

THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE AND AFRICA'S MINERAL GOVERNANCE REGIME

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ABSTRACT

The socio-economic development of African states is heavily dependent on how effectively governments are able to manage their natural resources. African states can derive greater benefit from the extraction of their natural resources and even develop sustainable legacies from their mineral wealth if the extractive industry is governed responsibly. In particular, African states need to ensure that the revenues collected are proportionate to the true value of the resources and are distributed equitably, ie, invested in social programmes that benefit communities. Transparency and accountability are central pillars in this process, acting as a check to common vices in the different extractive industries, such as illicit financial flows, tax evasion and corruption. Achieving transparency and accountability requires a mixture of regulatory initiatives and the acceptance of voluntary principles. Furthermore, the capacity of states to introduce the necessary reforms in their governance regimes can be bolstered through regional cooperation and a common strategy across Africa. This paper assesses the policy options available to African states to enhance the governance of their extractive industry, from the implementation of voluntary initiatives such as the Extractive Industries Transparency Initiative (EITI) to the adoption of government regulations at a national and regional level. The paper also considers the impact of multi-stakeholder governance on the management of the extractive industry and makes policy recommendations, aimed at achieving systemic reform, that are in line with the principles of transparency and accountability.

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ABBREVIATIONS AND ACRONYMS

AMV	African Mining Vision
CSO	civil society organisation
DRC	Democratic Republic of Congo
EITI	Extractive Industries Transparency Initiative
FDI	foreign direct investment
IFC	International Finance Corporation
MSG	multi-stakeholder group
NNPC	Nigerian National Petroleum Corporation
NEITI	Nigeria Extractive Industries Transparency Initiative
PWYP	Publish What You Pay
SADC	Southern African Development Community
SOE	state-owned enterprise
TEITI	Tanzania Extractive Industries Transparency and Accountability

INTRODUCTION

The quest by various parties (including foreign and domestic governments, communities and profit-driven investors) to control Africa's natural resources has been in evidence since the colonial period.¹ This has created both positive and negative legacies on the continent. Some of the negative legacies emerging from the struggle for the control of Africa's resources are exploitative practices by foreign companies, the collection of illegal mining rents by non-state actors, state custodianship of natural resources on behalf of the people, controversial tax benefits and the illicit flow of revenue from natural resources.²

The extractive industry (minerals, oil and gas) is one of the primary focus areas of foreign investment in Africa. African governments are stepping up their attempts to extract a higher proportion of revenue from the sector, which further entrenches countries' reliance on mineral extraction.³ Consequently, the governance of extractive industries has become the subject of intense scrutiny from both civil society organisations and corporate accountability advocates. Recently, the UN Economic Commission for Africa convened an expert group meeting to review the study on mainstreaming the governance of the extractive industry in the African Peer Review Mechanism process and to implement relevant codes and standards. This is one of several initiatives taking place in Africa relating to governance in the extractive industry.⁴ Another initiative launched some years ago is the African Mining Vision (AMV). Adopted by the AU in 2009, it sets out to integrate mining into local, national and regional development policies in such a way that local communities benefit from mining. The AMV is an attempt to ensure that mining revenue benefits the public and is distributed equitably.

The staggering level of illicit financial outflows from Africa suggests that corporate accountability in the extractive industry requires critical attention. The Africa Progress Panel Report of 2013 on 'Equity in Extractives: Stewarding Africa's Natural Resources for All' revealed that Africa loses twice as much in illicit outflows as it receives in international aid.⁵

1 The British Empire exploited Africa's natural resources for the development of Europe. See Kabemba C, 'Undermining Africa's wealth', OSISA (Open Society Initiative for Southern Africa), 2 March 2014, <http://www.osisa.org/economic-justice/blog/undermining-africas-wealth>, accessed 18 September 2016.

2 *Ibid.*

3 UNCTAD (UN Conference on Trade and Development), *World Investment Report (WIR)*. Geneva: UN, 2015, p. 33. Africa's top 10 recipients of foreign direct investment in 2013/14 were Nigeria, South Africa, Algeria, the Democratic Republic of Congo (DRC), Tanzania, Mozambique, Morocco, Ghana, Sudan and Zambia.

4 See UNECA (UN Economic Commission for Africa), 'Expert Group Meeting to Review the Study on Mainstreaming the Governance of the Extractive Sectors in the African Peer Review Mechanism Process', 2015, <http://www.uneca.org/egmextract>, accessed 18 September 2016.

5 Africa Progress Panel, *Equity in Extractives: Stewarding Africa's Natural Resources For All*, Africa Progress Report, 2013, p. 7.

Another problem is that the tax rates in some African countries, particularly in the extractive industry, are too low. In 2011 Zambia exported \$10 billion in copper and collected \$240 million in tax revenue, which amounted to only 2.4% of the export value.⁶ Similarly, Guinea exported \$1.4 billion of minerals and collected only \$48 million in taxes, a mere 0.4% of the export value.⁷ The African Development Bank indicated that during the 2012 reporting period, the average mining royalty in Africa was 3.5%⁸ while the average global tax rate in mining during the period was 45%–65%.⁹ These examples show that while mineral resources constitute one of the largest sources of revenue for African countries, the underwhelming returns are cause for serious concern.¹⁰ Although tax collection by the state may not lead to economic prosperity for Africans, taxes are arguably the most important resource that governments have to sustain public spending, which in turn could promote economic equity.

Furthermore, companies' exploration activities in the extractive industries across Africa are uncovering new natural resource reserves, which can potentially expand the revenue of some African states.¹¹ Recent examples include the discovery of oil in Ghana and Uganda, as well as natural gas off the coast of Mozambique and Tanzania, all of which have the potential to generate revenues of staggering proportions for the countries concerned.¹²

The challenge for African states is determining how to ensure that, firstly, the state receives an equitable share of revenues from the companies that are investing and, secondly, that state revenues are invested for the broader social and economic benefit of the people.¹³ This requires an equitable distribution of resources; thus, the principles of transparency and accountability should be upheld. Transparency ensures public access to information about the extent of wealth in natural resources and who the beneficiaries are. It allows the public to monitor the spending of this revenue. Accountability, in turn, helps to ensure that governments and companies are answerable for their actions.¹⁴

This paper will show that financial transparency and knowledge of the value and quantity of natural resources being extracted in Africa can facilitate the optimisation of resources for public benefit, which in turn should lead to economic equity. Too often, transparency has been a reactive tool used to tackle the problem of secrecy rather than a proactive tool used to avert some of the difficulties in revenue collection mentioned above. Understanding what transparency is and what it can achieve is necessary and will be considered in the paper.

6 *Ibid.*, p. 64.

7 *Ibid.*

8 Gajigo O, Mutambatser E & G Ndiaye, 'Royalty rates in African mining revisited: Evidence from gold mining', *African Development Bank Report*, 6, 2012, p. 2.

9 Africa Progress Panel, *op. cit.*, p. 64.

10 *Ibid.*

11 *Ibid.*, p. 8.

12 *Ibid.*, p. 42.

13 *Ibid.*, p. 8.

14 *Ibid.*, p. 54.

