

**Comments by the Mining Constituency Board Representatives on the Draft EITI Rules circulated on
10th April as part of Board Circular 146**

15th April 2013

Introduction

This paper sets out key areas of concern for the mining representatives on the EITI Board and includes a number of tracked changes to the most current version of the draft Rules (cleansed of earlier tracked changes). Our concerns relate to:

- **Licensing and Contractual Issues** – The mining constituency group has been a consistent supporter of exploration license transparency but we have concerns with the current draft either because it may not achieve the desired policy objectives or because, in the case of the wording around contracts it may undermine intellectual property and investment. We have, therefore, suggested clearer delineation as between exploration and exploitation licences. We have also built on the language that relates to governments and State owned companies declaring their interests in exploration and producing oil, gas and mining assets and on the draft provisions on Ultimate Beneficial Ownership by proposing what we hope is a consensual proposal which would ‘encourage’ countries to establish a register in which Ministers and senior officials involved in policy-making towards or the regulation of extractive industries or their close families or associates record any direct or indirect interests in entities that control either exploration or exploitation licenses.
- **Social Payments** – we have proposed clarifying amendments relating to the voluntary disclosure of company discretionary social payments (whilst accepting the agreement in Oslo on social payments mandated by contracts with governments).
- **Sub-National Disclosure** – minor clarificatory amendments relating to the tracking of sub-national transfers
- **Reliability of data:** whilst we strongly support the objective of ensuring that EITI data is reliable and commands confidence, we have two major concerns. The first relates to the fact that companies that do not have audited accounts – and may thus be rated as higher ‘risk’ of delivering less reliable data - are treated more leniently than those that do. Secondly, we believe that in Oslo it was agreed that an Independent Administrator/MSG’s power to require companies to produce an additional external audit letter (which may involve significant extra costs) should be constrained so that this is only done when strictly necessary rather than treated as a routine option.
- **Disaggregation of data:** it is essential both so that unnecessary audit costs and administrative complications are avoided for companies and that there is reasonable comparability between data produced as between countries that the definitions and reporting templates used for project by project reporting are consistent
- **Miscellaneous:** we have included a number of tidying-up suggestions at the end of the document

A) License and Contract Transparency

We think it is important, as a starting point to recall the underlying policy objectives that we are pursuing in seeking information about the disclosure of information around exploration licences and exploitation contracts. In the case of the former, it is a measure intended to create transparency around who holds which 'ground' and, in large part, to make it possible to track the potential 'flipping' of licences by politically connected people. In relation to contracts, it is as a means of MSGs/the public understanding the terms under which a specific oil, gas or mining deposit is to be exploited. We would prefer a reversion to our original draft (attached to our submission of 3rd April and appended at the end of this note) but if this is not acceptable we have submitted comments on the revised draft below

We believe that the following principles should be applied:

- Exploration licences are generally standard in their format and do not involve material payments to governments. Where there are signature bonuses (not a feature of mining exploration agreements) and these are material then these should be disclosed; material revenues coming from production 'licences' should be disclosed on the same basis as for production contracts; and licences that involve a significant deviation from the applicable regulatory framework should be subject to the same disclosure regime as for contracts.
- The disclosure of ownership; co-ordinates; and date of grant/duration of exploration licences should be required and this requirement should, as far as possible, be discharged through an open register or cadastre system. Where a country may have problem in delivering against this, they should apply to the Board for an exemption under the 'adapted implementation' provision.
- The commodity being searched for at exploration stage is, for the mining sector, a key issue of commercial confidentiality. Exploration targeting requires the investment of significant IP and technological resources. Premature disclosure of the commodity being sought may just cause competitors or politically connected officials to stake out ground in the vicinity to free ride on work done by the first mover. Were this to be undermined it would significantly impact upon investment and the value of intellectual property.
- To buttress the provisions on beneficial ownership, implementing countries/MSGs should be encouraged to establish a register where Ministers and officials involved in policy-making towards or the regulation of the extractive sector, together with members of their close family or close associates, record any interests they hold in exploration or production properties/entities

3.9 Registry of Licenses

a) The term 'license' in this context refers to any license, lease, title, permit, or concession by

which the government confers ~~to~~ on a company(ies) or individual(s) rights to explore or exploit

oil, gas and/or mineral resources. ~~The MSG should agree an appropriate definition and include it~~

~~in the EITI Report.~~

b) Implementing countries are required to maintain a publicly available register or cadastere

Comment [EB1]: Unclear why the MSG is given this responsibility just after a definition is provided. Delete?

system/s with timely and comprehensive information regarding each of the licenses. Implementing countries are required to publicly disclose the following information regarding licenses :

- i. license holder(s);
- ii. coordinates of the license area; and
- iii. date of application, granting, date of award and duration of the license; and
- iv. in the case of production licenses, the commodity being produced.

Unless the MSG demonstrates that there are significant legal or practical barriers to

disclosure, in which case they should apply to the EITI International Board for approval under the 'adapted implementation' provision, implementing countries are expected to make ~~publicly available~~ information publicly available regarding the licenses pertaining to companies that are not participating in the EITI Report (i.e. where their payments fall below agreed materiality thresholds).

