate status however civil society still sees the benefit of mandatory corporate disclosure to complement the national initiative.

- The think tank Centre for Trade Policy Development and Caritas Zambia have identified limited capacity within the national tax authority to investigate claims by mining companies that they are not profitable and therefore are not liable for a variable profits-based tax. Zambian Parliamentarians have highlighted the same problem due to the complexity of multi-national mining companies operations.
- Secrecy over the relationships between the government and mining companies contributes to public discontent at a time when huge rises in copper prices have not been matched by

¹³ That is the only thing that makes the EITI a voluntary initiative. Once the state has chosen to implement the EITI, companies are required to report their payments, whether they are or not EITI supporters.

¹⁴ Countries are required to report on « all material payments » but they have some freedom to decide what this means.

¹⁵ To see the differences within the content of EITI reports published, please consult <http://data.revenuewatch.org/eiti/>.

progress in terms of social and economic development. There is an urgent need to address this lack of transparency. Zambia's total annual copper production for 2009 was 698,000 tons and is predicted to reach almost a million tons by 2015¹⁶.

- The leaked audit report of Mopani Copper Mines Plc has sparked an international debate over the company's practices. It is important that rather than depending on leaked documents for information, investors, parliamentarians and citizens in Zambia have access to clear, comparable data from all the extractive companies operating within the country.
- A number of extractive companies which are active in Zambia but which will not be covered by the disclosure requirements of the US Dodd-Frank Act are listed on European stock exchanges. CTPD and Caritas Zambia have stated that *"Mining companies and government should both be made more transparent. Internationally-concerted action should seek to make detailed country-level revenue and profit figures available."*¹⁷

Cambodia: How mandatory reporting can contribute to good governance

Despite requests from civil society, the Cambodian government has made it clear that it will not join EITI.

- Cambodia is at the very beginning of oil and gas exploration and mining and the future development of the extractive sector could have a significant impact on its economy.
- The political space for public debate and discussion in-country can be extremely limited. This makes it difficult to raise issues at national level about how to combat corruption, although this is widely recognised as a significant challenge.
- Lack of clear information and misinformation about the developing extractive industries has been identified as significant issues within Cambodia.
- For example, research by a local CIDSE partner organisation and the Economic Institute of Cambodia has demonstrated that within the broader Cambodian economy, small and medium-sized business owners have very little understanding of the contribution that natural resources will actually make to their country. In some cases their expectations are very unrealistic – for example many business owners thought that future development of the extractive industries would lead to decreases in inflation and the price of gasoline. Approximately half of the SMEs surveyed who were familiar with at least one of the extractive industries did not know whether the government had generated revenues from extractive industries. Over 80% of respondents who did not know about the revenue or potential revenue from crude oil, natural gas and mining industries wanted to know this information¹⁸. Accurate information from mandatory disclosure requirements could be very useful for the internal economic debate. Cambodian partners have said: *"This is important not only for us but for all resource-rich countries."*
- Less than half (38%) of business respondents believed that the government would be able to manage the revenues generated from extractive industries.

¹⁶ CTPD Briefing Paper 'A Fool's Paradise Zambia's mining tax regime' Mining Taxation in Zambia December 2010.

¹⁷ Ibid, page 10.

¹⁸ CRRT Survey with small and medium enterprises on the perception of extractive industries in Cambodia, February 2011.

Compulsory reporting should cover all countries, not just the resource-rich countries that have already shown a commitment to promoting transparency by implementing EITI. Clearly the initiative would be complemented by a requirement for financial reporting the context of the companies' Annual Financial Report. A country-by-country financial disclosure requirement would be an easy way for civil society and investors to evaluate whether companies are fairly contributing (given the wealth they produce) to local economic development.

What kind of data disclosure is needed?

Disclosure requirements within the Transparency Directive should include information on payments but should not be limited to payments. Disclosure of different types of information would contribute to good governance, promoting accountability and have knock-on effects for local economic development.

