REVERSING THE CURSE: THE GLOBAL CAMPAIGN TO FOLLOW THE MONEY PAID BY OIL AND MINING INDUSTRIES

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For advocates of international transparency rules to help end the 'resource curse', 2013 was a significant year. A landmark European law with global reach was passed, the G8[1] and multinational mining companies voiced their support for legally binding rules, and great strides were taken to improve a key voluntary initiative implemented in 41 countries. Indeed, 2013 will be remembered as the year that a global standard for the extractive industries emerged. That said, the movement for accountability over the governance of natural resources also suffered a number of setbacks, and the fight is by no means won.

Most of us are now familiar with the concept of the resource curse – the paradox that countries rich in natural resources tend, with surprisingly few exceptions, to be poor, badly governed and prone to violent conflict.[2] While its causes are many and complex, efforts to tackle the resource curse are unlikely to succeed without there being far greater transparency in the global oil and mining industries.

Despite the fact that every year governments sell natural resources worth hundreds of billions of dollars on behalf of their citizens, people often have no way of knowing how much they are getting for their resources or who benefits from commercial deals. This opacity leaves these vast revenues acutely vulnerable to corruption and mismanagement, resulting in huge losses to public finances in resource-rich but economically poor countries.

If that money can be moved into the public domain so that citizens can track it and make sure that it is saved and spent properly, the impacts on tackling poverty in many of the world's poorest countries could be enormous. To give an idea of the potential benefit, oil, gas and mineral exports from Africa were worth US$382 billion in 2011 – more than eight times the value of official development aid received by African countries that year.[3]

CASE STUDY: SECRET SALES IN THE DRC

Between 2010 and 2012 in the Democratic Republic of the Congo (DRC), several mines were sold in secret by the state to companies registered in offshore jurisdictions, at prices steeply below market value. The offshore companies, whose ultimate (or 'beneficial') owners strive to remain anonymous, paid as little as 5 percent of the market rate for the mining rights, then sold them on to major international companies shortly afterwards for a hugely profitable markup.

According to the Africa Progress Panel, which highlighted the Congolese deals in its flagship 2013 report, Equity In Extractives, the DRC may have lost at least US$1.36 billion from these deals. This is equivalent to twice the DRC's health and education budgets combined, in a country with some of the world's worst malnutrition and where 7 million children are currently out of school.[4]

A GLOBAL CAMPAIGN IS BORN

Co-founded by Global Witness, Open Society Foundation and others in 2002, the civil society coalition Publish What You Pay (PWYP) was created to bring extractive deals out of the shadows. The message was simple: a more open and accountable industry will help to ensure that revenues from non-renewable resources, which provide a one-off opportunity to fund development, are used to benefit all citizens rather than swell the private bank accounts of political and business elites. Beginning with a handful of mostly UK-based CSOs, the PWYP coalition now includes 790 civil society groups from 58 countries, including human rights, development, faith-based and community-level organisations.[5]

A NEW TRANSPARENCY LAW IN EUROPE

After more than a decade of campaigning, PWYP achieved a landmark victory in June 2013 when the European Union Accounting and Transparency Directives were signed into law. The Directives require extractive companies that are based or listed in the European Union (EU) to publish detailed reports of the billions they pay governments in the form of taxes, royalties, licence fees and other payments. Together with Section 1504 of the Dodd-Frank Act, a similar law passed in the United States (US) in 2010, the EU Directives cover around two-thirds of the world's publicly listed extractive companies by value.

Crucially, PWYP's campaigning played a pivotal role in ensuring that the Directives oblige companies to report payments not only for every country they operate in, but also for each individual resource project in which they invest. This means that for the first time, communities living near to resource extraction sites will be able track revenues from local projects, and hold companies and governments to account for them.

CASE STUDY: SHELL AND ENI'S BILLION DOLLAR PAYMENT IN NIGERIA

The need for project-level reporting is starkly illustrated by a payment of US$1.092 billion made by the oil giants Royal Dutch Shell and Eni, a case that was highlighted by *The Economist* in June 2013.[6] The companies' Nigerian subsidiaries made the payment to the Nigerian government to acquire an oil block in 2011. The government had a separate agreement to pay the same amount to Malabu Oil and Gas Ltd, a company widely believed at the time of the payments to be controlled by the convicted money-launderer and former Nigerian oil minister Chief Dan Etete.

While both Shell and Eni have denied paying any money to Malabu Oil and Gas, United Kingdom (UK) High Court proceedings and other evidence show that Dan Etete was indeed an owner of the company, and that in making the $1.092 billion payment, Shell and Eni did so in the knowledge and agreement that these funds would subsequently be transferred to Malabu Oil and Gas.[7] This payment only came to light by chance through a court case. If companies were required to report these kinds of payments, they would be far less likely to end up in private accounts.

