



Report Series

How Home Governments Can Incentivise Responsible Business Conduct of Extractive Companies Operating Abroad

2. Reporting Requirements



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Report Series

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About this Report Series

Creating an accountable marketplace in a widely interconnected world is a necessary corollary to globalisation, in which governments, companies and civil society play important roles. In a world where business activities and value chains span across many countries, finding the right types of measures to incentivise responsible business conduct (RBC) that crosses borders can be a challenge for states. The primary duty to protect human rights is with states, but companies too have a responsibility - a responsibility to respect human rights, as set out in the UN Guiding Principles for Business and Human Rights (UN Guiding Principles).¹ The Institute for Human Rights and Business (IHRB) has examined the role of states in advancing the protection of human rights in relation to business activities in its “State of Play” report on Human Rights in the Political Economy of States which highlighted examples from 70 countries of recent action.²

This series of Reports (the Reports) build on this line of work and IHRB’s activities in East Africa³ on the extractive sector (oil, gas and mining) under the “Nairobi Process”.⁴ The newly emerging East African producer nations as “host states” to extractive activities, bear the primary responsibility for regulating business activities within their territories. Generally, there are limits on states adopting laws that will take effect on the territory of another state. Nonetheless, the principle of sovereignty does not prevent the “home states” of extractive sector companies, large and small, from exploration companies to supermajors in the oil, gas and mining sectors, from setting clear expectations and legal requirements addressing how businesses domiciled in their jurisdiction should operate abroad. Many of the home states reviewed in these Reports have extractive companies domiciled in their jurisdictions currently operating in or considering operations in East Africa. These Reports are addressed to those home states to serve as inspiration for creating clear incentives and disincentives for responsible business conduct by “their” extractive companies while operating in East Africa and in other emerging producer nations.

The extractive sector is crucial to the development of both developing and industrialised countries, but it remains a high-risk sector with often significant human rights, environmental and social impacts.⁵ Extractive companies are more likely to operate in fragile and conflict-affected situations than other businesses⁶ and states where there may be limited regulation of

1 Office of the UN High Commissioner for Human Rights, “UN Guiding Principles on Business and Human Rights: Implementing the ‘Protect, Respect, Remedy’ Framework” (2011), at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

2 IHRB, ‘State of Play 3: Human Rights in the Political Economy of States: Avenues for Application’ (2014) p. 21. Available at: https://www.ihrb.org/uploads/reports/2014-03-18%2C_Report%2C_State_of_Play_-_Human_Rights_With_in_the_Political_Economy_of_States_-_Full_Report.pdf (IHRB State of Play 3)

3 In particular, Kenya, Tanzania, Uganda, Ethiopia, South Sudan.

4 <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-2-addendum-23-May-2008.pdf>

5 See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, “Corporations and human rights: a survey of the scope and patterns – of alleged corporate-related human rights abuse” (2008) highlighting human rights impacts in the extractive sector at the start of his mandate <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-2-addendum-23-May-2008.pdf>, the work done since then on human rights by some of the main international industry associations – the International Council of Mining & Metals: <https://www.icmm.com/en-gb/society-and-the-economy/mining-and-communities/human-rights> and IPIECA (global oil and gas industry association for environmental and social issues): <http://www.ipieca.org/our-work/social/human-rights/> as well as the active attention by civil society in documenting and addressing human rights impacts of the oil, gas and coal sectors: <https://business-humanrights.org/en/sectors/natural-resources/oil-gas-coal> and mining sector: <https://business-humanrights.org/en/sectors/natural-resources/mining>

6 World Bank Group, ‘Investment Climate in Practice: Promoting Foreign Investment in Fragile and Conflict-Af-

human rights, environmental or social impacts or where existing standards are not rigorously enforced. And while there has been significant developments among some of the major international extractive sector companies in developing policies and practices to implement the UN Guiding Principles, supported by work at the industry association level, these measures have been challenging to put into practice. These experiences are nonetheless important in demonstrating that these issues are relevant and are being addressed to the far wider group of extractive companies large and small that have not yet started to address these issues or are resolutely ignoring RBC developments.

In the meantime, several East African countries are working to upgrade their nascent national legal and regulatory frameworks to address these increasingly important sectors but face many challenges.⁷ Managing the extractive sector in a way that contributes to sustainable development and economic prosperity is an imperative. The African continent is all too familiar with the cost of getting it wrong.

While host states have the primary responsibility for shaping their own approach and regulation of the extractive sector, home states can play an important role in supporting a sustainable, accountable sector. The UN Working Group on Business and Human Rights has recommended that countries should set clear expectations for business and “take into account extraterritorial implications of business enterprises domiciled in their territory in accordance with the UN Guiding Principles”.⁸ This series of Reports seeks to highlight what home states are doing and what more they can do in supporting that vision.

Under the UN Guiding Principles, home states have a role to play in setting clear expectations that all businesses domiciled in their territory and/or jurisdiction respect human rights throughout their operations.⁹ In addition, in conflict-affected areas, (a characterisation that can be applied to South Sudan and parts of Uganda in the Eastern African region) in which “the ‘host’ State may be unable to protect human rights adequately due to a lack of effective control,” home states of multinationals have roles to play in assisting both the businesses and the host state in ensuring that businesses are not involved in human rights abuse, particularly gross human rights abuses. A home state’s duties vis-à-vis its often significant state owned enterprises in the extractive sector has recently been addressed by the UN Working Group on Business and Human Rights.¹⁰

Terminology

- The **“home state”** refers to the country where a company is legally registered.
- The **“host state”** refers to the country where a company operates.

ected Situations’ (April 2014) p. 3. Available at: https://www.wbginvestmentclimate.org/advisory-services/investment-generation/investment-policy-and-promotion/upload/In_Practice_Note_No_22.pdf

⁷ See Institute for Human Rights and Business, “Human Rights in Kenya’s Extractive Sector: Exploring the Terrain” at: <https://www.ihrb.org/focus-areas/commodities/human-rights-in-kenyas-extractive-sector-exploring-the-terrain> and Institute for Human Rights and Business, “Human Rights in Tanzania’s Extractive Sector: Exploring the Terrain” at: <https://www.ihrb.org/focus-areas/commodities/human-rights-in-tanzanias-extractive-sector-exploring-the-terrain>

⁸ UN Working Group on Business and Human Rights, “Guidance on National Action Plans on Business and Human Rights, (2015), p. 12, available at: http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance

⁹ UN Guiding Principles on Business and Human Rights, Principle 2.