Comment [EB2]: Arguably this provision should address 'licenses' rather than companies since it may be small 'companies' flying below the radar of materiality where potential abuse may be occurring

c) Where the requisite information set out in 3.9(b) above is already publicly available, it is sufficient to include a reference (or link) in the EITI Report ~~to publicly available registers or cadaster systems.~~ Where such registers or cadasteres do not exist or are incomplete, the EITI Report should disclose any gaps in the publicly available information and document efforts to strengthen these systems. In the interim, the EITI Report should include the information required under 3.9(b) above in the EITI Report.

d) Implementing countries are encouraged to establish a register of interests in which Ministers and officials, their close family members and associates, who are involved in policy-making towards or the regulation of oil, gas or mining are required to record any interests they hold in entities holding exploration or exploitation licences or contracts.

3.10 Allocation of licenses

Implementing countries are required to disclose information related to the award or transfer of licenses pertaining to the companies covered in the EITI Report, including:

- a) a description of the process for transferring or awarding the license, the technical and financial criteria used, and information about the recipient(s) of the license that has been transferred or awarded (including consortium members where applicable), and any deviations from the applicable legal and regulatory framework.

b) Where licenses are awarded through a bidding process during the accounting period covered by the EITI Report, the government is also required to disclose the list of applicants and the bid criteria.

c) Where the requisite information set out in 3.10(a) and 3.10(b) above is already publicly available, it is sufficient to include a reference (or link) in the EITI Report.

d) The MSG may wish to include additional information on the allocation of licenses in the EITI Report, including summary data and commentary on the efficiency and effectiveness of these systems.

3.12 Contracts

a) It is a requirement that the EITI Report documents the government's policy on disclosure of contracts and agreements that govern the exploration and exploitation of oil, gas and minerals. This should include relevant legal provisions, actual disclosure practices and any reforms that are planned or underway. Where applicable, the EITI Report should provide an overview of the contracts that are available, and include a reference (or link) to the location where the contracts are published.

a) Implementing countries are encouraged to publicly disclose any contracts, agreements, or other documents that provide the terms attached to the ~~[[exploration and]]~~ exploitation of oil, gas and minerals and that give rise to material revenues covered in the EITI Report.

b) The term 'contract' means:

- the full text of any contract, ~~production~~ license, concession or agreement granted by, or entered into by,

the government and which ~~regulating~~ regulates rights to ~~[[explore or/and]]~~ exploit oil gas and mineral resources;

- The full text of any annex, addendum or rider that establishes details relevant to the

~~[[exploration and]]~~ exploitation rights mentioned above or its execution; and

- the full text of any alteration to the terms of the original contract.

Where implementing countries address this issue, the MSG should agree a definition of contracts and include it in the EITI Report.

Comment [EB3]: If exploration licences are included this would provide for the publication of the full text of thousands of licences – rather than those which generate significant revenues. It would then make many of the provisions around license transparency otiose and undermine the distinction drawn between exploration and production licenses

Comment [EB4]: Is this necessary since a definition has just been provided above

B) Social Expenditures

We are happy to support the mandatory disclosure of social payments that are undertaken as a result of contract provisions associated with a company's license to operate. We are strongly of the view, however, that where discretionary payments for social objectives are entirely discretionary **and** are not made to government entities that disclosure should explicitly remain voluntary on the ground of principle that these are private to private transactions.

'Social expenditures: Where social expenditures mandated by law or the contract with the government that governs the extractive investment are material the EITI Report must disclose and, where possible, reconcile these transactions. Where such benefits are provided in-kind, it is required that the EITI Report discloses the nature and the deemed value of the in-kind transaction.

i. Where the beneficiary of the mandated social expenditure is a third party (i.e. not a government agency), it is required that the name and function of the beneficiary is disclosed.

ii. Where reconciliation is not feasible, the EITI Report should include unilateral company and government disclosures of these transactions.

iii. Where the MSG agrees that discretionary social payments and transfers are material, the MSG is encouraged to develop a reporting process with a view to achieving transparency commensurate with other payments and revenues paid or in-kind transfers made to government entities. Where

reconciliation of key transactions is not possible (e.g., where company payments are

"in-kind" or to a non-governmental third party), the MSG may wish to facilitate consider voluntary unilateral company and/or government disclosures to be attached to the EITI Report.

C) Sub-National Transfers

The changes suggested in the text below are intended to be clarificatory and are not intended to have policy implications.

4.2 (c) iii Sub-national transfers: Where transfers between national and sub-national government entities are related to revenues generated by the extractive industries and are mandated by a national constitution, statute or other revenue sharing mechanism, the MSG is required to ensure that such material transfers, ~~where material~~, are disclosed in the EITI Reports. The EITI Report should disclose the revenue sharing formula, if any, as well as any discrepancies between the transfer amount calculated in accordance with the relevant revenue sharing formula and the actual amount that was transferred as between central government and each relevant sub-national entity. The MSG is encouraged to reconcile these transfers. The MSG is encouraged to ensure that any material discretionary or ad-hoc transfers, are disclosed and where possible reconciled in the EITI Report.

