

March 14, 2018

ActionAid International USA
Amnesty International
American Jewish World Service
Bank Information Center
CARE USA
Catholic Relief Services
Columban Center for Advocacy and Outreach
CorpWatch
Crude Accountability
EarthRights International
EARTHWORKS
EG Justice
EIRIS Conflict Risk Network
Environmental Defense Fund
Friends of the Earth
Gender Action
Global Financial Integrity
Global Rights
Global Witness
Government Accountability Project
Human Rights Watch
International Budget Project
International Labor Rights Forum
Justice in Nigeria Now
Micah Challenge USA
Natural Resource Governance Institute
ONE Campaign
Open Society Policy Center
Oxfam America
Pacific Environment
Presbyterian Church USA
Project on Government Oversight
Robert F. Kennedy Center for Human Rights
Sustainable Energy & Economy Network
The Borgen Project
United Methodist General Board of Church and Society
United Steelworkers
United to End Genocide

By E-Mail:

Chairman Jay Clayton
Commissioner Michael Piwowar
Commissioner Kara Stein
Commissioner Robert Jackson
Commissioner Hester Peirce

Re: Disclosure of Payments by Resource Extraction Issuers

Dear Chairman Clayton and Commissioners:

We are pleased to submit the attached statement on behalf of the Publish What You Pay - United States ("PWYP-US") coalition highlighting key considerations for the Securities and Exchange Commission ("Commission") as it develops a new proposed rule implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Section 1504").

Publish What You Pay ("PWYP") is a global civil society coalition that works to ensure that the wealth generated by oil, gas, and mining industries can be a pathway to poverty reduction, stable economic growth, and development in resource-rich countries. Founded in 2002, the coalition comprises over 700 organizations from more than 50 countries that advocate for payment transparency as a necessary component of accountability. PWYP-US comprises 40 members, including development, faith-based, human rights, environmental, financial reform, and anti-corruption organizations representing over 5 million constituents across the United States. PWYP-US members have long supported the work of the Commission to implement Section 1504 and have been actively involved in previous rulemakings.

As described in more detail in the attached statement, the Commission's new rule should include certain key elements to ensure compliance with Section 1504 and Congress's intended objectives. These elements, which are consistent with the robust evidence in the rulemaking record, include:

- Mandated public disclosure of payments by individual issuers at the project-level.
- Contract-based definition of "project" consistent with the Commission's June 2016 rule (Release No. 34-78167; File No. S7-25-15), and laws in the European Union, Canada, and Norway.
- No categorical exemptions.

Thank you for your continued engagement on this issue. As in previous years, we look forward to a carefully considered and thorough rulemaking. If you require any further information or clarifications, please contact Waseem Mardini, Policy Advisor for PWYP-US, at [REDACTED].

Sincerely,
Publish What You Pay – United States
Steering Committee



Joseph Kraus
Director, Transparency and
Accountability
ONE Campaign



Stefanie Ostfeld
Deputy Head of U.S. Office
Global Witness



Isabel Munilla
Policy Lead, Extractives Transparency
Oxfam America



James Royston
Regional Coordinator, G20 Countries
Publish What You Pay International

CC:

Mr. Brent J. Fields, Secretary of the Commission, Office of the Secretary
Ms. Elizabeth Murphy, Associate Director, Division of Corporation Finance
Ms. Tamara Brightwell, Senior Special Counsel to the Director, Division of Corporation Finance
Mr. Elliot Staffin, Special Counsel, Division of Corporation Finance
Mr. Vladimir Ivanov, Financial Economist, Division of Corporation Finance

Publish What You Pay – United States Position Statement
Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act
March 14, 2018

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I. Introduction

The PWYP-US coalition calls on the Commission to issue a rule implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act that is at least as robust as the rule released in June 2016 (“2016 rule”) and closely aligns with the international transparency standard already in place in the European Union (“EU”), Canada, and Norway, as detailed below. Section 1504 requires this alignment by directing the Commission to promote international transparency efforts and consistency across markets to better enable investors and citizens to effectively use and compare information, while minimizing costs for cross-listed companies.

Congress intended Section 1504 disclosures to provide investors with detailed information needed to assess risk and make better investment decisions, to combat and deter corruption, and to empower citizens of resource-rich countries with the information they need to monitor revenue flows and hold their governments accountable for the responsible management of their natural resource wealth. The Commission cannot achieve Congress’s intended goals unless the new rule, at a minimum: 1) requires fully public, company-specific disclosure at the project level; 2) includes a sufficiently granular definition of “project,” consistent with the definition in the EU and Canada; and 3) allows for no categorical exemptions.

We commend the Commission for its carefully considered and thorough rulemaking that led to the 2016 rule. PWYP-US regrets that a Congressional Review Act (“CRA”) resolution of disapproval was employed in February 2017 to delay final implementation of Section 1504. However, progress has continued around the world in the meantime, and implementation of the global transparency standard is firmly underway. A significant proportion of the world’s largest oil, gas, and mining companies (including issuers cross-listed in the US) now regularly disclose their project-level payments under the rules of other markets, without any exemptions. The Commission remains obligated to implement a rule that is consistent with Section 1504, fulfills its intended objectives, and is supported by the robust record. To do so, the Commission must align its rule with the global standard.

II. The Commission’s legal duty to carry out the pro-disclosure intent of Section 1504 remains the same

Although Congress invoked the CRA to disapprove the prior rule issued by the Commission, Congress did not alter, nor purport to alter, the original statutory directive in Section 1504 or the Commission’s obligation to adopt a regulation based on a rulemaking record compiled in accordance with the Administrative Procedures Act. Serious constitutional issues raised by Congress’s invocation of the CRA to invalidate other Executive Branch actions are now being litigated. *See Center for Biological Diversity v. Zinke*, No. 3:17-cv-00091 (D. Alaska, filed Apr. 20, 2017) (challenging constitutionality of CRA and resolution disapproving Interior Department rule as violating the separation of powers and unconstitutionally impairing agency’s ability to implement its statutory authorities). Those constitutional issues are of particular concern in the context of Section 1504, which unequivocally imposes a mandate on the Commission to take action to address a particular problem and where the Commission has already set forth, and supported with an extensive rulemaking record, what the agency regards as the

most appropriate means of executing the legislative intent underlying Section 1504. Especially because Congress, in taking action under the CRA, did not clearly articulate what it found objectionable about the prior rule and because the rationale for a strong, project-specific public disclosure rule has become even more compelling as a factual matter since the prior rule was adopted, it is incumbent on the Commission to again promulgate a strong rule notwithstanding Congress's action under the CRA. Assuming the constitutional validity of the CRA and the resolution of disapproval, there are a number of ways in which the Commission can promulgate a strong rule while complying with the CRA (particularly if the CRA is construed in such a manner as to avoid the separation of powers issues that will otherwise come to the fore). What the Commission should not (and cannot legally) do, is embark on a rulemaking process that subverts the pro-disclosure intent of Section 1504, as the Commission itself has already unequivocally clarified that intent.

