

# South Africa: A Driver of Change

## Increasing Transparency and Accountability in the Extractive Industries

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### Summary

South Africa occupies a highly unusual position in the international community disproportionate to its Gross Domestic Product (GDP), population or geography.<sup>2</sup> This status is the result of two factors. The first: South Africa's transformation from seemingly intractable racial and human rights pariah status into an exemplar of democratic constitutionalism. The second: South Africa's leadership and importance on the African continent. South Africa has become a proxy voice for Africa on international matters of importance ranging from United Nations Security Council reform to climate change and international trade imbalances. This latter status has not only been thrust upon (and expected of) South Africa, but in key respects it has been earned.

Since re-entering the international community, South Africa has been a driver of governance reform on the continent. Progress ranges from conceptualizing the New Partnership for Africa's Development and driving the reform of the Organization of African Unity into the African Union to participation in a host of peace-keeping interventions and persistence in elevating the "African Agenda" onto the top table of the G8 (which resulted in G20 membership). Since readmission to the international fold, South Africa has chaired the Southern African Development Community (SADC), hosted the Commonwealth Heads of States Meeting, chaired UNCTAD and led the Non-Aligned Movement. The nation is currently serving a second term as a non-permanent member of the United Nations Security Council.

Moreover, South Africa's economic and financial footprint on the continent has grown significantly since 1994, particularly in the retail, banking, telecommunications and extractive sector.<sup>3</sup> Such is the expansion of South African interests in Africa that the government is close to reaching its stated target of establishing a mission in each of the other 53 African states. Meanwhile, economic diplomacy has become a key tenet of the government's new White Paper on Foreign Policy.<sup>4</sup>

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1 Emerging economies are playing an increasing role in oil, gas and mining globally. This paper is one of a series commissioned by the Transparency and Accountability Initiative (T/AI) and the Revenue Watch Institute (RWI) to explore trends and promising strategies for dialogue at the national and international level. The series covers Brazil, China, India, Mexico, the Philippines, Russia and South Africa. The views expressed are those of the authors and are not necessarily those of T/AI and RWI.

2 South Africa's acceptance into the Brazil, Russia, India, China (BRIC) formation was questioned on these grounds, but heavily lobbied for and sponsored by China.

3 Excluding state-owned petroleum companies, South African corporates occupy the majority of the top 20 company investors in Africa.

4 South Africa Department of International Relations and Cooperation, "White Paper on Foreign Policy"

## ABOUT THE AUTHOR

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The **Revenue Watch Institute** promotes the effective, transparent and accountable management of oil, gas and mineral resources for the public good. Through capacity building, technical assistance, research, funding and advocacy, we help countries to realize the development benefits of their natural resource wealth.

The **Transparency and Accountability Initiative** aims to expand the impact and scale of funding and activity in the transparency and accountability field, as well as explore applications of this work in new areas.

South Africa's extractive companies (mining, petroleum, forestry and fisheries) operate in SADC, COMESA and ECOWAS countries. In the mining sector, South African companies<sup>5</sup> operate in Lesotho, Mozambique, Botswana, Namibia, Zimbabwe, Zambia, Tanzania, Ghana, Mali, Guinea, Madagascar, the DRC and the Republic of Congo. In the oil and gas sector, South African companies SASOL and PetroSA operate in Mozambique, Angola, Gabon, Equatorial Guinea and Nigeria, Sudan and Egypt. South African forestry and paper company SAPPI is active in Swaziland and its fisheries companies, Irvin & Johnson and Sea Harvest, trawl the Angolan and the Mozambican coasts. In summary, South Africa is not only a proxy voice for Africa in the international arena. It is a highly significant player in the extractive sector across the continent.

### The political and institutional environment of transparency and accountability in South Africa – a history of mistrust and opacity<sup>6</sup>

Debate in South Africa regarding the politics of the extractive sector, particularly mining, is controversial and intensive. Debate with respect to transparency and accountability in the extractive sector is not. Whereas debate regarding transformation, black economic empowerment and the nationalization of mines has come to dominate contemporary discourse, very little of this is driven by explicit attempts to enhance either transparency or accountability within the sector.

The reasons for this are complex and difficult to divine, but are located deep within South Africa's closed, exclusory and nationalist modern history. In political terms, South Africa has two histories, one pre-apartheid and one post-. Within these two epochs are two separate histories, one black and one white. Yet the extractive sector has been intimately woven into both these histories. Moreover, a number of Marxist revisionist scholars, (Kaplan, Davies, and Legassick among them) argue that the extractive sector and mining in particular were central drivers of South Africa's race- and class-based history.<sup>7</sup>

Before the early 1990s, capital in South Africa was almost exclusively the preserve of whites, so the legacy of mistrust and skepticism between the current government and business runs deep. The testimonies of South African corporates at the Special Hearings into the Business Sector at the Truth and Reconciliation Commission in November, 1997, ranged from honest and frank to evasive and resentful.<sup>8</sup> That the South African corporate sector was called before a special hearing of the TRC is significant, since the tone and tenor of the questioning was predicated on the central thesis that race-based legislation, power structures and the apartheid government were immutably linked to domestic racial capitalism from which business benefitted and profited exceptionally.

Significant trends relevant to transparency and accountability have emerged since democratic transformation in 1994. The first is the growth in national inequality in South Africa, leaving it the most unequal society globally, with a Gini coefficient exceeding that of Brazil. The second trend is the capturing of the state apparatus by the ruling African National Congress (ANC). The third is the emergence and growth of a black middle and upper class. The latter is almost invari-

5 These include, inter alia, Anglo-American, De Beers, Gold Fields, African Rainbow Minerals, Anglo Platinum and AngloGold-Ashanti and Anglo Coal.

6 For purposes of this paper, the working definitions of transparency and accountability used in this report are those adopted by the Sefton Darby report "Natural Resource Governance – New Frontiers in Transparency and Accountability, Open Society Foundation," London, 2010, pp. 9-10.

7 Merle Lipton in her "Capitalism and Apartheid: South Africa, 1910-1984" adopts a different typology, which views mining capital as benefiting from race-based legislation in the early periods of industrial-scale mining, but eventually opposing such legal strictures due to their labor, market and economic inefficiencies, if not political and moral objections.

8 See <http://www.justice.gov.za/trc/special/#bh>

ably connected to the ruling party at senior levels in some shape or form. This latter point is often contested since the ruling party enjoys the support of some 80% of black Africans in South Africa. It is thus probable that any emerging upwardly mobile economic class will exhibit some political affinity with the ruling party. The distinction in South Africa is the degree of party elite and new business elite alignment. Party membership, support and alignment are seen by many as an important element in securing financial success in both the private and public sectors. This phenomenon has given rise to the term “tenderpreneurs”—those who make a practice of winning lucrative contracts (including in the extractive sector) by virtue of their political connections.