¹⁰ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, “On the duty of States to protect against human rights abuses involving those business enterprises that they own or control, which are generally referred to as State-owned enterprises,” A/HRC/32/45 (4 May 2016).

2. Reporting Requirements

How Home Governments can Incentivise Responsible Business Conduct of Extractives Companies Operating Abroad

Where a company operates solely in its domestic market, the country is the home and host country at the same time. When a company operates abroad, host and home countries are distinct. Both home and host states have different tools at their disposal to incentivise RBC of companies and disincentivise irresponsible conduct.

The series of Reports is published in five parts:

1. Overview of the key international standards
2. Multi-stakeholder initiatives
3. Reporting requirements
4. Innovative new approaches
5. The role of capital markets

Each Report draws the spotlight to particular legislative, regulatory or engagement tools that home countries can use to incentivise RBC among extractive companies operating abroad. Each Report will also provide a direct country-by-country comparison and identify trends.

The Reports examine how a select number of home states seek to meet UN Guiding Principles expectations and incentivise the RBC of extractive companies when operating abroad. The analysis focuses on eight Organisation of Economic Cooperation and Development (OECD) countries with significant extractive sector companies (Australia, Canada, France, Germany, the Netherlands, Norway, the United Kingdom and the United States), the European Union (EU) and five BRICs countries (Brazil, Russia, India, China, and South Africa). The topics covered highlight measures available to home states to set expectations, if not legal requirements, applicable to extractive companies based in their countries and operating abroad. These examples can serve as models for other sectors that have drawn less attention but which may have increasingly significant human rights impacts when operating abroad. Also of importance, the examples discussed provide input to civil society and other stakeholders as part of the broader toolkit for promoting greater accountability, and should stimulate further debate on the efficiency and effectiveness of such measures.¹¹

There are more tools and approaches that could be highlighted in a more in-depth study. For example, the extraterritorial application of home country laws is the subject of extensive and on-going studies in the business and human rights space. Further research on the economic incentives certain home states provide to their extractive companies operating abroad would provide an interesting comparison to the efforts put into the kinds of RBC measures highlighted in this set of Reports. Further coherence between economic diplomacy and RBC diplomacy opens interesting possibilities for leveraging further action in the future.

¹¹ Given the broad scope of the task, the Reports do not attempt to evaluate the effectiveness of the measures. IHRB acknowledges that monitoring and evaluation of the various initiatives and tools discussed in this series would be important to track the impact and assess progress made, particularly at the host country-level. However it does seek to compare countries' engagement as an indicator for the relevance and range of the various incentives.

Executive Summary

This Report is the second in a series that review measures that “home states”¹² can use to incentivise responsible business conduct (RBC) and disincentivise irresponsible conduct of extractive companies operating abroad. It reviews measures by eight selected countries in the Organisation of Economic Cooperation and Development (OECD), as well as Brazil, Russia, India, China and South Africa (BRICS) and the European Union (EU) to use reporting requirements to stimulate more transparency, and greater accountability, of extractive companies concerning their operations outside their home base. The analysis is based on the data set out in the tables in the Annex.¹³

Home and host states of extractive companies have been active in requiring reporting by extractive companies around both revenue transparency and broader impacts on society and the environment. However, reporting requirements are a means to an end and not an end in themselves. For transparency to have an impact, disclosures must be relevant, accessible, timely and accurate¹⁴ so that stakeholders can use the information to hold governments and companies accountable. With the increased focus on making extractive data open source and machine-readable, the big data revolution is likely to spur uses and analysis of information that cannot currently be imagined.

Disclosures of revenue payments to host governments makes transparency a “fundamental tool to promote efficiency and accountability in converting natural resource wealth into long term social and economic development”.¹⁵ Disclosures provide citizens, civil society, investors and other stakeholders with the information to hold host governments and extractive sector companies to account for performance.

Access to such information also means that citizens and their governments are better placed to make informed decisions about the costs and benefits of natural resource extraction.¹⁶ Because accounting systems have not yet evolved to take full account of the costs and benefits to society of extractive operations, such as through full environmental and social cost accounting, other measures are needed to begin to put together a picture of the true costs and benefits of operations. Disclosure of contractual information and payments makes it possible to consider whether the contracts entered into between the government and extractive companies delivers adequate value to society and government for the use of non-renewable resources and whether the cost to society from losing the natural resource

12 The “home state” refers to the country where a company is legally registered. The “host state” refers to the country where a company operates.

13 The tables were updated as of May 2016.

14 Natural Resources Governance Institute, “NRGI Primer: Transparency Mechanisms and Movements.” Available at: <http://www.resourcegovernance.org/analysis-tools/publications/primer-transparency-mechanisms-and-movements>

15 Ibid.

16 Publish What You Pay, “Mandatory disclosures.” Available at: <http://www.publishwhatyoupay.org/our-work/mandatory-disclosures/>

is adequately compensated. Extractive industry associations, in turn, have been working on models to demonstrate the wider direct and indirect contributions of the sector.¹⁷

Reporting requirements around non-financial dimensions of extractive sector operations can drive new dynamics in responsible business conduct (RBC) through a variety of avenues. These include the exchange of good practices, new ideas in managing issues as well as upgrading of internal management systems that support more proactive and effective management of the environmental, social and human rights dimensions of extractive sector operations. Insights into how companies manage challenges relating to human rights, the environment and corruption allow for more accurate assessments of strengths and weaknesses in company accountability and governance structures for dealing with often complex challenges in operating environments and prioritising these issues for action. For extractive sector companies, the internal discussions, management and tracking systems that are put in place to generate accurate reporting can produce internal benefits in terms of more coherence, efficiency and internal learning. These benefits need to – and need to be seen to – balance out the cost and complexity of such systems, across enterprises operating in multiple jurisdictions and multiple corporate structures. Companies at the forefront of sustainability often excel at transparency and see value in discussing company financial and non-financial performance side by side¹⁸ through integrated reporting.