During the EU legislative process, PWYP countered efforts by some oil firms to turn the Directives into a 'tyrant's charter'. Business lobbyists claimed that national laws in countries such as Angola and China criminalise the publication of revenue payments. They argued for a clause in the Directives to exempt companies from reporting in such countries, despite not being able to provide any credible evidence that these national laws exist. The EU's eventual rejection of any exemption clause was a hard-fought and important victory, as its adoption would have encouraged transparency-resistant regimes to create new laws that criminalise the disclosure of revenue payments and thereby undermine the purpose of the EU Directives.

BREAKING THE LINK BETWEEN CONFLICT AND NATURAL RESOURCES

2013 also saw continuing efforts to tackle the trade in conflict minerals. Many of the world's most civil brutal wars – from Afghanistan to Cambodia to the DRC – have been fuelled and funded by the trade in natural resources.

Civil society groups have long pressed for binding rules that companies that source minerals in conflict-affected areas should conduct 'due diligence' checks in their supply chains, ensuring that their sourcing practices do not contribute to conflict financing or human rights abuses.

There were two major developments. First, a US District Court upheld the Securities and Exchange Commission's rule that implements Section 1502 of the Dodd-Frank Act. Signed into law in 2010, Section 1502 requires US-listed companies to carry out due diligence checks on minerals sourced from DRC and neighbouring countries, but was subject to a legal challenge filed by the US Chamber of Commerce and others. The decision has now been appealed, and a final decision is expected in mid-2014.

Second, the passing of Section 1502 has helped support DRC's own efforts to reform and demilitarise the mineral sector, leading to the creation of a domestic law in DRC requiring all trading and mining companies operating in the country to carry out due diligence to avoid sourcing 'conflict minerals'. A combination of the DRC law and growing international scrutiny of eastern DRC's mineral supply chains has resulted in local traders now having a much greater understanding of what due diligence is, how to do it, and why it matters, and the implementation, albeit patchy, of the first 'conflict free' supply chains from artisanal mines in the war-torn east of the country.

THE EITI OPENS A NEW CHAPTER

Transparency advocates celebrated another success in 2013 when the Extractive Industries Transparency Initiative (EITI) made far-reaching improvements to its implementing rules. An alliance of governments, extractive firms and civil society groups that aims to improve governance in the natural resource industries, the EITI was established in 2002 as a response to PWYP's call for greater transparency in the sector. Twenty-five countries currently adhere to EITI rules, and another 16 countries are on track to becoming compliant.

The EITI had focused mainly on revenue transparency since its inception, requiring companies to disclose their payments to governments, and governments to disclose the corresponding receipts. While the EITI has achieved some notable successes, it became clear that the risk of corruption and mismanagement lies not only in the flow of revenues from company to government, but also in other areas such as the process used to award resource licences and contracts, the design of the contracts themselves and the lack of transparency around the ownership of extractive firms.

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These concerns were reflected in a revised EITI standard that was adopted in May 2013. All participating countries are now required to disclose information related to the allocation of extractive licences, such as the criteria used for awarding licences, and to publish more detailed project-level reports of revenue payments in line with the EU Accounting and Transparency Directives.[8]

The new standard also encourages governments to disclose contracts signed with companies to extract resources, and to maintain a publicly available register of the beneficial owners – the individuals who ultimately own or control a firm – of companies that bid for or invest in extractive licences.

These changes greatly extend the breadth and depth of the EITI standard, and represent a major advance. Had these measures been in place in the DRC in 2010, for example, it would have been far more difficult to divert the missing US$1.36 billion from the Congolese public purse. As always however, the devil is in the detail. Countries have a significant degree of flexibility over how to apply the EITI's requirements and can ignore provisions that are only encouraged. The immediate challenges are to ensure countries implement the new standard effectively and that the EITI makes its encouraged elements compulsory.

THE G8 TAKES UP THE FIGHT FOR TRANSPARENCY

The UK's decision to use its Presidency of the 2013 G8 to put transparency on the global agenda provided a welcome boost to these issues. One of the key developments was the first coordinated global effort to roll back corporate secrecy and the role of anonymous shell companies – companies which exist on paper only, with no real employees or offices and whose ownership remains hidden - in large-scale corruption, tax evasion and state looting. Three days before the July G8 summit, the UK announced that it will create a national registry of companies' beneficial owners. At the Open Government Partnership summit that he hosted at the end of October, the UK Prime Minister announced that the register would be made public. This was a major victory for campaigners fighting financial crime and predation everywhere, not least because the UK had previously been a staunch defender of secrecy of corporate ownership. Other G8 members and the UK's offshore havens, such as the British Virgin Islands, have produced action plans, although there is much to do to make these into credible commitments to change.