III. The new rule must closely align with the global standard

Section 1504 makes clear that the rule “shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.”¹ In enacting Section 1504, Members of Congress were clear that the establishment of an international transparency standard was one of the intended objectives of the statute,² and they have repeatedly reaffirmed that objective in comment letters to the Commission's rulemaking record.³ Since Section 1504 was enacted in 2010, a clear global standard has emerged. Disclosure rules in 30 countries and the Extractive Industry Transparency Initiative (“EITI”) standard all require fully public disclosure of disaggregated project-level payments on a company-by-company basis, without any categorical rule-based exemptions. These are the essential elements of the international standard that are required by Section 1504, consistent with Congress's intent, and must be reflected in the Commission's new rule.

A new rule that strays from that standard by allowing anonymous reporting, aggregated reporting and/or broad rule-based exemptions would directly contradict the statutory directive and clear

¹ H.R.4173 (111th) § 1504(q)(2)(E). Available at: <https://www.congress.gov/bill/111th-congress/house-bill/4173/text>.

² See: 156 CONG. REC. S3816 (daily ed. May 17, 2010) (Statement of Senator Lugar, one of the sponsors of Section 1504) (“Adoption of the Cardin-Lugar amendment would bring a major step in favor of increased transparency at home and abroad. . . . More importantly, it would help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues. . . . The essential issue at stake is a citizen's right to hold its government to account.”); id. at S3817-18 (May 17, 2010) (Statement of Senator Dodd) (“[C]ountries with huge revenue flows from energy development also frequently have some of the highest rates of poverty, corruption and violence. Where is all that money going? [Section 13(q)] is a first step toward addressing that issue by setting a new international standard for disclosure.”).

³ Comment submitted by Sen. Benjamin L. Cardin, et al. (5 Feb. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-19.pdf> (“aligning the rule with the disclosures rules in the European Union (EU) and Canada, as well as the [EITI]” is “an important step in developing a global standard for the extractive industry”); Comment submitted by Sen. Cardin, et al. (1 May 2014). Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-41.pdf>; Rep. Maxine Waters, et al. (11 June 2014). Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-50.pdf>. See also comment submitted by Former Senators Richard Lugar, Carl Levin, and Christopher Dodd (4 Feb. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-20.pdf>.

Congressional intent. Such a rule would threaten to undermine the international standard, increase compliance costs for cross-listed issuers that would have to prepare multiple reports for different jurisdictions, deny investors the information they want and need, and deprive citizens of precisely the information they need to serve the corruption-fighting and accountability objectives Congress intended.

The landscape has changed significantly since the passage of Section 1504 and the Commission's 2012 rule (Release No. 34-67717; File No. S7-42-10) ("2012 rule"), which catalyzed similar mandatory reporting requirements around the world. Today, virtually identical reporting requirements are now in place in Norway, Canada, and the 28 member states of the European Union, including the United Kingdom, and similar laws are under development in Switzerland and Ukraine.⁴ Last year, the Labor Party of Australia (the world's largest exporter of coal and iron ore, and second largest exporter of gold and uranium) announced its commitment to align with the international standard if it achieves a majority in the upcoming elections.⁵

Major oil, gas and mining companies – including a number that are cross-listed in the US – have now disclosed multiple years of project-level payment information under the rules in other markets. This includes many of the world's largest oil, gas, and mining companies such as BHP Billiton, BP, Rio Tinto, Shell, and Total,⁶ as well as companies like Chevron and ExxonMobil, which are reporting payments of certain subsidiaries. After multiple years, public disclosure has notably produced none of the hypothetical harms suggested by industry commenters in the prior rulemaking. There is no evidence that public reporting has had any material impact on cash flow or competitiveness, nor run up against conflict with any foreign laws. Any suggestion that U.S. companies would somehow face a competitive

⁴ Switzerland: Projet de modification du code des obligations (Droit de la société anonyme), Chapitre VI: Transparence dans les entreprises de matières premières, Articles 964a à 964e, Conseil fédéral suisse, (23 Nov. 2016). Available at:

<https://www.admin.ch/opc/fr/federal-gazette/2017/625.pdf>; Ukraine: DiXi Group. "DiXi Group welcomes the initial steps towards mandatory reporting of extractive companies and calls for continued progress by adopting the Draft Law No. 6229" (6 Oct. 2017). Available at:

<http://dixigroup.org/eng/news/dixi-group-vitaye-pershi-kroki-do-krashchoi-zvitnosti-vidobuvnikh-kompaniy-i-zakli-kaye-prodovzhiti-proces-priynyattam-zakonu-6229/>

Publish What You Pay <http://www.publishwhatyoupay.org/why-ukraine-needs-mandatory-disclosures-legislation/>

⁵ Gareth Hutchens. "Labor plans to force Australian mining companies to disclose taxes paid overseas." The Guardian (30 Oct. 2017). Available at:

<https://www.theguardian.com/australia-news/2017/oct/31/labor-plans-to-force-australian-mining-companies-to-disclose-taxes-paid-overseas>.

⁶ See for example: Royal Dutch Shell Plc. Report on Payments to Governments for the Year 2015 (18 Apr. 2016) Available

at: https://www.shell.com/sustainability/transparency/revenues-for-governments/_jcr_content/par/textimage_569728713.stream/1460962925009/43a62e840a312580b7a030a0b6719d720a03afb774d5edf22bc8f30914609748/s-hell-report-payments-to-governments-2015-18042016.pdf; Royal Dutch Shell Plc. Report on Payments to Governments for the Year 2016 (13 Jun. 2017) Available at:

https://www.shell.com/sustainability/transparency/revenues-for-governments/_jcr_content/par/textimage_569728713.stream/1497344461477/2a405ab3befd1a4f3639369b63b9a6ae14c219354d96dbecf22ccd6006cfd6bb/rds-report-payments-to-governments-2016.pdf; Total, Registration Document 2015 (15 Mar. 2016) Available at:

http://www.total.com/sites/default/files/atoms/files/registration_document_2015.pdf; Total, Registration Document 2016 (17 Mar. 2017) Available at:

https://www.total.com/sites/default/files/atoms/files/ddr2016_va_web.pdf.

disadvantage from having to report project-level payments is no longer tenable, with so many of their competitors (include many state-owned companies) already reporting this very information without issue.

The requirements in other markets also align with the EITI standard, which requires public project-level reporting in all 50 EITI member countries.⁷ On March 8, 2017, the EITI Board reaffirmed that project-level reporting is required for all disclosures covering fiscal years ending on or after December 31, 2018.⁸ The EITI has also made clear in its project-level guidance documents and reporting templates,⁹ released in September 2017, that the definition of project must be linked to a legal agreement: **“the guiding principle that project level payments should be reported in relation to the legal agreement which forms the basis for payment liabilities with the government.”**¹⁰ The EITI further notes that “one of the key takeaways from global practice is that what constitutes a project is linked to the forms of legal agreement(s) governing extractive activities between the government and companies.”¹¹ All oil and mining company members of EITI Board are US-listed and subject to Section 1504. These include BP, BHP Billiton, Chevron, ExxonMobil, Newmont, Shell, Statoil and Total. As Board members, they govern the implementation of the EITI Standard, and provide approval and oversight on official guidance to countries on project reporting and have therefore endorsed the EITI approach to “project” level reporting.¹²

Consistency with the disclosure laws in other markets and the EITI standard is strongly supported by a wide range of commentators, including members of Congress,¹³ executive branch agencies,¹⁴ investors,¹⁵

⁷ The EITI Standard (24 May. 2017) Available at:

https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf.