The states surveyed in this Report have highlighted a number of benefits of requiring reporting by and for the extractive sector, including implementing broader policy goals -- often foreign policy goals -- around reducing conflict, addressing corruption, and promoting transparency more generally, in addition to more extractive-specific goals of reducing the resource curse. Reporting is being used to underpin home government participation in several important international initiatives in the extractives sector. By aligning their reporting requirements, home states can make it easier for extractive sector companies to comply with them in different countries while also reinforcing the importance of disclosure and levelling the playing field among home countries and their extractive companies.

Reporting requirements are also one way to fill global governance gaps. The extractive industry may be exceptional in terms of its size, its impact and its revenue-generating potential but its real uniqueness lies in its willingness to invest almost regardless of the operating environment. In resource-rich countries with poor governance, there may be limited regulation and even more limited enforcement of domestic laws relevant to extractive operations. Reporting requirements by home governments or through international initiatives may be one of the few avenues for local communities and civil society to access information.

While there are many reporting requirements that apply to extractive companies,¹⁹ this Report and the tables in the Annex illustrate only those reporting requirements that are specific to the extractive sector or specifically reference the extractive sector, stemming

¹⁷ See, e.g., International Council on Mining and Metals, "Social and economic development." Available at: <http://www.icmm.com/page/84166/social-and-economic-development>, last accessed 15 July 2016.

¹⁸ M. Tonello, Matteo, The Conference Board, Inc., "Pillars of Sustainability Leadership," (2016), published in Harvard Law School Forum on Corporate Governance and Financial Regulation. Available at: <https://corpgov.law.harvard.edu/2016/07/03/pillars-of-sustainability-leadership/>

¹⁹ See, e.g., UK Modern Slavery Act 2015, §54; Karnel, Richard "How corporate compliance with the Modern Slavery Act 2015 may help behavioral improvement for other human rights risks," (2015). Available at: <http://www.richardkarnel.co.uk/how-corporate-compliance-with-the-modern-slavery-act-2015-may-help-behavioral-improvement-for-other-human-rights-risks/>

from both national and international sources. Table A covers reporting requirements related to the extractive sector at the international levels.²⁰ Tables B and C cover EU and national reporting requirements respectively, most of which address revenue transparency. All of the OECD countries (plus the EU) except Australia, have adopted specific legislation on revenue disclosure by extractive companies domiciled in their jurisdiction as part of their wider efforts to support transparency in the extractive sector.

The Extractive Industries Transparency Initiative

2

The Extractive Industries Transparency Initiative (EITI)²¹ is a multistakeholder initiative of governments, NGOs, and companies, designed to enhance “good governance of natural resource development through improving transparency and accountability in the extractive industries”.²² A global standard for the governance of a country’s oil, gas and mineral resources,²³ it started as an effort to promote disclosure of information on revenue management and expenditures. More recently it has evolved to require much more comprehensive disclosures about how the extractive sector is managed in a particular country.²⁴

The expanded disclosure requirements now cover:²⁵

- **At the contracts and licensing stage:** (1) the legal framework and fiscal regime; (2) license allocations; (3) register of licenses; (4) contracts; (5) beneficial ownership; and (6) state-participation in the extractive sector. This enables stakeholders to understand the laws and procedures for the award of exploration and production rights, the legal, regulatory and contractual framework that apply to the extractive sector, and the institutional responsibilities of the State in managing the sector.
- **At the exploration and production stage:** (1) information about exploration activities; (2) production data; and (3) export data, enabling stakeholders to understand the potential of the sector.

20 KPMG & Global Reporting Initiative, “Carrot and Sticks,” (2013), p.17. Available at: <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>

21 For a broader discussion of

22 EY, “Disclosing government payments: Implications for the oil and gas industry,” (2013), p.1. Available at: [http://www.ey.com/Publication/vwLUAssets/EY_-_Disclosing_government_payments_for_natural_resource_extraction/\\$FILE/EY-Disclosing-government-payments.pdf](http://www.ey.com/Publication/vwLUAssets/EY_-_Disclosing_government_payments_for_natural_resource_extraction/$FILE/EY-Disclosing-government-payments.pdf)

23 EITI Factsheet. Available at: https://eiti.org/sites/default/files/documents/eiti_factsheet_en.pdf

24 EITI. Available at: <https://beta.eiti.org/>

25 EITI Standard, Requirements 2-6 respectively. Available at: <https://eiti.org/standard/overview>

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- **At the revenue collection stage:** (1) comprehensive disclosure of taxes and revenues; (2) sale of the state's share of production or other revenues collected in kind; (3) Infrastructure provisions and barter arrangements; (4) transportation revenues; (5) state-owned enterprise (SOE) transactions; and (6) subnational payments. The EITI requires a comprehensive reconciliation of company payments and government revenues from the extractive industries.
- **At the revenue allocation stage:** (1) distribution of revenues; (2) subnational transfers; and (3) revenue management and expenditures. This enables stakeholders to understand how revenues are recorded in the national and where applicable subnational budgets.
- **Social and economic spending:** (1) social expenditures by companies; (2) SOE quasi-fiscal expenditures; and (3) an overview of the contribution of the extractive sector to the economy. This information helps stakeholders to assess whether the extractive sector is leading to the desirable social and economic impacts and outcomes.

At present, the EITI has:

- 51 implementing countries that include a number of the countries covered in this Report series.
- Over 90 oil, gas and mining companies are "EITI Supporting Companies".
- Civil society organisations (CSOs) that play a role at the international level and as part of the secretariat, with many more participating in the national level multi-stakeholder groups.
- A range of international institutions such as the World Bank Group, the European Commission and the African Union as partner organisations¹ that provide support for good governance in the extractives sector, and technical, financial, and political support for in-country implementation and training.