The EU is also considering how to deal with anonymous companies, and there is strong support in the European Parliament for the creation of public beneficial ownership registries across Europe. The US is probably home to more shell companies than anywhere else in the world. Data from the World Bank shows that the US forms around 10 times more legal entities (i.e. companies) than all 41 offshore tax haven jurisdictions combined.[9]

Securing change in the US will be a key sign of global momentum in 2014, especially as key secrecy jurisdictions such as the US states Delaware and Nevada are actively fighting US federal legislation to enact the G8 commitments.

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A breakthrough was also made by the G8 in the field of revenue transparency. In the run-up to the Lough Erne G8 summit, the Canadian government announced it would introduce a mandatory revenue reporting rule for oil, gas and mining companies listed on Canadian stock exchanges. As Canada is host to almost 60 percent of the world's mining companies, with more than 1,000 firms operating in over 100 countries, the commitment represents a major contribution to achieving global transparency standards for extractive industry revenues.[10]

At the summit itself, G8 leaders committed to establishing a mandatory global standard and called on other major markets to follow suit. Encouragingly, the G8's position was endorsed by the International Council on Mining and Metals, an industry forum of 21 of the world's leading mining companies, including Rio Tinto, BHP Billiton, Anglo American, Vale and Xstrata.[11]

BIG OIL'S ASSAULT ON TRANSPARENCY

In marked contrast to the mining companies' supportive statement, the American Petroleum Institute (API) – an oil business association that includes ExxonMobil, Shell, Chevron and BP – continued making strenuous efforts to undermine the global transparency standard.

The API filed a lawsuit aimed at striking out Section 1504 of the Dodd-Frank Act in 2012, and while it failed to overturn the legislation, in July 2013 a US District Court judge ordered the Securities and Exchange Commission (SEC) to re-write the rules that implement Section 1504. Although the court's decision means that the implementation of Section 1504 will be delayed, the underlying statute requiring disclosure still stands, and the ruling does not preclude the SEC from re-issuing the implementing rules in their original form, as long as sufficient justification is given.[12]

THE WAY FORWARD: CURSE OR BLESSING?

As new global actors emerge and demand for natural resources increases, competition for the world's remaining deposits of oil, gas and minerals will continue to intensify. The drive to find new sources of supply is taking extractive companies into ever more challenging operating environments, which brings with it an increased risk of complicity in fuelling violent conflict, looting of state assets and propping up autocratic regimes.

Money from minerals will be the main income for many of the world's poorest countries for the foreseeable future, dwarfing aid, debt relief and other forms of trade. If these huge transfers of wealth are to be used to benefit communities, the first step will be to shine the light of public scrutiny on the natural resource business. Some great gains were made in 2013 towards this end, and in 2014 it will be critical to keep this positive momentum for change moving forward.

1 The G8 or Group of Eight is a forum for the governments of a group of eight leading industrialised countries. These countries are: Canada, France, Germany, Italy, Japan, Russia, the United Kingdom and the United States.

2 M Humphreys, J Sachs, and J Stiglitz, Escaping The Resource Curse, (New York: Columbia University Press, 2007).

3 ONE Policy Brief, Transparency: increasing resources for development, 6 June 2013, available at: www.one.org/c/international/policybrief/4696/.

4 Africa Progress Report, Equity in extractives: stewarding Africa's natural resources for all, (Geneva: Africa Progress Panel, 2013), available at: www.africaprogresspanel.org/publications/policy-papers/africa-progress-report-2013/.

5 www.publishwhatyoupay.org.

6 The Economist, Safe sex in Nigeria, 15 June 2013, available at: www.economist.com/news/business/21579469-court-documents-shed-light-manoeuvrings-shell-and-eni-win-huge-nigerian-oil-block.

7 Global Witness, The scandal of Nigerian oil block OPL 245, November 2013, available at: www.globalwitness.org/sites/default/files/library/OPL245%20brief%20Nov%202013%20EN.pdf.

8 The EITI Standard includes seven provisions that all participating countries are required to comply with. The ultimate penalty for failing to comply is exclusion from the initiative. The EITI Standard also includes a number of provisions that go beyond the seven requirements that countries are encouraged, but not required, to adopt.

9 World Bank Stolen Asset Recovery Initiative. The Puppet Masters. How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It. (Washington, D.C.: World Bank, 2011) pg 92.

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11 International Council on Mining and Metals, ICM supports G8 position on transparency, 18 June 2013, available at: https://www.icmm.com/page/95730/icmm-supports-g8-position-on-transparency.

12 Oxfam America, Oxfam disagrees with District Court decision that sides with oil industry in attempt to keep payments secret, 2 July 2013, available at: www.oxfamamerica.org/press/oxfam-disagrees-with-district-court-decision-that-sides-with-oil-industry-in-attempt-to-keep-payments-secret/.