⁸ EITI, Project-level reporting, Guidance note – Requirement 4.7, (Sept. 2017). Available at:

<https://eiti.org/document/guidance-note-29-on-projectlevel-reporting>.

⁹ Ibid.

¹⁰ EITI, Project-level reporting, Guidance note – Requirement 4.7, (Sept. 2017), p. 4. Available at:

https://eiti.org/sites/default/files/documents/guidance_note_28_on_project-level_reporting_final.pdf (emphasis added).

¹¹ Ibid, p. 3.

¹² In March 2017, after the CRA resolution of disapproval removing the Commission’s 2016 rule, the EITI Board reaffirmed that project-level reporting is required. See: <https://eiti.org/BD/2017-14>.

¹³ See e.g. Comment submitted by Sen. Benjamin L. Cardin, et al. (5 Feb. 2016). Available at:

<https://www.sec.gov/comments/s7-25-15/s72515-19.pdf>; Comment submitted by Sen. Cardin, et al. (1 May 2014).

Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-41.pdf>; Rep.

Maxine Waters, et al. (11 June 2014). Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-50.pdf>. See also

comment submitted by Former Senators Richard Lugar, Carl Levin, and Christopher Dodd (4 Feb. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-20.pdf>.

¹⁴ Comment submitted by US Department of State (13 Nov. 2015). Available at:

<https://www.sec.gov/comments/s7-25-15/s72515-1.pdf>; Comment submitted by US Department of State (21 Jan 2016) Available at: <https://www.sec.gov/comments/s7-25-15/s72515-13.pdf>.

¹⁵ See for example, Comment submitted by Anne Sheehan, Director of Corporate Governance, California State

Teachers' Retirement System (1 Feb. 2018) Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf>;

citizens in resource-rich countries and civil society groups,¹⁶ and numerous issuers,¹⁷ among others. As the Commission has already recognized, consistency with the regimes in other countries “furthers the Federal Government’s foreign policy interests in promoting international transparency by, among other things, fostering compatibility with the existing European Union and Canadian transparency regimes.”¹⁸ Ensuring equivalency between the US rule and the rules in other markets is “consistent with Section 13(q),”¹⁹ and would “reduce costs for companies listed in both the United States and those jurisdictions by not requiring different disaggregation of project-related costs due to different definitions of the term

Comment submitted by Steve Waygood, Chief Responsible Investment Officer, Aviva Investors (12 Feb. 2018) Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3130136-161939.pdf>; Comment submitted Steve Berexa, Managing Director, Global Head of Research, Allianz Global Investors et al. (28 Apr. 2014). Available at:

<http://www.sec.gov/comments/df-title-xv/resource-extractionissuers/resourceextractionissuers-35.pdf>.

¹⁶ See e.g. Comment submitted by Open Society Initiative for Southern Africa - Angola (29 Jan. 2015). Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-60.pdf>;

Comment submitted by PWYP Indonesia (11 Mar. 2015). Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-64.pdf>;

Comment submitted by the Civil Society Coalition on Oil and Gas - Uganda (18 May 2015). Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-71.pdf>.

¹⁷ See e.g. Comment submitted by Chevron (7 May 2014). Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-40.pdf> (“We believe ‘equivalency’ between the EU and US reporting regimes is critical as the EU Member States move to implement the transparency reporting Directives.”); Comment submitted by ExxonMobil (1 May 2014). Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-37.pdf>;

Comment submitted by Total S.A. (13 Jan. 2016) Available at:

<https://www.sec.gov/comments/s7-25-15/s72515-14.pdf> (Total CEO Patrick Pouyanne cites the benefit of restoring a “level playing field” among oil and gas companies); Comment submitted by BHP Billiton (25 Jan. 2016).

Available at: <https://www.sec.gov/comments/s7-25-15/s72515-9.pdf> (“A globally consistent mandatory framework will create a level playing field amongst the resource sector while minimizing the reporting burden and compliance costs for companies operating in multiple jurisdictions and ensuring stakeholders are able to access and analyze uniform data.”); Comment submitted by Encana (25 Jan. 2016). Available at:

<https://www.sec.gov/comments/s7-25-15/s72515-11.pdf> (“We believe the SEC rules should more closely align to the disclosure requirements established by other reporting jurisdictions including the European Union Directives (“EU Directives”) and ESTMA. We believe that multiple compliance frameworks will unnecessarily increase costs for issuers, with little incremental benefit in achieving greater transparency of payment disclosures.”); Comment submitted by Eni SpA (31 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-12.pdf> (“Several legislative initiatives on transparency have/are being developed in different jurisdictions (EU, USA, Canada, Norway), potentially creating diverse disclosure obligations. While we are currently working to implement the EU Directives regarding 2016 payments, asymmetry remains between companies that are subject to reporting obligations and companies that are immune. We therefore welcome the new Rule proposed by the SEC in the USA, as it goes in the direction of levelling the field in the industry and addresses the issue of multiple reporting obligations and the associated compliance costs.”). See also Appendix I.

¹⁸ 81 Fed. Reg. at 49,382.

¹⁹ SEC, Disclosure of Payments by Resource Extraction Issuers, Final Rule, 81 Fed. Reg. at 49382 (“We also believe that, beyond the potential for reduced competitive harm, a disclosure requirement that is in accordance with the emerging international transparency regime is consistent with Section 13(q), including its instruction that, “[t]o the extent practicable,” the Commission’s rules “shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.”)

‘project’.”²⁰ In light of the global progress over the past two years, and with reporting well underway in other markets, the case for close alignment has only grown stronger.

IV. Disaggregated project-level payment information is essential to achieve Section 1504’s objectives

Fully public, disaggregated project-level reporting is necessary to achieve the anti-corruption and transparency goals of Section 1504. This includes realizing the benefits of disclosure for investors, civil society and other stakeholders and harmonizing disclosure requirements globally, as the statute requires. In particular, we expect that the Commission’s definition of “project” in the new rule will be consistent with the definition in the EU and Canada; this means adopting a contract-based definition that will produce detailed and useful information.²¹ The Commission’s definition of project in the 2016 rule was consistent with the standard industry definition of project,²² and so must its definition in a new rule.

- A. Any definition of “project” that aggregates payments across multiple projects would be unacceptable

The Commission’s rule must provide for granular, disaggregated disclosures. An approach that instead allows disclosure at a higher level of aggregation – for example, by awkwardly equating “project” with all extractive activities within a subnational region, as previously proposed by the American Petroleum Institute (“API”)²³ – would be incompatible with the regulations in other markets and would upend international transparency efforts, in direct contradiction of the statutory directive to support the government’s “commitment to international transparency promotion efforts.”²⁴ Such a definition would render the information substantially less useful or even useless to investors and others, undermine efforts to increase transparency and combat corruption in the sector, and directly conflict with the Commission’s findings of fact on this issue.