The need for such understanding became that much more acute in the aftermath of the massacre at the Lonmin Marikana mine, where 44 people, mostly miners, died in a clash with South African police during a wage-related protest in August 2012.¹⁵ When the South African government launched a commission of enquiry to investigate the Marikana atrocity, no one expected that the governance problems at Lonmin in particular and in the extractive industry as a whole would be on trial. Yet the commission inferred that the lack of financial transparency, the secrecy surrounding licensing conditions, and the lack of accountability and effective oversight mechanisms were some of the reasons for the Marikana massacre.¹⁶ Lonmin's abdication of its responsibilities (most importantly, the construction of housing for its workers) was played down in its reporting to shareholders in order to shield the company from financial liability, while the government failed to hold Lonmin accountable for violating its licensing conditions. The commission of enquiry found that Lonmin's 'failure to comply with its housing obligations created an environment conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct'.¹⁷

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STEPPING INTO THE VOID: THE EITI AS A MULTI-STAKEHOLDER GROUP FOCUSING ON GOVERNANCE IN EXTRACTIVES

GOVERNANCE UNDER THE SPOTLIGHT

Lonmin's failure to comply with its contractual obligation to the South African government to provide social housing would have been made public much earlier if South Africa had been a member of the Extractive Industries Transparency Initiative (EITI). The EITI¹⁸ was initiated through a campaign by a global civil society movement, Publish What You Pay (PWYP), and was launched in 2002 at the World Summit on Sustainable Development in Johannesburg. It was established to promote transparency, good governance, and civil society participation and accountability within different extractive industries. The EITI standard requires companies to disclose their social expenditures where they are 'legally or contractually required to make social contributions'.¹⁹ This requirement would have ensured disclosure by Lonmin in clear terms and compelled the government to exercise its oversight responsibilities more effectively.

15 South Africa History Online, 'Marikana massacre, 16 August 2012', <http://www.sahistory.org.za/article/marikana-massacre-16-august-2012>, accessed 18 September 2016.

16 Marikana Commission of Enquiry, *Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province*, (Marikana Report), 2015, Chapter 24.

17 *Ibid.*, p. 542.

18 EITI (Extractive Industries Transparency Initiative), 'The EITI Standard 2016', https://eiti.org/sites/default/files/documents/english-eiti-standard_0.pdf, accessed 27 August 2016.

19 Moberg J, 'Charting the next steps for transparency in extractives', EITI, 2013, <https://eiti.org/blog/charting-next-steps-for-transparency-in-extractives>, accessed 5 April 2017.

The Marikana tragedy is an example of what can happen when insufficient economic and social dividends flow from mining activities in an African context, because citizens are often only ‘informed of decisions taken by government on a “need to know basis” and the assumption was that they needed to know very little’

The Marikana tragedy is an example of what can happen when insufficient economic and social dividends flow from mining activities in an African context,²⁰ because citizens are often only ‘informed of decisions taken by government on a “need to know basis” and the assumption was that they needed to know very little.’²¹ Furthermore, ‘complex commercial transactions between government agencies and foreign investors’ are often shrouded in secrecy, which makes the practice vulnerable to corruption.²² A new culture, however, is developing. This includes contracts being published and more rigorous assessments being performed on the social and environmental impacts of investments.²³ The Marikana crisis was triggered by a number of underlying factors, many of which were linked to governance problems. It is therefore necessary to identify ways of addressing the governance challenges confronting the extractive industry in Africa.

The EITI currently has 58 member countries. A total of 24 African member countries implement the EITI standard, with 18 of them being fully compliant.²⁴ The initiative is overseen by a multi-stakeholder group (MSG) in each member country consisting of representatives from the private sector, civil society and government. The global board of the EITI, in turn, includes representatives from the PWYP.²⁵

Over time the scope of the EITI has evolved from ‘a narrow set of rules focused on revenue collection into an international standard covering the wider governance of extractive resources’.²⁶ After a few years of reporting by member countries, the EITI rules were published in 2009 and 2011, and the standard was revised in 2013 and again in 2016.²⁷ These revisions were done to allow more comprehensive and accurate disclosures by governments and companies, and to cover new forms of non-disclosure that could impede the promotion of accountability through transparency.

In terms of the most recently released [standard \(2016\)](#), EITI member countries are required to make full disclosures of licence allocations, licence registers, contracts, beneficial ownership provisions, and state participation in the extractive industry

20 For other cases, see reporting on various developments in different countries by Mines and Communities, <http://www.minesandcommunities.org>, accessed 20 July 2017.

21 Africa Progress Panel, *op. cit.*, p. 9.

22 *Ibid.*

23 *Ibid.*

24 The 18 compliant African countries are Burkina Faso, Cameroon, Chad, Côte d’Ivoire, the DRC, Ghana, Guinea, Liberia, Mali, Mauritania, Mozambique, Niger, Nigeria, Republic of Congo, Sierra Leone, Tanzania, Togo and Zambia. The other African countries implementing the EITI are Ethiopia, Madagascar, São Tomé and Príncipe, Malawi, Senegal and Seychelles. See EITI, ‘Countries’, <https://eiti.org/countries>, accessed 27 August 2016.

25 PwC (PricewaterhouseCoopers), *Tax Transparency Country-By-Country Reporting: An Ever Changing Landscape*, October 2013.

26 EITI, ‘History of the EITI’, <https://eiti.org/history>, accessed 5 April 2017.

27 Until 2011 the principles, membership criteria and regulations of the EITI were known as the EITI rules. After 2011 these became known as the EITI Standard.

via state-owned enterprises (SOEs).²⁸ The EITI also requires disclosure of exploration activities, production output and export data. In addition, member countries are required to disclose in their annual reports all revenue collected – including taxes, dividends and other revenues collected in kind. This requirement extends to SOE transactions and sub-national payments.²⁹ In terms of revenue allocation, the EITI requires disclosure of revenue distribution, sub-national transfers, and revenue management and expenditures.³⁰ It also requires disclosure of companies' social expenditures.³¹

For a country to avoid being found non-compliant, it must show progress in the areas of government engagement, company engagement, civil society engagement and timely EITI reporting.³² The EITI introduced an open data policy in 2015. In terms of this policy, EITI-implementing countries are encouraged to use open data as the default mode of information disclosure. This involves releasing data early under open licence, and ensuring that the public can freely obtain and reuse the data and that users have sufficient information to process the data.³³

It was not until 2013 that the EITI secretariat introduced rules providing contextual information about the extractive industry.³⁴ This move was aimed at addressing the problem of a lack of standardisation in the first set of EITI reports and the need to provide relevant information to ensure a better understanding of countries' financial disclosures. Under the most recent EITI standard,³⁵ other information now subject to disclosure includes contextual details on various extractive industries (including a description of the legal framework and fiscal regime), each extractive industry's contribution to the economy, production data, state participation in each extractive industry, revenue allocations and sustainability, licence allocations and licence registers, applicable provisions relating to beneficial ownership, and contracts.³⁶

Within these broad categories of disclosures, more specific disclosures are required in terms of total government revenues generated (including taxes, royalties, bonuses, fees and other payments), employment in each extractive industry, the value of production

28 EITI, 'The EITI Standard 2016', https://eiti.org/sites/default/files/documents/english-eiti-standard_0.pdf, accessed 27 August 2016.

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

34 Moberg J, *op. cit.*

35 In the compilation of the report, disclosures by government and industry are made to an independent reconciler who reconciles the receipts and payments, collects and reviews the other data, and compiles the report. The MSG then oversees the process and signs off on the final report to the public. The government leads the process and provides the political space and the authority needed to mandate disclosure by the companies to the reconciler.