1. Payments

Data must be broken down into different types of payments on a **country** and **project** specific basis, in line with the Extractive Industries Transparency Initiative with a breakdown of each type of tax paid. Companies must also be required to report payments at the country level for any country in which it has a trading presence but no production. The EITI usually refers to the breakdown of several types of payments which are:

- profits taxes;
- royalties;
- dividends;
- bonuses (such as signature bonus, discovery bonus, production bonus);
- licence fees, rental fees, entry fees and other considerations for licences and/or concessions;
- profit oil;
- host government's production entitlement;
- other significant benefits to government.

In addition to these payments, we think that a country-by-country disclosure requirement should include surface rental¹⁹, export tax²⁰ and employer contributions²¹.

2. Other types of information

Reporting should be required on a country-specific basis for all countries in which the company has a trading presence for:

- Profits, production volumes and sales for extractive industries;
- Intra-group trade and financing volumes;
- Assets information;
- Staffing information.

¹⁹ Ascertaining the surface rental is extremely important for the mining sites. The bigger the mine is, the more important will be the environmental and social impacts on the local population.

²⁰ This will allow authorities and citizens to make a comparison within businesses working in a same country.

²¹ This will help to have a better understanding of the payments made to employees, especially when compared with the number of employees.

Compulsory financial reporting requirements will not undermine the EITI

1. Differences between EITI and financial reporting requirements

The scope of data for the EITI differs from that of a financial reporting obligation such as the Dodd-Frank Act. Parties in the EITI undertake to publish audited data related to payments made by companies and received by governments. Mandatory disclosure requirements would cover a wider set of information. A country-by-country financial reporting obligation would provide a global picture of the activity of the company in all jurisdictions, including operating countries and territories where the subsidiaries provide financial, management, etc. services. The Dodd-Frank Act with its project-by-project reporting requirement will provide more valuable detail than what is currently provided in most of the EITI reports.²²

2. Many EITI supporters welcome the Dodd-Frank Act

Civil society has long argued that the EITI and mandatory disclosure are complementary. This view is shared by key figures such as French President Nicolas Sarkozy, French Minister for Cooperation Henry de Raincourt²³, the UK Chancellor George Osborne,²⁴ investors Georges Soros,²⁵ Calvert and former EITI Secretary Peter Eigen²⁶. While some companies such as Total and Shell have made statements against the Dodd-Frank Act, mining companies like Areva or Newmont appear to be more supportive. Overall, a broad range of EITI members support implementation of regulation similar to Dodd-Frank. Such regulation would also help countries intending to implement EITI²⁷.

²² With the exception of Mali.

²³ http://eiti.org/files/Statement_De_Raincourt_MCOOP_France.pdf. France has been a supportive EITI country since the beginning of the initiative.

²⁴ <http://www.guardian.co.uk/business/2011/feb/20/george-osborne-oil-mining-africa>. United Kingdom has been a leading country in the implementation of the EITI since the beginning of the initiative.

²⁵ <http://www.ft.com/cms/s/0/016ad9d4-45e1-11e0-acd8-00144feab49a.html#axzz1FcQ3grew>

²⁶ "I think mandatory disclosure requirements under the American legislation are complimentary and very helpful to our cause [the EITI]" Opening plenary session at the Paris EITI conference, 2 March 2011.

²⁷ <http://www.publishwhatyoupay.org/en/resources/letter-ugandan-mp-henry-banyenzaki-peter-voser>.

Recommendations

A. The EU should not adopt disclosure requirements which are less demanding than EITI best practices

Even within compliant countries, EITI does not provide the same level of information disclosure. Therefore it is important not to refer to the EITI within the corpus of the Directive. This would be confusing and create the risk of conflicting interpretations by Member States in the implementation of the Transparency Directive. It would probably undermine the concept of a level-playing field for EU-listed companies. At most, the European Commission could refer to learning from EITI best practice highlighted below as a threshold that the Transparency Directive should achieve and surpass:

1. Obligation to disclose data in a timely manner

Implementing EITI countries have to produce annual reports after their first report²⁸. An annual reporting requirement is also consistent with the Dodd-Frank Act. This would not be difficult to implement, especially if integrated within the financial annual report. Failure to disclose data in a timely manner should be sanctioned²⁹.

