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Making Sure.

# **TRANSPARENCY AND COMMODITIES TRADING:**

**A BUSINESS CASE FOR DISCLOSING  
PAYMENTS TO GOVERNMENTS BY  
COMMODITIES TRADING COMPANIES**

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## RCS GLOBAL Making Sure.

Trafigura Beheer B.V. commissioned RCS Global to produce this paper. It was produced under the project direction and editorial control of RCS Global director, Dr Nicholas Garrett ([nicholas@rcsglobal.com](mailto:nicholas@rcsglobal.com)).

RCS Global ([www.rcsglobal.com](http://www.rcsglobal.com)) is a leading firm working on responsible raw materials supply chains, providing advisory, audit, research and technical assistance services. RCS Global's clients include high-profile companies in the extractive industries, trading, as well as smelting/refining and manufacturing sectors. RCS Global also works for global end user brands, investors and policy makers. The firm specialises in the following work areas:

- Transparency, payments to governments and anti-corruption
- Supply chain due diligence and conflict minerals compliance
- Corporate social responsibility strategy
- Human Rights
- Communities and artisanal and small-scale mining (ASM)
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RCS Global is an Extractive Industries Transparency Initiative (EITI) accredited validator and provides strategic advisory services on the EITI, DF1504 and the EU Accounting and Transparency Directives, as well as any advisory related to stakeholder demands, as articulated by the global transparency movement.

Dr Garrett is a leading expert across RCS Global's work areas. He has worked as Project Director or Lead Consultant on 50+ projects for high profile supply chain actors and policy makers across the globe. Next to his strategic work, he also focuses on clients' regulatory and good practice compliance. He holds a PhD in Political Science from the Freie Universität, Berlin and a MSc in International Development Management from the London School of Economics (LSE). He is a widely published author and regular presenter.

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**Dr Nicholas Garrett**

*RCS Global director*

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# 1. FOREWORD BY THE EITI

Transparency of government revenue from the commodities trade is key to ensure that the three billion citizens living in resource-rich countries can see the benefits from their natural resources.

## Time to step up

The commodities trading industry plays an important role in feeding the global market with oil, gas, minerals and metals necessary for economic development. This much is widely appreciated. What is often less obvious is the key role these trading companies play in providing revenues to governments of resource-rich countries. Acting often as an intermediary between exporters and importers of crude oil, for example, an oil trading company transfers not only oil from one country to another, but also significant amount of capital from the oil consumer to the oil producer.

Until recently, the proceeds from the sale of these resources went unnoticed and were not publicly recorded in most countries. Such secrecy breeds abuse, corruption, mismanagement, resentment and sometimes conflict.

This is why a commitment to disclose payments to governments will be an important act of industry leadership by the trading sector. This is also the reason why the EITI is calling on trading companies to step up and join the global effort towards more transparent commodities trading. This Paper will contribute in deepening stakeholders' understanding of the cost of secrecy, and in furthering the debate toward more responsible disclosure.

The EITI is first and foremost implemented by governments and therefore arguably not the right tool to address all issues in the trading industry. However, bringing transparency to the interaction between trading companies and resource-rich governments is a necessary step if we are to ensure that citizens benefit from the resources that belong to them. A common set of comprehensive and practical reporting guidelines will ensure a level playing field for the trading industry and a response to the increasing global demands for reporting, transparency and, ultimately, accountability.

## The EITI standard

At the EITI Global Conference in Sydney, in May 2013, the EITI Board adopted the *EITI Standard*, a result of years of consultations and negotiations. The Standard took the EITI from being a relatively narrowly focused revenue transparency mechanism to a wider platform for reforms of natural resource management. The Standard requires that each country publish an annual *EITI Report* that contains, amongst other things, information about the legal and fiscal provisions relevant to extractives, organisation of State-Owned Enterprises (SOEs), production, licence allocations and registers. The Standard contains recommendations on contracts disclosure and a provision on the disclosure of oil sales by SOEs. The EITI Board may refine the Standard further to result in the approval of a common set of reporting guidelines applicable to both trading companies and SOEs.

In other words, the EITI is at the cusp of providing detailed information about how the extractive sector is managed in EITI countries. Some countries are already at the forefront when it comes to disclosing information about their oil sales. Ghana, Iraq, and Nigeria, for example, have already published detailed information about the oil sold by the respective government including the buying companies. In other countries like the Republic of Congo, detailed information about the sale of oil by the state-owned company, SNPC (Société National de Pétrole du Congo) is available but the buying company is not revealed.



### Results of transparency

While the EITI has been successful in bringing transparency to the extractive sector, one of the key challenges ahead is to ensure that the wealth of data generated by the EITI is understood, analysed and used to encourage change and improvements in the extractive sector. Some early examples of how the EITI is being used to initiate reforms include:

- In **Chad**, the government has established revenue recording and monitoring systems after EITI reports identified inadequate record keeping systems.
- In **Ghana**, closer scrutiny of royalties transferred by the central government to the local level has led the government to develop guidelines for the utilisation of local revenue and to open separate bank accounts that facilitate revenue-tracking.
- In **Myanmar**, the EITI has become a platform for conversations on needs for reforming state-owned enterprises and how to manage the revenues from oil and gas sustainably.
- In **Mongolia**, the EITI has helped harmonise and enforce auditing practices across government agencies contributing to strengthening public financial management.
- In **Nigeria**, the government is developing a new calculation model for royalty payments from oil after EITI identified a US\$2bn underassessment.

### Mandatory disclosure

There have been extensive debates in recent years about mandatory disclosure requirements for oil, gas and mining companies in the US and Europe. This refers to legislation, particularly section 1504 in the Dodd-Frank Act in the US and the EU Transparency Directive requiring that extractive companies with publicly listed shares and instruments report payments to governments, by project. The EITI considers there to be complementarity between these reporting requirements and the EITI. Having data in stock exchanges in the US and Europe is welcome. These listings rules require company disclosure, without making government receipts transparent and without a national commission responsible for using this information to inform public debate. Furthermore, in EITI implementing countries, all companies that make significant payments to Government, whether listed or not, are required to report, bringing a level playing field to the country of operation. The EITI national processes often engage with local communities, where community members do not

have the capacity to dissect stock exchange reporting or international civil society organisation reports. In addition, about one-third of the 48 countries that implement the EITI have enacted some sort of EITI legislation, mandating full disclosure at the national level.

The EITI is increasingly becoming a forum where companies, civil society and governments meet to reach compromises that further a common agenda of transparency and accountability in the management of natural resources. With the increasing global focus on transparency in the trading of oil, gas and minerals, it is time for commodities trading companies to join this debate.



**Jonas Moberg**

*Head of the International Secretariat  
of the Extractive Industries Transparency Initiative (EITI)*

## 2. EXECUTIVE SUMMARY

The commodities trading industry is under increasing pressure from advocates and policy makers (henceforth the ‘transparency movement’) to adopt more transparent business practices. A central objective is the disclosure of data on commodities trading companies’ (henceforth ‘traders’) payments to governments. The rationale for making such data available is both simple and worthy: to enable the citizens of commodities-producing countries to hold companies and their governments accountable when determining whether their government secured a fair deal for the production and commercialisation of domestic natural resources.

This paper<sup>1</sup> provides clarity on the origination and development of discussions relating to transparency of payments to governments. It seeks to present the view that the targeted disclosure of information by companies active in the commodities trading sector is already, and increasingly will be required, both by law but also as a foundation from which companies might retain and promote their social and political licenses to operate.

It is the considered view of RCS Global that the current environment presents a timely opportunity for the commodities trading sector to engage in transparency issues, either independently or as a coalition, through the Extractive Industries Transparency Initiative (EITI). Doing so will ensure that the global transparency debate can be shaped by industry leaders, in partnership with thought leaders, government and civil society.

RCS Global advises as follows:

1. Traders should engage with the EITI in designing an effective disclosure standard for the commodities trading industry.
2. Traders should apply for ‘EITI Supporting Company’ status. This step does not require additional reporting or disclosure of payments beyond what is legally required for all companies operating in EITI-implementing countries.
3. Traders should commit to voluntary data disclosures commensurate with reporting requirements in EITI-implementing countries, bearing in mind that the disclosure model developed is likely to evolve over time in response to informed discussions under the auspices of the EITI.

In summary, the rationale behind RCS Global’s recommendations is as follows:

1. Governments, as well as civil society organisations and over 90 supporting companies in both host (producing) countries and in companies’ home countries, consider the EITI as the principal multi-stakeholder forum for pursuing the widely endorsed aim of creating greater accountability in the management of the natural resources sectors overall and the management of revenues from minerals, oil and other natural resources in host countries in particular. Engaging with the global multi-stakeholder forum that is the EITI would provide a positive platform for traders to promote the role they play in furthering trade and, ultimately, economic development.
2. Increasingly, important jurisdictions are introducing legislation requiring the disclosure of payments to governments by extractives companies. This is notably the case with Section 1504 of the US Dodd-Frank Act, the EU Accounting and Transparency Directives and Canada’s Extractive Sector Transparency Measures Act. These initiatives focus on extractive activities at this stage, but pressure to broaden their scope to cover trading companies is considerable, notably in Switzerland. Working with the EITI would give the sector a ‘seat at the table’ in shaping the development of a disclosure standard for the trading industry, informing any potential future legislative intervention.

<sup>1</sup> Commissioned by Trafigura, this paper is presented in support of and alignment with Trafigura’s publicly announced decision to become an Extractive Industries Transparency Initiative (EITI) Supporting Company and Trafigura’s corporate Policy on Payments to Governments.