Of the countries included in this Report, only Norway is compliant with EITI standards,²⁶ and three others are: Germany, the UK and the US. While joining the EITI is a voluntary choice by countries, once a country has joined, for the companies operating in the sector in that country, EITI reporting is mandatory, not voluntary. In almost all implementing countries, the commitment to implement the EITI has been enacted in law or decreed in some way.²⁷

Additional countries and regions (namely the EU) that are home to significant extractive sector companies but not implementing countries themselves have also adopted specific legislation around disclosure of payments by extractive companies to further support the global effort on revenue transparency. The EU mandatory disclosure requirements on country-by-country reporting for extractive companies complement the EITI efforts by legally requiring companies registered or listed in the EU to disclose payments to governments along the same lines as EITI, thus contributing to the strengthening of the EITI and extending its reporting scope to all resource-rich countries.

²⁶ In order for a country to be compliant with the EITI, rather than simply a "candidate country," it must undergo a two-and-a-half-year validation process that helps the EITI Board determine that it has met all of the EITI Requirements, and has satisfactory levels of disclosure and openness in the management of the natural resources, as well as a functioning process to oversee and improve disclosure.

²⁷ <https://eiti.org/faq>

The EITI complements these national and regional revenue transparency reporting efforts²⁸ by:

- Covering all companies based in an implementing EITI country, including state-owned enterprises, not just those covered by reporting requirements from the home government; EITI is a host government tool and thus shows how the two can work hand-in-hand to reinforce each other.
- Requiring a reconciliation²⁹ of what companies say they have paid with what a government discloses that it has received, thus going beyond the home country disclosure requirements discussed below.
- Establishing a specific mechanism for debate about the resources inside the country.
- Requiring disclosure of the legal infrastructure – both public and private, underpinning the sector in a particular country. Public authorities must disclose the legal, regulatory, contractual and institutional framework while the private sector must disclose its contracts, beneficial ownership and social investment. This evolution provides a far more contextualised understanding of the whole extractive sector value chain, beyond just the revenue collection and management step, including a more informative picture of the government-extractive sector interaction.

National & Regional Legislation on Revenue Transparency

3

Many home states have implemented national legislation to mandate reporting requirements for the extractive sector, in addition to being a part of international initiatives. Reporting requirements are typically introduced by binding legislation, which are based on criteria such as being listed on a stock exchange in the country,³⁰ having its seat in the legislating country, and/or having a certain size (e.g. in employees).

Of the countries reviewed in Tables B and C in the Annex, France, Germany, the Netherlands, Norway, the UK, the US and Canada created their own national legislation to implement mandatory reporting requirements for the extractive sector. Much of the language used by EU

²⁸ EITI, “FAQs for governments considering EITI implementation.” Available at: <https://eiti.org/eiti/faq-countries-considering-eiti#significantrevenues>, last accessed 15 July 2016.

²⁹ EITI, “EITI Glossary – Reconciliation.” Available at: <https://eiti.org/glossary#Reconciliation>, last accessed 15 July 2016.

³⁰ They take account of sector-specific realities (e.g. the size of extractive companies operating abroad for setting the threshold for mandatory reporting).

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Member States in their respective national reporting requirements mirrors the amended EU Directives (see below) not surprisingly as EU member states are required to implement the EU Directives by specific deadlines.

No BRICS countries evaluated have created binding legislation on revenue transparency. The China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCMC), a subordinate unit of the Ministry of Commerce of China³¹, describes itself as an industry association representing a membership of 6,006 companies, the majority of Chinese mining companies investing abroad and trading mineral, metal and hydrocarbon products. The CCCMC has adopted "Guidelines for Social Responsibility in Outbound Mining Investments".³² While the Guidelines state that their purpose is "to regulate Chinese mining investments and operations", they are not adopted as legislation and do not have a regulatory enforcement mechanism. They nonetheless encourage disclosure of all payments made to foreign government entities in countries of operation, including in-kind payments and infrastructure projects, in line with global transparency standards, in countries where those apply. The Guidelines conclude that "revenue transparency is becoming globally imperative for the mining industry," citing EITI, the legislation from the US and EU, and listing requirements.³³

Featured Legislation: the United States

Section 1504 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") sets out a mandatory revenue reporting requirement for extractive companies. The legislation reflects US foreign policy interests in "supporting global efforts to improve transparency in the extractive industries. The goal of such transparency is to help combat global corruption and empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources."³⁴

Companies registered with the Securities and Exchange Commission (SEC) are required to report how much they pay host state governments to access oil, gas, and other mining resources.³⁵ This is not limited to US companies, but also foreign companies who meet that registration requirement.

Similar to the EU Directives (see below), Dodd-Frank requires extractive companies and any of their subsidiaries to disclose payments to foreign governments.³⁶ After revisiting the legal justification for these transparency requirements outlined in Section 1504 in response to a

31 See: https://www.emm-network.org/case_study/cccmc-developing-guidelines-for-social-responsibility-in-outbound-mining-investment/

32 The China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCMC), 'Guidelines for Social Responsible Outbound Mining Investments' contain the sector-specific guidance on social responsibility https://www.emm-network.org/case_study/cccmc-developing-guidelines-for-social-responsibility-in-outbound-mining-investment/ (CCCMC Guidelines)

33 CCCMC Guidelines, Section 2.2.5 and footnote 4.

34 SEC Rule, "Disclosure of Payments by Resource Extraction Issuers," Release No. 34-78167; File No. S7-25-15, 17 CFR Parts 240 and 249b (27 June 2016). Available at: <https://www.sec.gov/rules/final/2016/34-78167.pdf> (SEC Rule)