D) Data Reliability

The amendments suggested here are designed to support the objective but to ensure that companies that do not operate with audited accounts are identified and that recourse to the requirement for external auditor letters (which may involve significant costs for international companies) are not made routinely but in response to a demonstrable need.

5,2 (c) Agree on the assurances to be provided by reporting entities to the Independent Administrator

It is required that the terms of reference agreed by the MSG and Independent Administrator outlines what information should be provided to the Independent Administrator by the participating companies and government entities to assure the credibility of the data. Where

deemed necessary by the Independent Administrator and the MSG (provided that a justification is provided as to why such steps are necessary), these may include:

i. That a senior company or government official from each reporting entity signs off on the completed reporting form as a complete and accurate record;

ii. That the companies attach a confirmation letter from their external auditor that confirms that the information they have submitted is comprehensive and consistent with their

audited financial statements. Where the company operates internationally, endorsement by the group external auditor is preferable. The MSG may wish to phase in this any such procedure so that the confirmation letter may could be integrated in to companies' their auditor's usual work programme.

Where some companies are not required by law to have an external auditor and therefore cannot provide such assurance, theies should be clearly identified documented in each case, and noting any reforms that are planned or underway should be noted.

iii. Where relevant and practicable, government reporting entities may be requested to obtain a certification of the accuracy of the government's disclosures from their external auditor (or equivalent).

E) Disaggregated reporting

Agree the level of disaggregation for the publication of data. It is required that EITI data is

presented by individual company, government entity, and revenue stream. Reporting at project level is required, provided that it is consistent project consistent with accepted international standards.

Add footnote: The EITI Board will issue guidance on the design of templates/definitions to maximise consistency.

F) Miscellaneous Provisions

Sign-up Steps: Amend Number One to read: ‘The government is required to issue an unequivocal public statement of its intention to lead the implementation of EITI and its commitment to the process’

Section 1.3 (d) The requirement on ‘stakeholders’ that they ‘must refrain from actions which result in narrowing or restricting public debate in relation to the implementation of the EITI’ whilst generally laudable seems to us to be relevant to the actions of governments. Otherwise, how are other ‘stakeholders’ to be defined, are they all likely to be under the control of members of the MSG and how would such behaviour of extraneous stakeholders (e.g. by powerful press owners) be validated?

Section 1.3 (e) ii add ‘or agencies’ after ‘relevant government ministries’

Section 1.3 (e) ii insert ‘necessarily’ between ‘including but not’ and ‘limited to’

1.3 (iv) currently requires that the MSG ‘ensures that there is a process for changing group members which does not include and suggestion of coercion or attempts to include members who will not challenge the status quo’. Propose either deletion of the provision since the requirement to have a process for installing new members is also covered in 1.3 (f) vii; or deleting the section about not including people who will not challenge the status quo. There are existing provisions that require diversity of opinions this could, however, be taken to mean that supporters of a government or people of a conservative bent should not be included.

1.7 (a) para 6 – this section deals with countries who have sought to be suspended because of a political crisis or conflict, but this para refers to the need for the MSG to take corrective measures’ but in the context of ‘voluntary suspension it is the external environment which needs to have changed.

3.2 (a) – here the previous requirement for a summary of the fiscal regime to be provided has been replaced by the requirement for a ‘description’ – this suggests greater length and the additional provisions risk making for unwieldy EITI Reports. Perhaps we can compromise on a ‘summary description’?

3.4 (d) – it might be most informative to provide the proportion of ‘employment in the extractive industries’ as a percentage of ‘those in employment’ as opposed to the ‘total workforce’. We would also suggest including the words ‘directly and, where available, indirectly’ so as to capture employment generated by contracting and supplier companies.

3.7 in the list of revenue streams, we would suggest adding in ‘receipts from the privatisation of extractive sector corporate entities, operations or geological assets’

4.1 (f) v replace 'where practically feasible' with 'where practicable' (which means the same thing)

7.2 ii amend to read: An assessment of progress with meeting and maintaining compliance with each EITI requirement and any steps taken, **consistent with the EITI Principles**, to exceed the requirements'

In the **Validation Guide, section 4** (Draft Report), third bullet under 'narrative report', first line amend to read: 'any innovations and actions being undertaken by the MSG that, **consistent with the EITI Principles**, exceed the EITI requirements...'

Annex – Original Mining Constituency Proposals on License Transparency

a) Implementing countries are required to maintain a publicly available register or cadaster system/s with timely and comprehensive information regarding all oil gas and mineral licences including:

- i. license holder(s);
- ii. coordinates of the license area; and
- iii. date of application, granting, duration of the license.

b) The term 'license' in this context refers to any license, lease, title, permit, or concession by which a government confers on a company(ies) or individual(s) rights to explore for oil, gas and/or mineral resources. The MSG should agree an appropriate definition and include it in the EITI Report.

c) The EITI report must contain a reference (or link) to the publicly available registers or cadaster systems.

Points (d) and (e) may be retained as drafted in earlier iteration of rules.