3. EITI-implementing countries are starting to require disclosure of government receipts from resource sales to trading companies, and disclosure of trading companies' payments to governments. Iraq is already reconciling these two datasets as part of EITI implementation. Discussions are ongoing to extend trading-related reporting requirements and disaggregated sales data disclosures for state-owned enterprises, including national oil companies selling state equity shares of production in Nigeria, Republic of Congo, Chad and Indonesia. In fact, Nigeria already unilaterally discloses cargo-by-cargo sales data, which, however, is not yet being reconciled under its EITI process. In those EITI-implementing countries that choose to include the trading industry in reporting requirements, disclosure of payments to governments by trading companies is, or will be, mandatory. By working with the EITI, traders would place themselves ahead of this curve.
4. Under the EITI process, 2015 is expected to see the development of a commodities trading disclosure benchmark for payments to governments.
5. There is already a considerable volume of trading data that is in the public domain, either through ongoing and sometimes indirect disclosures under the EITI, or by reporting agencies. Without appropriate contextualisation of disclosed data by traders, there is a growing risk that the validity of data – and perhaps even the deals themselves – will be called into question.

In conclusion, RCS Global recommends that the time is now for traders to actively engage with the transparency movement to further constructive collaboration.



## BOX 1: THE 48 EITI IMPLEMENTING COUNTRIES

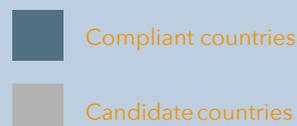
EITI implementing countries comprise both EITI compliant and EITI candidate countries.

A country is designated as EITI compliant when the EITI Board considers that it has met all of the EITI Requirements. Compliant countries must undergo Validation every three years, or upon the request from the EITI Board. To be EITI compliant does not necessarily mean a country's extractive sector is fully transparent, but it means there are satisfactory levels of disclosure and openness in the management of the natural resources, as well as a functioning process to oversee and improve disclosure.

Source: <https://eiti.org/faqs#EITCompliant>

An EITI candidate country has met the sign-up requirements and has two and half years to meet the remaining requirements for compliance to the EITI Standard. At this point, the EITI Board will assess whether the country has satisfactorily met the requirements. A country cannot hold candidate status for more than five years from the date that the country was admitted as an EITI candidate.

Source: <https://eiti.org/faqs>





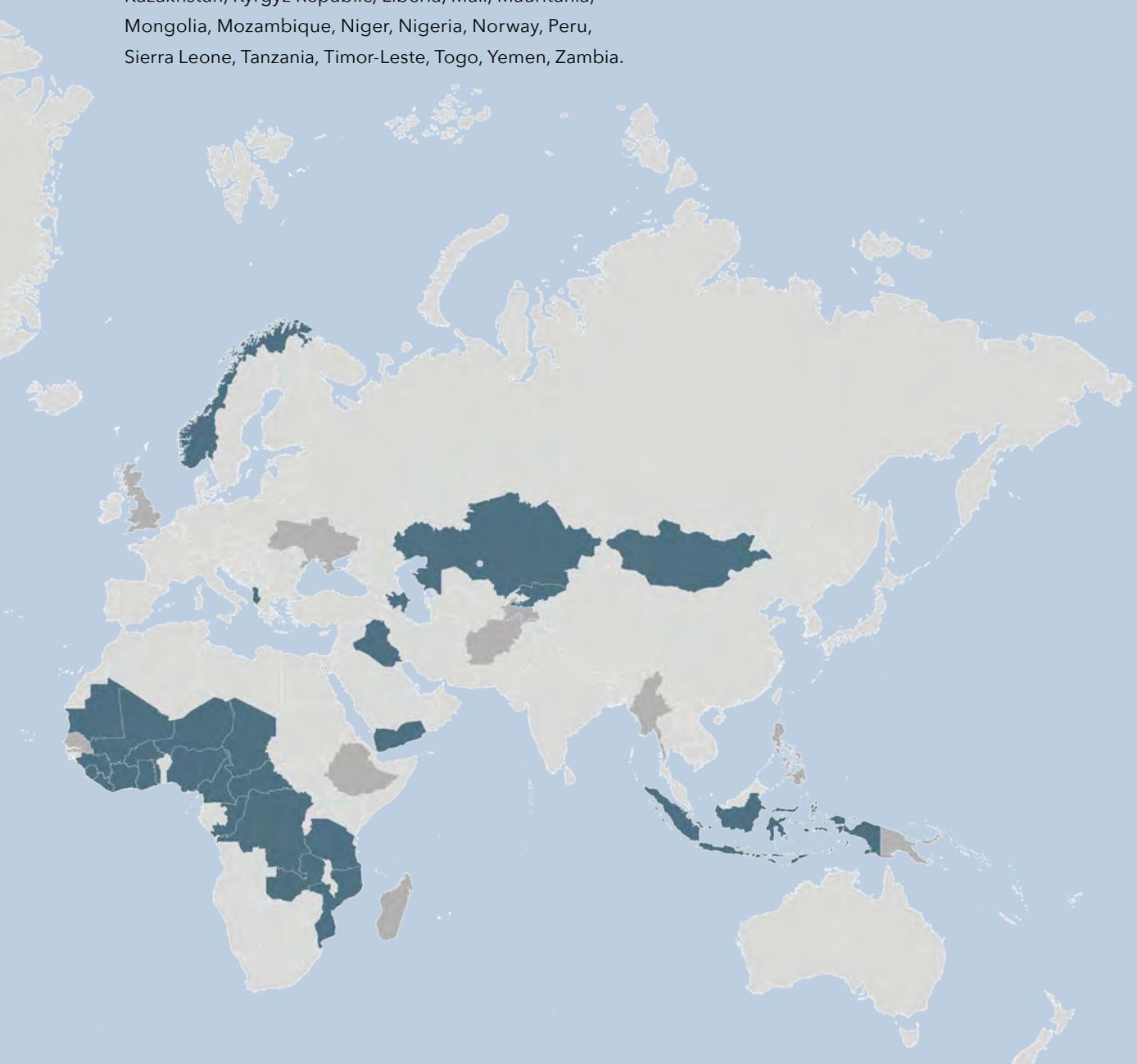
As of February 2015, EITI-implementing countries (both candidate and compliant countries, as companies disclose in both sets of countries) include:

**Compliant countries:**

Albania, Azerbaijan, Burkina Faso, Cameroon, Central African Republic (currently suspended), Chad, Congo-Brazzaville, Cote d'Ivoire, Democratic Republic of Congo, Ghana, Guatemala, Guinea, Indonesia, Iraq, Kazakhstan, Kyrgyz Republic, Liberia, Mali, Mauritania, Mongolia, Mozambique, Niger, Nigeria, Norway, Peru, Sierra Leone, Tanzania, Timor-Leste, Togo, Yemen, Zambia.

**Candidate countries:**

Afghanistan, Colombia, Myanmar, Papua New Guinea, Senegal, Tajikistan, the Philippines, Ukraine, Ethiopia, Honduras, Madagascar, Sao Tome and Principe, Seychelles, Solomon Islands, Trinidad and Tobago, United Kingdom, USA.



### 3. INTRODUCTION

The commodities trading industry is under increasing pressure from the transparency movement to disclose, amongst other things, data relevant to payments to governments, particularly in host (producing) countries. Host country governments are equally under pressure from citizens, civil society and other supporters of the transparency movement to publicly disclose revenues from trading companies.

The last decade and a half has seen a growing confluence of corporate and governmental interests in regards to issues of transparency.<sup>1</sup> Those companies and host countries that have aligned with the objectives of the transparency movement have made considerable progress in levelling the competitive playing field for natural resources, and secondly have targeted, and in a number of cases reversed, corruption and mismanagement. The seeds for improved accountability and good governance have been sown. Investor confidence has been strengthened and foreign direct investment has been bolstered.

#### A broad agenda

The shift towards greater transparency of payments to governments should not be considered in isolation. Investors are increasingly looking for non-financial information to evaluate their investment options and make more informed investment decisions. Organisations, such as the 'Sustainability Accounting Standards Board' and the 'Global Reporting Initiative', are requiring that companies standardise their disclosure of non-financial information. *A clearly discernible trend has developed towards more transparent business practices and corresponding reporting.*<sup>2</sup> Regulators, perhaps unsurprisingly, are in support of this shift. Regulatory focus has developed beyond financial transparency towards the examination of deeper, more complex interrelated issues, such as the protection of, and respect for, Human Rights.

The Swiss Government has adopted this line of argument, linking revenue transparency and Human Rights in the context of discussions about the regulation of the Swiss commodities trading industry.<sup>3</sup>

Despite the scale of commodities trading companies and the crucial function that the industry as a whole serves in enabling the physical transfer of commodities from point of origin to point of consumption, the sector has, until recently, largely remained overlooked by evolving transparency standards. In part, this results from the privately held status of many of commodities trading companies. The business and regulatory environments however are fast evolving: privately held companies are seeing increased benefits from playing a constructive role in facing-up to seemingly intractable socio-economic issues, which are at the core of the global regulatory agenda.

#### Towards shared objectives

In theory, the objectives of both the transparency movement and commodities trading sector are not fundamentally incompatible. Before progress can be made however, recognition is required amongst many corporate decision makers that the status quo, i.e. not engaging on the matter, is neither sustainable nor makes good business sense. *Put simply, the transparency agenda will not wither away – commodities trading companies must engage with what is without question a growing and deepening agenda.*

*Taking into consideration both commercial and also reputational imperatives, the business case for traders to demand greater transparency of payments to governments is strong. The time for the commodities trading industry is now to, at the minimum, converge towards common ground with the transparency movement.*

1 These include, but are not limited to: the Publish What You Pay civil society movement, the Kimberly Process Certification Scheme, the International Council of Mining and Metals (ICMM) Sustainable Development Framework, the Extractive Industries Transparency Initiative (EITI), the Africa Mining Vision, the Natural Resource Charter, the OECD Due Diligence Guidance, the UN Global Compact, the IMF Resource Revenue Transparency Guidelines, the Global Reporting Initiative (GRI), the Equator Principles, as well as major legislative and rulemaking efforts, such as the Dodd-Frank Act and the EU Accounting and Transparency Directives.