35 U.S. Dodd-Frank Act, §1504(q)(1)(D). Available at: WHAT IS SHE AFTER HERE? NOT SURE THIS url IS THE RIGHT ONE BUT CAN'T FIND ANOTHER http://www.dodd-frank-act.us/Dodd_Frank_Act_Text_Section_1504.html See also SEC, <https://www.sec.gov/news/pressrelease/2016-132.html>,

36 U.S. Dodd-Frank Act, §1504(q)(1)(C).

2012 lawsuit filed by American Petroleum Institute (API),³⁷ the SEC confirmed its importance in Dodd-Frank in 2016.³⁸

The revised and final SEC rule on “Disclosure of Payments by Resource Extraction Issuers”³⁹ issued in June 2016 requires companies covered to disclose information on an annual basis about payments related to the commercial development of oil, natural gas, or minerals. This includes exploration, extraction, processing, export, and the acquisition of a license for any such activity. The rule specifically requires the disclosure of payments, including both single payments and a series of related payments within a fiscal year, that are equal to or greater than \$100,000 as well as the disclosure of payments on a project-level basis.

The specific payments that must be disclosed include taxes, royalties, fees, production entitlements, bonuses, dividends, and payments for infrastructure improvements. A new addition - if required by law or contract - includes payments with respect to community and social responsibility activities. This last requirement makes the disclosure requirements consistent with the revised EITI 2016 Standard.⁴⁰

In order to reduce the regulatory burden on companies and promote a level playing field in international transparency, a company may comply with the relevant US reporting requirements by filing a report prepared in connection the European Union Accounting and Transparency Directives, Canada’s Extractive Sector Transparency Measures Act, and the US Extractive Industries Transparency Initiative subject to certain conditions as these were found to be “substantially similar” to the SEC requirements.⁴¹ As noted in the SEC Rule, this should also incentivise foreign countries that are considering adoption of resource extraction payment disclosure laws to provide a level of disclosure that is consistent with US rules and the other major international transparency regimes.⁴²

Featured Legislation: European Union Country-by-Country Reporting of Payments by Extractive Companies⁴³

The EU Accounting and Transparency Directives cover more than the extractive sector, but also have specific country-by-country reporting requirements for the extractive sector. In 2013, the EU approved amendments to the Transparency and Accounting Directives that established new standards for financial and non-financial reporting requirements for both listed and large,

37 API v SEC & OXFAM, 953 F. Supp. 2d 5, 25 (D.D.C. 2013).

38 Global Witness, “SEC Announces Historic Transparency Rule for U.S. Oil, Gas, and Mining Companies Doing Deal With Foreign Governments”, (2016). Available at: <https://www.globalwitness.org/en/press-releases/sec-announces-historic-transparency-rule-us-oil-gas-and-mining-companies-doing-deals-foreign-governments/>

39 SEC Rule.

40 SEC Rule, pp. 262-263.

41 SEC Rule, Section J.

42 SEC Rule, Section J.

43 European Commission, “Public Country-by-Country Reporting/Corporate tax transparency.” Available at: http://ec.europa.eu/finance/company-reporting/country-by-country-reporting/index_en.htm#cbcr-payments-news, last accessed 15 July 2016.

non-listed extractive companies. The EU mandatory disclosure requirements complement EITI efforts by legally requiring companies registered or listed in the EU to disclose payments to governments along the same lines as EITI. In doing so, “the ultimate objective is to contribute to the strengthening of the EITI and to extend its scope to all resource-rich countries”.⁴⁴

The Accounting Directive (2013/34/EU) requires that large and/or public companies with activities in the extractive and forestry industries disclose payments made to host governments on a country-by-country basis, and at times, on a project-by-project basis.⁴⁵ Pertaining to payments to governments, companies are required to report the target recipients of payments, and the attribution and breakdown of the payments: whether it be a production entitlement, tax levied, royalty, dividend, or bonus.⁴⁶ It also includes non-money payments such as “infrastructure improvements” as a type of payment to a host country.⁴⁷

The Accounting Directive is complemented by the Transparency Directive (2013/50/EU), which also includes country-by-country reporting requirements.⁴⁸ This includes all companies listed on EU regulated markets, while the Accounting Directive only applied to companies that were registered in the European Economic Area. Specific to the extractive sector,⁴⁹ it requires mandatory reporting of all payments made by extractive and logging companies to other governments at least worth €100,000 that include: production entitlements, taxes, royalties, dividends, bonuses, fees, and payments for infrastructure improvements.⁵⁰ The enhanced transparency “should include types of payments comparable to those disclosed under the Extractive Industries Transparency Initiative (EITI)”.⁵¹ Should a large undertaking or public entity not comply, the Directive gives EU Member States the authority to determine appropriate measures and sanctions for such a breach.⁵²

All EU Member States are expected to transpose into domestic legislation the Transparency and Accounting Directives by 2015 and Directive 2014/95/EU by December 2016.⁵³ Currently, 24 have transposed the Accounting Directive while only 15 Member States have fully transposed the Transparency Directive. All EU Member States included in this report (UK, France, the Netherlands, Germany) have transposed both Directives by the deadline.

44 European Commission, “New disclosure requirements for the extractive industry and loggers of primary forests in the Accounting (and Transparency) Directives (Country by Country Reporting),” (2013). Available at: http://europa.eu/rapid/press-release_MEMO-13-541_en.htm

45 European Commission, “Public Country-by-Country Reporting/Corporate tax transparency.” Available at: http://ec.europa.eu/finance/company-reporting/country-by-country-reporting/index_en.htm#cbcr-payments-news, last accessed 15 July 2016.

46 Ibid, Ch. 10, Art. 41(5).

47 “Payments means an amount paid, whether in money or in kind...,” Ibid.