Because the South African government has instituted a series of codes for ensuring black economic empowerment and, more recently, broad-based black economic empowerment, a relatively small number of politically-connected black “entrepreneurs” has accrued wealth rapidly. They have benefited from both privatization and equity deals conducted under the aegis of black economic important charters, particularly in the extractive sector.<sup>9</sup>

*It is important to note, too, that within both histories, neither transparency nor accountability were prominent, let alone dominant, drivers.*

It is important to note, too, that within both histories, neither transparency nor accountability were prominent, let alone dominant, drivers. The apartheid regime operated within—and indeed actively cultivated—a legal, political, constitutional and policy environment of opacity and non-accountability. This was often cloaked in a “government knows best” injunction, or portrayed as being in the avowed “national interest” of defending (white) citizens against the dual perils of communism and black nationalism. This political pathology gave rise to the practice of government ministers lying to Parliament—for example, regarding the invasion of Angola in 1975—and hiding the development of nuclear weapons until their pre-emptive destruction in the early 1990s. Sanctions against the regime, while critical to its eventual demise, also impelled the government and the private sector to engage in a host of illegal, collusive and illicit local and international activity, including that in the extractive sector.<sup>10</sup> South Africa’s pariah status often led to legitimate companies operating in a furtive, unaccountable and opaque manner. Sanctions also propelled the South African government and private sector to intensify the extraction of and exploration for natural resources, particularly mining,<sup>11</sup> metals, gas and petroleum.

Both the government and private sector engaged in extensive illegal “sanctions busting” behavior in procuring petroleum. This, along with the South African dual currency system, provided extraordinary opportunities for grey and black market wealth creation through arbitrage and illicit trade. By definition, this illicit behavior was cloaked in secrecy. Disclosure of such practices was a treasonable offense. The government instituted an absolute prohibition against photographing any key point in the process, whether a mine or a pipeline.

The then-white oriented constitution, courts, parliament and business ownership curtailed and subordinated principles of transparency and accountability to those of strategic and national security. Attempts to forge greater accountability and transparency were invariably dismissed as naïve, against the national interest or radical/revolutionary in the besieged environment of sanctions and the states of emergency that followed the Soweto uprising of 1976 and the adoption of the new constitution in 1984.

<sup>9</sup> South Africa’s richest businessman (measured by listed assets) is black mining entrepreneur Patrice Motsepe, CEO of African Rainbow Minerals. Of the ten wealthiest black South Africans, eight owe their wealth to mining interests and the remaining two have significant holdings in the extractive sector. <http://www.theafricanmillionaire.blogspot.com>

<sup>10</sup> South Africa’s procurement of crude oil from the Shah’s Iran and post-1979 on the black market are the most notorious cases. Diamond giant De Beers also operated in a deeply opaque manner with respect to its operations, particularly with the former Soviet Union.

<sup>11</sup> This included the intensive exploitation of mineral and diamond wealth from the pre-independence (1990) South West Africa (Namibia).

Prior to 1994, the African National Congress had never been allowed to compete freely for political power in a national election, and thus was never subject to constitutional or public mechanisms of accountability. Moreover, from 1960 on, the movement and other black nationalist movements (such as the Pan Africanist Congress) were banned or forced underground. Many of its leaders were imprisoned or effectively exiled. During this crucial period, ANC leadership was often socialist or communist, and was influenced by Stalinist or Leninist principles of democratic centralism. These leaders promoted a culture of secrecy, opacity, suspicion and lack of public accountability.<sup>12</sup>

### The contemporary environment of transparency and accountability

Despite this indelible legacy, the environment for transparency and accountability has improved significantly since 1994. The new leadership wanted to avoid repeating the excesses of the apartheid regime. It hoped to foster human rights and to establish a constitutional state that upheld the rights of all citizens, particularly those politically, economically and socially excluded under the previous system.

In contemporary South Africa, transparency through the free flow of information is guaranteed under the constitution. Section 32 of chapter two of the constitution states:

Access to information – Everyone has the right of access to –

- (a) Any information held by the State; and
- (b) Any information that is held by another person and that is required for the protection of their rights.

National legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the State.

When added to other guaranteed freedoms, such as the right to a safe and healthy environment, free expression, labor rights, the right of protest and assembly, the information clause greatly increases the chances of transparency and accountability in the extractive sector.

Moreover, the constitution provides for a number of “State Institutions Supporting Democracy.” They are designed to protect and promote the rights and principles enshrined within the founding law. The so-called Chapter Nine (of the Constitution) institutions include, most notably, the Public Protector and the Auditor General. The mandate of the Public Protector is particularly relevant to public accountability.

The Mandate of the Public Protector is to strengthen constitutional democracy by investigating and redressing improper and prejudicial conduct, maladministration and abuse of power in state affairs; resolving administrative disputes, or rectifying any act or omission in administrative conduct through mediation, conciliation or negotiation; advising on appropriate remedies or employing any other expedient means; reporting and recommending; advising and investigating violations of the Executive Members Ethics Act of 1994; resolving disputes relating to the operation of the Promotion of Access to Information Act and discharging other responsibilities as required by relevant legislation.

<sup>12</sup> African Nationalist and Communist leadership was constantly under attack from the white regime and deeply penetrated and compromised by its security and intelligence services, resulting in exceptionally high levels of secrecy and opacity among exiled leadership.

Of particular relevance to transparency and accountability in the extractive sector, the Public Protector has the authority to receive, consider and adjudicate public complaints regarding public tendering processes. A number of cases illustrate the point. In August, 2011, the official opposition political party, Democratic Alliance, formally requested that the Public Protector investigate and rule on the nature of the contract between electricity utility company Eskom and mining giant BHP-Billiton. At the other end of the power spectrum, in June 2011 the Public Protector received a complaint from the Amadiba Crisis Committee (a local community group) relating to the failure of the Director General of Department of Mineral Resources<sup>13</sup> to honor commitments made to the community with respect to mining rights granted to an Australian Mining Company on ancestral lands of the community. The community also drew on the support of another Chapter Nine statutory body, the Human Rights Commission, the NGO Legal Resources Centre and the Trust for Community Outreach and Education.<sup>14</sup>

Regrettably, the performance and vigilance of the Public Protector has been uneven because of severe funding constraints (which in itself raises questions about the government's commitment to good governance).

In 2000, the government made good on the constitutional requirement to install a freedom to information clause in the constitution. The Promotion of Access to Information Act of 2000 states in its preamble:

**Recognising that** - The system of government in South Africa before 27 April 1994, among others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violation;

**And bearing in mind that** – The State must respect, protect, promote and fulfil at least, all the rights in the Bill of Rights which is the cornerstone of democracy in South Africa;

**And in order to** – Foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;

Actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all their rights...

Although the passage of the Promotion of Access to Information Act (PAIA) was a significant breakthrough and has been used to good effect by NGOs, activists, think tanks and private citizens, the practice of the state has at times been at variance with the spirit of the act.

The passage and operation of the PAIA contrasts sharply with the March, 2010, introduction by the Minister of State Security (Intelligence Services) of the Protection of Information Bill. If passed in its original form, the bill would severely curtail the range of information to which public access can be granted.<sup>15</sup> It provides for the classification of such information by a raft of government officials across all departments/ministries. Moreover, the bill prescribes penalties of as many as 25

13 The then Director General of Mineral Resources Advocate Sandile Nogcina named in the Wild Coast case has also been named in the so-called Oilgate scandal relating to high-profile South Africans alleged to be involved in alleged irregularities in the Iraqi Oil for Food program.