2 See, e.g. "Give Investors Access to All the Information They Need", Financial Times, 20 May, 2014

3 See, e.g., the Swiss Government's report on Commodities (FDFA 2013), discussing initiatives to improve transparency in product flows in the context of a broadening revenue transparency agenda, as a means of preventing products "that have been extracted in breach of human rights or environmental standards, or that are used for the financing of conflicts, from passing into the market supply chain."



## 4. 'PAYMENTS TO GOVERNMENTS' AND 'REVENUE TRANSPARENCY' DEFINED

This paper defines 'payments to governments' as the disclosure by companies of monies paid by companies to governments in relation to the extraction and sale of a country's natural resources. 'Revenue transparency', a more widely used term in the international development and business world, is defined as the disclosure by governments of payments made by companies and received by governments.<sup>1</sup>

Important to note is that the definition of revenue transparency has been broadened in recent dialogue within the transparency movement to encompass an array of concepts and criteria, including a) the clarity of roles and responsibilities of the different actors in extractive, trading

and taxation processes; b) public availability of information; c) open budget preparation, execution, and reporting; and d) assurances of integrity.<sup>2</sup> The concept of revenue transparency has also been used to encompass transparency in contracting and licensing process, clarity of the legal framework governing extraction, components of natural resource fund governance, and clarity in the rules for distribution of revenue to subnational governments.<sup>3</sup>

Definitions used in various governance assessment and benchmarking contexts such as the 'Resource Governance Index',<sup>4</sup> or the IMF's 'Guide on Resource Revenue Transparency'<sup>5</sup> tend to be somewhat more expansive and inclusive than those used in the context of the various regulatory initiatives discussed in this paper. Ultimately however, there is no universally accepted definition of the term revenue transparency - this presents both a risk but also an opportunity for the commodities trading sector.

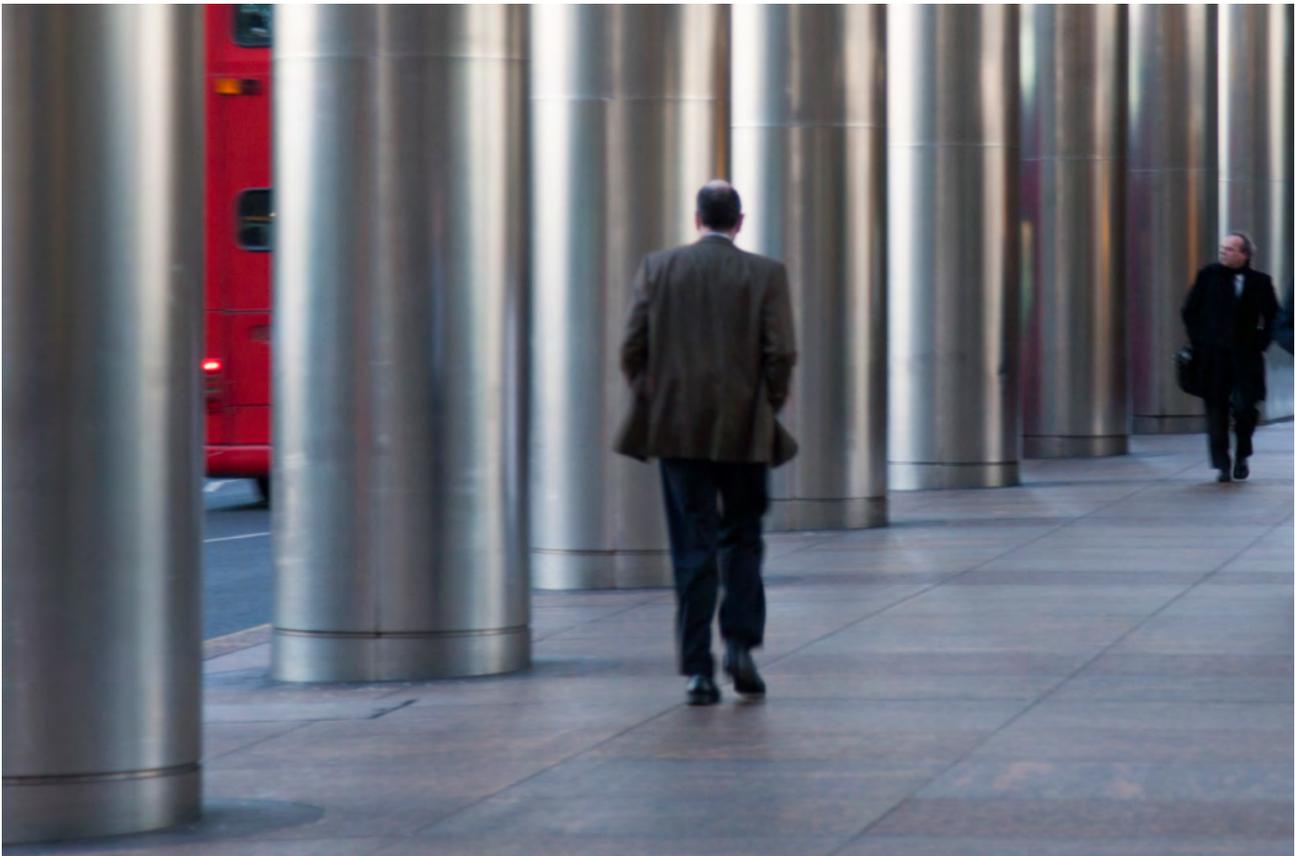
<sup>1</sup> See Revenue Watch (2010)

<sup>2</sup> Adapted from IMF (2005) "Guide on Resource Revenue Transparency"

<sup>3</sup> See Revenue Watch (2010)

<sup>4</sup> See Revenue Watch Institute (2013)

<sup>5</sup> IMF (2005)



## 5. THE TRANSPARENCY MOVEMENT AND ITS DEMANDS OF THE COMMODITIES TRADING SECTOR

The transparency movement is playing an increasingly vocal and public role in the lobbying of governments and other global policy makers. In July 2014, the Berne Declaration, the Natural Resource Governance Institute (NRGI) – formerly known as the Revenue Watch Institute – and SWISSAID released ‘Big Spenders’ a report that directly focussed on the activities of the Swiss commodities trading sector. The report called for the Swiss Government *“to pass regulation that requires Swiss companies producing or trading in natural resources to disclose all payments they make to governments and state-owned companies, whether associated with exploration, production or trading activities.”*<sup>1</sup>

The report further recommended, *“oil-producing countries should take steps to protect the integrity of the processes through which they sell their oil, as with other high-value transactions. At its most basic level, this requires succeeding at three main tasks: 1) selecting buyers through a method that reduces opportunities for favouritism, bribery and manipulation; 2) attracting the best possible return for the oil in question, as losses of just pennies per barrel can add up to significant revenue shortfalls; 3) collecting and transferring the revenues to the treasury through a rule-based process that reflects clear national priorities.”*

Encapsulating all sales to foreign and domestic buyers, as well as transfers to other state-owned enterprises and refineries, the ‘Big Spenders’ report presented the following corporate disclosures as a future ‘gold standard’:

- The name and beneficial owners of the company;
- The name of the selling entity;
- Volume, grade, and date of each individual purchase;
- The respective payments made for each individual purchase;
- The related contracts (e.g., term contract, agreements for trading crude for petroleum products);
- The way the purchase was secured (e.g., public tender, applied for term contract), including additional aspects of the agreement such as loans or infrastructure promised in exchange for lifting rights; and
- The same information for any payments made by the company’s subsidiaries or by joint ventures in which it holds significant shares.

To the above demands, and by way of highlighting the position taken by the EITI on some of the more granular information requests, it is important to underline as follows:

- EITI multi-stakeholder groups (comprising representatives of relevant governments, industry and civil society) in charge of overseeing EITI implementation in implementing countries are granted latitude to determine the nature of mandatory in-country reporting (explained in section 6.1.1 on the EITI on page 14);
- EITI Principles make explicit reference to the fact that *“achievement of greater transparency must be set in the context of respect for contracts and laws”*.

With definitions of transparency remaining fluid and disclosure targets equally so, there is a pressing need for the commodities trading industry to align with informed stakeholders, define parameters and develop a vision for a pragmatic, commercially workable solution.

The following sections explore these issues more fully and present pragmatic next steps for consideration.

<sup>1</sup> Gillies, A., Guéniat, M, Kummer, L. 2014 *Big Spenders*, Berne Declaration, NRGI, SWISSAID



## 6. PUBLIC INTEREST, KEY DISCLOSURE FRAMEWORKS AND THE NEED FOR DIALOGUE

The media has reported extensively on the transparency movement's campaign concerning traders' payments to governments.<sup>1</sup> The expansion of the EITI framework in 2013 (discussed in 6.1.1 below) to cover trading activities was in part a response to this pressure, and occurred without the active participation of most commodities trading companies. This development offers a clear indication as to the potential for unintended consequences were the industry to fail to engage in future discussion.

### From civil society unease to dialogue

As already outlined, prominent reports by the Berne Declaration, the NRGJ and SWISSAID on the commodities trading sector and, moreover, the alleged malpractice of Swiss traders on the African continent<sup>2</sup> provide a vivid and widely circulated account of those issues of material concern to civil society.<sup>3</sup> The need for data often has been highlighted as being pivotal but, in fact, so too is the need for the commodities trading sector to engage and better explain its activities. Few traders report annually on performance or highlight activities in any detail on, for example, corporate websites. In an age of information, a lack of access to information and knowledge has bred distrust.