48 European Commission, “Revised Directive on transparency requirements for listed companies (Transparency Directive),” (2013). Available at: http://europa.eu/rapid/press-release_MEMO-13-544_en.htm

49 European Commission, “New disclosure requirements for the extractive industry and loggers of primary forests in the Accounting (and Transparency) Directives (Country by Country Reporting),” (2013). Available at: http://europa.eu/rapid/press-release_MEMO-13-541_en.htm

50 Directive 2013/50/EU, Art. 1 (5), amending Art. 6 of Directive 2004/109/EC.

51 Directive 2013/50/EU, Preamble (7).

52 EU Directive, 2013/50/EU, Art. 1 (20), amending Art. 28 of 2004/109/EC.

53 Directive 2014/95/EU.

3.1 Scope of Extractive Companies Covered by Disclosure Requirements

Most of the countries that have national reporting requirements for extractive companies have similar breadth of coverage with respect to which types of companies are covered and what must be included in the report. The main exception concerns Section 1504 of the US Dodd-Frank Act, which imposes mandatory reporting on the broadest swathe of extractive companies, including all companies who are required to file annual reports with the SEC.⁵⁴ This includes both US and foreign companies that meet this requirement. Of the remaining countries with national sources for reporting requirements addressed in this Report, all have exceptions for small and medium-sized non-public entities with the exception of the Netherlands.⁵⁵

3.2 Application to Extraterritorial Operations

Of the countries that implemented mandatory reporting requirements for the extractive sector, all have created expectations for companies to report on activities abroad. Specifically, any payment to a foreign government or for a specific project related to extractives that is over the threshold mandated by the legislation must be included. Canada's Extractive Sector Transparency Measures Act covers reporting requirements for payment disclosures made to any levels of government, trusts, and corporations operating in Canada or abroad.⁵⁶

3.3 Application to Subsidiary Operations

Of the countries that implemented mandatory reporting requirements for the extractive sector, most have created some kind of obligation for parent companies to report on behalf of their subsidiaries. This expectation, however, is less clear than the reporting of extraterritorial activities because parent companies may have the option to produce a consolidated report, unless their subsidiaries publish one individually. For example, Norwegian country-by-country reporting requirements apply to undertakings that alone or together with subsidiaries meet the criteria for a "large undertaking" and "have one or more subsidiaries engaged in activities in the extractive industries".⁵⁷ This definition of a "large undertaking" is also

⁵⁴ Norton Rose Fulbright, "Disclosure provisions in the extractive industries," (2013). Available at: <http://www.nortonrosefulbright.com/knowledge/publications/80179/disclosure-provisions-in-the-extractive-industries#section2>.

⁵⁵ The only extractive companies that must report are those which are public entities or meet two of the following three criteria: at least 250 employees; at least 20M (local currency) in assets; or at least 40M (local currency) in revenue or net turnover. This language, originally found in the amended EU Directives, can also be found in the national legislation of Canada, France, Germany, Norway, and the UK. The Netherlands' Accounting Directive Implementation Act extended the scope of its reporting requirements by extending the application to any company with 50 employees instead of 250 employees detailed in all of the other national requirements.

⁵⁶ Natural Resources Canada, "Information on the ESTMA." Available at: <http://www.nrcan.gc.ca/mining-materials/estma/18184>, last accessed 15 July 2016.

⁵⁷ PWYP Norway, "Norwegian Regulations concerning country-by-country reporting," (2014). Available at: <http://www.publishwhatyoupay.no/en/node/16414>.

seen in the EU Directives which have been transposed into national legislation by France, Germany, the UK, and the Netherlands.⁵⁸ The EU Directives note that subsidiaries do not have to report separately when they are included in this kind of consolidated report.⁵⁹ The EU Directives anticipated that the national legislation of its Member States would reflect reporting obligations of parent companies for its subsidiaries. The UK amended its original law transposing the EU Accounting Directive due to concerns that the definition of “undertaking” was too narrow.⁶⁰ The UK Reports on Payments to Governments Regulations 2015 now more appropriately reflects the “Accounting Directive’s requirement for parent undertakings to report on payments made to governments by overseas subsidiaries”.⁶¹

Other National Reporting Requirements Covering the Extractive Sector

4

Certain countries covered in this Report have general reporting requirements that do not explicitly reference the extractive industry but apply to them if these companies fall within the eligibility requirements. For example, France strengthened its reporting legislation⁶² after recognising reporting gaps within non-financial reporting in the scope of social and environmental reporting.⁶³ The requirement also applies to subsidiaries and extraterritorial business operations.⁶⁴ In order to ensure compliance, the French government is required under the Grenelle II Act to submit a report to the French Parliament on how firms are fulfilling their reporting requirement and on action to ‘promote corporate social responsibility’ taken at the national, European and international levels. The Grenelle I and II Acts are not specific to the extractive sector, though any French extractive company is obligated under these acts to fulfil

58 PWYP Norway, §4/ Available at: <http://www.publishwhatyoupay.no/en/node/16414>, last accessed 15 July 2016.

59 EY, “Disclosing government payments: Implications for the oil and gas industry,” (2013), p.3. Available at: [http://www.ey.com/Publication/vwLUAssets/EY_-_Disclosing_government_payments_for_natural_resource_extraction/\\$FILE/EY-Disclosing-government-payments.pdf](http://www.ey.com/Publication/vwLUAssets/EY_-_Disclosing_government_payments_for_natural_resource_extraction/$FILE/EY-Disclosing-government-payments.pdf)

60 PWYP UK, “UK implementing regulations and rules for reports on payments to governments,” (2016), pp.1, 3. Available at: <http://www.publishwhatyoupay.org/wp-content/uploads/2016/01/PWYP-UK-fact-sheet-on-UK-regulations-rules-for-reports-to-governments-EU-Directives-updated-January2016.pdf>,

61 Ibid.

62 See, e.g. The ‘Nouvelles Régulations Economiques Act’ (‘Law on New Economic Regulations’), Loi n. 2001-420 (15 May 2001) (requiring that National Stock Exchange listed companies disclose non-financial information in their annual report in order to evaluate social and environmental issues related to business activities). Available at: <https://www.legi-france.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000223114&categorieLien=cid>.