14 See <http://www.tcoe.org.za>. "Wild Coast Community Seeks Public Protector Intervention in Mining Appeal."

15 This report was drafted in 2011.

years imprisonment for the possession of classified information. Any journalist found in possession of information passed on to by a government official could be prosecuted and, if convicted, sentenced to 25 years imprisonment. Notably, although the bill adopts a broad definition of national interest, it lacks any definition of public interest, or any language protecting it.<sup>16</sup>

More encouragingly, under severe public and parliamentary opposition pressure (and reportedly pressure from within the ruling party itself), the bill was withdrawn in September, 2011, for further consideration. However, the ruling party has only established a discussion forum to consider revisions to the bill rather than referring the process back to parliament for public hearings.

The bill was introduced at a time when the ruling party floated the notion of establishing a media appeals tribunal. The scope of the proposed tribunal is yet to be defined, but it could include a requirement for newspapers to “register” for a licence, for journalists to do likewise and for fines against journalists to be highly punitive. The proposed tribunal was strongly opposed by the South African National Editors Forum as well as by bodies such as the Freedom of Expression Institute and other rights- and democracy-based civil society organizations.

Significantly, a mere 31% of the South African population supported either the proposed Media Appeals Tribunal or the Protection of Information Bill.<sup>17</sup> The establishment of a government newspaper and the launching of a daily newspaper (The New Age) by ANC-supportive business people adds further grist to the mill regarding threats to media freedom (and transparency and accountability) in South Africa.

Public accountability is anchored on a number of key institutions in South Africa. The first is the Constitutional Court, the final arbiter of legal constitutionality. The Constitutional Court’s independence has been demonstrated repeatedly. It has found against the state in a number of cases and recently ruled that disbanding and dismantling the Special Investigative Unit (SIU) of the Department of Public Prosecutions was unlawful. The significance of this finding is that the SIU (formerly known as the Scorpions) was responsible for investigating and prosecuting a number of high-profile public and political cases involving corruption and tender fraud. These cases included the successful prosecution and conviction of (now President) Jacob Zuma’s financial advisor and financial benefactor, Shabir Shaik.

The second key institution of public accountability, at least nominally, is parliament. The South African Parliament is bicameral. The National Council of Provinces represents the interests of the nine provinces at the national level. In the 400-member National Assembly, 200 members are elected from provincial lists and 200 from national party lists. There is no constituency representation at the national or provincial level. Such representation occurs only at the local ward and council level. The absence of vertical accountability between the electorate (constituents) and national representatives is a major weakness of contemporary South Africa. While constituencies are “allocated” to individual MPs by their respective parties, and an allowance is set aside to fund constituency offices, MPs are not directly elected by constituents and are thus not accountable to constituents. As a result, communities living near mines or coastal fisheries have no directly represented member of parliament to whom they can address their concerns and grievances.

<sup>16</sup> Opposition to the Bill has been widespread, but co-ordinated by the South African Right To Know Campaign, <http://www.r2k.org.za>

<sup>17</sup> <http://www.tnsresearchsurveys.co.za/news/mediatribunal-25May2011>

Yet the oversight powers granted to parliament through the constitution are considerable. Clause 55 (2) of the Constitution provides that:

The National Assembly must provide for mechanisms

- (a) To ensure that all executive organs of state in the national sphere of government are accountable to it; and
- (b) To maintain oversight of-
  - (i) The exercise of national executive authority, including the implementation of legislation; and
  - (ii) Any organ of state.

Clause 56 of the Constitution provides that the National Assembly or any of its Committees may

- (a) Summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;
- (b) Require any person or institution to report to it;
- (c) Compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and
- (d) Receive petitions, representations or submissions from interested persons or institutions.

In addition to these considerable powers of oversight and accountability, parliament has established a range of portfolio committees that shadow all government departments except the presidency. These committees are staffed by a clerk and a professional researcher. They enjoy a dedicated budget that covers travel and oversight activity. The provisional results of the University of Cape Town African Legislatures Project's South African Parliamentary case study suggest that, although the post-apartheid parliament has developed a credible legislative record, and its committees have scrutinized every piece of legislation entering parliament, effective oversight still eludes the institution.<sup>18</sup> Indeed, 16 years after the democratic transition and ten years after the first independent paper presented by parliament on an appropriate oversight and accountability model, parliament finally approved an appropriate model only in 2009.<sup>19</sup>

Moreover, parliament's credibility with respect to ethics was severely damaged when 40 members were found guilty of defrauding Parliament by making false travel claims. Parliament made matters worse by being slow to investigate the so-called "Travelgate" scandal. About \$2 million US remains unrecovered.

In addition to stifling party discipline, an unwelcome pattern of executive intervention to blunt effective oversight is often seen in parliament.<sup>20</sup> In 2010, some 175 questions remained unanswered at the end of the parliamentary session. In 2011, 360 went unanswered during the prescribed 10-day period, with some 224 remaining unanswered presently.<sup>21</sup> To a significant degree, the effectiveness of Parliament's portfolio committees is determined by their respective

18 The initial findings of the research can be found at <http://www.africanlegislaturesproject.org>

19 "Oversight and Accountability Model – Asserting Parliament's Oversight Role in Enhancing Democracy," Parliament of the Republic of South Africa, Cape Town, 2009.

20 For example see Tim Hughes, "The South African Parliament's Failed Moment" in M.A. Mohamed Salih (Ed) 'African Parliaments – Between Governance and Government, Palgrave Macmillan, London, 2005.

21 "Parliament's Unanswered Questions," Mail and Guardian Newspaper, August 26, 2011.

chairs.<sup>22</sup> Historically, the chair of Parliament's finance committee has played an important role with respect to oversight. This role was enhanced in 2010 by the passage of legislation granting Parliament the power to amend (rather than reject or adopt) the national budget. Meanwhile, the current chair of the Water Affairs and Environment Committee, who served previously as chair of the Justice Committee and Deputy Minister of Justice, has instilled new vigor into the committee and its policy<sup>23</sup> oversight role.

Positively, South Africa secured the highest ranking in the International Budget Partnership 2010 Open Budget Survey, achieving a rating of 92 out of a possible 100.<sup>24</sup> To place this ranking into context, only 20 of 90 countries scored above 60. In 41 of 92 countries, the survey found the information provided to be inadequate. A mere eight countries—South Africa, New Zealand, the United Kingdom, France, Norway, Sweden and the United States—provided extensive information in the budgeting process. All scored more than 80 points out of a possible 100.

Transparency and accountability are often involved in debates about corruption. In 2010, South Africa received a rating of 4.8 in the Transparency International Corruption Perception index—lower than in the two previous years. The nation ranked 54th of 178 countries rated. In 2011, the Public Service Commission announced a 78% surge in corruption cases involving government and state-owned enterprises.