²⁰ SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,075-80,076. The Commission states, “[T]aking an approach that shares certain core elements with the definition used in the EU Directives and the ESTMA specifications would further international transparency promotion efforts. Such an approach should also reduce costs for companies listed in both the United States and those jurisdictions by not requiring different disaggregation of project-related costs due to different definitions of the term ‘project’. In addition, a definition having substantial similarities might enable companies to take advantage of equivalency provisions available in other jurisdictions.”

²¹ Comment submitted by NRG (23 Sep. 2015), p.12. Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-84.pdf>;
Comment submitted by PWYP Coalition (14 Apr. 2014). Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-32.pdf>;
Comment submitted by Global Witness (25 Feb. 2011), p.16-17. Available at: <https://www.sec.gov/comments/s7-42-10/s74210-34.pdf>.

²² Comment submitted by Oxfam America (3 Dec. 2015) Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-103.pdf>.

²³ Comment submitted by the American Petroleum Institute (7 Nov. 2013) Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf>.

²⁴ 15 U.S.C. 78m(q)(2)(E).

As the Commission has already correctly observed, a definition of “project” that “permit[s] companies to aggregate their oil, natural gas, and other extractive activities over large territories . . . would not provide local communities with payment information at the level of granularity necessary to enable them to know what funds are being generated from the extraction activities in their particular areas . . . and deprive them of the ability . . . to ensure that the national government or subnational government has not entered into a corrupt, suspect, or otherwise inappropriate arrangement.”²⁵

That clear finding is strongly supported by ample evidence already in the rulemaking record showing that the full benefits of Section 1504 for resource-rich communities can only be realized if the information is sufficiently disaggregated at the local project level. As an illustrative example, the submission by the Africa Centre for Energy Policy made clear that public disclosure of payments made by company and by project are critical in order to ensure that the statutory allocation of mining royalties to Ghanaian subnational governments takes place, but reporting at a higher subnational regional level “would render the oil payment disclosures useless for accountability purposes, and would prove a waste of effort for reporting companies.”²⁶ The National Advocacy Coalition on Extractives explained that for local communities in Sierra Leone, “knowledge of the total, combined amount a company has paid the government for all extractives projects is of little value. . . . When a single company operates multiple projects, as commonly occurs in Sierra Leone, community oversight becomes nearly impossible without data on each specific project.”²⁷ PWYP Indonesia told the Commission that “access to full and accurate project-level data is crucial” to effectively monitor payments, and that reporting only at the first tier below the central government would be “completely unsatisfactory in Indonesia” because it would exclude critical information about the revenue local governments are entitled to under Indonesia’s production sharing agreements. The submission further explained a number of ways that, thanks to the level of detail in Indonesia’s EITI, civil society was already putting newly available project-level payment data to effective use monitoring in-kind payments from oil and gas companies and production sharing contracts.²⁸

Aggregation of payments at a higher level was also rejected by the State Department and USAID, which “strongly supported” granular project-level disclosures.²⁹ USAID, for example, explained that aggregated information would “not allow for citizens to understand or engage with extraction companies operating in their geographical area;” rather, “[o]nly through more granular, project-level reporting will disclosures

²⁵ 81 Fed. Reg at 49,381-82.

²⁶ See Comment submitted by Africa Centre for Energy Policy (16 Feb. 2016), p.6. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-40.pdf>.

²⁷ Comment submitted by National Advocacy Coalition on Extractives in Sierra Leone (20 Feb. 2015) at 3. Available at <https://www.sec.gov/comments/df-title-xv/resource-extractionissuers/resourceextractionissuers-61.pdf>.

²⁸ Comment submitted by PWYP Indonesia (11 Mar. 2015), p.2-3. Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-64.pdf>; see also SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. 80057, 80067 n.94 (citing numerous examples). Available at <http://www.gpo.gov/fdsys/pkg/FR-2015-12-23/pdf/2015-31702.pdf>; See also Comment submitted by Oxfam and EarthRights International (8 Mar. 2016), p.6-9 (citing statements from numerous commenters). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-59.pdf>.

²⁹ 81 Fed. Reg. at 49380.

produce meaningful data for citizens, civil society, and local groups that seek to break cycles of corruption that involve government and corporations.”³⁰

Based on its own expertise, the Commission expressly rejected an aggregated approach to “project,” concluding that company-specific disclosures at the project-level “will better help deter corruption by all participants in the resource extraction sector” as compared to “the API proposal of aggregated disclosures at the major subnational jurisdiction level.”³¹ The Commission explained that its “own experience in implementing the Foreign Corrupt Practices Act” further shows that granular disclosures at the project level “will better help combat corruption than the aggregated (and anonymized) disclosures that the API Proposal would yield. We have found that requiring issuers to maintain detailed, disaggregated records of payments to government officials significantly decreases the potential for issuers and others to hide improper payments and as such their willingness to make such payments. This experience has led us to believe that, where corruption is involved, detailed, disaggregated disclosures of payments minimizes the potential to engage in corruption undiscovered.”³²

A rule allowing aggregated disclosures would also be of far less value for investors and problematic for issuers. Investors have consistently emphasized the importance of fully-public, project-level disclosures, as well as comparability. In a recent letter to the Commission, for example, Aviva Investors stated that “[t]he disclosures required by Section 13(q) help address the need of detailed information regarding the financial relationship between extractives companies and the governments where they operate. The disclosure resulting from implementation of Section 13(q) would not be useful if it provided on an anonymous basis or without clear association to the company and project to which payments may be attributed.”³³ Calvert Investments, as just one of many other examples, has emphasized the need for “detailed, reliable, and comparable data regarding oil, gas and mining companies’ payments to host governments to account for material and distinct social, political and regulatory risks to accurately assess cash flows or account for factors such as acquisition costs and management effectiveness.”³⁴

³⁰ Comment submitted by US Agency for International Development (Feb. 16, 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-37.pdf>. See also: Letter from the United States Department of State (21 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-13.pdf>. Comment submitted by US Department of the Interior, Office of Natural Resources Revenue. (4 Aug. 2011). Available at: <https://www.sec.gov/comments/s7-42-10/s74210-108.pdf>. See also e.g. PWYP France, Oxfam France, ONE and Sherpa, Beyond transparency: investigating the new extractive industry disclosures, (Sep. 2017), Available at: https://www.oxfamfrance.org/sites/default/files/file_attachments/beyondtransparency.pdf, See also Appendix III; PWYP Zimbabwe, (Jun. 2017). Available at: http://www.publishwhatyoupay.org/wp-content/uploads/2017/06/PWYP-Data-ExtractorCase-Study_Mukasiri.pdf, PWYP Secretariat. “How Zimbabweans persuaded diamond companies and government to listen” (Aug. 2017). Available at: <http://www.publishwhatyoupay.org/pwyp-news/how-zimbabweans-persuaded-diamond-companies-and-government-to-listen/http://www.publishwhatyoupay.org/pwyp-news/how-zimbabweans-persuaded-diamond-companies-and-government-to-listen/>.