While civil society organisations may independently access detailed data online as to oil sales to trading companies by national oil companies through, for example, price reporting agencies such as Platt's and Argus, there is a pressing need for commodity traders to better explain the context behind their activities.

To non-experts, the review of raw data alone can prove misleading and is better complemented by qualitative dialogue and commercially appropriate disclosure by the commodities trading industry. Navigating this environment will be complex for all concerned and is therefore best served via adherence to an established framework.

Major disclosure frameworks with a direct or potential bearing on the commodities trading industry include as follows:

- The EITI and its latest 2013 EITI Standard;
- International legislative initiatives in the US Dodd-Frank Wall Street Reform Act, Section 1504 on Foreign Government Disclosures and Canada's Extractive Sector Transparency Measures Act;
- The EU Accounting and Transparency Directives (EU);
- The Swiss proposal for mandatory reporting standards for the extractive sector.

The following paragraphs provide an overview of how each framework implicates privately held and listed traders.<sup>4</sup>

### 6.1.1 EITI

The EITI presents a global standard to promote openness and accountable management of natural resources. It seeks to strengthen government and company systems, inform public debate, and enhance trust. Important to note is that the initiative becomes a *mandatory* national-level disclosure framework governed by the EITI Standard in countries that choose to implement the EITI.

The EITI also offers an important multi-stakeholder forum for the evolving international debate about the importance of enhanced transparency and accountability in the natural resources sector. In each implementing country, governments, companies and civil society organisations work together to implement EITI through multi-stakeholder groups.

### An evolving process which already includes the trading sector

The integration of the commodities trading industry into EITI reporting in EITI-implementing countries is a relatively new and evolving part of EITI implementation. Departing from its initial focus on the extractive industries, the 2013 EITI Standard explicitly addresses a core set of transactions undertaken by traders: purchases of the state's share of mineral production directly from the state or state-owned enterprises, including national oil companies.

1 See e.g., Javier Blas, "Oil Traders Face Heat Over Disclosure" Financial Times (April 22, 2012).

2 See e.g., Africa Progress Panel (2014).

3 See Revenue Watch (2012) and Berne Declaration (2012).

4 Our analysis focuses on a hypothetical "pure" trading firm. Of course, where an integrated extractive firm has its own trading arm, that firm will be covered more directly on account of its extractive activities. Application of current or potential frameworks to the activities an integrated extraction and trading firm is likely to be idiosyncratic.



## BOX 2: EITI STANDARD REQUIREMENT 4.1.C ON THE 'SALE OF THE STATE'S SHARE OF PRODUCTION OR OTHER REVENUES COLLECTED IN-KIND'

- Where the sale of the state's share of production or other revenues collected in-kind is material, the government, including state-owned enterprises, are required to disclose the volumes sold and revenues received.
- The published data must be disaggregated to levels commensurate with the reporting of other payments and revenue streams (Requirement 5.2.e).
- Reporting could also break down disclosures by the type of product, price, market and sale volume.
- Where practically feasible, the multi-stakeholder group<sup>1</sup> is encouraged to task the Independent Administrator with reconciling the volumes sold and revenues received by including the *buying companies* in the reporting process.

<sup>1</sup> A group made up of government, company and civil society representatives that oversee the EITI implementation in a country. The MSG develops the country work plan, the production of the EITI report and ensures that the EITI contributes to public debate.

### The growing potential for 'indirect disclosure'

Requirement 4.1.c (see above) does not necessarily demand action on the part of traders. While the basic premise of the EITI is to reconcile payment data with receipt data (requiring disclosures from both parties to a transaction), the pure application of requirement 4.1.c only necessitates disclosure by the Government or state-owned enterprises, including national oil companies. It would thus be possible for a country to be EITI compliant without requiring traders to participate directly and disclose, as this would be one set of data for which reconciliations were not made automatically.

However, from the perspective of traders, what this means is that national oil companies and other state-owned enterprises may be required to disclose on the sales side of a transaction, even if traders do not have to report on the purchase side. Thus, whether approved by traders or not, the EITI may lead to indirect disclosure of transaction data, as is the case in Nigeria, for example. Whether this data is able to be associated with a specific trading company or trade will depend upon the rules established by the EITI multi-stakeholder group in the implementing country. The multi-stakeholder group can opt to go beyond the disclosure requirements stipulated in the EITI Standard and require traders to report and then reconcile this data as part of EITI implementation, as is already the case in Iraq.

### Understanding the potential breadth of EITI implementation

Considering the relative flexibility afforded to multi-stakeholder groups in EITI-implementing countries in going beyond the requirements of the EITI Standard, this means that the level of granularity of disclosure will continue to vary across EITI implementing countries. Given the increased focus on the role of traders in the commercialisation of state oil/minerals, it is reasonable to expect that some countries may push for increasingly broad and detailed disclosures. When an EITI multi-stakeholder group decides what exactly traders' disclosure should entail and the decision is adapted into law or decreed, it becomes mandatory for traders to disclose in line with EITI multi-stakeholder group requirements in that specific EITI-implementing country.

If payments to governments or state owned companies, including national oil companies and revenues received by these entities are above the materiality threshold established by the national EITI multi-stakeholder group, then the payments will be reconciled in that EITI-implementing country. The EITI reconciliation process will highlight discrepancies between the two data sets, if such discrepancies exist. The transparency movement and other parties can then use this data to follow up on discrepancies and help to hold the Government and state owned companies, including national oil companies to account.

### BOX 3: CARGO-BY-CARGO DISCLOSURES

#### Iraq

Iraq's 2010 EITI report, published in 2013, details that its government received US\$52.2 billion from sales of its crude oil to 35 international buyers. The report is the first EITI national report to include *reconciled* data on the sale of state oil. Buyers of oil disclose cargo-by-cargo data on their purchases, including:

- Shipment number
- Contract number
- Invoice number
- Invoice date
- Quantity in barrels
- Barrel price (US\$)
- Invoice amount in local currency and US\$
- Quantity in tons
- Port
- Loading date
- Letter of credit number<sup>1</sup>
- Destination
- Due date
- API<sup>2</sup>
- Vessel's name
- Settlement
- Notes (for further explanation)

This data is then aggregated to an annual aggregated per-company basis and published in the EITI reconciliation report. Uncovered discrepancies in the total US\$ amounts reported by Iraq's national oil company (State Organization for Marketing of Oil or 'SOMO') and the purchasers can then be traced back to individual cargos and explained with greater ease, as the cargo-by-cargo data is already to hand.

#### Nigeria

Nigeria's EITI 2009-2011 physical and process audit report, Annex B, includes an explanation and review of the procedures for pricing Nigerian oil, an assessment of the conformity with the procedures, and a review of the contracts between the Nigerian National Petroleum Corporation or 'NNPC' and the companies that purchased Nigerian oil. It also includes cargo-by-cargo sale data that is not reconciled as part of the EITI implementation process but nevertheless is in the public domain. Data includes as follows:

Data includes as follows:

- Customer
- Bill of lading date<sup>3</sup>
- Crude type
- Nominal quantity
- Quantity lifted
- Vessel's name
- Unit price in US\$
- Crude value in US\$
- Letter of credit number
- Pricing option
- API<sup>2</sup>
- Destination

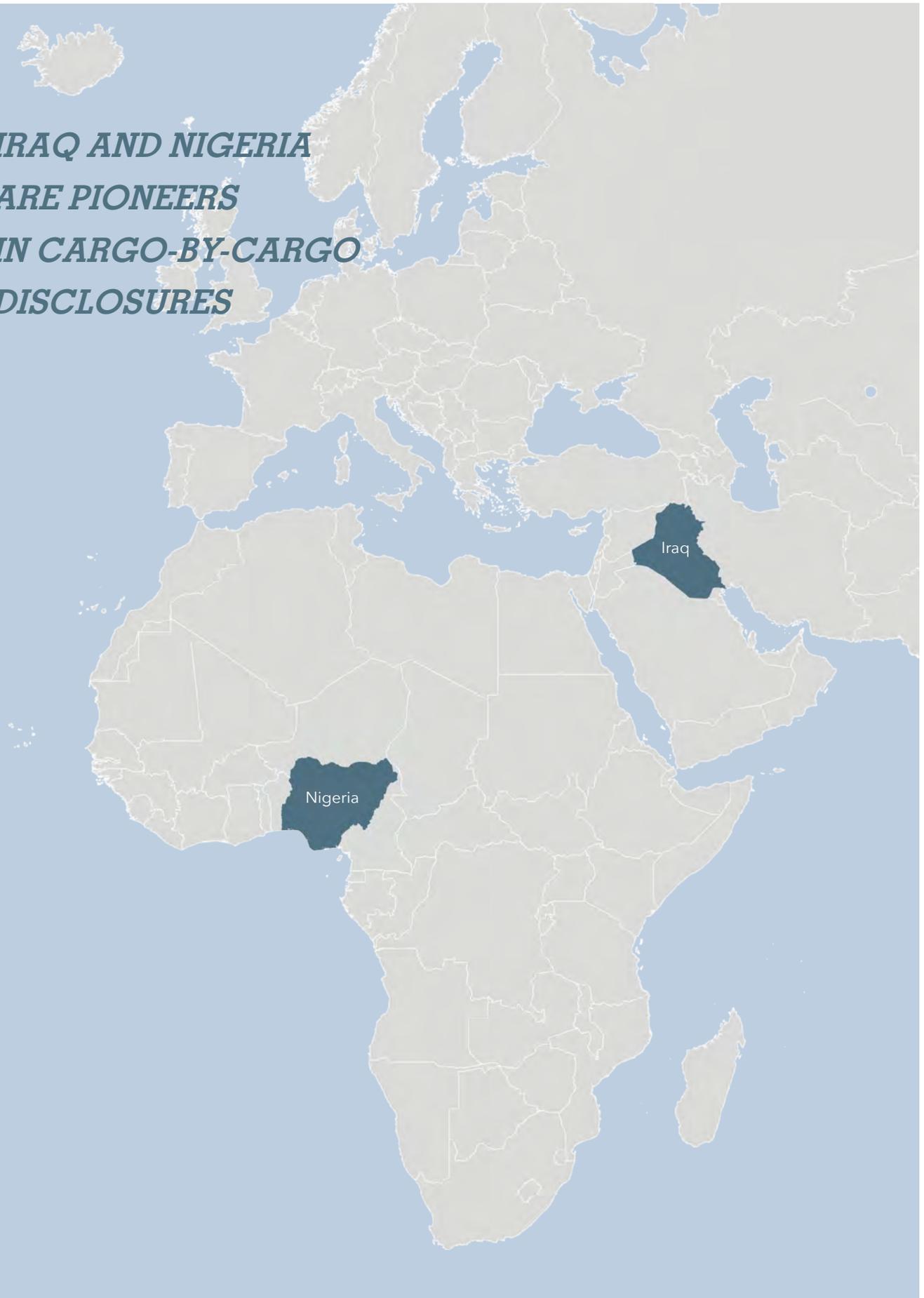
<sup>1</sup> A document from a bank guaranteeing that a seller will receive payment in full as long as certain delivery conditions have been met