36 EITI, 'The EITI Standard 2016', *op. cit.*

and export volumes, and beneficial ownership³⁷ in mining, oil and gas companies, among other details.³⁸

The EITI MSG publishes this information for the benefit of the public, while also determining what impact the EITI has had and the extent to which suggested recommendations have been adopted.³⁹

WHAT THE EITI SETS OUT TO DO

The EITI has been lauded for providing governance at three levels:⁴⁰

the establishment of an internationally accepted standard for reporting resource revenues by both corporations and governments; the creation of a model framework of multi-stakeholder dialogues on critical public policy issues in signatory countries; and the creation of an international network of governments, civil society organisations [CSOs] and corporate actors who share a commitment to revenue transparency.

According to Clare Short, the former chair of the EITI, the creation of the EITI was based on a number of assumptions. These were that transparency

- leads to less corruption and mismanagement;
- involves a commitment to openness and reform;
- improves the investment climate and attracts foreign investment;
- attracts support from multilateral institutions;
- improves private and public sector accounting;
- improves auditing systems (creating opportunities for reform); and
- improves public trust.⁴¹

In order to gauge the value of the EITI and whether it has realised its objectives, it is necessary to scrutinise the fundamental tenets of EITI-driven transparency as an accountability mechanism and the role of multi-stakeholder dialogues.

37 A beneficial owner in the EITI in respect of a company means the natural person(s) who directly or indirectly ultimately own(s) or control(s) the corporate entity. Publicly listed companies, including wholly-owned subsidiaries, are not required to disclose information on their beneficial owner(s) in terms of the EITI.

38 For a detailed list of the disclosures required under the EITI, see EITI, 'The EITI Standard 2016', *op. cit.*

39 *Ibid.*

40 Khadiagala G, 'Global and regional mechanisms for governing the resource curse in Africa', *Resource Insight*, 12, 2014, p. 18.

41 Short C, 'The development of the Extractive Industries Transparency Initiative', *Journal of World Energy Law and Business*, 2014, p. 12.

TRANSPARENCY: AN END IN ITSELF?

For more than a decade – between 2000 and 2011 – Equatorial Guinea was the fastest growing economy in the world. Driven entirely by oil, the country's average economic growth rate was 17% during that period.⁴² However, this did not translate into an improved standard of living for Guineans – which was hardly surprising as the country had a reputation for being a kleptocracy, with rampant corruption in many quarters. During the height of the looting of the country's resources, the US Justice Department seized a Gulfstream jet, several luxury cars and a 12-acre estate in the state of Florida valued at \$38 million from the son of the president, who also happened to be a minister in government.⁴³ This took place at a time when Equatorial Guinea had one of the lowest levels of primary school enrolment in the world and was ranked 136 out of 187 countries on the Human Development Index.⁴⁴

To understand the lack of correlation between Equatorial Guinea's impressive economic growth rate and the poor standard of living in the country, it is necessary to look at governance challenges at various levels of government, the private sector and society as a whole. Although promoting transparency is an important element in addressing these challenges, the following *caveat* should be noted (as previously argued):⁴⁵

Transparency has an instrumental value, which makes it a means to an end. Consequently, the emphasis in respect of transparency imperatives in the mining sector should be on what transparency can actually achieve. Transparency is often perceived as a reactive logic that is used in seeking redress of wrongs. However, it is important that the running narrative moves towards a more proactive approach to transparency, where this approach translates into good business decisions for corporations and embracing transparency initiatives becomes an issue of strategic importance. The question to consider, then, is not how to achieve transparency, but what we want mining corporations to be transparent about.

Transparency and accountability have been described as two sides of the same coin.⁴⁶ If there is to be accountability, the mandate of the relevant authority needs to be understood. There also needs to be access to information and strong institutions to implement and enforce the rule of law.⁴⁷

42 Africa Progress Panel, *op. cit.*, p. 17.

43 *Ibid.*, p. 29.

44 *Ibid.*, pp. 22–23.

45 Adeleke F & R Ward, 'Who's afraid of transparency? A critical appraisal of transparency as an investment imperative for the South African mining industry', in OSF (Open Society Foundation), *In Good Company? Conversations Around Transparency and Accountability in South Africa's Extractive Sector*, 2015, p. 35.

46 Murombo T, 'The effectiveness of initiatives to promote good governance, accountability and transparency in the extractives sector in Zimbabwe', *Journal of African Law*, 60, 2, 2016, p. 234.

47 *Ibid.*

According to Short, ‘transparency is not an end in itself. It has to lead to improved accountability and better management of ... resources for the benefit of the people in whose countries they are found.’⁴⁸ Consequently, for transparency to translate into accountability, strong oversight institutions are necessary to ensure that disclosures of wrongdoing have consequences. These consequences should not only involve punitive measures for companies, government institutions and corrupt officials in the public and private sectors; enforceable regulations also need to be introduced to prevent similar occurrences in the future. The role of transparency in promoting accountability should also encompass educating and empowering the public to use publicly available information to demand change that will benefit the community. Consequently, transparency does not only mean access to information but also covers public consultations informed by democratic principles, such as broad inclusivity, access to independent grievance mechanisms, and freely given, prior and well-informed consent from communities. These are fleshed out in more detail below.

It is useful to see accountability in two dimensions. According to the Africa Progress Panel, the first dimension is⁴⁹

making clear, comprehensive information on government business fully available to all. That business includes dealings with companies that affect the management of natural resources. The second dimension is voice, or having the power to use information through political and legal processes to influence decisions.

ACCOUNTABILITY AND ACCESS TO INFORMATION

To implement the EITI standard, a well-informed citizenry is required ‘to engage in public debate on how the country’s resources should be managed’.⁵⁰ This is made possible through access to information. However, in providing ‘information that adds value to the public discourse about governance of the extractive industries’,⁵¹ it is necessary to ensure that information is provided in an accessible form and can be used in a way that holds government and corporations accountable. Therefore, providing disaggregated data, including ‘public information on district or individual entitlements, and the extent to which these are met’ – rather than macro-economic figures as is currently the case – has been suggested.⁵²

If the information made publicly available is to be used, it must be provided timeously in an accessible, clear and accurate form. This requires regulation that goes beyond the EITI and accession issues to other voluntary principles influencing the well-being of the extractive industry. Sectoral laws that facilitate access to information, for example, will

48 Short C, *op. cit.*, pp. 13–14.

49 Africa Progress Panel, *op. cit.*, p. 71.

50 Short C, *op. cit.*, p. 11.

51 *Ibid.*, p. 15.

52 Kolstad I & A Wiig, ‘Is transparency the key to reducing corruption in resource-rich countries?’, *World Development*, 37, 2009, p. 525.

be necessary. Furthermore, prior and well-informed consent from affected communities during the natural resource licensing process is needed to ensure their willing participation in the process. Apart from facilitating access to information, the EITI also aids the participatory process by affording civil society unprecedented access to government and private companies. However, without effective sanctions, transparency alone is unlikely to ensure compliance, while national laws are essential channels for imposing duties and other obligations on companies or state agencies.

Transparency aside, it is necessary to have a clear regulatory framework with a strong state oversight mechanism that addresses legal breaches, as well as an equally strong civil society to hold government and corporations accountable. These elements of governance require structural pluralism and multi-stakeholder complexity, which together boost the potential of multi-stakeholder governance in extractive industries. This has been the basis for the development of the EITI as a governance mechanism.