2. Promotion of a user-friendly approach

EITI Indicator 18³⁰ ensures the accessibility, the comprehensibility and the comprehensiveness of the EITI reports. The Transparency Directive should therefore include a requirement for companies to publish data in a comprehensive and accessible way. This would also be consistent with the Dodd-Frank Act which obliges data from listed businesses to be published in an electronic, interactive and tagged document.

3. Ensure that the data are not aggregated

While the EITI initiative leaves it up to countries to decide whether to aggregate data on companies or not, many EITI implementing and compliant countries disaggregate data by types of payments and at least by companies. The Transparency Directive should require the disaggregation of data. This would be consistent with the Dodd-Frank Act that lists the minimum types of payments that the companies should disclose.

4. Include other data linked to the exploitation of natural resources

Some EITI countries³¹ add information to their EITI reports on the type and level of the national extractive industries production. Such information, especially when comparable within a country and within a region, would be very useful to determine which business is really contributing to the economic local development. Disclosure of production levels could

²⁸ http://eiti.org/files/EITI_Rules_2011.pdf, requirement 5.

²⁹ For example, Liberia was the first African EITI-compliant country. The LEITI ACT 2009 offers the possibility to the LEITI Multi-stakeholders committee “to determine the sanctions to be applied against any company and/or agency government failing to submit a report required by the EITI, or otherwise comply with requirements of the LEITI” (see http://protimos.org/Protimos/Legal_news_G&A_files/leitiaact.pdf).

³⁰ <http://eiti.org/fr/eiti/indicator-assessment-tool-18>.

³¹ That is for example the case in Nigeria.

help to assess if the amount of royalties paid by the company is a fair contribution regarding its activity.

5. Ensuring the quality of the information provided

One of the EITI criteria states that “payments and revenues are the subject of a credible, independent audit, applying international auditing standards”³². Ensuring that the disclosed information is audited would therefore be consistent with the EITI.

6. “Extractive industries” scope should be as large as possible

EITI’s scope is not limited to oil, gas and mining. For example, Liberia³³ has included the forestry³⁴ and the agricultural sector within the scope of EITI. Togo includes water resource within the EITI’s scope. Consistent with EITI best practices, the Commission should adopt the widest definition of the term “extractive industry” (cf. recommendation C) and not limit itself to mining, oil and gas.

7. Breakdown of payments should be as precise as possible

The Commission should not only refer to the EITI minimum standard in the breakdown of payments. Countries like Liberia include much more information in a very user-friendly format. Surface rental, export tax and employer contributions should at the very least be included in the breakdown.

B. The Commission should not grant exemptions

One of the main criticisms of compulsory financial disclosures (either on a country-by-country or on a project-by-project basis) is that it might create obligations in violation of some national legislation. According to Peter Voser³⁵, CEO of Royal Dutch Shell, “some in civil society organisations have argued that it [the Dodd-Frank Act] may and should even require companies to violate host countries’ sovereignty and disclose information that is prohibited by these countries’ governments”.

This contention has been countered by Susan Mapples, a post-doctoral research fellow at the Columbia law school and co-author of the report *Contracts Confidential: Ending Secret Deals in the Extractive Industries*³⁶. Within the “100 provisions from foreign and US laws and regulations concerning confidentiality and required and prohibited disclosures” used as a database for this report, the authors “did not uncover any examples of an explicit prohibition of disclosure of payments or provisions making payments confidential”³⁷. In fact, some foreign laws even require

³² <http://eiti.org/eiti/principles>.

³³ Ghana is willing to include the forestry sector within the Ghanaian EITI scope.

³⁴ For more information on the inclusion of the forestry sector, please refer to http://www.leiti.org.lr/doc/liberias_forestry_report.pdf.