<sup>2</sup> American Petroleum Institute's inverted scale for denoting the 'lightness' or 'heaviness' of crude oils and other liquid hydrocarbons

<sup>3</sup> A document issued by a carrier which details a shipment of merchandise and gives title of that shipment to a specified party



***IRAQ AND NIGERIA  
ARE PIONEERS  
IN CARGO-BY-CARGO  
DISCLOSURES***



### Towards more timely disclosure

Iraq is currently the only country globally that requires purchasers of state oil to disclose cargo-by-cargo data on their purchases in its EITI reports, and reconciles this data through the Iraqi EITI process. Iraq, which requires all buyers to participate in the EITI process, published data in 2013 that refers to trading activities in 2010 (i.e. with a three-year delay). However, the 2013 EITI Standard's 'Requirement 2.2' now stipulates, "*EITI Reports must cover data no older than the second to last complete accounting period, e.g. an EITI Report published in calendar/financial year 2014 must be based on data no later than calendar/financial year 2012*". Where traders may have hoped to mitigate confidentiality concerns through substantially delayed disclosure, the companies' non-participation in the EITI Standard-setting deliberations has resulted in an approach that, whilst still allowing for a 24-month delay, looks set to tighten further as EITI multi-stakeholder group deliberations in EITI implementing countries indicate that there is demand for shorter time lags.

*A pioneer of more timely disclosures is the Republic of Congo.* The country provides quarterly figures with a one-year delay. According to the EITI website, "the Government has taken a step in making information on oil sales available to the public in a timely manner. In July, 2014 the figures for 2013 were published showing how Congo's NOC collected and sold its oil. Specifically, the reports show the amount of oil SNPC [Société Nationale des Pétroles du Congo] receives from operators extracting oil in the country, in accordance with production-sharing agreements. The prices at which the oil is then sold by SNPC and the amount of revenue transferred to the state treasury are included in quarterly reports".<sup>1</sup>

### Follow the leader?

Iraq's lead in disclosing and reconciling disaggregated cargo-by-cargo data is one that other EITI implementing countries may well adopt in the future. According to the EITI International Secretariat, discussions at national EITI multi-stakeholder group level in Nigeria<sup>2</sup>, Republic of Congo, Chad, and Indonesia, are pointing to the inclusion of

disaggregated sales data for state-owned enterprises, including national oil companies and purchasing data for commodities traders buying from these state-owned enterprises, including national oil companies in disclosure and reconciliation processes. In countries where such detailed disclosure is not yet the norm, unilateral disclosure by state-owned enterprises, including national oil companies, during a full EITI process audit, as was the case in Nigeria, for example, can lead to the indirect disclosure of commodities trading industry-relevant data, which may be misinterpreted by stakeholders if published without contextualisation by the commodities trading industry.<sup>3</sup>

### Understanding data limitations

The latter risk ties in with the EITI's goal to make information readily accessible, understandable and useful to citizens of resource-producing countries, and other stakeholders globally. However, users of disclosed data do not always demonstrate a full understanding of the limitations of such data. For instance, some groups have used EITI data to argue that certain countries are at a significant disadvantage to others by comparing the reported revenues of countries with similar output.<sup>4</sup> Such analyses may fail to take into account legitimate reasons for these discrepancies (e.g., where one country's industry is more mature and companies have already recovered the cost of up-front investment, or where fiscal revenues have been legitimately traded against other, non-revenue benefits such as higher levels of in-country beneficiation or in-kind benefits such as infrastructure).

Indirect data disclosures and/or insufficiently contextualised data disclosures give rise to possible reputational risks for traders, and also increased regulatory risk as data is likely to be used to urge ever more stringent regulation. This is a key argument for the commodities trading industry to support the EITI's endeavour to generate and present not only more data, but better contextualised and presented data so as to aid all stakeholders' understanding of the data and its implications.

1 EITI "Congo Brazzaville: Quarterly reporting brings new level of transparency" EITI News, 25 August 2014 <https://eiti.org/news/congo-brazzaville-quarterly-reporting-brings-new-level-transparency>

2 Nigeria published the sales of oil by NNPC to trading companies. While this information is not reconciled with the trading companies, NNPC disclosed the name of the buyer in each transaction in the Nigeria EITI 2009-2011 Physical and Process Audit (page 14). [http://neiti.org/ng/sites/default/files/pdf\\_uploads/EITI-Physical-And-Process-Final-Audit-Report-2009-2011.pdf](http://neiti.org/ng/sites/default/files/pdf_uploads/EITI-Physical-And-Process-Final-Audit-Report-2009-2011.pdf)

3 EITI "Nigeria EITI sheds light on spiralling petroleum subsidies" EITI News, 20 February 2013 <https://eiti.org/news/nigeria-eiti-sheds-light-national-oil-company-spiralling-subsidy-deductions>

4 EITI, 2013, What EITI Reports Do and Don't Tell us about Oil Deals, <https://eiti.org/blog/what-eiti-reports-do-and-don-t-tell-us-about-oil-deals>



### 6.1.2 US DODD-FRANK WALL STREET REFORM ACT SECTION 1504: FOREIGN GOVERNMENT DISCLOSURES

Section 1504 on Foreign Government Disclosures of the US Wall Street Reform Act only applies to firms with securities listed in the US. This means it excludes many of the most prominent privately held trading firms. The Act covers issuers engaged in “commercial development” of extractive resources. “Commercial development” is defined to include “exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the Commission [Securities and Exchange Commission or ‘SEC’]”.

While it covers “export”, Section 1504 does not cover the comprehensive suite of trading activities<sup>5</sup>, including transport, storage and marketing, which traders typically undertake.

The SEC was given authority to expand coverage beyond the activities explicitly listed in the legislation, but, “...to avoid confusion as to the scope of the activities covered by the rules, the final rules do not include the phrase ‘and other significant actions relating to oil, natural gas, or minerals.’”<sup>6</sup> *The explicit inclusion of “export” activities, coupled with the explicit exclusion of transport, storage and marketing activities makes application of the rule to trading firms unclear, and raises the risk that traders’ activities may bring them into Section 1504 depending on how exactly those activities are structured or interpreted.*

#### Dodd-Frank 1504 challenged

Dodd-Frank Section 1504 was successfully challenged in a Federal Court in 2013, which resulted in the need for rules to be reissued. In 2014, the SEC suggested new rules would be published by March, 2015, but media sources later suggest the new rules could be published as late as October, 2015.<sup>7</sup> Currently it is unclear how the

new rules will apply to any company, including commodities trading companies. It is worth noting that the development of the 2013 EITI Standard, and the expansion of that standard to cover commodities trading with respect to state production share and in-kind revenues, occurred largely after most of the work had commenced on the SEC rulemaking process. In a second rulemaking process—provided it allows for ample comment once again—it is likely that the transparency movement will seize on the recent expansion of the EITI to argue for a similar expansion of the Section 1504 rules. The likelihood of the SEC taking such a recommendation on board is considered low, primarily given the fact that the SEC has already sustained a defeat at the hands of industry and does not seem likely to push back with an expanded rule. Secondly, even the first rulemaking process accepted differences with the EITI in favour of relatively strict adherence to the language of the Act. Despite such wrangling, this debate is one that the commodity trading industry should follow with interest.

### 6.1.3 EU ACCOUNTING AND TRANSPARENCY DIRECTIVES

Following the example of Dodd-Frank Section 1504, the European Parliament approved the Accounting and Transparency Directives. Member states have until July, 2015, to issue laws to enforce application of the Directives, which require public-interest and non-public interest large companies incorporated in the European Economic Area (EEA) to disclose payments made to governments, on a project-by-project basis, in an annual report.