THE MULTI-STAKEHOLDER GOVERNANCE MODEL

Multi-stakeholder governance is useful in addressing the divide between the state and society, the state and the private sector, and the private sector and society. Trust in traditional institutions of government and in the legitimacy of representative democracies has been declining.⁵³ Consequently, there has been a sustained interest in alternative forms of governance. A multi-stakeholder governance mechanism such as the EITI is concerned with the development and approval of new standards of conduct achieved through consensus.⁵⁴ The idea behind a multi-stakeholder governance mechanism such as the EITI is that it is a decision-making process among equals rather than a process of consultation in which one stakeholder takes the lead.⁵⁵ This means that multi-stakeholder governance mechanisms are process oriented and focus on social cohesion.⁵⁶

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53 This is a theme that has been consistently explored in various country contexts. For instance, in a 2014 poll conducted on the level of political trust in South Africa, it was found that citizens do not distinguish between political institutions and the actors who preside over these institutions, which affects confidence in democratic institutions. See Gouws A & C Schulz-Herzenberg, 'What's trust got to do with it? Measuring levels of political trust in South Africa 20 years after democratic transition', *Politikon*, 43, 2016, p. 18. A recent poll cited the US Congress as the least trusted institution in the US: see Gallup, 'Confidence in institutions', <http://www.gallup.com/poll/1597/confidence-institutions.aspx>, accessed 20 September 2016. Another report suggests growing disillusionment with democracy: see Foa R & Y Mounk, 'Across the globe, a growing disillusionment with democracy', *New York Times*, 15 September 2015, http://www.nytimes.com/2015/09/15/opinion/across-the-globe-a-growing-disillusionment-with-democracy.html?_r=0, accessed 17 October 2016.

54 MSI Integrity (Institute for Multi-Stakeholder Initiative Integrity), *Protecting the Cornerstone: Assessing the Governance of Extractive Industries Transparency Initiative Multi-Stakeholder Groups*, 2015, p. 12, <http://www.msi-integrity.org/assessing-eiti-msg-governance/>, accessed 5 April 2017.

55 *Ibid.*, p. 63.

56 *Ibid.*, p. 28.

There are several advantages to multi-stakeholder governance. Importantly, it promotes accountability, with mechanisms such as the EITI achieving greater accountability than traditional modes of governance. An example of this is the beneficial ownership disclosures project where, in the absence of regulation, the EITI has been able to ensure the disclosure of beneficial owners in extractive industry companies.

The voluntary nature of the EITI has both strengths and weaknesses. While voluntary initiatives have limited scope to enforce compliance, the multi-stakeholder governance approach has the advantage of flexibility. An MSG can be established quickly without the need for prolonged negotiations and in cases where the agreed rules of the game are not working, they can easily be adjusted.

Countries have adopted the EITI for a number of reasons. For example, membership of the EITI signals participating countries' respect for the rule of law. In this regard it has been suggested that the International Finance Corporation (IFC) prefers to invest in EITI member countries.⁵⁷ Consequently, the pressure on states to fight corruption and to improve their reputation and legitimacy has helped to drive membership of the EITI.⁵⁸

With MSGs comprising experts from different segments of society, they can tap into a diverse group of people and interests that may help to advance the goal of accountability. A multi-stakeholder governance mechanism such as the EITI is intended to be inclusive, ie, it involves the state, civil society organisations and the private sector. However, this inclusivity is entirely dependent on the extent to which civil society actors represent a broad church of interests, including trade unions, community groups, indigenous groups and gender groups. More importantly, the quality of the representation and participation of these groups stems from their level of influence and ability to influence the decision-making process.

Furthermore, when MSGs achieve transparency through the promotion of access to information, open meetings and the review of decision-making processes, there should be greater confidence in the outcomes of the deliberations. While the EITI advocates transparency in the extractive industry, its internal procedures have been shrouded in secrecy. Among the concerns that have been raised about the EITI are the lack of transparency in some country MSGs regarding the criteria used to invite people into civil

57 UNECA, 'Africa Review Report on Mining', 2008, p. 9, <http://www.uneca.org/sites/default/files/PublicationFiles/aficanreviewreport-on-miningsummary2008.pdf>, accessed 12 November 2016.

58 The background paper to the Nigeria Extractive Industries Transparency Initiative (NEITI) stated that 'the federal government has recognized that improvements in the transparency of petroleum revenue data are needed for the effective management of public resources and to improve the image of Nigeria at home and abroad'. See Idemudia U, 'The Extractive Industries Transparency Initiative and corruption in Nigeria: Rethinking the links between transparency and accountability', in Calland R & F Diallo (eds), *Access to Information in Africa: Law, Culture and Practice*. Leiden: Brill Publishing, 2013, pp. 134–135.

society groups, the holding of closed meetings and the failure to disclose payments to CSOs to cover the costs of participation.⁵⁹

A key responsibility of the EITI is the collection of data. Most governments do not have the bureaucracy or infrastructure for records management.⁶⁰ As a result, the planned process in the EITI of collecting information that is verifiable and accurate is very important for governments as it helps them to keep track of their revenue and to collect taxes.

The longevity of the EITI or any multi-stakeholder governance process creates an opportunity for the process to be institutionalised. This has been achieved in the case of the EITI, which has a global secretariat as well as country secretariats. This has led to the development of EITI laws in some countries as a way of further cementing the long-term sustainability of the initiative.⁶¹ The institutionalisation process was intended to address the weaknesses of the EITI, such as its voluntary character and its reliance on donor funding. However, the EITI can still be undermined by government and other stakeholders, and concerns surrounding its effectiveness at a local level still need to be addressed through the state practice of prioritising the representation and participation of marginalised groups.

A multi-stakeholder governance initiative such as the EITI essentially creates some political space where stakeholders are allowed to delve more deeply into governance issues. Such a process gives the public, represented by civil society groups, closer access to state agencies and extractive companies. It offers an opportunity for CSOs to ask direct questions and to receive responses, both of which would otherwise be difficult to achieve.

Although the EITI provides opportunities for multi-layered oversight, the effectiveness of an MSG is dependent on how inclusive that MSG is. There is a real danger of exclusivity, where elite experts and CSOs that are invited to be a part of the EITI hijack the process and fail to represent their constituencies.⁶² This raises the question of representation in MSGs and the extent to which it is inclusive in the first place. In this regard it is necessary to probe the manner in which grassroots organisations are included in MSGs. In some cases, representatives from civil society are self-selecting and dominated by certain actors, which can lead to perceptions of bias and a lack of independence among MSG members.

The EITI has done a particularly good job of developing clear timelines for the delivery of results. Despite this, multi-stakeholder governance initiatives in general are seen to lack a sense of urgency. Even the EITI does not escape this perception – eg, some EITI

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59 See, for example, the case study on Cameroon and per diems paid to participating CSOs in MSI Integrity, *op. cit.*, p. 22.

60 Darch C & PG Underwood, *Freedom of Information and the Developing World: The Citizen, the State and Models of Openness*. Oxford: Chandos Publishing, 2010.

61 Nigeria and Liberia are EITI member countries that have passed EITI laws to support the implementation of the initiative.