³⁵ Speech made during the 5th Global EITI Conference in Paris, 2011. The whole speech is available at: http://www.shell.com/home/content/media/speeches_and_webcasts/2011/voser_paris_02032011.html

³⁶ The whole report is available at: <http://www.revenuewatch.org/files/RWI-Contracts-Confidential.pdf>.

³⁷ <http://www.sec.gov/comments/s7-42-10/s74210-52.pdf>.

payment disclosures³⁸. Petrobras, for example, is also not aware of any regulations prohibiting the disclosure of payments to any governments in the 30 countries where the company operates³⁹.

Companies have not provided any texts of laws and/or regulations prohibiting the disclosure of payments to governments. We assume that this is because no such laws exist. Providing exemptions based on a hypothetical argument could be counter-productive. It could lead to companies who are reluctant to comply with transparency obligations to lobby for local legislation that will prohibit payments disclosure. Therefore, we urge the European Commission not to consider any exemption clause in the adoption of a country-by-country financial reporting obligation for EU listed companies.

C. The Commission should use the broadest possible definition of the term “extractive industry”

Beyond adopting the best practice from EITI in Liberia and Togo as described above, the scope of extractive activities should also be sufficiently wide. To be consistent with the Dodd-Frank Act, the Commission should consider the inclusion of “the exploration, extraction, processing, export and other significant actions relating to oil, natural gas or minerals, or the acquisition of a license for any such activity” as stated in Section 1504 of the Act.

To limit the definition of activities covered by the Directive only to the exploration and production part will greatly undermine the benefits from the introduction of an information disclosure obligation. While Glencore does not own extractive operations in DRC it buys minerals from small-scale miners⁴⁰. With a definition limited to exploration/production, Glencore activities in DRC would be almost impossible to ascertain. It is also crucial to include the trading activity, as this activity is key in fixing the price of raw materials.

Definition not limited to companies registered as “extractive”.

The Commission should not limit the definition of extractive industries to the companies listed as “extractive industry” on the stock markets. Areva, which is one of the world uranium extraction leaders, would not be covered by a country-by-country disclosure obligation if only applied to companies listed as extractive.

D. The Commission should not accept the argument of unfair competition with non EU-listed companies

Due to the change in the law in the US a broad range of international companies – both EU listed and non-EU listed - will already be required to report on a country-by-country and project-by-project basis.

³⁸ Liberian LEITI Act for example, available at: <http://www.leiti.org.lr/doc/act.pdf>.

³⁹ <http://www.sec.gov/comments/s7-42-10/s74210-25.pdf>.

⁴⁰

http://www.brotfueralle.ch/fileadmin/deutsch/2_Entwicklungspolitik_allgemein/C_Wirtschaft%20und%20MR/Rapport%20Le%20cas%20Glencore%20en%20RDC.pdf (in French), page 18.

The cost of such disclosure would be very limited

The Security and Exchange Commission evaluated the cost of Dodd-Frank Act section 1504 at only US \$20 million for all the extractive industries. In comparison, the French oil company Total has registered US\$10 billion of after-tax profit in 2010. The limited cost for companies would be counterbalanced by the benefits of such disclosure for investors and civil society.

The disclosure of such information would not put the competitiveness of EU businesses at risk

Based on this information, it would be unlikely that competitors would be able to form an idea of what a particular bid was for a specific project. This being said, most of the information on bids is already published in professional reviews like Wood MacKenzie. In addition, such information often only remains commercially sensitive for a limited period of time. In conclusion, information provided by such disclosure will not harm EU-listed companies' competitiveness, would reduce the risk of corruption and would allow civil society and investors to ascertain the contribution of businesses to the local economy.

Document contacts:

Jean Saldanha, saldanha@cidse.org, +32 2 233 37 53.

Anne Lindsay, alindsay@cafod.org.uk, + 44 20 7095 5423

Grégoire Niaudet, Florian Gomart, gregoire.niaudet@secours-catholique.org, + 33 1 454975678

June 2011