The EU rules apply to “undertakings active in the extractive industries”, which includes undertakings “with any activity involving the exploration, prospection, discovery, development, and extraction of minerals, oil, natural gas deposits or other materials, within the economic activities listed in Section B, Divisions 05 to 08 of Annex I to Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 (1).” The referenced listing of activities in the Annex to Regulation (EC) No 1893/2006 includes “mining”, “quarrying” and “extraction” of various minerals and petroleum products, but do not specifically encompass “trading”. *Thus, the directives do not apply directly to the*

5 The SEC report also cites to an additional comment letter (see March 2, 2012 comment of Philippe Le Billon: “Finally, trading constitutes a vulnerable point in the value chain with large (retro) commissions as demonstrated in the Iraqi ‘oil-for-food’ schemes”, comments available at: <https://www.sec.gov/comments/s7-42-10/s74210.shtml>) recommending expansion of the set of covered activities to include trading. While the SEC does not explicitly reject these recommendations, its discussion makes clear that it has not expanded the definition beyond that included explicitly in the legislation and the proposed regulations.

6 17 CFR Parts 240 and 249, Release No. 34-67717; File No. S7-42-10, at fn 129.

7 Guillén, A (2014), Timeline slips for major energy regulations - Why Canada may hold the key to keystone, Politico. Available at: <http://www.politico.com/morningenergy/1114/morningenergy16219.html>

trading sector, nor do they introduce the uncertainty seen in the US rules which include "exporting". However, given the flexibility accorded to member states in transposing and implementing the directives, some member states may seek to engage the trading industry directly.

#### 6.1.4 CANADA'S EXTRACTIVE SECTOR TRANSPARENCY MEASURES ACT

In October, 2014, the Canadian Federal Government tabled a new law: the Extractive Sector Transparency Measures Act (ESTMA) that would require oil, gas and mining companies to publicly disclose payments they make to governments around the world. The ESTMA is scheduled to be enacted in early 2015.<sup>8</sup>

The Act closely tracks both Dodd-Frank Section 1504 and the EU rules and contains an equivalency clause allowing for the substitution of the Government of Canada's payment reporting requirements with those of another jurisdiction. This equivalency clause, which is also found in the EU rule, would allow companies to publish a report on the basis of the mandatory disclosure requirements of another country (or a province or territory), provided that these are considered equivalent to the Canadian requirements.

The Act's equivalency clause aims to minimise the administrative burden that could result from multiple reporting obligations.<sup>9</sup> Specifically with respect to the activities covered, the Canadian rules track Dodd-Frank Section 1504 to cover exploration, extraction, processing (primary), and export (transport out of country). *To date, traders are not directly covered by the Act except to the extent that they are involved in export. As with the Dodd-Frank rule, the inclusion of export activities raises possibilities that some activities of some traders may be covered.*

#### 6.1.5 SWISS DISCLOSURE RULES

In accordance with the EU Directives, the preliminary draft of disclosure rules presented by the Swiss Federal Council in November, 2014, applies to extractive industry companies, and requires them to disclose their payments to public authorities. *Companies solely active in commodities trading presently are not subject to this requirement.*<sup>10</sup>

Media sources suggest the draft law is at consultation stage and the enactment of the law is not expected until 2017.<sup>11</sup>

##### Navigating a complex environment

An important distinction to make for any commodities trading company wishing to navigate this complex environment is the difference between those disclosure frameworks that relate to host (producing) countries and those focussed on the reporting company's home country.

Host country rules, like the EITI Standard, apply to all types of entities undertaking an activity covered by the individual country multi-stakeholder group's application of the EITI Standard. Thus, if a company wants to engage in those activities within an EITI implementing country, participation in the EITI's disclosure regime becomes mandatory. This is because in almost all EITI implementing countries, disclosure requirements have been decreed or otherwise passed into law. Host country rules are therefore a means to level the playing field amongst purchasers from state-owned enterprises, including national oil companies. In order to make such rules most effective, host countries' capacity to enforce laws must be strengthened.

On the other hand, a company engaging in a covered activity in a non-EITI implementing country could avoid disclosure under home-country rules, such as the US, EU and proposed Canadian listing requirements (or any eventual Swiss disclosure regime), by relocating or de-listing (depending on the structure of the framework) or simply by booking trades through jurisdictions where the effective application of the rule of law is compromised and companies can still escape effective regulatory scrutiny. In addition, a mandatory disclosure requirement

8 McCarthy Tétrault. "Canada Introduces New Payment Disclosure Regime: The Extractive Sector Transparency Measures Act". Accessed December 10, 2014. [http://www.mccarthy.ca/article\\_detail.aspx?id=6930](http://www.mccarthy.ca/article_detail.aspx?id=6930)

9 <https://lexextrahendi.wordpress.com/category/estma/>

10 Hoffman, A, 2014, Swiss Consider More Payment Transparency for Commodity Traders, Bloomberg, <http://www.bloomberg.com/news/2014-06-25/swiss-consider-more-payment-transparency-for-commodity-traders.html>

11 Wolf, Matthias and Iffland, Jacques (2014), "Corporate Law Reform", Lenz & Staehelin. Accessed December 10, 2014 <http://www.lexology.com/library/detail.aspx?g=659917e6-229c-4fa0-a356-5b3ec13bebde>



(e.g., in Switzerland) would not necessarily be binding on trading firms based in other jurisdictions (e.g. Singapore), potentially putting Switzerland based traders at a competitive disadvantage. It is conceivable that counterparts in non-EITI implementing countries that wish to avoid disclosure of commercial information will give preference to trading firms that are not subject to these mandatory home-country disclosure requirements. This is of course a highly controversial argument (and strategy), but one the upstream oil and gas industry has advanced vigorously in the US Dodd-Frank 1504 debate, which is why it is important to highlight it here.

Another key distinction between home-country and host-country regimes is the greater standardisation of reporting frameworks under a home-country regime. While the EITI Standard enforces a high degree of standardisation across EITI frameworks, significant latitude remains for the EITI multi-stakeholder groups in EITI implementing countries to define different reporting requirements. As a result, risks and opportunities in relation to disclosure by traders are harder to predict.

On the other hand, the relative flexibility afforded to multi-stakeholder groups provides traders with a solid mechanism for engagement to potentially shape the country-specific application of the EITI Standard.

At the same time, home-country regulatory processes may afford a greater opportunity for trading firms to wield influence by advocating for the shared interests of the industry. Whereas only a small subset of traders may be active in any given EITI implementing country, the large number of traders present in certain jurisdictions can enhance their political power to influence rulemaking, if effectively applied.



## 7. CONCLUSION AND NEXT STEPS

Over 90 of the world's largest oil, gas as well as mining and trading companies have chosen to become EITI Supporting Companies. Its expert authority and highly participative strategy in driving the transparency agenda forward has resulted in significant global multi-stakeholder support for the initiative.

The timeline of milestones in the transparency movement presented in Annex 1 of this paper highlights that disclosure legislation was introduced in the US, Canada and the European Union (and soon Switzerland) despite some extractive industries companies committing to voluntary disclosure of payments to governments under the EITI framework. A devil's advocate could thus argue that extractive companies may have gained some initial kudos by disclosing relatively painless amounts of data, but that legislation followed irrespective of these companies' actions. If that deduction holds, then one could make a case for the commodities trading industry to 'sit tight' and do nothing, on the grounds that helping the disclosure cause will only bring legislation closer, or at least not forestall the process.

However, there are important holes in this interpretation. It is wrong to assume that companies that were proactive in disclosing data were somehow punished with legislation afterwards. In fact, not many extractive companies took a fully constructive view towards disclosure prior to the initial legislative proposals. More granular voluntary disclosure was, according to the EITI, only undertaken by Statoil, BHP and Tullow Oil, all of which disclosed 2013 data in 2014, with Tullow Oil being the first to disclose on a project-by-project basis. *The aim of legislators is of course to capture a significantly larger share of entire industries.* Tullow Oil gained significant reputational advantage by disclosing on a project-by-project basis before the EU legislation came into effect. Knowing that such disclosure requirements would come their way, the company seized the moment at the right time to gain significant credit with the transparency movement and stakeholders globally.<sup>1</sup>

The rationale for many extractive companies to participate in the EITI was therefore not to somehow forestall disclosure legislation. The example of the extractive industries suggests that, once it was evident that the transparency movement's pressure for mandatory disclosure regulation would not go away, the extractive companies' rationale was first to participate in the shaping of appropriate legislation (which many have long considered to be an inevitable outcome), and second to draw on the EITI as a key stakeholder engagement forum. The principal benefit for traders in participating in the EITI is indeed the engagement platform the initiative provides. This is particularly the case, as becoming an EITI Supporting Company does not entail any additional EITI-related reporting requirements over and above those that companies are already subject to in the EITI implementing countries they operate in.

### A path ahead

While complex, the current environment presents a timely opportunity for commodities trading companies to engage directly with the transparency movement - either independently or as a coalition. Partnering with civil society, government and other companies will be essential to progress.

Engagement will require bold steps as outlined below. Above all however, any steps that are taken should resonate directly with the citizens of commodity producing countries. The transparency movement in its many forms will rightfully demand it.

1. Traders should engage with the EITI in designing an effective disclosure standard for the commodities trading industry.
2. Traders should apply for 'EITI Supporting Company' status. This step does not require additional reporting or disclosure of payments beyond what is legally required for all companies operating in EITI-implementing countries.
3. Traders should commit to voluntary data disclosures commensurate with reporting requirements in EITI-implementing countries, bearing in mind that the disclosure model developed is likely to evolve over time in response to informed discussions under the auspices of the EITI.