62 MSI Integrity, *op. cit.*, p. 38.

reports are published long after the information in the reports was made available on other platforms.⁶³

Furthermore, the EITI is sometimes perceived as being very technical, given its detailed standards and the array of compliance notes that must be adhered to.⁶⁴ While these requirements may stem from a desire to ensure the comprehensiveness of reports to support effective oversight, they could lead to reporting fatigue, particularly in cases where states are under-resourced. In addition, the tracking of financial flows through the EITI does not extend to 'bilateral loans, permitting donor countries to lend money to companies which may collude with officials in resource-rich countries without public scrutiny'.⁶⁵

In 2014, a non-profit company, MSI Integrity, conducted the most comprehensive assessment to date of national-level MSG governance practices in the EITI.⁶⁶ The assessment covered all publicly available governance materials released by 41 EITI-implementing countries, as well as the actual governance practices of 15 countries.⁶⁷ The assessment revealed shortcomings in internal governance in many national EITI processes.⁶⁸ This affected the ability to reach efficient decisions, led to the failure to uphold principles of inclusivity and transparency, and weakened the independence of participating CSOs in MSGs.⁶⁹ The assessment found that the overwhelming majority of MSG members are based in those cities where MSGs hold their meetings, 'which is rarely where extractive activity occurs'.⁷⁰ Furthermore, it was shown that the effectiveness of the EITI is being undermined by a lack of transparency in MSGs, 'and the failure to establish clear and comprehensive internal governance and decision-making processes'.⁷¹ This lack of transparency is evident in the closed sessions of the MSGs, in payments being made to participating organisations that could call into question the independence of the CSOs, and in the absence of dispute resolution procedures in the event of ideological conflicts arising within the MSGs.⁷²

Given the advantages and the challenges associated with the EITI, it is useful to assess the implementation status of the EITI in an African context. This assessment will be performed

63 The EITI rules require publication of reports within six months after the activities of a year come to an end. See EITI, 'EITI Standard 2016', *op. cit.*, pp. 31–32, 37.

64 There are 24 guidance notes that deal with a diverse range of issues, from contract transparency to licence allocations and registers, quality data and assurance, artisanal small-scale mining, the publication of EITI data and reports, social expenditures, transportation revenues, infrastructure provisions, establishment of MSGs, taxpayer confidentiality and sub-national reporting.

65 Besada H *et al.*, 'Regulating extraction in Africa: Towards a framework for accountability in the Global South', *Governance in Africa*, 2, 1, 2015, p. 7.

66 MSI Integrity, *op. cit.*, p. iv.

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*, p. x.

71 *Ibid.*, p. 8.

72 *Ibid.*, pp. 22–23.

on the assumption that, given the disclosures made under the EITI, transparency has improved but any improvement in accountability has been much harder to measure. Given the tentative and limited impact of the EITI, this paper poses the following questions: How do we manage transparency and measure accountability when the advantages and challenges of multi-stakeholder governance systems such as the EITI are not seen as mutually exclusive? Has the EITI offered value and achieved its stated objectives?

AN ASSESSMENT OF THE EITI IN SELECTED AFRICAN COUNTRIES

The EITI-compliant countries that this paper evaluates are Nigeria, Tanzania and Zambia. Particular attention is given to the value placed on the institutionalisation of the EITI through the statutory enactment thereof, the effect of delayed audits on EITI reporting, and the extension of reporting requirements to cover sub-national revenue flows.

NIGERIA

In Nigeria the term 'resource control' has gained notoriety, because it has come to describe the dispute between the federal government and Nigerian oil-producing states on how revenue from oil should be distributed. While the oil-producing states currently receive more than half of the country's oil revenue under the current revenue-sharing formula, demands for a higher allocation from the federal government are a constant feature of the resource discourse in Nigeria.⁷³

The Nigerian National Petroleum Corporation (NNPC) is an SOE responsible for the collection and transfer of oil revenue to the Nigerian government. A government audit in 2016 found that it had failed to pay over \$16 billion to the government.⁷⁴ Corruption has been blamed for this staggering loss and one of the recent initiatives of the Nigerian government has been the restructuring and reform of the NNPC.⁷⁵ Some of these reforms have included the appointment of new management at the NNPC, the division of the entity into smaller companies and the operationalisation of what is called a single treasury account, which is particularly relevant for the EITI because 70% of government revenue comes directly or indirectly from the extractive industry.⁷⁶ Currently, the Nigerian government typically does not receive the revenue it is due since it lacks the necessary oversight mechanisms to ensure proper accountability. This is despite the fact that the Nigerian government passed the [Nigeria Extractive Industries Transparency Initiative \(NEITI\) Act](#) in 2007, the first country in Africa to take such a step. The NEITI Act

If tax revenues are to grow and the sources thereof are to be diversified, the trust relationship between the government and the private sector will have to improve rapidly

73 Africa Progress Panel, *op. cit.*, p. 34.

74 Turkson N, 'The Nigerian oil company's missing billions', *The Atlantic*, 18 March 2016, <http://www.theatlantic.com/international/archive/2016/03/nigeria-oil-corruption-buhari/473850/>, accessed 13 February 2017.

75 BBC, 'Nigeria's NNPC "failed to pay" \$16bn in oil revenues', 15 March 2016, <http://www.bbc.com/news/world-africa-35810599>, accessed 13 February 2017.

76 EITI, 'Nigeria EITI's official statement on restructuring of NNPC and President Buhari's reforms', 2015, <https://eiti.org/node/4432>, accessed 13 February 2017.

provides a statutory framework for ensuring transparency and accountability in reporting and disclosure by extractive companies of revenue due to or paid to the government.⁷⁷

The EITI has used various means of dissemination, including the organising of road shows and the involvement of traditional leaders.⁷⁸ The Nigerian government views the EITI as having had a positive impact on the economy, and it is also seen to provide enough information to the public to hold government accountable.⁷⁹ The EITI is seen as having effectively forged collaboration between the legislative, civil society, companies and the government in the interests of better governance.⁸⁰ The Nigerian example shows that the implementation of EITI recommendations can lead to internal reforms and build the capacity of relevant stakeholders in the extractive industry.⁸¹

Quite often, several different laws regulate the extractive industry. In Nigeria, for instance, there are 19 laws that regulate the oil and gas sector.⁸² The EITI process is therefore a way of streamlining the regulation of the sector.

A downside to the implementation of the EITI is the political interference that has accompanied it. In 2015 the uncertainties surrounding the election and the change in government, which led to the dissolution of the MSG, negatively affected the implementation of the government's EITI work plan.⁸³ Clearly, political will is central to the implementation of the EITI.

Another significant weakness of the EITI in the Nigerian context is the reporting process. Owing to delays in reporting, a great deal of the information emanating from the EITI is regarded as outdated.⁸⁴ Most of the information provided in its report is already publicly available in other forms and, while the EITI information is more comprehensive, the lack of currency of the information devalues the report.⁸⁵

In a detailed analysis of the relative success of the EITI in Nigeria, some shortcomings in the EITI process were identified, including the fact that the EITI does not deal with the skewed 'power relations between the Nigerian state and multinationals and between the Nigerian state and western states'.⁸⁶ Furthermore, there is limited information on expenditure of the revenue collected, as well as 'a misplaced faith in civil society and their ability to demand accountability without regard for their nature, character and capacity'.⁸⁷

77 The Nigeria Extractive Industries Transparency Initiative Act 2007.

78 Wilson E & J van Alstine, *Localising Transparency: Exploring EITI's Contribution to Sustainable Development*, University of Leeds, 2014, p. 35.

79 NEITI, *Annual Activity Report 2015*, p. 41.

80 Africa Progress Panel, *op. cit.*, p. 42.

81 *Ibid.*

82 *Ibid.*, p. 44.