³¹ 81 Fed. Reg. at 49379, n. 280

³² 81 Fed. Reg. at 49382

³³ Comment submitted by Steve Waygood, Chief Responsible Investment Officer, Aviva Investors (12 Feb. 2018) Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3130136-161939.pdf>

³⁴ Comment submitted by Calvert Investments (25 Nov. 2013), p.4-5. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-17.pdf>.

Such a dramatic departure from the approach in the EU and Canada would also render substitute compliance unworkable for cross-listed issuers, requiring the preparation of multiple different reports. For this reason, numerous US and cross-listed issuers such as Chevron, BHP Billiton, Total, and Eni, among others, have opposed the adoption of a definition that differs from the EU and Canada.³⁵ Shell and ExxonMobil sent a joint letter to the Commission in May 2014 clearly summarizing the sentiment: “Equivalency, we believe, is critical as the EU member states move to implement the transparency reporting directives. No one benefits from an outcome under which multinational resource companies are required to file multiple reports in multiple jurisdictions providing substantially the same information in different forms.”³⁶

More broadly, an approach that relies on the major subnational political jurisdiction as the defining characteristic of a “project” would be contrary to standard industry practice. As the Commission found, such an approach is inconsistent with how companies in the resource extraction sector refer to their projects and monitor project-related costs,³⁷ and it “disregards the economic and operational considerations” that are more relevant to determining whether various operations should be treated as one project.³⁸ It would, for example, conflict with the basic design of petroleum fiscal systems. Substantial evidence exists in the record demonstrating that supporting a definition of project linked to

³⁵ See e.g. Comment submitted by Chevron (7 May 2014). Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-40.pdf> (“We believe ‘equivalency’ between the EU and US reporting regimes is critical as the EU Member States move to implement the transparency reporting Directives.”); Comment submitted by Total S.A. (13 Jan. 2016) Available at: <https://www.sec.gov/comments/s7-25-15/s72515-14.pdf> (Total CEO Patrick Pouyanne cites the benefit of restoring a “level playing field” among oil and gas companies); Comment submitted by BHP Billiton (25 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-9.pdf> (“A globally consistent mandatory framework will create a level playing field amongst the resource sector while minimizing the reporting burden and compliance costs for companies operating in multiple jurisdictions and ensuring stakeholders are able to access and analyze uniform data.”); Comment submitted by Encana (25 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-11.pdf> (“We believe the SEC rules should more closely align to the disclosure requirements established by other reporting jurisdictions including the European Union Directives (“EU Directives”) and ESTMA. We believe that multiple compliance frameworks will unnecessarily increase costs for issuers, with little incremental benefit in achieving greater transparency of payment disclosures.”); Comment submitted by Eni SpA (31 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-12.pdf> (“Several legislative initiatives on transparency have/are being developed in different jurisdictions (EU USA, Canada, Norway), potentially creating diverse disclosure obligations. While we are currently working to implement the EU Directives regarding 2016 payments, asymmetry remains between companies that are subject to reporting obligations and companies that are immune. We therefore welcome the new Rule proposed by the SEC in the USA, as it goes in the direction of levelling the field in the industry and addresses the issue of multiple reporting obligations and the associated compliance costs.”)

³⁶ Comment submitted by Shell and ExxonMobil (1 May 2014). Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-37.pdf>;

³⁷ See 81 Fed. Reg. at 49381 n. 297 (“the API Proposal appears to be inconsistent with how companies in the resource extraction sector often refer to their “projects” with foreign countries. Similar to the definition we are adopting, it appears that companies use the term project to refer to their concession-level or field level operations.”); id. at n. 286 (in commercial relations, “contracts are frequently used to define the scope of a project that one party is undertaking for another”).

³⁸ 81 Fed. Reg. at 49381.

legal agreement that gives rise to the payments is a common sense approach that aligns with industry practice and petroleum and mineral fiscal systems.³⁹

Finally, in addition to contradicting the Commission's clear findings of fact, such an approach would also be inconsistent with the plain language of Section 1504. Had Congress intended only to require aggregated payment information, defined by the political jurisdiction, it could have mandated government-level disclosure only.⁴⁰ Instead, Congress explicitly mandated project-level disclosure in the statute.⁴¹ To read "each project" to mean the aggregation of numerous different projects defies logic, distorts the plain meaning of the language Congress chose, and would fail to generate the level of transparency necessary to achieve the statute's anti-corruption, transparency, and investor protection goals.

B. Public disclosure of disaggregated project-level information is the only effective way to carry out Congress's transparency, accountability, and investor protection goals

Numerous community-based groups in resource-rich countries and investors have repeatedly demonstrated the added utility, importance, and necessity of disaggregated contract-level disclosures. Developments over the last two years, including early usage of data from the EU and Canada, have only further shown the value of granular disclosures.

1. *Granular project-level payment information is the most effective way to empower citizens of resource-rich countries to hold governments to account*

One of the central objectives of Section 1504 is to combat and deter corruption and to provide citizens of resource-rich countries with the information they need to hold their own governments accountable for the responsible management of their country's natural resource wealth.⁴² Project-level payment data is essential to inform government officials, citizens, civil society, journalists, parliamentarians, and other stakeholders about the revenues generated by the extraction of their countries' natural resources. The

³⁹ See PWYP-US letter to Commissioner Walter (23 Feb. 2012), which cites to publications that make clear existing petroleum fiscal systems are based on licenses, concessions and contracts. Available at: <https://www.sec.gov/comments/s7-42-10/s74210-191.pdf>; See also International Monetary Fund, Fiscal Regimes for Extractive Industries: Design and Implementation (15 Aug. 2012), p. 15. Available at: <http://www.imf.org/external/np/pp/eng/2012/081512.pdf> See also comment submitted by PWYP-US (14 Mar. 2014). PP 19-21. Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issues/resourceextractionissues-28.pdf>

⁴⁰ See id. At 49380, n. 291.

⁴¹ See 15 U.S.C. 78m(q)(2)(A)(i) (requiring "the type and total amount of such payments made for *each project* of the resource extraction issuer") (emphasis added).

⁴² See e.g. 156 Cong. Rec. S3816 (daily ed. May 17, 2010) (Statement of Senator Lugar, one of the sponsors of Section 1504) ("Adoption of the Cardin-Lugar amendment would bring a major step in favor of increased transparency at home and abroad. . . . More importantly, it would help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues."); id. at S3817-18 (May 17, 2010) (Statement of Senator Dodd) ("[C]ountries with huge revenue flows from energy development also frequently have some of the highest rates of poverty, corruption and violence. Where is all that money going? [Section 13(q)] is a first step toward addressing that issue by setting a new international standard for disclosure.").

data help show how well the revenues compensate for the depletion of host countries' finite resources and any negative social and environmental impacts of extraction, and the specific amounts that flow to identified government entities. Citizens and civil society can link extractives revenue data to their monitoring of how their governments budget and spend public finances.