<sup>1</sup> Gillies, A. (2014), Tullow Pulls Back the Curtain, Natural Resource Governance Institute, <http://www.resourcegovernance.org/news/blog/tullow-pulls-back-curtain>



## ANNEX 1: MILESTONES IN THE REVENUE TRANSPARENCY MOVEMENT

PUBLISH WHAT YOU PAY  
(INCLUDING UNILATERAL INDUSTRY ACTION)

EITI

US DODD-FRANK SECTION 1504

EU TRANSPARENCY AND ACCOUNTING DIRECTIVE

CANADA'S EXTRACTIVE SECTOR  
TRANSPARENCY MEASURES ACT (ESTMA)

SWISS DISCLOSURE RULES

### LATE 1990s THROUGH EARLY 2000s

A number of academics (Jeffrey Sachs, Joseph Stiglitz, Terry Lynn Karl, Paul Collier and others) began to focus attention on the so-called 'resource curse', highlighting and seeking to explain the phenomenon of lower-than-expected growth in states with huge mineral wealth. The literature generally recommends that "*transparency and dialogue had to be part of the starting point*" for addressing the many challenges underlying this resource curse<sup>1</sup>. This academic focus provides an important backdrop for much of what follows.

#### 1999

##### DECEMBER

Transparency watchdog Global Witness publishes "A Crude Awakening"<sup>2</sup>, an "exposé of the apparent complicity of the oil and banking industries in the plundering of state assets during Angola's 40-year civil war."<sup>3</sup> The report draws a direct line between the refusal of major multinational oil companies to release financial information and government mismanagement and corruption, concluding with a call on the oil companies to "*publish what you pay*".

#### 2001

##### FEBRUARY

BP responds to the call from Global Witness and publishes the US\$111 million signature bonus it paid for an offshore license and immediately begins pushing for approaches to level the playing field that would not leave it standing alone with such a unilateral disclosure. This declaration was rare at the time but is now not uncommon. Oil companies begin urging a shift in emphasis toward government reporting and the notion of the level playing field, meaning that all companies in a country should disclose if company disclosure was to be required. Lord Browne, then BP Chief Executive, concluded, "*a unilateral approach, where one company or one country was under pressure to 'publish what you pay' was not workable*".<sup>4</sup>

1 Extractive Industries Transparency Initiative (2014a).

2 Global Witness. "A Crude Awakening". Accessed December 10, 2014. <http://www.globalwitness.org/library/crude-awakening>

3 Publish What You Pay (2014a).

4 See Extractive Industries Transparency Initiative (2014a).



## 2002

### JUNE

Global Witness, CAFOD, Open Society Institute, Oxfam GB, Save the Children UK and Transparency International UK, launch the “*Publish What You Pay*” (PWYP) campaign, calling for extractive companies globally to disclose the payments they make to host governments. The Open Society Institute, George Soros’ philanthropic foundation, creates a new program called “*Revenue Watch*” to investigate revenue flows in the Caspian oil sectors (in 2006, the Revenue Watch Institute will be launched as an independent organisation working on these issues globally). The PWYP network in 2014 spans nearly 60 countries, with PWYP national affiliated coalitions in more than 35 of these.<sup>5</sup>

## 2003

### JUNE

The British Government, in response to the push from the PWYP campaign and the recommendations of oil companies, convenes a meeting of civil society, company and government representatives and launches the Extractive Industries Transparency Initiative (EITI).

## 2004

### MARCH

Statoil makes ‘transparency and trust’ the key theme of its 2003 sustainability report and voluntarily discloses payments to governments on a country-by-country basis in its 2004 annual sustainability report.<sup>6</sup>

## 2005

### MARCH

A standard set of implementation procedures for the EITI is developed and the initiative begins to take shape as an international disclosure standard. The basic premise of the EITI is that companies report the money they pay to governments, governments report the revenues they receive, and the two figures are reconciled in a report. In addition to the data disclosures at the heart of the EITI, the multi-stakeholder structure of the EITI and the required involvement of civil society are seen as a means of fostering more inclusive and accountable sector governance.

### MARCH

Talisman Energy begins voluntary disclosure of tax and royalty information on a country-by-country basis.<sup>7</sup>

## 2007

### OCTOBER

Following targeted advocacy from the PWYP coalition to develop a mandatory ‘home country’ requirement to complement the EITI’s ‘host country’ framework, the US House Financial Services Committee, led by Chairman Frank, holds a hearing to examine the importance of increased revenue transparency in the oil, gas and mining industries. Seven months later, Representative Frank introduces H.R. 6066 (the Extractive Industries Transparency and Disclosure Act), the first version of what will eventually become Dodd-Frank 1504.

## 2009

### APRIL

Rio Tinto begins to voluntarily disclose details of tax and royalty payments it makes on a country-by-country basis.<sup>8</sup>

### SEPTEMBER

Following continued advocacy from the PWYP coalition in Washington D.C., Senators Cardin and Lugar step forward as ‘champions’ of extractive sector transparency in the US Senate and introduce S. 1700, the “Energy Security Through Transparency Act”.

### DECEMBER

The House version of the Wall Street Reform act is passed, which does not include Section 1504.

<sup>5</sup> Publish What You Pay (2014a)

<sup>6</sup> Statoil. “Statoil and Sustainable Development 2004”. Accessed December 10, 2014. [http://www.statoil.com/en/EnvironmentSociety/Sustainability/Downloads/Sustainable\\_report\\_2004.pdf](http://www.statoil.com/en/EnvironmentSociety/Sustainability/Downloads/Sustainable_report_2004.pdf)

<sup>7</sup> Talisman Energy. “2005 Corporate Responsibility Report”

<sup>8</sup> Rio Tinto. “2008 Annual Report and Financial Statements”. Accessed December 10, 2014. [www.riotinto.com/annualreport2008/](http://www.riotinto.com/annualreport2008/)

## 2010

### JULY

In the conference process, through which the Senate and House versions of the financial reform bill are reconciled, Section 1504 is added to the final text and becomes law upon President Obama's signature of the bill into law. Section 1504 of the Dodd-Frank Act requires the Securities and Exchange Commission (SEC) to issue rules calling for companies listed on US exchanges and engaged in commercial development of oil, natural gas or minerals to file an annual report disclosing payments made to governments, on a project-by-project basis. Payment categories generally track those in the EITI.

## 2011

### MARCH

At the EITI Global Conference in Paris, following extensive consultation, the EITI Board adopted the EITI Rules that set out disclosure requirements for EITI implementing countries. The EITI Rules will pave the way for the adoption of the EITI Standard in May, 2013.

### OCTOBER

The European Commission publishes a proposal calling for disclosure of company payments to governments in oil, gas, mining and forestry on a country-by-country and project-by-project basis. Advocacy efforts target the G20 (with Bill Gates urging support for, and replication of, Section 1504 in a report to the G20 nations on development<sup>9</sup>).

## 2012

### APRIL

Coordinated with the Financial Times Global Commodities Summit, the Revenue Watch Institute and the Swiss-based Berne Declaration publish simultaneous studies on the role of commodities traders, highlighting trading as a major gap in the current revenue transparency frameworks.<sup>10</sup>

### MAY

After nearly two years of public comment on Section 1504, the SEC has still not published a final rule and Oxfam America sues the SEC for "unlawful" delay. Several other rulemaking processes required by the Dodd-Frank Act are also delayed, but activists and Congressional champions of the bill are especially concerned about delay as there is a parallel advocacy push on-going in the EU, and that failure by the US to finalise rules may result in uncoordinated/conflicting rules—or simply may result in the US ceding its influence as first-actor.<sup>11</sup>

### JUNE

Tullow Oil first voluntarily publishes country-by-country payment data in its Corporate Responsibility Report<sup>12</sup> (this will be expanded to include project-level data in 2014).

### AUGUST

The SEC, closely tracking the language of the statute, issues final rules under Dodd-Frank section 1504.

### SEPTEMBER

The European Parliament's Legal Affairs Committee votes to require certain EU-based oil, gas, mining and forestry companies<sup>13</sup> to disclose their payments to governments.

### SEPTEMBER

Swiss Parliament proposes rules that would require Swiss traders to make public the payments they make to governments.

9 Bill and Melinda Gates Foundation. "G20 Report". Accessed December 11, 2014. <http://www.gatesfoundation.org/What-We-Do/Global-Policy/G20-Report>

10 Revenue Watch's study, "Selling the Citizens' Oil" looks at how 11 countries sell the government's share of oil. Revenue Watch (2012). The Berne Declaration's book focuses specifically on the Swiss commodities sector. Berne Declaration (2012).

11 See, e.g., letters from Earthrights International (on behalf of Oxfam International), Greenpeace, Global Witness, Arlene McCarthy (Member European Parliament) and others, available at: <http://www.sec.gov/comments/s7-42-10/s74210.shtml>; observation also based on personal recollection of unpublished discussions.

12 Tullow Oil. "Tullow Oil plc 2012 Corporate Responsibility report". Accessed December 10, 2014. <http://www.tulloil.com/index.asp?pageid=137&newsid=844>

13 Covered entities include entities meeting criteria for size and turnover as well as companies traded on a regulated exchange in any Member State. For further details of the EU Directive's coverage, see Appendix 1.



## SEPTEMBER

Mining groups and civil society organisations in Canada convene a "Resource Transparency Working Group" to develop a reporting framework in Canada similar to Section 1504. One key objective is to "level the playing field" within Canada. The emergence of revenue transparency rules in the US and the EU means that a number of Canadian companies will be subject to disclosure in those jurisdictions. Development of a Canadian reporting framework –with a goal of eventually moving toward a unified reporting framework—is seen as a strategic manoeuvre with the end goal of preventing disproportionate regulatory impacts across the sector.

## OCTOBER

The American Petroleum Institute, the Chamber of Commerce, the Independent Petroleum Association of America and the National Foreign Trade Council file a lawsuit challenging Section 1504, claiming that the rulemaking process was "arbitrary" and "capricious" and that the disclosure obligations infringe upon their First Amendment rights by compelling "speech" through the required disclosures.

## 2013

### JANUARY

SwissAid organises a Commodities Conference, calling on the Swiss Government to embrace emerging transparency standards and develop similar regulations for the commodities trading sector.