63 Ministère des Affaires Etrangères, Office of the Ambassador at large for Corporate Social Responsibility, “The French legislation on extra-financial reporting: built on consensus,” (2012), p. 2. Available at: http://www.diplomatie.gouv.fr/en/IMG/pdf/Mandatory_reporting_built_on_consensus_in_France.pdf

64 The non-financial report is mandatory for listed companies on French Stock Exchange and subsidiaries of foreign companies listed in France, moreover it is mandatory for unlisted companies including subsidiaries of foreign corporations located in France. Business for Social Responsibility, “The Five W’s of France’s CSR Reporting Law,” (2012), p. 6. Available at: http://www.bsr.org/reports/The_5_Ws_of_Frances_CSR_Reporting_Law_FINAL.pdf

its reporting obligations.

In some countries, there are reporting requirements for companies listing on the stock exchange related to environmental, social and governance issues. As many exchanges are now private, some of these requirements are initiatives of the exchange itself, while others are prompted by the host government.⁶⁵

A number of countries are adopting sustainability frameworks for their capital markets, with some using 'comply or explain' rules to guide disclosure for listed companies (and even non-listed companies). In Brazil, the regulator is expected to develop a "Report or Explain" rule in 2016 and the stock exchange already encourages disclosure of sustainability reporting.⁶⁶ In 2008, the Chinese government introduced the "Taida Environmental Index" into the Shenzhen Stock Exchange, and also began providing instruction on RBC-related issues.⁶⁷ The 2008 Instructing Document noted that there should be a CSR reporting mechanism for SOEs, though does not detail what, if anything, the SOEs should be reporting beyond CSR strategy and implementation.⁶⁸ The Sustainable Stock Exchange Initiative provides a platform for peer-to-peer dialogue among global exchanges and seeks to enhance corporate transparency and performance in respect to environmental, social and corporate governance (ESG) issues.⁶⁹

Featured Legislation: European Union Directives on Non-Financial Reporting for Large Enterprises

In the EU strategy 2011-2014 on corporate social responsibility, the European Commission emphasized the need to "improve undertakings' disclosure of social and environmental information".⁷⁰ According to the Commission, financial and non-financial reporting enables all stakeholders — from citizens to shareholders — a "meaningful, comprehensive view of the position and performance of companies"⁷¹ and "is important for Europe's competitiveness and the creation of more jobs".⁷²

Recent amendments to the Accounting Directive adds a non-financial statement requirement in the management report and a consolidated non-financial statement to improve the disclosure of social and environmental information by all large companies.⁷³ The amended requirements are not specifically directed to the extractive sector but will apply to extractive companies if they meet the disclosure criteria -- public-interest entities or large undertakings

65 For more information on listing rules of stock exchanges, see KPMG & Global Reporting Initiative, "Carrot and Sticks," (2013). Available at: <https://www.globalreporting.org/resource/library/Carrots-and-Sticks.pdf>

66 See: <http://www.sseinitiative.org/fact-sheet/bovespa/>

67 Ibid.

68 Ibid.

69 See: <http://www.sseinitiative.org/about/>

70 Directive 2013/34/EU, Art. (2).

71 European Commission, "Non-financial reporting." Available at: http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm, last accessed 15 July 2016.

72 European Commission, "Disclosure of non-financial information: Europe's largest companies to be more transparent on social and environmental issues," (2014). Available at: http://europa.eu/rapid/press-release_STATE-MENT-14-291_en.htm

73 Directive 2014/95/EU, preamble (2).

2. Reporting Requirements

How Home Governments can Incentivise Responsible Business Conduct of Extractives Companies Operating Abroad

with over 500 employees.⁷⁴ This Directive builds on early adopters of mandatory reporting requirements such as Denmark, and broader voluntary reporting initiatives such as the Global Reporting Initiative.⁷⁵

The Directive requires companies covered to include in the management report material information on: environmental matters, social and employee aspects, respect for human rights, and anti-corruption and bribery issues.⁷⁶ As the reporting must give an “understanding of the group’s development, performance, position and impact of its activity” on these issues, if it has operations abroad, these should be covered. A subsidiary fulfilling the criteria does not have to disclose as long as it is part of a consolidated reporting by the parent undertaking.⁷⁷ The Commission is working on non-binding guidelines on non-financial reporting expected before the end of 2016.⁷⁸

Companies not complying with the disclosure criteria will have to explain this absence, following the ‘comply or explain’ rationale.⁷⁹ The types of penalties warranted for non-compliance with the Directives are left to Member States to determine. Specifically, Member States are responsible for ensuring that penalties are “effective, proportionate, and dissuasive” for infringing national provisions of the Directives, and that all steps necessary are taken to ensure enforcement of such penalties.⁸⁰ The UK, for example, noted that any failure to comply with the regulations would fall within its existing system of criminal enforcement that included imprisonment and/or a fine.⁸¹

74 Directive 2014/95/EU, Art. 1, (1) & (3).

75 Environmental Leader, “Impact of the EU Directive on Non-Financial Reporting,” (2015). Available at: <http://www.environmentalleader.com/2015/08/06/impact-of-the-eu-directive-on-non-financial-reporting/>

76 Directive, 2013/34/EU, Ch. 5 Art. 19 (1).

77 Art. 29 and 19a(3) introduced to the Directive 2013/34/EU by the Directive 2014/95/EU.

78 European Commission, “Non-financial reporting.” Available at: http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm, last accessed 15 July 2016.