Substantial evidence in the rulemaking record from civil society organizations, corruption watchdogs, and individuals and organizations representing communities in numerous resource-rich countries highlights the significant benefits of disaggregated project-level information. For example:

- The Iraqi Transparency Alliance for Extractive Industries explained that project-level, company-specific disclosures would be necessary for them to reconcile production volumes data provided by the Ministry of Oil with funds received from the Ministry of Finance in order to ensure that citizens located near extraction sites can determine their fair share, and to achieve greater transparency into payments received by the Kurdistan Regional Government, which are not published by companies and are not included in the EITI reports for Iraq.⁴³
- The Open Society Institute for Southern Africa-Angola noted that project-level data would be necessary to fill in major discrepancies between the reports of various ministries and the media with respect to bonuses and taxes, and to ensure that communities are receiving the amounts due to them based on statutory revenue-sharing formulas.⁴⁴
- PWYP Zimbabwe explained that company- and project-level payment data would enable it to track the flow of revenues from US-listed companies into public accounts, enhance civil society and communities' ability to hold state agencies to account for payments they receive and services they must legally deliver, inform ongoing national policy reform efforts on revenue and spending transparency of Zimbabwe's natural resource revenues, and help communities and civil society weigh the costs and benefits of individual projects.⁴⁵
- The Civil Society Coalition on Oil & Gas in Uganda (CSCO) explained that company-by-company, contract-based project-level reporting will greatly enhance its ability to monitor individual companies' contributions to the public finances and ensure that the government is properly collecting and accounting for payments.⁴⁶ CSCO described how Section 1504 disclosures would allow it to expand on the work that it is already doing to track payments into government accounts using project-level data voluntarily disclosed by Tullow and to "advocate more effectively for transparency at the 'receiving' end of Government."⁴⁷
- The Carter Center noted that disaggregated project-level payment data in the Democratic Republic of Congo would be used to bolster their efforts, and those of their Congolese civil society partners, to monitor revenue flows to subnational governments as well as state-owned

⁴³ Comment submitted by the Iraqi Transparency Alliance for Extractive Industries (25 Sep. 2015). Available at <https://www.sec.gov/comments/df-title-xv/resource-extractionissuers/resourceextractionissuers-87.pdf>.

⁴⁴ Comment submitted by Open Society Institute for Southern Africa-Angola (29 Jan. 2015). Available at <https://www.sec.gov/comments/df-title-xv/resource-extractionissuers/resourceextractionissuers-60.pdf>.

⁴⁵ Comment submitted by PWYP Zimbabwe (20 Feb. 2015). Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-63.pdf>.

⁴⁶ Comment submitted by Civil Society Coalition on Oil and Gas in Uganda (18 May 2015) p. 1. Available at <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-71.pdf>.

⁴⁷ Ibid. p. 2.

companies and strengthen the fight to combat corruption as well as to encourage debate on the fiscal regime.⁴⁸

These are just a few examples of the numerous detailed submissions that clearly show effectively combating the resource curse requires detailed, granular payment information.⁴⁹

Indeed, industry groups and numerous issuers likewise expressly recognize that public disclosure of detailed project-level payments can effectively produce the very benefits Congress intended.⁵⁰ As the Commission has observed, industry participants in EITI have expressly adopted the position that EITI disclosures produce “[b]enefits for implementing countries” by “strengthening accountability and good governance, as well as promoting greater economic and political stability.” And, further, “[b]enefits to civil society come from increasing the amount of information in the public domain about those revenues that governments manage on behalf of citizens, thereby making governments more accountable.”⁵¹

- a. Civil society is already using data disclosed in the EU and Canada to hold governments accountable

Although disclosure is still in the early stages, civil society organizations in both the Global South and Global North have already started reviewing, monitoring, and using the data made available by mandatory disclosure laws in Canada and the EU to ensure accountability over resource revenues in resource-rich countries. For example, PWYP Indonesia, which uses EITI report data to track revenues, map concession areas and monitor subnational payments, analysed 2015 payments to Indonesian government entities reported under the EU Directives by BHP Billiton, BP, Jardine Matheson, Premier Oil, Shell, and Total, and disclosures under Norwegian law by Statoil. These seven companies’ payments in Indonesia in 2015 totalled more than US\$2.38 billion. PWYP Indonesia created an interactive online map of the companies as a public resource for citizens, including operational sites and data disaggregated by payment type, and included the data in their Android “Open mining” mobile application for wider accessibility. They plan to update these information resources annually.⁵²

In Nigeria, BudgIT, a technology-based civil society organisation, runs a “Fix our oil” campaign that uses infographics based on EU countries’ mandatory extractive company disclosures to give citizens a clearer

⁴⁸ Comment submitted by The Carter Center (21 Apr. 2015) at 1. Available at

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-68.pdf>.

⁴⁹ For additional examples see e.g. 80 Fed. Reg 80066-67 (citing examples from different commenters); Comment submitted by Oxfam and ERI (6 Mar. 2016), p. 6-9. Available at:

<https://www.sec.gov/comments/s7-25-15/s72515-59.pdf> (citing examples).

⁵⁰ See 81 Fed. Reg. at 49401 & n.536 (discussing industry support for EITI and citing specific issuer statements).

⁵¹ Ibid.

⁵² PWYP Indonesia, “Open mining”. Available at:

<https://play.google.com/store/apps/details?id=com.zan.android.pwyp&hl=en>; “Why mandatory disclosures matter for Indonesia”, (Apr. 2017). Available at:

<http://www.publishwhatyoupay.org/pwyp-resources/why-mandatory-disclosures-matter-for-indonesia>.

view of their government's oil and gas revenues. BudgIT uses social media to make its infographics available to wider audiences, including tagging government ministers with its Twitter posts.⁵³

PWYP Zimbabwe held trainings with local communities, relying in part on payment data disclosed by Anglo American for its Unki platinum mine, to empower citizens in their efforts to advance tax transparency. Workshops were held with 20 representatives of the Marange and Shurugwi communities to enable them to develop their skills in assessing local mining tax revenue alongside local government budget and financial statements, as a tool to better support their advocacy for better funding for local economic and social development from the proceeds of mineral extraction.⁵⁴

Independent industry analysts OpenOil have used mandatory disclosures BP, Shell, and Statoil to develop a public analysis of oil pricing at a granular level - information not otherwise available to the public without paying pricey fees for market data through subscription services. Their work, using production entitlement payment information disclosed in the EU, displays the price of oil across the companies' different projects in different countries in a particular year, and finds that prices spread across a wide range, including wide variation in the concurrent price of oil for different projects in the same country. This kind of data and analysis will increasingly enable citizens and civil society to identify patterns and outliers in company payment reports and government oil sale prices, enabling improved public oversight, more informed debate and ultimately better public policymaking.⁵⁵

The utility of the information produced thus far in ensuring citizens are getting a good deal on their natural resources has not been limited only to resource-rich developing countries. PWYP-US analyzed 2015 state and federal tax payments made by nine major extractive companies operating in the US using companies' mandatory and voluntary financial disclosures. This included reports disclosed under UK law from BP, Rio Tinto, Shell and others. The analysis raised questions about the rationale for the low taxation rate, and provided a basis for a more informed public debate.⁵⁶

Other organizations are working to ensure that citizens anywhere in the world can easily access and use payment data now being disclosed. For example, the Natural Resources Governance Institute ("NRGI"), a leading global think tank on oil, gas and mining governance, has launched an [online repository](#) of open-source data on oil, gas, and mining projects to support citizens in monitoring project and national level revenue flows in their countries.⁵⁷ NRGI has also produced a briefing examining the payments to Nigerian government entities by oil and gas companies, demonstrating how this data can be used in-country to conduct project, company, government entity and payment analysis. This briefing analyzed

⁵³ BudgIT, "Fix our oil". Available at: <http://fixouroil.com/wp-content/uploads/2017/04/Oil-Gas-Payments.pdf>.