### MARCH

The Swiss Government, following a month-long investigation<sup>14</sup> of risks attached to the country's trading sector, rejects proposals for greater regulation of the commodities trading sector that would have required disclosure of payments, announcing instead the cabinet proposed tightening existing laws, notably on money laundering and shareholder rights. Swiss civil society organisations continue to push for regulatory mandated disclosure (as described further in this report).

### MAY

The Iraq EITI releases its 2010 Final Report<sup>15</sup> (prepared under the EITI criteria (2011 edition), which is the first EITI national report to include reconciled data on the sale of state oil. Buyers of oil disclose data on their purchases, which is included on a per-company basis in the final report.

### MAY

The new EITI Standard is launched, making several key changes. The new Standard calls for inclusion of detailed contextual information about the covered sectors in reports, including production data, an overview of relevant laws, a description of the role of state-owned companies, and other information. Reports under the new Standard must also be broken down by company, project and revenue stream. Other changes targeted the clarity of reports and the procedures for "validating" reports. The new EITI Standard also included a number of "recommendations" not required for EITI compliance. While reporting by state-owned companies of their mineral sales is required, it is only a recommendation that countries require reporting by the purchasers in these transactions. Disclosure of host government contracts governing the exploitation of oil, gas and mineral resources is also recommended but not required. It is up to multi-stakeholder groups in EITI Implementing Countries to decide whether or how to incorporate these recommendations into the individual national EITI reporting process.<sup>16</sup>

<sup>14</sup> Swiss Federal Department of Foreign Affairs. "Background Report: Commodities Report of the interdepartmental platform on commodities to the Federal Council". Accessed December 11, 2014. <http://www.news.admin.ch/NSBSubscriber/message/attachments/30136.pdf>

<sup>15</sup> PWC. "Iraqi Extractive Industries Transparency Initiative (EITI) Oil Export and Field Development Revenues in 2010". Accessed December 11, 2014. <https://eiti.org/report/iraq/2010>

<sup>16</sup> Many of these changes pick up innovations that individual implementing countries had previously pioneered in their reports under the oil framework, while others were designed at the global level to address identified gaps, such as the lack of information on the marketing of state-owned oil under the old EITI framework. The EITI website captures well the evolution of the EITI in 2013: "Before 2013, the authors were worried that the EITI was going to become irrelevant by simply focusing on revenue transparency when the debate had moved on. By 2014, the concern was that everyone was trying to hang everything on it, because the EITI was the only game in town. In many countries, it was beginning to play host to some topics had previously been considered politically taboo: beneficial ownership, production and consumer subsidies, the role and behaviour of state owned companies, secretive contracts, aggressive transfer pricing, non-payment of taxes, smuggling, fraud, etc. The debate had clearly shifted and transparency was no longer an aspiration. It was an expectation. And through collective governance, it was beginning to lead to accountability." (EITI 2014a).

**JUNE**

Following a series of tripartite discussions among the European Commission, Council and Parliament, the European Parliament approves new "Accounting and Transparency Directives". Member states have until July, 2015, to issue laws to enforce application of the Directives, which requires public-interest and non-public interest large companies incorporated in the EU and active in exploration, prospection, development or extraction of mineral (or the logging of primary forests) to disclose payments made to governments, on a project-by-project basis, in an annual report.

**JUNE**

In large part due to the push from the Resource Transparency Working Group convened in September, 2012, Prime Minister Harper announces that Canada will adopt mandatory reporting rules for oil, gas and mining companies.

**JULY**

The US District Court determines that the rules issued by the SEC under Section 1504 are "arbitrary and capricious" and vacates the rules. The SEC does not appeal the decision.

**SEPTEMBER**

The SEC announces that it will redraft the rules taking account of the court's reasoning.

**2014****JANUARY**

The Resource Transparency Working Group in Canada releases a framework of recommendations for mandatory reporting, calling for development of provincial securities regulations that would largely mirror the disclosure rules in Dodd-Frank 1504 and the EU Directives. Consistent with the objective of mirroring existing frameworks, the Working Group recommendation explicitly calls for inclusion of an "equivalence" principle, whereby Canadian listed companies complying with substantially equivalent reporting frameworks would be allowed to submit disclosures made under those frameworks in satisfaction of the Canadian requirements.

**MARCH**

Tullow Oil published details of its revenue payments to governments broken down by each project the company operates worldwide, in its annual report.<sup>17</sup> The transparency movement welcomes the voluntary disclosures (in advance of the effectiveness of the EU disclosure law) as the first such voluntary disclosures to include project-specific data and proof of the business case for project-level transparency.<sup>18</sup>

**MAY**

Natural Resources Canada, a governmental agency released a consultation paper on establishing mandatory reporting standards for the extractive sector.

**MAY**

In response to the US District Court for the District of Columbia cessation of the SEC's rule in July, 2013, the SEC indicated in its regulatory flexibility agenda that it would issue a new proposal under Section 1504 by March, 2015.

**JUNE**

First Natural Resource Charter conference since the merger of the Charter with the Revenue Watch Institute to form the Natural Resource Governance Institute in June 2013.<sup>19</sup> Discussions suggest that trading may feature more heavily in future iterations of the Charter.

<sup>17</sup> Tullow Oil. "Tullow Oil plc 2013 Annual Report and Accounts". Accessed December 11, 2014. [http://www.tulloil.com/files/pdf/tulloil\\_ar\\_report\\_2013.pdf](http://www.tulloil.com/files/pdf/tulloil_ar_report_2013.pdf)

<sup>18</sup> See Financial Times (2014) and Global Witness (2014).

<sup>19</sup> Videos and other material available at: <http://www.resourcegovernance.org/news/2014-natural-resource-charter-conference-session-videos-and-materials>



## JULY

A joint report between the Berne Declaration, SWISSAID, and the Natural Resource Governance Institute titled “Big Spenders: Swiss Trading Companies, African Oil and the Risks of Opacity”, analysed the sales of crude oil from NOCs in the top ten sub-Saharan oil-producing countries from 2011 to 2013 and revealed a high number of Switzerland-based commodities trading firms behind the purchases.<sup>20</sup>

## AUGUST

Civil society organisations continued to press the SEC to move quickly on a new disclosure rule for the resource extraction industry. Oxfam America told the SEC it would sue if the commission fails to adopt a final rule by the end of December, 2014. Part of the urgency surrounding the rulemaking is that other countries—including the European Union, Norway and Canada—are moving ahead with their own resource extraction mandatory disclosure requirements. The oil and gas industry also called on the SEC to propose a rule by year-end.<sup>21</sup>

## OCTOBER

The Canadian Federal Government tabled a new law, the “Extractive Sector Transparency Measures Act” (ESTMA) that would require oil, gas and mining companies to publicly disclose payments they make to governments around the world. The ESTMA is expected to be enacted in early 2015.<sup>22</sup>

## NOVEMBER

Trafigura Beheer B.V. announced a new policy committing the company to voluntarily disclose payments to governments in oil and oil-related products in EITI implementing countries from 2015. It also commits to actively participate in the development of a trading industry disclosure standard under the auspices of the EITI. Trafigura formally declared its support to the EITI, becoming the first commodities trading company to join the over 90 oil, gas and mining companies already supporting the EITI and to commit to voluntary data disclosure commensurate with EITI requirements.<sup>23</sup>

## NOVEMBER

The EITI International Secretariat welcomed Trafigura’s commitment to align its disclosure policy with the EITI Principles and Requirements and called on other trading companies to follow Trafigura’s example.

## NOVEMBER

The Swiss Federal Council presented a preliminary draft of the corporate law reform proposal and starts a consultation process. Among the proposals stipulated in the draft is the obligation for major companies in the extractive industries to disclose payments to governments. The draft remains under consultation and enactment is not expected before 2017.<sup>24</sup>

## DECEMBER

The Reports on Payments to Governments Regulations 2014 (Regulations) came into force in the UK on December 1, 2014. This follows the UK Government’s commitment in 2013, at the G8 Summit in Northern Ireland, to implement the EU requirements ahead of the July, 2015 deadline for implementing the EU Accounting Directive imposed on EU Member States as part of its desire to promote transparency in corporate reporting.<sup>25</sup>

20 Gillies, A., Guéniat, M., and Kummer, L. “Big Spenders: Swiss Trading Companies, African Oil and the Risks of Opacity”. Accessed December 11, 2014. <http://www.resourcegovernance.org/publications/big-spenders-swiss-trading-companies-african-oil-and-risks-opacity>

21 Bloomberg BNA. “NGOs Lean on SEC to Move On Resource Extraction Rule” Accessed December 10, 2014. <http://www.bna.com/ngos-lean-sec-n17179893509/>

22 McCarthy Tetrault. “Canada Introduces New Payment Disclosure Regime: The Extractive Sector Transparency Measures Act”. Accessed December 10, 2014. [http://www.mccarthy.ca/article\\_detail.aspx?id=6930](http://www.mccarthy.ca/article_detail.aspx?id=6930)

23 Natural Resource Governance Institute. “Trafigura Announces Disclosures: A Big Step That Should Be the First of Many”. Accessed December 10, 2014. <http://www.resourcegovernance.org/news/blog/trafigura-announces-disclosures-big-step-should-be-first-many>

24 Lexology. “Corporate Law Reform”. Accessed December 10, 2014. <http://www.lexology.com/library/detail.aspx?g=659917e6-229c-4fa0-a356-5b3ec13bebd>

25 Lexology. “Extractive Industries – New UK Reporting Requirements”. Accessed December 10, 2014. <http://www.lexology.com/library/detail.aspx?g=aeae84f-10e6-4661-a828-90d0190029d4>





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Paper commissioned by Trafigura Beheer B.V.



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