Transparency and accountability are also factors in how open and responsive government departments are. The Department of Finance (<http://www.treasury.gov.za>), the Department of Mineral Resources (<http://www.dmr.gov.za>)<sup>25</sup> and Department of Energy (<http://www.energy.gov.za>) are widely considered transparent and accessible. The web sites of all three departments are generally useful and reasonably user-friendly. All three sites contain useful information regarding structure, policy, documentation and contact details. However, teledensity and access to the internet remain relatively low in South Africa. Besides, all government web sites use English, as do all policy documents (all acts are published in English and Afrikaans, but not in the other nine official languages). Guided by the governmental injunction of “Batho Pele” (people first), personal interaction with each of the above departments is generally satisfactory.<sup>26</sup> Think tanks, for example, have little difficulty securing the co-operation and attendance of relevant senior departmental officials at topical seminars and briefings.<sup>27</sup> The degree of openness of government departments to the public is the subject of a forthcoming Open Society Foundations research program report and cannot be independently assessed until then.

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### South Africa and the Extractive Industries Transparency Initiative

- 22 Interest in and engagement with, the EITI by Parliament's Portfolio Committees on Mineral Resources and Energy have been disappointing to date.
- 23 Most recently with respect to the Government's negotiating position on the United Nations Framework Convention on Climate Change Conference of the Parties 17 to be held in Durban South Africa in November and December 2011.
- 24 <http://www.openbudgetindex.org> and [http://www.internationalbudget.org/wp-content/uploads/2011/06/2010P\\_Full-Report-English.pdf](http://www.internationalbudget.org/wp-content/uploads/2011/06/2010P_Full-Report-English.pdf)
- 25 The Department of Mineral Resources has recently revamped its web site and established a public feedback portal. A further welcome addition to the new web site is a record of parliamentary questions tabled to and answered by the minister and deputy minister.
- 26 These departments contrast with others such as the Department of Home Affairs, which is notorious for poor access, poor service and poor responsiveness. In 2010, one individual committed suicide in protest at not receiving an identity document and another occupied Home Affairs offices, holding officials hostage and claiming that chronic poor service compelled him to take such extreme action.
- 27 The exception to this otherwise positive pattern is the track record of the former media liaison officer of the Department of Mineral and Energy Affairs, who failed to respond to a single e-mail, call, or text message during a three-year SAIIA research program into the Governance of Africa's Resources. The uncommunicative nature of this former media relations officer was eventually exposed during a television documentary at the end of which the official's mobile telephone number was broadcast with an invitation to the national viewing public to call him.

The clash between democratic governance and occasionally cynical government is reflected in South Africa's position on membership in the Extractive Industries Transparency Initiative (EITI). Whereas the nation has informally and unofficially considered becoming a "supporting country," it has so far resisted proposals, requests and lobbying to become an implementing country. From the perspective of the EITI Secretariat, South Africa's support would add considerable impetus and cachet to the initiative on the African continent and among developing countries endowed with significant natural resources. Given South Africa's economic and political leadership role on the African continent, belonging to and adopting EITI would send a clear message that could add considerable impetus to the initiative globally. South Africa's position within the G20, the India-Brazil-South Africa (IBSA) and the Brazil Russia India China South Africa (BRICS) might add to its international credentials and to the potential success of EITI.

Yet South Africa has resisted membership on a number of grounds. The most commonly expressed reason is as follows: South Africa does not need EITI and would not benefit from it. The country has been extracting minerals and metals on an industrial scale<sup>28</sup> for some 150 years, and its domestic regulations and processes are adequately transparent.

The second most commonly expressed reason: EITI may not fit South Africa's resource/accounting/revenue situation, because there is a significant difference between liquid resource revenue (gas and petroleum) accounting and hard mineral resources, such as coal and gold accounting.

Despite political resistance, South Africa's position regarding EITI has eased. The EITI Secretariat has conducted one-on-one meetings with senior government figures, including the former Minister of Finance and Director General of Minerals and Energy. In May, 2009, the chairman of EITI and the South African Minister of Finance met with senior treasury and South African revenue officials. At the end of the meeting, the Minister of Finance stated that he would take the EITI matter to the cabinet for discussion. The biennial EITI conference in February, 2010, coincided closely with a state visit to France by South African President Jacob Zuma. The EITI lobbied the South African government. Minister Pravin Gordhan attended and spoke at the EITI conference. Furthermore, senior figures within Treasury have expressed favorable positions towards EITI. But it remains unclear whether this will translate into a shift in the government's appetite for it.

It is unclear who is currently working with, lobbying or pressuring the South African government to move closer to a positive position on membership--apart from the EITI Secretariat, which has lobbied the SA government opportunistically (at international forums and at events such as the annual Mining Indaba in Cape Town). However, direct engagement with the SA government was conducted by the South African Institute of International Affairs between 2008-2009. Moreover, SAIIA has conducted workshops with government stakeholders and with the South African Parliament.

### **The current natural resources governance, transparency and accountability debates**

Since its launch in 2002, the South African Mining Charter (embedded within the Mineral and Petroleum Resources Development Act, 28 of 2002) has dominated debate, discourse and governance policy development within the mining sector. The vision of the Mining Charter is to

<sup>28</sup> Most notably the South African Chamber of Mines.

facilitate the sustainable transformation, growth and development of the mining industry. The Charter seeks:

1. To promote equitable access to the nation's mineral resources to all the people of South Africa
2. To sustainably and meaningfully expand opportunities for 'Historically Disadvantaged Communities' (HDAs) to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources
3. To utilize and expand the existing skills base for the empowerment of HDAs and to serve the community
4. To promote employment and advance the social and economic welfare of mine communities of major labour sending areas
5. To promote beneficiation [Is this the word you want? Is this a word?] of South Africa's mineral commodities
6. Promote sustainable development and growth of the mining industry.

While these objectives are uncontroversial, the Charter also requires stakeholders to commit to 26% ownership from HDAs by 2014. It also requires 40% of procurement to be from Broad-Based Black Economic Empowerment companies by 2014. It further requires multinational companies operating in South Africa to contribute a minimum of 0.5% of income generated by local operations towards a social development fund for local mining communities.<sup>29</sup>

For nearly a decade, the South African mining industry has been scrambling to comply with the Charter--in particular the requirement to transfer 26% ownership to HDAs. Despite the billions of dollars involved in share transactions and wealth transfer, the words "transparency" and "accountability" do not appear in the Charter.

The current debate about the Charter centers around the merits of nationalizing mining in South Africa. The ANC Youth League was first to propose this.<sup>30</sup> The ANCYL proposal propelled an ongoing nationwide and multi-sector debate, prompting the ANC party to respond to the proposal in a series of internal policy papers. Notably, the term "transparency" is absent from the entire ANC discussion document.<sup>31</sup> The term "accountability" appears seven times. The contributions note:

The (proposed) State Owned Mining Company progress should be measured as per its ability, capacity and coherent determination to create jobs, maximization of the country's gain from mineral resources, contribution to socio-economic development and assistance of communities where mining happens. This will conspicuously require greater levels of accountability, openness and engagement with communities, workers and other important stakeholders in the determination of the responsibilities of the company.

The depth and degree of challenges confronting good corporate governance are addressed as follows:

<sup>29</sup> South Africa Department of Mineral Resources, "Amendment of the Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry," Pretoria, September 2010.

<sup>30</sup> African National Congress Youth League, "Towards the transfer of mineral wealth to the ownership of the people as a whole: A perspective on the nationalisation of the mines," Johannesburg, 2010.