83 *Ibid.*, p. 7.

84 *Ibid.*, p. 44.

85 *Ibid.*

86 Idemudia U, *op. cit.*, p. 137.

87 *Ibid.*

Some of these identified concerns have been addressed in the new EITI standard with the introduction of disaggregated reporting, which shows which state agency received what and how much, as well as the transfers made to sub-national governments.⁸⁸

The inability of the EITI to hold governments accountable for how they spend the revenue accrued and the weak institutional structure of CSOs certainly affect the effectiveness of the EITI as a governance mechanism. For the EITI, it should be acknowledged that governance structures in African states are weak and unable to effectively fulfil their role. CSOs often lack the resources and expertise to mount sustainable campaigns and build relationships that can consistently hold companies accountable. African governments, like their counterparts across the world, view CSOs with suspicion and do not engage in collaborative governance.

Other concerns persist. An emerging problem that is not addressed in the EITI is the independent verification of production volumes and value without reference to information supplied by production companies. Furthermore, because there is a limited amount of disclosure when it comes to contract transparency, secret contracts can allow resources to be hidden if there are no appropriate accountability mechanisms for local communities. Beneficial ownership transparency and contract transparency play a crucial role in ensuring that the right frameworks are in place for communities to be able to hold government and corporations accountable.

It is important for African states to recognise the bottlenecks that inefficient bureaucratic systems cause, including the negative effect of inefficient oversight systems. The EITI MSG mechanism is an attempt to complement the oversight system in government by allowing a collaborative governance approach. However, the EITI process is susceptible to capture by groups of people who may have a vested interest in sustaining corruption. Therefore, locally developed processes to police accountability are equally necessary.

Despite the above-mentioned constraints, some of the positive outcomes of the EITI in Nigeria have been the discovery of regulatory loopholes, revenue discrepancies and missing tax payments from the NNPC between 2009 and 2011 totalling \$8.3 billion.⁸⁹

TANZANIA

Tanzania is the fourth largest gold producer in Africa, with gold being the country's leading export in 2014. Tanzania's revenue from the extractive industry has been consistently rising and even jumped by 28% from \$602 million in 2013 to \$754 million in 2014.⁹⁰

In 2009, in the initial stage of Tanzania's compliance with the EITI, there was a \$37 million discrepancy between what companies paid to the government and what the government

88 EITI, 'The EITI Standard 2016', *op. cit.*

89 Short C, *op. cit.*, p. 13.

90 EITI, 'Tanzania: More revenues from extractives despite falling prices', <https://eiti.org/es/node/4470>, accessed 13 February 2017.

said it was paid.⁹¹ In 2012 the discrepancy had narrowed by \$4 million.⁹² However, an improvement in revenue collection does not necessarily mean an improvement in resource governance, and does not tell the story of how the revenue collected is spent.⁹³ As a result, Tanzania enacted the [Tanzania Extractive Industries Transparency and Accountability \(TEITI\) Act 2015](#). The TEITI Act requires disclosures of all contracts and licences to the public. Section 16(b) of the TEITI Act provides the committee established in terms of the act with the power to publish environmental management plans, in a bid to ensure extractive companies' compliance with mine closure plans, among other obligations. The TEITI Act also requires the disclosure of beneficial owners of extractive companies.

As a result of the TEITI Act, Tanzania has mainstreamed transparency and accountability in other sectoral laws, such as the Petroleum Act 2015 and the Oil and Gas Revenues Management Act 2015.⁹⁴ Furthermore, the TEITI Act allows the MSG to request disclosure of mineral development agreements and production-sharing agreements that were signed before and after the act was passed.⁹⁵

Tanzania participated in the beneficial ownership pilot project, which is discussed in more detail below. Furthermore, it developed a registry of licences detailing beneficial owners and conducted training in communities affected by mining.⁹⁶ Yet despite its attempts to comply with the EITI requirements, its membership was suspended in 2015 for failing to publish the fourth report on time, as required by the EITI Standard.⁹⁷ However, the suspension was lifted when Tanzania later met its reporting obligation.

ZAMBIA

Zambia is the world's eighth largest producer of copper. Mining accounts for 70% of the country's total export value and 28% of total government revenue.⁹⁸ Zambia re-privatised its mines in the 1990s without having the necessary geological information or mapping to properly value its reserves.⁹⁹ While Zambia is relatively stable politically, it ranks far down on the Human Development Index and relies heavily on mining to sustain its economy.

The [EITI MSG](#) in Zambia lacks a key player from civil society. Civil society representatives include non-governmental organisations working on trade policy and development, organisations representing women's rights, advocates of land reform, the council of

91 Khadiagala G, *op. cit.*, p. 18.

92 *Ibid.*

93 *Ibid.*, p. 19.

94 TEITI (Tanzania Extractive Industries Transparency Initiative), *Final Annual Progress Report: January–December 2015*, p. 22.

95 *Ibid.*

96 *Ibid.*, p. 10.

97 *Ibid.*, p. 19.

98 World Bank, *Zambia Mining Investment and Governance Review – Final Report 2016*, p. 5.

99 *Ibid.*, pp. 6, 12.

churches and the Mine Workers Union.¹⁰⁰ Traditional rulers, however, are excluded – which was a deliberate decision in view of the establishment of a government ministry of chiefs and traditional affairs. Therefore, traditional rulers are regarded as government representatives.¹⁰¹ The absence of traditional rulers in the MSG is cause for concern as they form an important institution that directly represents the views of affected communities and serves as an important conduit for information. The government ministry representing chiefs and traditional rulers is an administrative structure that does not carry the authority of traditional rulers in their immediate communities. This has created a potentially exclusionary MSG.

According to the 2015 Zambian EITI progress report, the African Mining Vision (AMV) was domesticated by the Ministry of Mines with the aim of reviewing and aligning Zambia's mine policies and laws with the AMV.¹⁰² Zambia has taken an important step in adopting a regional approach to solving its mining governance challenges, which this paper supports.

Other African states are increasingly recognising the advantages of the EITI's multi-level governance model and how this can mitigate the potentially negative effects of mining exploration. Agreements between mining companies and communities in countries such as Ghana and the Democratic Republic of Congo (DRC) are testimony to these changing sentiments, while Ghana and Sierra Leone have been increasing their revenue disbursements to sub-national governments. In light of these developments in Africa, it is time to explore whether the EITI has been a valuable mechanism, thereby affirming Short's assumption that the EITI's emphasis on transparency can lead to greater public trust.

HAS THE EITI BEEN OF VALUE?

In the past the EITI was considered to be a minimum standard, with the reporting requirement largely constituting a box-ticking exercise with no clear commitment to improving accountability.¹⁰³ For Short, the EITI plays an important role in ensuring that funds are accounted for in corruption-prone countries and in building trust among local communities.¹⁰⁴ The efficient presentation of data can help to inform debates and ultimately encourage better management of the extractive industry.

For the EITI to be truly effective, public knowledge and understanding of the process are required. For example, an understanding of company payment and government revenue streams and systems can inform public debates about the quality of governance of the extractive industries. Regular disclosure of extractive industry data is of little practical use without public awareness of what the figures mean or public debates on how resource

100 ZEITI (Zambia Extractive Industries Transparency Initiative), *Final Annual Progress Report: January–December 2015*, p. 3.

101 *Ibid.*

102 *Ibid.*, p. 25.