⁵⁴ PWYP Zimbabwe, "Community data literacy for demand driven change", June 2017. Available at: http://www.publishwhatyoupay.org/wp-content/uploads/2017/06/PWYP-Data-Extractor-Case-Study_Mukasiri.pdf

⁵⁵ OpenOil, "With mandatory disclosures, more open, granular oil price data", August 2016. Available at: <http://openoil.net/2016/08/15/with-mandatory-disclosures-more-open-granular-oil-price-data/>.

⁵⁶ PWYP-US, "Is the United States getting a good deal on its natural resources?", April 2017. Available at: <http://www.extractaffect.org/blog/is-the-united-states-getting-a-good-deal-on-its-natural-resources-a-taxing-question>.

⁵⁷ NRGI, "Resource Projects". Available at: <http://resourceprojects.org/>.

\$14.6 billion in payments to 10 Nigerian government entities made by seven oil and gas companies, including Chevron, Shell, Statoil, and Total.⁵⁸

PWYP International runs the [Data Extractors Programme](#) to build the capacity of civil society to access, analyze, and present the data. To date, the program has helped train analysts from around the world in advanced data analysis and data training skills and have conducted joint projects and case studies.⁵⁹

PWYP-US runs [Extract-A-Fact](#), a website that documents case studies of how citizens are putting payment data to use. These efforts enable citizens, activists, journalists and academics to find, sort, analyze and visualize oil, gas and mining payment data to hold governments to account.⁶⁰

- b. Developments over the last two years demonstrate that greater transparency is desperately needed to combat corruption

The significant corruption risks in the oil and mining sectors are well recognized, including by leading compliance firms such as Ernst and Young⁶¹, PricewaterhouseCoopers (PwC)⁶², and KPMG⁶³. For example, Ernst and Young makes clear the corruption risks that emerge at the contract level and describe how bribes to secure and maintain contracts can be extracted from legitimate, contractually-obligated payments made by companies – including those required for disclosure under Section 1504:

“In emerging markets, companies may be exposed to government officials seeking bribes in return for these permits. Where lucrative development agreements for rights to reserves are available, companies may come under pressure to bribe high ranking politicians in order to secure such contracts. Additionally, taxes and other remittances on revenues and royalties for extraction and production agreements may bypass government bank accounts and be diverted to individuals working in government. Bribes are not just payments to individuals or entities. Indirect bribery can include, for example, contributions to scholarship funds, charitable donations, or payments to local development funds set up to provide government official with a

⁵⁸ NRGI, “Nigeria’s Oil and Gas Revenues: Insights from New Company Disclosures”, December 2017. Available at: <https://resourcegovernance.org/sites/default/files/documents/nigeria-oil-revenue.pdf>.

⁵⁹ For more information, see PWYP International’s website: <http://www.publishwhatyoupay.org/learning/data-extractors/>.

⁶⁰ See: www.ExtractAFact.org. See Appendix II.

⁶¹ Ernst and Young, Managing Bribery and Corruption Risks in the Oil and Gas Industry at P. 4. [http://www.ey.com/Publication/vwLUAssets/EY-managing-bribery-and-corruption-risks-in-the-oil-and-gas-industry/\\$FILE/EY-managing-bribery-and-corruption-risks-in-the-oil-and-gas-industry.pdf](http://www.ey.com/Publication/vwLUAssets/EY-managing-bribery-and-corruption-risks-in-the-oil-and-gas-industry/$FILE/EY-managing-bribery-and-corruption-risks-in-the-oil-and-gas-industry.pdf)

⁶² PricewaterhouseCoopers, The cost of corruption – too big to ignore? <https://www.pwc.com/gx/en/issues/economy/global-economy-watch/cost-of-corruption.html>. PwC analysis from 2015 and 2016 CEO survey: “Our analysis suggests that commodity-intensive industries such as mining, construction and oil and gas extraction are areas where CEOs feel that corruption poses a significant threat. This makes sense as extractive industries are often in less developed economies, where corruption tends to be more of a problem and require a set of permits and official interactions with government which can create opportunities for bribery, and so, corruption.”

⁶³ KPMG Global Energy Institute, The growing global challenge: Managing anti-bribery and corruption compliance in energy and natural resources, November 9, 2015. <https://home.kpmg.com/xx/en/home/insights/2015/11/anti-bribery-corruption-compliance-energy-natural-resources.html>

direct or indirect benefit. These may in themselves appear to be valid transactions, making it difficult for companies to detect improper payments.”⁶⁴

Furthermore, the slew of recent high-level corruption scandals and investigations confirm that existing anti-corruption laws and voluntary initiatives are insufficient to properly deter and expose corruption involving U.S.-listed companies, with negative impacts for investors, governments, and citizens.⁶⁵

For example, revelations of widespread bribery and corruption allegations flowing out of the still ongoing investigations into Brazilian oil company Petrobras (a U.S. listed company) have had sweeping ramifications for the country, the region, and investors. The scandal has implicated dozens of high-level politicians - including former President Luiz Inacio Lula da Silva and his successor Dilma Rousseff - and businesspeople as part of a widespread investigation into an estimated \$3 billion in bribery, money laundering, and kickbacks involving Petrobras officials. In April 2015, Petrobras announced that the company had lost \$17 billion to mismanagement and graft, its market value had been reduced by half, and that it had become burdened by \$100 billion in debt.⁶⁶ In January 2018, Petrobras announced a \$2.95 billion settlement to a securities class action lawsuit filed in the United States District Court for the Southern District of New York.⁶⁷ The scandal is estimated to have reduced Brazil’s GDP by 0.75 percent in 2015, plunged faltering Brazilian economy into recession and an its worst economic crisis in more than a century, and led to a downgrade of Brazil’s sovereign bonds to junk status.⁶⁸

Allegations of payments by Shell and Eni, an Italian oil company, to the former Nigerian oil minister to obtain rights to a valuable oil block have triggered investigations in numerous countries that have implicated executives at the highest levels.⁶⁹ Shell and ENI executives are currently on trial in Italy (with proceedings set to continue in May) facing allegations that the companies paid \$1.1 billion for rights to block OPL 245, with the knowledge that those funds were diverted away from a government account to the former oil minister who distributed \$523 million in cash as bribes to top government officials, including the Nigerian president himself. Leaked internal emails published by Global Witness show that senior Shell executives knew that their payment was likely to fund a vast bribery scheme. According to the prosecutor \$50 million in cash was allegedly delivered directly to the home of Eni’s current Chief Operating Officer. The \$1.1 billion diverted away from the Nigerian people in the upfront payment is roughly equivalent to the country’s entire health budget. This matter also highlights the risks to investors as Shell and Eni - and ultimately their shareholders - now face the potential loss of an oil block

⁶⁴ Ernst and Young, Managing Bribery and Corruption Risks in the Oil and Gas Industry

⁶⁵ See, e.g. James Osborne, Oil industry rocked by global corruption scandals (Feb. 2, 2018). Available at <https://www.thestar.com/business/2018/02/02/oil-industry-rocked-by-global-corruption-scandals.html>

⁶⁶ Paulo Sotero, “Petrobras Scandal”, January 25, 2018. Available at: <https://www.britannica.com/event/Petrobras-scandal>.