<sup>31</sup> The formal ANC response and debate centers on the contending interpretations and positions developed in the ANC's on-line magazine "Umrabulo," Number 33, Second Quarter 2010, see <http://www.anc.org.za/show.php?id=2832>

... State capacity to manage is doubted often in comparison to the State's oversight, or lack thereof of key state owned enterprises ... The comparison is not fair because in most instances these have failed due to sheer criminality, mismanagement, patronage, coupled with weak accountability systems.

In the management of vital resources such as mines and minerals, a need will certainly arise for strong accountability systems and legislative guidelines of how mines are operated, buttressed by strong public accountability mechanisms.

A further area of concern and debate centers around corruption within the extractive sector.<sup>32</sup> Anti-corruption measures fall under the South African Prevention and Combatting of Corrupt Practices Act. Companies with U.S. operations also fall under the scope of the U.S. Foreign Corrupt Practices Act. One high-profile case illustrates the areas of concern. Aurora Empowerment Systems qualifies as an "empowerment" company in the mining sector. Although it was granted a license to operate, Aurora lacked the capital, the necessary skills and the experience to succeed. The company was liquidated, but not before 600 workers went without pay and a number of miners were killed underground as a result of illegal practices.<sup>33</sup>

Illegal mining is pervasive. The South African Police Services have launched campaigns such as "Operation Yield" to tackle the problem. Nevertheless, 650 illegal miners were arrested on a uranium mine in 2009. In 2010, the then-Commissioner of Police stated that illegal mining in South Africa cost the industry R5billion.<sup>34</sup> The Commissioner claimed that many of those involved in illegal mining in South Africa were from Lesotho, Mozambique and Zimbabwe.

The environmental effects of mining have become an increasing concern. A legacy of environmental mismanagement and irresponsibility has begun to emerge. This is most clearly apparent in the looming crisis of acid mine drainage (AMD). Heavily acidic water (with a pH sometimes as low as 3) is a by-product of coal and gold mining. It is believed that mine acid water pollution may contribute to health conditions ranging from cancer to neurotoxic syndromes. Professor Anthony Turton (South Africa's leading water environment specialist)<sup>35</sup> has termed AMD the greatest environmental threat to South Africa. He estimates the cost of remediating this damage at R1.3billion (\$173million) per year. Turton also notes that South Africa's government spending on water infrastructure peaked in 1980 and is now hovering at the equivalent of 1920's levels. In the 2011 national budget, the Minister of Finance set aside R225million (\$30 million U.S.) over three years to deal with AMD. Some 50% of this amount has been earmarked for one mine alone. Yet the Federation for a Sustainable Environment (FSE)<sup>36</sup> estimates that 270 tailings dams on the Witwatersrand will continue to produce AMD for centuries. The FSE finds itself at odds with the South African Government and indeed Parliament's Portfolio Committee on Water Affairs and Environment.

32 A National Anti-Corruption Forum, comprising government, business and civil society principals, was established in January, 2001. <http://www.nacf.org.za> Since 2001, levels of corruption in South Africa have continued to rise and South Africa's Transparency International Corruption Perceptions ranking have declined.

33 Charlotte Mathews, "Shafts of Shame," Financial Mail, June 16, 2011. <http://www.fm.co.za/article>

34 "Illegal Mining Costs R5billion a Year - Cele". Mining Weekly, October 22, 2010. <http://www.miningweekly.com/article/illegal-mining>

35 After bringing the crisis of AMD to the fore, Professor Turton was suspended from the Government's Council for Scientific and Industrial Research on grounds of bringing the body into disrepute and for speaking to the media without permission. See <http://www.antonyturton.com> 'South Africa's Inconvenient Truth'.

36 <http://www.fse.org.za>

The FSE notes,

The Department of Minerals and Energy has an attitude of promoting mining regardless of environmental cost. The Department of Water Affairs, having over-committed the country's water resources, seems to have given up on its task of managing our scarce supplies. The Department of Environmental Affairs and Tourism appears to be drowning in a self-imposed powerlessness to perform vital coordination and compromise functions to ensure that development is sustainable. And while Government cats are distracted by politics and not speaking to each other, the corporate rats are having a feeding frenzy.<sup>37</sup>

The AMD issue raises difficult, yet highly pertinent, questions about corporate and government accountability, responsibility and financial liability. Turton raises questions of possible criminal liability with respect to mining houses. Yet a number of the mining houses responsible for creating the legacy of AMD are no longer in operation. Others have sold their mining rights to fledgling companies.

### South African corporates in the extractive sector

The South African extractive sector is vast and global in scale. The country's mineral wealth is extensive. About 90% of the globe's platinum metal reserves, 80% of its manganese, 73% of its chrome, 45% of its vanadium and 40% of its gold reserves underpin the economy. Mining constitutes about 8% of the South African economy. The sector contributes another 10% indirectly. It employs 500,000 people and twice as many through associated economic activity. The sector is estimated to contribute between 10% and 20% of all corporate taxes and is the largest contributor to Broad-Based Black Economic Empowerment wealth creation.<sup>38</sup>

Perhaps contrary to expectations, a number of South African corporates scored high in a 2011 survey of sustainability and transparency of South Africa's largest 25 companies.<sup>39</sup> The ten highest-ranked companies, based on Global Reporting Initiative criteria, are:

Top Ten			
Rank	Company	Sector	Rating
1	AngloGold-Ashanti Ltd	Mining	95
2	Gold Fields Ltd	Mining	94
3	Sappi Ltd	Paper (forestry)	91
4	Anglo-American Platinum Ltd	Mining	90
5	De Beers Consolidated Mines Ltd	Mining	89
6	SASOL	Petroleum (coal to liquid)	88
7	SANLAM Ltd	Insurance	86
8	ESKOM Holdings Ltd	Electricity (Parastatal)	83
9	The Bidvest Group Limited	Industrial Holding Company	79
10	Barloworld Ltd	Industrial Holding Company	78

37 This FSE posting dates to before the revision of governmental departments that deal with the extractive and environmental sectors. Yet the relationship between it and the Portfolio Committee Chair remain tense.

38 All statistics drawn from the South African Chamber of Mines, <http://www.bullion.org.za>

39 'The Transparency Index, South Africa 2011, Beyond Business Limited, 2011.

While these findings may be counterintuitive, they may be explained by a number of factors. The first is that the mining sector has been held up to greater domestic scrutiny than any other, particularly given its apartheid past, its importance to the South African economy and its relatively poor safety record. The second is that mining has had longer than any other industrial/commercial sector in South Africa to develop high levels of reporting, including sustainability reporting on the triple bottom line. The third reason is that all of these major companies have dual listings in the United Kingdom or the United States, where corporate reporting criteria are more stringent and stakeholder pressure is significant. The fourth reason is that these extractive companies have joined recognized global corporate governance initiatives such as the Extractive Industries Transparency Initiative, or are members of bodies such as the International Council on Metals and Minerals, or subscribe to the principles contained in the UN Global Compact or the Equator Principles.

South African mining companies do not subscribe to global corporate governance conventions simply because they are altruistic or philanthropic. Interviews conducted for this paper suggest that South African extractive companies may view such global conventions as advantageous when operating in environments where corruption, bribery, graft and poor political governance are constant realities.

