CONTRIBUTION TO EITI AND TO MINING GOVERNANCE IN AFRICA

By Papa Gora BAR (SENEGAL) – May 2012

EITI: Extractive Industries Transparency Initiative

EITI is defined as a set of tools for the transparent management of revenues gained from mineral resources. It aims to strengthen the governance of mineral resources so that their exploitation contributes effectively to the economic and social growth of producer countries, especially those which are developing.

An international standard which was created in 2003, EITI aims to promote transparency in the extractive industries sector. It does so through the publication of payments made by mining, oil and gas companies, and by revenues recorded by governments. These principles are a perfect expression of demand to '*publish what you pay*'. It is a demand that arises from a multitude of complaints and accusations of plundering natural resources, especially those of African countries.

In the light of the EITI principles and criteria, summarized above, we feel that the standard is very well structured. As such, it will, in some measure, be useful to States which wish to show that they are willing to apply transparency in managing public revenues. It will also be useful to companies which have governmental permission and are seeking social permission. The standard will also be acceptable to an inexperienced civil society which will want to be content with a simple reconciliations of payments and revenues.

In this sense, EITI is effectively an almost perfect tool for encouraging transparency. However, this is only in terms of payments and revenues. Our concern here is that transparency in mining governance must not come into play only at the end of the process of exploiting resources. In other words, it should not concern only the outcomes but the entire processes. This applies especially to the relationships between governments and companies which have produced the outcomes in question. It is today apparent that many forms of corruption known in the mining sector occur upstream in the process. They range from the issuing of licenses in conditions that lack transparency to the signing of agreements which do not respect the laws established by mining codes.

In other words, EITI could be seen as a means of monitoring traceability which, in reality, is only interested in verifying payments and revenues. As such, EITI would benefit from being redefined as a process of monitoring and validation. This would cover equitable revenue 'sharing' from the extraction of resources at the same time as ensuring that final payments and revenues actually reflected the terms of the agreements. Thus, EITI would be able to enact Principle No. 6 which recognizes that '*greater transparency must be set in the context of respect for contracts and laws*'.

Populations are the undisputed owners of mineral resources that are, by nature, non-renewable. In order for EITI to be able truly to benefit those populations, it must be aligned with the sustainable development of such resources. This means firstly ensuring that the divisions agreed with the investors are equitable, and secondly that the payments made to the State tally with the State revenues. It also means ensuring that the aforesaid revenues are allocated to the economic and social development of the country. For this purpose, it would seem to me entirely appropriate to broaden the EITI sphere of activity to include the criteria below:

- Transparency of agreements and contracts signed between governments and companies, as the only guarantee that the laws established by the mining code are strictly applied.
- Publication of incomes and profit-sharing clauses for the purpose of making the equity of sharing more transparent, and for a true reconciliation of company payments and government revenues.
- Codification of the social responsibility of mining companies through specific, measurable steps, with the involvement of stakeholders to ensure that their concerns are heard. The application of this very important criterion would not in itself satisfy the kind of trust agreements that conform to the principles of the Global Compact, an adaptation of the GRI (Global Reporting Initiative) to the mining sector, or other applications of the ISO 26000. In effect, within the framework of negotiations for operating licences or mining concessions, it would be appropriate to include funding for the full or partial implementation of projects positioned within the framework of local or regional integrated development plans.
- In terms of environmental impacts, mining regulations have adopted provisions for the purpose of rehabilitating sites. Despite these, it is clear that there will always be residual damage which cannot be rectified. This residual impact must be subject to an assessment and the payment of a royalty. The latter should be invested exclusively in improving the living environment and in the welfare of the populations affected.

If EITI does not extend its criteria to transparency of contracts, it could actually contribute to strengthening corruption upstream in the process. This is because transparency over the revenues received will hide the injustice of the contracts. Such contracts might facilitate the pillaging of resources or ignore the social responsibility of the company if they do not include any opportunities for the social and community development of local people.

What is the truth about revenues?

In order to attempt to answer that question, let us try to analyse, very briefly, the retained value from a mining operation in Africa, especially in the CFA zones which I know best. The concept of Retained Value was defined by Giraud (1983) as the sum of payments from mining operations to the national economy. Its composition is represented by the formula below:

$$\mathbf{VR} = Sn + Sel + Al + IT + DI + Div + IL$$

VR : Retained value (*Valeur retenue*)

Sn : Salaries of nationals (*Salaire des nationaux*)

Sel: Salaries of expatriates paid in local currency (bearing in mind that the greater part is paid abroad)

Al: Local purchases of goods and services (*Achats locaux*)

IT: Income taxes and taxes paid to the Host State

DI: Import duties paid to the Host State (*Droits d'importation*)

Div: Dividends paid to local shareholders

IL: Interest paid to local creditors

In the majority of WAEMU[1] and CEMAC[2] States, the State is usually the only local shareholder and almost all of the production is exported. The profits from exports are also often lodged in foreign banks. It is also important to note that there are too many tax exemptions. These are due to unnecessary competition between States which boast of the economic integration of their community.

