Combatting the resource curse: conferences and mandatory disclosure rules

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One of the most powerful things that we in developed countries can do to help combat the resource curse in developing countries is to make sure that mining and drilling companies are transparent about their activities. Companies that are domiciled and/or listed on stock exchanges in developed countries run most of the world's natural resource extraction projects, so it is actually within our power to enforce this. On Wednesday last week I attended a conference organised by Publish What You Pay (PWYP) that focussed on legislation that is about to become active in the USA and the European Union, and which will require transparency of extractive company payments to host governments. These advances throw into sharp relief the fact that Australia has not made any significant progress in enacting equivalent legislation. The PWYP event was one of a number of conferences held in Sydney last week related to mining and development – see Margaret Callan's recent post for this blog**.**

Mandatory disclosure rules for extractive companies – USA and European Union

The table below supplements our recent policy brief [pdf] on extractive industry transparency with some additional detail regarding these two mandatory disclosure rules, in particular the additional progress made by the European Union towards establishing its rules.

	USA (section 1504 of the Dodd-Frank Act)	**European Union**
Nature	Companies listed on USA stock exchanges must disclose payments made to foreign governments in relation to extractive activities	Companies domiciled in the European Union must disclose payments made to foreign governments in relation to extractive activities
Progress	Disclosure will commence after 30 September 2013, with any relevant payments made after this date required to be disclosed	Agreement on the disclosure rules was reached on 9 April 2013. Some procedural hurdles remain, including a vote by the European Union Parliament to take place in mid-June. However, this is unlikely to prevent the legislation from being enacted. Member countries will have two years to implement the legislation locally, but the major capital markets may do this sooner.
Companies and payments covered	All companies that file a report with the SEC that "engage in the commercial development of oil, natural gas or minerals" must annually disclose payments or sets of payments above $100,000 in relation to exploration, extraction, processing, export or the acquisition of a licence. Payments may include taxes, royalties, fees, production entitlements, bonuses, in-kind payments, dividends and infrastructure improvements.	All "large" companies engaged in relevant activities related to oil, gas, mining and forestry must annually disclose payments (such as taxes on profits, royalties, dividends, bonuses and licence fees) above €100,000 to governments, regional and local authorities for extraction-related activities. "Large" is defined as either listed on a stock exchange or exceeding at least two of the following: o Total assets of €20m o Net turnover of €40m o 250 employees
Project-level reporting required?	Yes – project not specifically defined, in order to give companies flexibility	Yes – project specifically defined
Exceptions granted to the rules	None	None

Sources: PWYP, Norton Rose

Additional aspects of the above schemes were noted during the conference:

- In the USA, it is common for the oil industry to oppose most legislative changes, and it has indeed filed a lawsuit aiming to prevent the mandatory reporting legislation from being enacted. However, this lawsuit has not gained much support, and it is unlikely to prevent the disclosure rules from taking effect later this year.
- The fact that both schemes require project-level reporting is significant because local communities near a project often have certain rights relating specifically to the revenues from that project. To ensure that they are receiving what they are entitled to, these communities need to know how much the federal government receives from the project in their area.
- Transparency is ineffective without a civil society that is able to take the information and use it to hold governments to account. The USA does intend to undertake a project to encourage the use of the information generated by its legislation, but whether this will have much influence is perhaps doubtful.

Arguments against mandatory disclosure legislation

There are a number of arguments against having such reporting standards. One of the main objections that have been made is that the legislation will weaken the competitive power of firms that are subject to it with respect to firms that are not. For example, the availability of information about the payment terms of a US firm's existing projects might disadvantage it in competition for future projects where a firm that is not subject to these rules is also bidding. However, a point made at the conference was that the type of information to be disclosed is not trade secrets, but simply amounts being paid to governments. There are not many situations in which this type of information advantage would be decisive in winning a contract. Further, there is no information disadvantage if all bidding companies are subject to the same rules, so this problem is smaller the greater the number of jurisdictions that enact similar legislation.

Another objection is the possibility that countries in which extractive firms operate may have regulations expressly prohibiting the release of the information covered under the new legislation. In my view, even if some countries did prohibit disclosure (it is not clear that there are such countries), this would not be a reason to neglect to establish such disclosure rules. Making transparency the norm in global extractive industries will empower civil society in all resource-rich countries; it will provide valuable information in countries where no prohibitions exist, and it will highlight the potential for corruption in countries where prohibitions do exist. In particular, if a country enacted prohibitions in response to the new legislation, then this would be cause for significant concern.

Yet another argument is that such rules will exempt firms from emerging countries which are not listed in the US or European Union, and which will become more significant as these countries catch up with the rest of the world. This is true, and a problem, but increasingly these companies will be listed, and increasingly emerging countries will abide by global norms.

Conferences are good, but mandatory disclosure rules are better

Together, the USA and European Union rules will cover many of the world's major international extractive companies. But that doesn't excuse Australia from doing its part; extractive industries make up 45% of ASX-listed companies. The arguments typically made against establishing mandatory reporting legislation are weak in light of the fact that the USA and European Union have managed to enact such legislation.

Achieving transparency of extractive industry payments to governments is only a start. Extending transparency to other stages in the process (e.g. exploration arrangements, the share of revenues between government and extractive enterprise, government expenditure of natural resource revenues), and enabling civil society to gainfully use the information generated to hold governments to account, are issues that are

yet to be addressed in many resource-rich developing countries, some of which already require transparency of contracts between extractive enterprise and government. But starts are nevertheless important, and we are being left behind, a fact no number of conferences can hide.

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