### Oil and gas

South Africa is not a major crude oil producer. Its proven reserves amount to 15 million barrels. However, through its Fischer-Tropsch process, the South African Coal, Oil and Gas Corporation (SASOL) is the world's leading oil-from-coal producer.<sup>40</sup> SASOL's Secunda plant is also the world's largest producer of concentrated carbon dioxide and faces serious questions about its continued operations in light of increased global pressure on carbon emissions.<sup>41</sup>

In August 2010, SASOL has been fined more than once for price-fixing. In October, 2008, the German government imposed a fine of Euro 318.2 million on the company for leading a wax price-fixing cartel in Europe.<sup>42</sup> In August, 2010 the South African Competition Commission recommended a fine amounting to 10% of a SASOL subsidiary's turn-over due to alleged price-fixing.

South Africa has abundant gas reserves and boasts the world's largest gas-to-liquid refinery in Mossel Bay on the Cape South Coast. Its capacity is 45,000 barrels a day. In 2009, South Africa produced 67 billion cubic feet of natural gas.

The most controversial aspect of South Africa's natural gas reserves is the reported 485 trillion cubic feet of technically recoverable shale gas. Although companies such as Shell, SASOL, Falcon Oil and Gas and Anglo-American have been granted exploratory licenses, the environmentally sensitive location of the shale gas reserves in the Karoo Basin has given rise to comprehensive

40 SASOL is not evaluated or ranked in the Revenue Watch Institute – Transparency International "Promoting Revenue Transparency 2011 Report on Oil and Gas Companies."

41 Despite this pressure, SASOL, along with electricity producer ESKOM, has been included on the South African advisory team for the CoP17 climate change negotiations to be hosted in Durban in November and December, 2011.

42 SASOL was fined some 50% of the overall fine imposed on companies including Exxon, Total, Repsol, ENI and others. Shell was given amnesty in exchange for admitting participation and exposing the cartel. See <http://www.ioi.co.za/news/world/sasol-faces-R3,7billion-price-fixing-penalty>.

and high-profile opposition.<sup>43</sup> It centers on “fracking”—the extractive process involving hydraulic fracturing of the underlying shale in order to release natural gas to the surface. The regulatory requirement for exploration companies to publish their proposals in popular media alerted stakeholders to the proposed exploration, giving rise to the public campaign to oppose the big oil and gas companies. In response to public pressure, the South African government announced a moratorium on shale gas exploration in April, 2011.<sup>44</sup>

Although the outcome of the Karoo fracking licensing application is still undetermined, the debate illustrates how effective transparency and accountability mechanisms in the extractive sector can be.

### Fisheries

South African has a coastline of some 2, 798km, yet its fisheries are a relatively under-researched resource in the renewable extractive sector. It is acknowledged, however, that the sustainability of the country’s fisheries is threatened.<sup>45</sup> The government department responsible is the Department of Agriculture, Forestry and Fisheries (DAFF).<sup>46</sup> Within DAFF, the Marine Coastal Management branch holds overall responsibility for marine management and fisheries policy, monitoring, compliance and enforcement. Fisheries are governed under the 1998 Marine Living Resources Act. However, it is widely believed that the legislation is inadequate to manage a highly complex and contested sector. In addition, the industry suffers from less-than-optimal political leadership, from the ministerial level down. Complex networks of interests<sup>47</sup> hamper effective delivery. Many also believe that the portfolio and select committees responsible for fisheries oversight have not developed sufficient issue-specific and technical knowledge to conduct effective oversight of either the executive branch or a complex industry. Even though the industry has long tried to break down previous white oligopolistic practices, the results are not clearly successful. Many small-scale and artisanal “colored” fishers feel disadvantaged and excluded. The awarding of lucrative fisheries quotas to politically connected consortia and black “fronting” for established white-owned fisheries businesses so they can win new business has created deep dissatisfaction among excluded coastal communities.

In addition, there are serious issues generated by Illegal, Unreported and Unregulated (IUU) fishing around the South African coast. The sector employs more than 43,000 people. Its investment value exceeds R12 billion. Some 2,990 commercial fishing permit holders operate 1,400 fishing boats in the country’s Exclusive Economic Zone.<sup>48</sup> Yet it has been estimated that the value of IUU fishing around the South African coastline is some R6 billion—that is, about 20% greater than the estimated official value of legal commercial fisheries.<sup>49</sup> When the environmental cost of IUU fishing (particularly the use of trawl nets) and social costs of job losses and lost opportunities is factored in, the crisis in the South African fishing industry is apparent.

43 The anti-fracking campaign has coalesced around the Treasure the Karoo Action Group, a coalition of environmentalists, celebrities, activists and volunteers. See <http://treasurethekaroo.co.za> for more detail.

44 <http://www.reuters.com/article/2011/04/21>

45 Horst Kleinschmidt (former Head of Marine and Coastal Management), “Turmoil in Fishing Sector: Balancing Inequalities Among Fisher,” Cape Times, October 17, 2011.

46 <http://www.nda.agric.zq>

47 Questions have been raised about the formation of a ruling party ANC Fisheries Desk in 1999 and the potential for it to influence policy, legislation and the awarding of licenses and quotas.

48 Shaheen Moolla, “Contextualising illegal, unregulated and unreported fishing of marine resources in South African Waters,” Institute for Security Studies, Cape Town, 2009.

49 Moolla, *ibid*, page 8.

Moreover, illegal fishing (including poaching) is directly associated with local gangsterism, international crime syndicates and rogue national fleets. It is at this intersection that questions of transparency and accountability become most acute. South Africa's Department of Marine Coastal Management is so critically underfunded and understaffed that the country's ability to certify its own fishery has been questioned.<sup>50</sup> More alarmingly, one fisheries researcher concluded that MCM was so badly underfunded that it has become dependent on receipts received from the seizure and sale of illegal fisheries. This, the researcher concluded, may explain the closing of "successful" environmental courts as well as special investigative and prosecuting units dealing with illegal fisheries.<sup>51</sup>

### Points of access for enhancing dialogue regarding transparency and accountability in the extractive sector

The "New South Africa's" defining characteristic is its success in creating a constitutional democratic state from enmity, diversity and institutional violence. Enhanced transparency and accountability in the extractive sector may follow the same path. The key to South Africa's transition lay in ensuring broad consultation and inclusiveness, particularly of those lying at the extremes of the political, class and interest spectrum. The defining characteristic of the negotiating process was that of strengthening negotiators, rather than weakening opponents. Finally, the key ingredient of success was a commitment to seek points of convergence and fundamental agreement rather than areas of disagreement. These broad principles could be resuscitated and applied usefully to enhancing transparency and accountability in the extractive sector.

Three government ministries are vital to successful engagement: the Ministry of Finance (Treasury), the Department of Mineral Resources and the Department of Energy. Within Cabinet, Treasury enjoys seniority, prestige and influence. This influence is disproportionately significant for any transparency- and accountability-focused initiative in the extractive sector. Moreover, Treasury—and in particular the South African Revenue Service (SARS)—have a material interest in improved transparency and accountability in the extractive sector. South Africa's budget deficit is growing and is set to rise to more than five percent of GDP. National debt is expected to reach 40% of GDP in 2014. SARS collection deficit is growing and Treasury is under pressure to ensure maximum revenue efficiency. Any program of engagement can assist in that effort. The Department and Minister have been lobbied with respect to EITI, and senior officials within Treasury have expressed interest and unofficial support.