Analysis of the retained value balance sheets highlights certain problems in the concessionary model in use in the region:

- There are no local creditors and therefore no interest paid.
- Local purchases of goods and services are minimal as the mining techniques used in large operations require items of equipment that are almost entirely imported. Furthermore, these companies mainly work with their international partners in order to have the most technologically advanced services.
- In the mining industry, the sum of salaries paid rarely exceeds 15% of the profit on sales from the mining operation. This salary pot is shared between the salaries of workers and management. Of the latter, a large proportion are foreign personnel. Their remunerations are very high and also in part paid directly in foreign currency in their countries of origin.
- In terms of the share going to the State as retained value, if we take a closer look at the primary sources which contribute to it, we see a rate of return which needs to be better contextualised. On their own, the taxes related to turnover such as the ad valorem tax and taxes on imports and exports, where not subject to exemptions, are sources of reliable funds. Conversely, the taxes on company revenue and dividends, which represent the greater part of State revenues, are linked to profits. This means that they are very susceptible to fluctuations in the market. As such, they may be greatly reduced with a fall in currency and/or increase in production costs. For the WAEMU and CEMAC States, these revenues generally constitute more than half of the retained value. The fiscal value of their principal elements is explained below:
    - Land royalty is a very appropriate annual tax. However, its value is negligible for all the WAEMU and CEMAC countries. The only exception is Niger where it is at least twenty times the average land royalty of its partner countries. For Senegal, it is non-existent.
    - Mining royalty (ad valorem tax): this appears more profitable when it is indexed to the type of mineral ore with higher rates for precious stones (5-10%) and lower rates (3-5%) for metals and other ores. This is the case in almost all the countries in the region except for Senegal and Mali where it is fixed at 3% for all mining operations. Nevertheless, for the State it remains a highly symbolic share in its own resources.
    - The taxes on imports and exports are waived in almost all the countries in the region.
    - The tax on companies is waived during the first years of operations purely for competitive reasons in the WAEMU zone. The duration is three years in Niger, seven years in Senegal for the concessions, and in Togo it runs to the date of first production. Only Mali and Benin have kept the full tax while Burkina Faso has reduced it to 10%. Owing that tax exemption, it is not unusual for deposits of precious metals such as gold to be worked out during this grace period with

the speed of exploitation exceeding the given time period. 'Low grade' ores are stockpiled while 'high grade' ones are systematically sent for processing.

- Super profits and additional profits are not taxed in any of these countries. This leaves very substantial margins to the companies while the State looses out with the current currency explosion.

Certainly the retained value differs greatly from one mine to another. Nevertheless, it is easy to see from this analysis that it scarcely reaches 50% of the sales profits, sometimes even after covering the cost of investments.

How to get out of this rut?

Clearly, in the first place it is necessary to believe that mining resources belong to the State. Investors spend their money primarily because they are looking for profit. In addition, and most importantly, they do so because these primary resources are vital for western industry.

Next, it is necessary to believe that mining resources are exhaustible. However, they can, and must, serve to boost the sustainable economic development of the countries that have them.

In addition to these assertions, it is necessary to consider the fundamental questions below:

- Awarding tax advantages to foreign investors is inappropriate. These are linked to competition which scarcely finds justification in community structures. The member countries of these communities share the same geographical, geological and economic environments. They have all the structural harmonisation tools which would impose sustainable management of mining resources and natural resources in general.
- The effective integration of the mining industry into the national economy through the development of a real industry for processing mineral products, and above all through the development at local level of all the links necessary for its success. This would certainly favour the development of an integrated market in the region.
- Profit-sharing on the part of the national private sector in the capital of mining companies or in access to permits and concessions. The national private sector is largely absent from the mining sector. Known deposits, identified by the State, could stimulate this profit-sharing and lead to greater national participation instead of being quietly granted to investors. In this respect, it will not be unrealistic for the State to make use of bilateral or multilateral cooperation in the search for deposits of targeted minerals. It will also be necessary to strengthen training in order to bring to the market sufficient local expertise able to offer profit-sharing with the national private sector.
- Strengthening capacities, both at the level of local labour and at the level of mining administration, for a more effective defence of national interests. This is especially necessary during the negotiation of mining contracts with investors who are often accompanied by international experts.
- Within the framework of CSR (Corporate Social Responsibility), the State must be more involved in directing the activities of companies implementing projects.

These programmes will have been researched beforehand within the framework of ambitious local development programmes. Once needs have been assessed, mining companies will be able to integrate them into their investment plans or conduct projects on an individual basis.

Our considerations shall also cover the limits of the concessionary model currently being applied in the West African mining sector. This model is an agreement by which the State awards the licensee full possession and free disposal of the mineral resources which are extracted. This occurs by means of payment of a mining royalty and taxes relating to the common law tax regime. Does this traditional concept of mining taxation work in favour of the sustainable management of mining resources? What further advantage would a production-sharing contract or a service contract offer? Is it necessary to create a model specifically for the community, in line with its aspirations for sustainable development and management of natural resources?

In effect, when States have clearly defined mining policies which are considered favourable to development, that is when EITI will find the points of anchorage that will enable it to extend upstream in the mining process. The current state of the standard has enabled members to put in place transparent structures for collecting and recording mining revenues. Similarly, if the standard is extended to monitoring compliance with the laws that govern access to mineral resources and their exploitation, then it will enable the creation of a procedure which all stakeholders must adopt for the sake of social stability of sustainable development. EITI certainly has the means to achieve it. However, with the announcements of the harmonisation of African mining codes, EITI would gain in support if communities such as WAEMU, CEMAC and ECOWAS[3] were signed up.

1: WAEMU, West African Economic and Monetary Union
2: CEMAC, Economic and Monetary Community of Central Africa
3: ECOWAS, Economic Community of West African States