103 Short C, *op. cit.*, p. 11.

104 *Ibid.*

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revenues can be used effectively. In this regard, the EITI requirements regarding outcomes and impact seek to ensure that stakeholders are engaged in dialogue about natural resource revenue management.¹⁰⁵

Aside from the public interest that the EITI creates in the extractive industry, it encourages the formulation of new solutions to persistent problems around transparency and corporate accountability. Some of these problems are secrecy pertaining to beneficial ownership, tax evasion and insufficient disclosure of social spending from revenue accrued. These solutions could be the opening lines of a new chapter in the EITI's development.

THE EITI, GOVERNANCE AND BENEFICIAL OWNERSHIP

Foreign companies play a major role in the natural resource sector throughout Africa. In Liberia, a total of 121 foreign-owned companies reported to the EITI between 2008 and 2010.¹⁰⁶ In neighbouring Sierra Leone, more than twice that number of foreign-owned firms – 265 – were operating in the mining industry during that two-year period.¹⁰⁷ The presence of foreign companies brings a number of challenges, but these can be minimised through transparency and accountability. There are several documented cases where mining concessions and licences issued by African governments have been to the detriment of the countries concerned. An example of this is the loss of over \$1 billion by the DRC government due to the under-pricing of mining assets sold to offshore companies.¹⁰⁸ A lack of knowledge infrastructure and an inability to measure the value of reserves were at the root of some of these problems. If extractive companies had advanced technology and ample financial resources, they would be able to gather the necessary information and use it to their advantage in seeking mining concessions.¹⁰⁹ The lack of transparency in the awarding of mining contracts and concessions heightens the need for disclosures in respect of beneficial ownership.

The EITI has introduced new beneficial ownership requirements whereby implementing countries must disclose, by 2020, their real owners – including politically exposed persons and countries – and maintain a public register of this information.¹¹⁰ The EITI beneficial ownership pilot project took place between October 2013 and September 2015, and 11 countries participated.¹¹¹ The pilot project defined beneficial ownership, established

105 EITI, 'The EITI Standard 2016', *op. cit.*

106 Africa Progress Panel, *op. cit.*, p. 50.

107 *Ibid.*

108 Africa Progress Panel, *op. cit.*, p. 56.

109 *Ibid.*, p. 50.

110 EITI International Secretariat, *Beneficial Ownership Pilot Evaluation Report*, 2015, <https://eiti.org/document/beneficial-ownership-pilot-evaluation-report>, accessed 18 September 2016.

111 Burkina Faso, the DRC, Honduras, Kyrgyz Republic, Liberia, Niger, Nigeria, Tajikistan, Tanzania, Togo and Zambia.

disclosure thresholds, made disclosures about politically exposed persons and tracked changes in ownership over time, including specific details relating to beneficial ownership identity.¹¹² A number of its findings were common across participating states, including the inability to distinguish beneficial ownership from legal ownership, the lack of an enabling legal framework, and the inability to address the issue of company ownership when operations straddle multiple jurisdictions.¹¹³

The aim of the pilot project of the EITI was to expose the ultimate beneficiaries in a company. The EITI recommends the maintenance of a 'publicly available register of the beneficial owners' of corporations and their level of ownership. However, at a minimum, the information must be included in the country's EITI report.¹¹⁴ These disclosures are expected to enable the monitoring of revenue so that government can extract taxes as appropriate.

At the national level, the lack of a definition of beneficial ownership by governments and applicable thresholds reportedly made it difficult for the EITI secretariat to establish compliance with the beneficial ownership requirements.¹¹⁵ As these areas are still evolving and countries are not yet familiar with them, some of the participating countries expressed concerns about privacy and contractual relationships in the disclosure of beneficial ownership.¹¹⁶

Several challenges were experienced in the rollout of the pilot beneficial ownership project in Nigeria. Some companies refused to participate while others published the names of beneficial owners but felt they were violating confidential agreements with the companies concerned.¹¹⁷ In addition, some discrepancies were found between the information disclosed via the beneficial ownership project and the information contained in the Corporate Affairs Commission.¹¹⁸ Moreover, beneficial ownership disclosure was allegedly seen as a witch-hunt of political opponents.¹¹⁹ Ultimately, because politically exposed persons used surrogates in their business dealings, the beneficial ownership disclosure exercise did little to expose the beneficial owners.¹²⁰

The need for training, education and capacity building in transparency in beneficial ownership is therefore necessary to encourage states to buy in to this new reporting requirement.

112 EITI International Secretariat, *op. cit.*, p. 3.

113 *Ibid.*, p. 2.

114 EITI, 'Beneficial ownership', <https://eiti.org/pilot-project-beneficial-ownership>, accessed 18 September 2016.

115 EITI International Secretariat, *op. cit.*, p. 6.

116 *Ibid.*, p. 17.

117 NEITI, *Pilot Assessment of Beneficial Ownership Disclosure: Nigeria's Experience*, 2015, p. 10.

118 *Ibid.*

119 *Ibid.*

120 *Ibid.*

THE ROLE OF TRANSPARENCY IN TAX EVASION AND AVOIDANCE

The ownership structure of companies can be utilised to undermine good governance in the extractive industries – as evidenced in particular in tax avoidance and illegal financial flows. These tax strategies siphon revenue from already poor states, and the regulatory gaps in these countries widen the loopholes that companies exploit to evade taxes.¹²¹ To address these problems, state coordination is required to uncover tax havens, review double taxation treaties that inadvertently allow corporations to evade taxes, and expose hidden beneficial owners. Given the lack of ‘human, financial and technical resources needed to secure tax compliance’,¹²² African governments need to develop strategies that maximise their resources. This should include joint coordination among states to prevent tax evasion. Regional approaches to adopting multilateral agreements that halt tax evasion can be helpful in this regard.

States need to plug regulatory gaps that allow tax evasion. Therefore, there is a need for a resilient system that requires the disclosure of beneficial owners of companies and allows states to collect taxes based on the true value of natural resources. When such illicit revenue outflows are stopped, the focus should then extend to monitoring public spending.¹²³

TRANSPARENCY AND SOCIAL EXPENDITURE

While a huge amount is lost through inadequate collection, there is also the problem of the public spending of revenue collected. Resource-rich countries like the DRC and the Central African Republic spend less than 3% of gross domestic product on education.¹²⁴ According to the Africa Progress Panel, ‘Africa has never suffered a “resource curse”. What the region has suffered from is the curse of poor policies, weak governance and a failure to translate resource wealth into social and economic progress.’¹²⁵ Addressing the curse of poor policies and weak governance requires a robust national regime that optimises the potential of the extractive industry. The EITI can potentially aid this process.

Despite the extensive disclosures required by the EITI, it does not create a mechanism whereby recorded revenue is matched with social spending by the state. While the EITI provides for the reporting of social expenditure by companies and transfers to sub-national governments, this requirement does not apply to government expenditure. Kolstad and Wiig have argued that¹²⁶

the EITI focuses on one facet of the value chain only – transparency in revenue collection. It does not address upstream activities, such as procurement which constitutes a significant

121 Africa Progress Panel, *op. cit.*, p. 51.

122 *Ibid.*, p. 65.

123 *Ibid.*, p. 93.

124 *Ibid.*, p. 67.

125 *Ibid.*, p. 92.

126 Kolstad I & A Wiig, *op. cit.*, pp. 521–532.

part of the value chain in oil and gas; nor does it cover the distribution of income and public expenditure stemming from the extractive industry revenues.