The Ministry of Mineral Resources is the next most important department with which to engage. The Minister is relatively new to the portfolio, as is the Director General (Permanent Secretary). This may necessitate new forms of approach, engagement, information-sharing and trust-building, given the pressure the department is under with respect to the nationalization debate, mining license conversion rights, the new Mining Charter, environmental challenges, safety concerns and mine community concerns. However, if formulated appropriately, a transparency- and accountability-focused initiative for extractives may be viewed as a welcome initiative that could assist in mediating a number of these challenges.

Encouragingly, in February, 2011, the minister announced the establishment of an on-line portal on the departmental web site. It is designed to ensure greater transparency and accountability in

50 Personal interview conducted with CEO of major South African fisheries company

51 Moolla, *ibid*, pages 12-13.

licensing and tenders. The South African Mineral Resources Administration System (SAMRAD)<sup>52</sup> on-line application portal allows any registered user to submit a licensing application, and also to view the location and owner of mining licenses.

The Department of Energy is relatively new as a stand-alone department, since the Department of Minerals and Energy was split in two only three years ago. Although it has sector responsibility for oil and national energy matters, the department has an agreement with the Department of Mineral Resources to defer to it on matters relating to governance in the extractive sector.<sup>53</sup> Nevertheless, the Department of Energy is about to commission the country's largest capital expenditure project—two new nuclear power stations. Energy is also responsible for all renewable and green energy programs. Thus, transparency and accountability are particularly relevant to its operations.

Given environmental concerns surrounding the extractive sector, and related questions of accountability, there is merit in the program's engaging with the Department of Water and Environmental Affairs.<sup>54</sup>

While acknowledging the important principle of separation of powers, parliament must be included in the effort to improve transparency and accountability in the extractive sector. The portfolio committees of Mineral Resources; Energy; Water Affairs and Environment; Agriculture; Forestry & Fisheries; Standing Committee on Finance, and the Standing Committee on Public Accounts are also important points of entry.

The second set of important stakeholders is big business in the extractive sector. The two most important umbrella bodies are the South African Chamber of Mines ([www.bullion.org.za](http://www.bullion.org.za)) and the South African Petroleum Industry Association ([www.sapia.org.za](http://www.sapia.org.za)).<sup>55</sup> The Chamber of Mines is by some measure the more important of the two bodies with respect to the extractive sector in South Africa.<sup>56</sup> The Chamber is authoritative, respected and well-capacitated. It is also responsible for policy development and sector engagement with both the government and organized labor. The Chamber is open to discussion and debate regarding transparency and accountability in the mining sector.<sup>57</sup>

SAPIA serves as the petroleum industry voice in South Africa and seeks to improve information exchange between the industry and key stakeholders, most notably between the industry and government and, in turn, industry and consumers. The petroleum sector is subject to meeting the requirement of its own government published sectoral charter.<sup>58</sup> Thus, transformation is a legal requirement and business imperative. The terms “transparency” or “accountability” are not used or directly implied within the Charter. SAPIA also focuses its attention on environmental compliance.

52 <http://www.samradonline.co.za>

53 It is unclear if this relationship has been formalized, but it was confirmed by senior officials (deputy director general level) during interviews for the paper.

54 Access to the Ministry and Parliamentary Portfolio Committee is good.

55 SAPIA represents BP (Southern Africa), Shell (Southern Africa), Chevron (South Africa), Engen Petroleum Ltd, PetroSA (Pty) Ltd and Total South Africa Ltd

56 It is significant that the ANC Youth League's October, 2011, protest march for “Economic Freedom” first targeted the Chamber of Mines before moving to the Johannesburg Stock Exchange, then to the Government's Union Buildings in Pretoria.

57 Personal interviews with the Chamber of Mines CEO and Chief Economist and former SADC mining policy head.

58 Charter for the South African Petroleum and Liquid Fuels Industry, Republic of South Africa, Pretoria, November, 2003.

Two further umbrella bodies are relevant to the study. The first is Business Leadership South Africa (BLSA),<sup>59</sup> which represents South Africa's largest 50 companies as well as the ten largest international companies operating in South Africa. The chair and recently retired CEO of BLSA come from corporate mining backgrounds. Business Unity South Africa (BUSA)<sup>60</sup> is the overarching business body that incorporates most significant business chambers. It is regarded by the government as the most representative business body in dealing with governance matters.

It should be noted that organized business in South Africa is in a constant state of flux, especially since the Black Management Forum (BMF)<sup>61</sup> recently withdrew from BUSA to form the Black Business Council. As a result, at least a dual-track approach regarding transparency and accountability in the extractive sector will be necessary.

The third set of stakeholders with whom to engage are non-governmental organizations and civil society organizations working in transparency and accountability as well in the extractive sector.

South Africa has one of the most comprehensive, well-developed and robust civil society sectors on the continent. The South African National NGO Coalition (SANGOCO)<sup>62</sup> has hundreds of registered affiliates, with regional offices in all nine provinces. The Congress of South African Trade Unions (COSATU)<sup>63</sup> has some 19 affiliates, with a combined membership of more than two million. Moreover, the South African policy and think tank community is well-entrenched and well-organized. It has the capacity to produce credible relevant policy research. In 2009 and 2010, for example, the South African Institute of International Affairs<sup>64</sup> was voted the top think tank in sub-Saharan Africa. Other South African think tanks occupied the top five positions in recent years.

A number of NGOs and think tanks (or their programs and projects) focus on good governance. These include the Institute for Democracy in Southern Africa (IDASA),<sup>65</sup> the Open Democracy Advice Centre; the Council for the Advancement of the South African Constitution<sup>66</sup> and Global Integrity.<sup>67</sup> A number focus on transparency and accountability issues, including the Institute for Accountability in Southern Africa. IDASA's budget monitoring program focuses on analyzing budget process and content as well as providing responses and alternatives to the government's budget process.

A number of institutes conduct research into and applied research for the South African extractive sector, including Mintek<sup>68</sup> and the Chamber of Mines.

A number of South African policy research institutes, or more specifically their subsidiary programs, conduct work into governance in the extractive sector. These are SAIIA's Governance of Africa's Resources Programme, the Institute for Security Studies<sup>69</sup>, IDASA's Economic Governance

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59 <http://www.businessleadership.org.za>

60 <http://www.busa.org.za>

61 <http://www.bmfonline.org.za>

62 <http://www.sangoco.org.za>

63 <http://www.cosatu.org.za>

64 <http://www.saiia.org.za>

65 <http://www.idasa.org>

66 <http://www.casac.org.za>

67 <http://www.globalintegrity.org/report/southafrica>

68 <http://www.mintek.co.za>

69 <http://www.iss.co.za>

Programme and the Southern African Resources Watch.<sup>70</sup> Notably, however, all four of these programs focus overwhelmingly on non-South African case studies. Although some programs and research findings are shared, there is relatively little inter-institutional or inter-program co-operation. The exception is the co-operation between SAIIA and SARW in convening a conference on South Africa and the EITI, hosted in 2008. A fifth institute, Mintek, stands apart from the others. Its major client is the South African government. Mintek derives one-third of its revenue from this arrangement.