79 Art. 19a(1), Art. 29a(1) introduced to the Directive 2013/34/EU by the Directive 2014/95/EU.

80 Directive 2013/34/EU, Ch. 11, Art. 51.

81 Publish What You Pay, “UK implementing regulations and rules for reports on payments to governments,” (2016), pp.10-11. Available at: <http://www.publishwhatyoupay.org/wp-content/uploads/2016/01/PWYP-UK-fact-sheet-on-UK-regulations-rules-for-reports-on-payments-to-governments-EU-Directives-updated-January2016.pdf>

Annex: Sources on Reporting Requirements for the Extractive Industry



Table A: Extractives Industries Transparency Initiative Reporting Requirements

Who Must Report	All extractive industry companies operating in the countries participating in an EITI country		
What Must be Reported	Material payments including: Profit taxes, royalties, dividends, bonuses, fees, host government's production entitlement, national state-owned company production entitlement		
Reporting Parent Obligation of Subsidiaries	Yes		
Reporting Obligation of Extraterritorial Activities	Yes		
Countries			
Australia	No	India	No
Brazil	No	Netherlands	No
Canada	No	Norway	Yes
China	No	Russia	No
EU	No	South Africa	No
France	No	United Kingdom	Candidate Country
Germany	Candidate Country	United States	Candidate Country

2. Reporting Requirements

How Home Governments can Incentivise Responsible Business Conduct of Extractives Companies Operating Abroad

Table B: EU-Specific Reporting Requirements for the Extractive Sector

	EU Accounting Directive 2013/34/EU [Financial and Non-Financial Reporting]	EU Transparency Directive 2013/50/EU [Financial Reporting]	Amendment to Accounting Directive 2014/95/EU [Non-Financial Reporting]
Who Must Report	EU listed or large undertakings active in the extractive industry with 2 of 3 criteria: <ul style="list-style-type: none"> • At least 250 employees • At least €20M assets • At least €40M net turnover 	EU listed or large undertakings companies active in the extractive industry with 2 of 3 criteria: <ul style="list-style-type: none"> • At least 250 employees • At least € 20M assets • At least € 40M net turnover 	Large undertakings which are public-interest entities with more than 500 employees
What Must be Reported	Reporting of payments greater or equal to €100,000 including: Taxes, royalties, dividends, bonuses, fees, infrastructure improvements Non-financial reporting related to environmental and employee concerns	Payments greater or equal to €100,000 including: Taxes, royalties, dividends, bonuses, fees, infrastructure improvements	Non-financial reporting on the company's impact relating to environmental and social matters, respect for human rights, anti-corruption and bribery matters, including: <ul style="list-style-type: none"> • Description of business model • Description of the policies pursued in relation to those matters, including due diligence processes • Outcome of those policies; • Risks of operation including products or services which are likely to cause adverse impacts in those areas • Risk management • Non-financial key performance indicators
Reporting Parent Obligation of Subsidiaries			
	Yes	Yes	Yes
Reporting Obligation of Extraterritorial Activities			
	Yes	Yes	Yes

Table C: National Sources on Specific Reporting Requirements for the Extractive Sector

	National Source	Who Must Report	What Must be Reported	Parent Company Reporting Obligation For Subsidiaries	Reporting Obligation For Extra-territorial Activities
Australia	None	None	None	No	No
Brazil	None	None	None	No	No
Canada	Extractive Sectors Transparency Measures Act	Listed or unlisted extractive companies with 2 of 3 criteria: <ul style="list-style-type: none"> • 250 employees • C\$20M in assets • C\$40M in revenue 	Payments greater or equal to C\$100,000 including: Taxes, royalties, dividends, bonuses, fees, infrastructure improvements	Yes	Yes
China	The Chinese Guidelines for Social Responsible Outbound Mining Investments	Not mandatory	All payments which are made to foreign government entities in countries of operation, including in-kind payments and infrastructure projects, in line with global transparency standards, in countries where those apply	No	Guidelines recommend this
EU	EU Accounting and Transparency Directives	EU listed or large undertakings active in the extractive industry with 2 of 3 criteria: <ul style="list-style-type: none"> • 250 employees • €20M assets • €40M net turnover 	Payments greater or equal to €100,000 including: Taxes, royalties, dividends, bonuses, fees, infrastructure improvements	Yes	Yes
France	The Transposing Act	French listed or large undertakings active in the extractive industry with 2 of 3 criteria: <ul style="list-style-type: none"> • 250 employees • €20M assets • €40M net turnover 		Yes	Yes

2. Reporting Requirements

How Home Governments can Incentivise Responsible Business Conduct of Extractives Companies Operating Abroad

	National Source	Who Must Report	What Must be Reported	Parent Company Reporting Obligation For Subsidiaries	Reporting Obligation For Extra-territorial Activities
Germany	Accounting Directive Implementation Act; Act on the Implementation of the Transparency Directive	Public interest entities or large undertakings active in the extractive industry with 2 of 3 criteria: <ul style="list-style-type: none"> • 250 employees • €20M assets • €40M net turnover 		Yes	Yes
India	None	None	None	No	No
Netherlands	The Accounting Directive Implementation Act	Public interest entities or large undertakings active in the extractive industry with 2 of 3 criteria: <ul style="list-style-type: none"> • 50 employees • At least € 20M assets • At least € 40M net turnover 	Payments to host governments, including: Taxes, royalties, production entitlements	Yes	Yes
Norway	Norwegian Accounting Act and Norwegian Securities Act	Public interest entities or large undertakings active in the extractive industry with 2 of 3 criteria: <ul style="list-style-type: none"> • 250 employees • NOK 320M in sales • NOK 160M in assets 	Payments greater or equal to NOK 800,000 including: Taxes, royalties, dividends, bonuses, fees, infrastructure improvements, and shares or other ownership=	Yes	Yes
Russia	None	None	None	No	No
South Africa	None	None	None	No	No

	National Source	Who Must Report	What Must be Reported	Parent Company Reporting Obligation For Subsidiaries	Reporting Obligation For Extra-territorial Activities
United Kingdom	Reports on Payments to Governments Regulations 2015 and Payments to Governments and Miscellaneous Provisions Regulations 2014	Public interest entities or large undertakings active in the extractive industry with 2 of 3 criteria: <ul style="list-style-type: none"> • 250 employees • £18M revenue • £36M net turnover 	Financial report must include: the government to which each payment was made, total amount of payments, total amount per type of payment, and total amount per type of payment to a specific project	Yes	Yes
United States	§1504 of The Dodd-Frank Act	All extractive companies required to file annual reports with the SEC	Payments greater or equal to \$100,000 including: Taxes, royalties, dividends, bonuses, fees, infrastructure improvements	Yes	Yes