They further assert that transparency is not enough to lift the resource curse. For them, transparency is only important 'to the extent that it impacts on the basic mechanisms underlying the resource curse, which are rent-seeking and patronage. It follows that transparency reform should focus on increasing access to information in areas that matter for reducing rent-seeking and patronage.'¹²⁷ In light of this, they suggest that the EITI's emphasis on revenue collection is misplaced because 'patronage is a question of the allocation of public expenditures'.¹²⁸ However, the revised EITI standard now offers technical assistance to member states aimed at improving the management and spending of resource revenues.¹²⁹ This new offering is a welcome development. Developing states often require external technical expertise to complement overworked or under-skilled public service officials. Host communities that are affected by mining operations should not be excluded from government-led and/or company-led decision-making that affects the welfare of the community – assuming they know what is generally best for communities. A more systematic approach to the spending of resource revenues will reduce the possibility of wastage and augment the benefits enjoyed by communities.

Host communities that are affected by mining operations should not be excluded from government-led and/or company-led decision-making that affects the welfare of the community

COMPLEMENTING THE EITI

It is not only the EITI that has been proposed as a mechanism for governing Africa's extractive industry. On a continental level, SADC, ECOWAS and the West African Economic and Monetary Union have attempted to develop a single mining code for their member states. For example, ECOWAS adopted a Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector, which seeks to create a common mining code for West Africa.¹³⁰ The code aims to promote participation, sustainable socio-economic development, poverty reduction, environmental protection, good governance and respect for human rights.¹³¹ However, the directive has not gained as much traction as the EITI and it should not serve as a substitute for joining the EITI.

Another initiative is the AMV, a broad framework of principles adopted by the members of the AU in 2009. The primary objective of the AMV is to integrate mining into local, national and regional development policies for the benefit of local communities.¹³² The AMV has similar objectives to the EITI in certain respects. For instance, the AMV aims to collect data to show the value of a resource so that the revenue due to government can be determined.¹³³ It therefore encourages investment in knowledge infrastructure, such as

127 *Ibid.*, p. 527.

128 *Ibid.*

129 EITI, 'Social and economic spending', <https://eiti.org/social-economic-spending>, accessed 18 September 2016.

130 UNECA, 2008, *op. cit.*, p. 8.

131 *Ibid.*

132 AU, *African Mining Vision*, 2009.

133 *Ibid.*, p. 15.

geological mapping.¹³⁴ It also promotes participation and access to information to ensure inclusivity in environmental and social impact assessments.¹³⁵

Like the EITI, the AMV has a secretariat. Known as the African Minerals Development Centre, the secretariat's role is to implement the AMV's action plan. Notably, the AMV recommends accession to the EITI.¹³⁶

The AU has endorsed the objectives of both the EITI and the AMV, which are in line with the recommendations in the 2015 AU Illicit Financial Flows report calling for 'country-by-country reporting, project-by-project reporting, disclosure of beneficial ownership, public information about commercial contracts' and other matters.¹³⁷ The AU's acknowledgement of the need for African states to join the EITI highlights the value of the initiative in enhancing governance in Africa's extractive industry. Membership of the EITI need not be exclusive; it can occur alongside the implementation of other initiatives.

CONCLUSION AND POLICY RECOMMENDATIONS

South Africa has attempted to shun the EITI. This is because of a misplaced belief in the adequacy of its own governance procedures and the systems in place to oversee its extractive industry. This belief persists despite a former minister of mineral resources acknowledging at the 2015 World Economic Forum that 'transparency is the white elephant of mining woes in South Africa'.¹³⁸ South Africa's resistance suggests that it sees the EITI as appropriate only for countries with weak governance systems – even though a number of developed economies have joined the EITI to encourage greater disclosure of ownership, operational and financial information.¹³⁹ Other stakeholders such as investors are also heeding the call for more transparency in the extractive industry.¹⁴⁰ In fact, a number of South African multinational mining companies are already participating in EITI processes in other countries. Given the new requirement for country-by-country reporting in the EITI, it is high time that the EITI is embraced more widely by African states in the interests of improving the governance regime in their extractive industries.

134 *Ibid.*

135 *Ibid.*, p. 31.

136 *Ibid.*, p. 20.

137 High Level Panel on Illicit Financial Flows, *Illicit Financial Flows: Report of the High Level Panel on Illicit Financial Flows from Africa*, AU/ECA Conference of Ministers of Finance, Planning and Economic Development, 2015, p. 67.

138 Eyewitness News, 'Ramathlodi: Transparency is 'white elephant' of SA's mining woes', video interview of South African Minister of Mineral Resources at the [World Economic Forum](http://ewn.co.za/2015/01/22/Ngoako-Ramathlodi-Transparency-is-white-elephant-of-SA-mining-woes), <http://ewn.co.za/2015/01/22/Ngoako-Ramathlodi-Transparency-is-white-elephant-of-SA-mining-woes>, accessed 19 September 2016.

139 The US, the UK and Germany are among these countries.

140 Mongoai T, 'Mining companies urged to be more transparent', *SABC News*, 12 February 2016, <http://www.sabc.co.za/news/a/ab74ed004ba70296b4b0feab7e8da8e1/Mining-companies-urged-to-be-more-transparent-20161202>, accessed 18 September 2016.

As suggested in various sections of this paper, the EITI is an important platform for the governance of Africa's extractive industry. However, it should not be implemented in isolation, as it cannot replace essential regulations at the national level. Such regulations – aimed at plugging loopholes in governance standards – include the adoption of sectoral laws that promote public access to information in the extractive industry.

Furthermore, the concept of freely given, prior and well-informed consent, as recognised in the UN Declaration on Rights of Indigenous People, must be legally recognised and enforceable in countries' national legal frameworks. Affected communities should have the right to participate and to be represented in the process of issuing licences and concessions to mining companies. To facilitate such participation, information must be given to communities in good faith and their consent must be obtained before mining operations commence. The EITI MSG concept allows a modest form of multi-stakeholder participation, but national laws can extend this further to ensure that communities have a say in shaping their future livelihoods. Such sectoral laws must include representation and participation of communities in environmental and social impact assessments, which are designed to mitigate the detrimental cost of extraction to the environment.

Revenue collection by African states involved in resource extraction has been hampered by tax evasion, illicit financial flows and the lack of state capacity to collect revenue. To overcome this problem, African governments need to join and/or extend the EITI by adopting beneficial ownership laws that will expose beneficiaries of mining concessions and allow the collection of taxes that are payable. The regulation of beneficial ownership, however, requires regional cooperation in exposing tax havens and coordination among state tax agencies to identify tax evaders. In addition, a regional approach to mining-related taxation is necessary. Such an approach could start with a review of double taxation treaties that provide opportunities for companies to avoid paying taxes. The AMV and the African Peer Review Mechanism constitute good kick-off points for the various suggestions made in this paper and African states need to urgently support and fund these initiatives.

Finally, CSOs are indispensable when it comes to holding governments and companies accountable. African states need to support CSOs instead of treating them like enemies of the state. CSOs have a responsibility to ensure that revenues paid by companies and collected by the state are spent in an equitable manner that benefits communities. For too long, Africans have watched their countries' natural resources being extracted and exploited without any sustainable benefits reaching communities. CSOs offer an important, collective voice that should demand accountability in the strongest possible terms. Governments and corporations that are interested in safeguarding their future and the future of the continent as a whole will want to listen to what CSOs have to say.

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