Consequently, although a range of NGOs, CSOs, institutes, think tanks and programs conduct applied and policy research into good governance, transparency and accountability—and others conduct research into the extractive sector—there is very little intersection between them and less still that focuses on transparency and accountability in the extractive sector. This situation confirms the importance of a transparency- and accountability-focused initiative for extractives, but also presents challenges in configuring an appropriate approach and methodology for this study and possible future program of engagement.

The fourth set of stakeholders is organized labor. Although some 17 trade union federations are registered, three major trade union federations operate in South Africa: the COSATU, the Federation of Unions of South Africa (FEDUSA)<sup>71</sup> and the National Council of Trade Unions (NACTU).<sup>72</sup> COSATU affiliates the National Union of Mineworkers and the Chemical, Printing, Wood and Allied Workers have a direct interest in the extractive sector, but all three union federations operate to some degree within it and all three have strong organizational capacity. The independent union Solidarity,<sup>73</sup> with some 250,000 members, is also significantly represented in the extractive sector and mining in particular.

COSATU in particular is a vociferous critic of opacity and non-accountability in the extractive sector and of corruption and poor governance in general. Putting its criticism into action, the labor federation has promised to provide R10million to establish an Anti-Corruption Unit headed by former Trade Commissioner Dave Lewis. As an alliance partner of the ruling ANC and Communist Party, COSATU is particularly well-placed to provide access and influence on decision-makers within the ruling party, parliament and ultimately government.

The fifth important stakeholder for any transparency- and accountability-focused initiative is the media. Despite its marginalized and rigorously over-regulated past, the independent media in South Africa survived forced and financial closings, draconian regulation and occasional sabotage during apartheid. In significant respects, surviving the apartheid and securocratic eras has imbued South African media with the experience and skills to deal with threats to media freedom and independence posed by today's single-party system.

The South African Broadcasting Corporation (SABC), a state broadcaster, is generally supportive of the government and often supports the ruling party. Even so, the country's media are among the most free on the continent. Independent media have shown the appetite to cover stories and issues of importance relating to transparency and accountability, and have shown similar enthusiasm for covering these issues in the extractive sector. The Fourth Estate has exposed deep and

70 <http://www.sarw.org>

71 <http://www.fedusa.org.za>

72 <http://www.nactu.org.za>

73 <http://www.solidaritysa.co.za>

extensive corruption among political and corporate elites, most notably in the Strategic Arms Procurement Package (the so-called Arms Deal). Such media exposure has led directly to successful prosecution of corrupt politicians and businesspeople. The media (in a loose alliance with civil society activists and opposition politicians) has been vindicated in its campaign by the recent announcement of the launch of a Judicial Commission of Enquiry into the Arms Deal.

Media coverage of the extractive sector is extensive, but less probing than it might be with respect to transparency and accountability. However, the media have eagerly covered corrupt tendering and licensing agreements and environmental issues in the extractive sector. Even business-aligned publications such as *Business Day*,<sup>74</sup> *Financial Mail*<sup>75</sup> and *Mining Weekly*<sup>76</sup> have covered stories relating to corruption, poor governance, environmental damage and conflict within the extractive sector. The weekly *Mail & Guardian*<sup>77</sup> has taken the lead in covering transparency and accountability in the extractive sector. Moreover, the *Mail & Guardian* has produced relevant coverage and investigative journalism relating to the extractive sector and environmental threats—and more recently, to climate change.

For South Africa, the principles and modalities of engagement are as important as the substance. The three key principles to successful engagement in South Africa are inclusivity, dialogue and negotiation. The first principle suggests that there are many ways to strengthen dialogue in the extractive sector. Yet placing a premium on being representative is critical. Therefore, umbrella bodies must be included, for both practical and political reasons. By definition, umbrella bodies represent wide memberships. Therefore, they would be very useful in the effort to engage with sectoral representative bodies.

The principle of dialogue suggests that the leadership of these sectoral bodies should be engaged early in the process. This is important for two reasons. The first is to ensure recognition of the importance of the particular body and its leadership. The second is that early engagement will provide maximum opportunity to help design and authenticate the optimal mode of engagement. All umbrella bodies in South Africa pride themselves in their openness to dialogue. If they are approached tactfully, diplomatically and correctly, the transparency and accountability initiative should have no difficulty engaging with all important representative and umbrella bodies. Like their counterparts elsewhere in the world, South African stakeholders are keen to share experiences, discuss progress and debate ongoing programs, rather than reflect on shortcomings, gaps and blockages. To enhance dialogue relating to transparency and accountability in the resources sector in South Africa, it makes sense to seek out and build upon the shared experiences of those already engaged in dialogue.

This links to the third important principle of negotiation in South Africa. Negotiation in this context relates less to a contest between competing interests, and more to establishing, identifying and building upon shared interests, even if they are not immediately apparent. Both government and organized business in the extractive sector could, and sometimes do, see transparency and accountability as being critical and adversarial in nature. This is driven in part by culture, in part by collusiveness and, in part by the existence of bad practices. But shrill and unstrategic in its engagement with both of these constituencies will contribute to defensiveness and muted

74 <http://www.businessday.co.za>

75 <http://www.fm.co.za>

76 <http://www.miningweekly.com>

77 <http://www.mg.co.za>

dialogue. The benefits to democracy, good governance, revenue generation and development from enhanced transparency and accountability are readily apparent to citizens. The challenge for any transparency and accountability initiative is to identify and tap into areas of mutual concern and interest between government and business.

In South Africa, the legitimacy of the current political and corporate leadership is often questioned. Thus, greater transparency and accountability, beginning with improved dialogue, are mutually desirable. Given the intensive debate surrounding nationalization of the mines, as well as outrage over the level of corruption in South Africa, improved dialogue to enhance transparency and accountability in the extractive sector would be timely and useful.

It is advisable that transparency and accountability in the extractive sector be introduced and thoroughly debated within the following umbrella bodies before being taken to government for engagement:

- Trade Union Federations (COSATU, FEDUSA & NACTU)
- Business Councils (Business Unity South Africa and the Black Business Council)
- The South African Chamber of Mines and South African Petroleum Industry Association
- The South African Council of Non-Governmental Organisations Coalition
- Think tanks (SAIIA, ISS, IDASA, and SARW) and research bodies conducting work in governance and the extractive sector
- Parliament's relevant Portfolio Committees (Mineral Resources, Energy, Finance, Water and Environment, Agriculture, Forestry & Fisheries)

Finally, it is recommended that any transparency and accountability initiative issues open a dialogue with the National Economic Development and Labour Council (NEDLAC).<sup>78</sup> Legally constituted, NEDLAC is mandated to bring together government (in the form of the Department of Labour, Trade and Industry, Finance and Public Works), organised labour (COSATU, NACTU and FEDUSA), organized business (BUSA and the BBC) and social formations into a social dialogue to help formulate better economic policy with social equity. While transparency and accountability as discrete issues in the extractive sector are not central to NEDLAC's business, the Council has legitimacy, status and structure to host productive discussions on these issues.

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78 <http://www.nedlac.org.za>



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