⁶⁷ Petrobras Form 6-K submitted on January 3, 2018. https://www.sec.gov/Archives/edgar/data/1119639/000130901418000011/htm_11841.htm.

⁶⁸ Paulo Sotero, “Petrobras Scandal”, January 25, 2018. Available at: <https://www.britannica.com/event/Petrobras-scandal>.

⁶⁹ See e.g. Sarah Kent and Eric Sylvers, Inside the Bribery Scandal Sweeping Through the Oil Industry, The Wall Street Journal, (Feb. 13, 2018), <https://www.wsj.com/articles/inside-the-bribery-scandal-thats-sweeping-through-the-oil-industry-1518543648>

that is key to the company's future reserves. Had public disclosure requirements been in place, it is much less likely that these kind of secret deals would have happened.⁷⁰

2. *Requiring detailed project-level disclosures will produce the most benefits for investors*

A rule that requires disaggregated project-level disclosures on a company-by-company basis also best serves the core interests of investors, consistent with Congress's investor protection objective,⁷¹ and consistent with the Commission's role as an investor advocate.

Throughout the Section 1504 rulemaking process, investors representing nearly \$12 trillion in assets under management made clear that public company-specific disclosure of project level payments are in their interests.⁷² Support from investors has not wavered. The California State Teachers' Retirement System (CalSTRS), the nation's second largest pension fund with investments of approximately \$225.3 billion, sent their fourth submission to the Commission in February 2018. The letter, sent by Anne Shaheen, Chairman of the Commission's Investor Advisory Committee and Director of Corporate Governance at CalSTRS, reaffirmed their strong support for a robust rule that aligns with the global standard being implemented in the EU and Canada.⁷³

⁷⁰ See: Global Witness report "Shell Knew." More information is available at:

<https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/shell-knew/>

⁷¹ See e.g. floor statements by Senator Ben Cardin and former Senator Richard Lugar: 156 CONG. REC. S3815 (17 May 2010) (Sen. Cardin) ("Investors need to know the full extent of a company's exposure"); id. at S3816 (17 May 2010) (Sen. Lugar) ("[the disclosures] would empower investors to have a more complete view of the value of their holdings"); 156 CONG. REC. S5873 (17 May 2010) (Statement from Senator Cardin) ("Transparency helps create more stable governments, which in turn allows US companies to operate more freely— and on a level playing field—in markets that are otherwise too risky or unstable."); and 156 CONG. REC. S3816 (17 May 2010) (Statement of Senator Lugar) ("Transparency empowers citizens, investors, regulators, and other watchdogs and is a necessary ingredient of good governance for countries and companies alike. . . . Transparency also will benefit Americans at home. Improved governance of extractive industries will improve investment climates for our companies abroad, it will increase the reliability of commodity supplies upon which businesses and people in the United States rely, and it will promote greater energy security."); Comment submitted by Sen. Benjamin L. Cardin, et al. (Feb. 5 Feb. 2016) Available at: <https://www.sec.gov/comments/s7-25-15/s72515-19.pdf> ("[O]ne of the primary goals of Section 1504 is to support and protect investors. [...]As the Commission notes in the proposed rule release, the Congressional record reflects the importance of ensuring that the disclosures required by the rule provide useful and transparent information for investors. Project-level payment disclosures for each company provides precisely the information investors want and need when they are making decisions about whether to invest in particular extractives companies and the risks involved in doing so. [Investors] cite a range of rationales for supporting the rule, including the protection to investors, as well as enabling more efficient functioning of capital markets and capital formation through the public disclosure of actual, relevant information from issuers. These investors constitute reasonable investors and it is crucial that the Commission recognize and acknowledge their significant interests in the final rule.")

⁷² This figure represents the total combined assets under management of each investor that expressed support for Section 1504 in letters submitted to the Commission. All sources and data are available at:

http://www.pwypusa.org/wp-content/uploads/2018/03/Investor-Institutions-and-AUM_v7.xlsx.

⁷³ Comment submitted by Anne Shaheen, Director of Corporate Governance, California State Teachers' Retirement System [CalSTRS] (1 Feb, 2018). Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf>; See also: Comment submitted by Erik Jan van Bergen, Chief Investment Officer, ACTIAM NV, et al. [incl. CalSTRS] (8 Mar. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-52.pdf>; Comment submitted by Peter

As reflected in the record, investors and other commentators have provided detailed explanations of the value of these disclosures.⁷⁴ For example, economist Jeffrey Sachs and the Columbia Center on Sustainable Investment have provided thorough demonstrations of how Section 1504 disclosures can be used in the valuation and analysis of securities in several different asset classes, using both active and passive management strategies.⁷⁵ Additional uses of issuer-specific, project-level disclosures highlighted in the record include:

- Calculate the riskiness of extractive companies as investments, especially those that operate in opaque, resource-rich countries where projects may cause social unrest or loss of the social license to operate, and where the size and frequency of payments may influence a company's reputation. This information also provides insights into a company's risk diversification strategy and its reliance on high-risk projects.⁷⁶ In the record, Calvert Investments raised the example of Guatemala, where Glamis Gold had to abandon valuable tax benefits as a result of the reputational damage arising from criticism that the company was contributing insufficiently to the national welfare.⁷⁷
- Improve the investment climate in resource-rich countries by diminishing opportunities for corruption and ameliorating the political instability risks associated with a lack of transparency.⁷⁸

Lundkvist, Senior Strategist & Head of Corporate Governance, AP3/Tredje AP-Fonden (Third Swedish National Pension Fund) et al. [incl. CalSTRS] (28 Apr. 2014). Available at:

http://www.sec.gov/comments/clf-title-xv/resource-extraction-issuers/resourceextraction_issuers36.pdf.

Comment submitted by CalSTRS (1 Mar. 2011) Available at:

<https://www.sec.gov/comments/s7-42-10/s74210-59.pdf>.

⁷⁴ See e.g. Comment letter submitted Steve Berexa, Managing Director, Global Head of Research, Allianz Global Investors et al. (28 Apr. 2014). Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-35.pdf> (writing on behalf of 34 signatories with assets under management collectively totaling more than \$6.40 trillion); Comment letter submitted by Peter Lundkvist, Senior Strategist & Head of Corporate Governance, AP3/Tredje AP-Fonden (Third Swedish National Pension Fund) et al. (28 Apr. 2014). Available at: http://www.sec.gov/comments/clf-title-xv/resource-extraction-issuers/resourceextraction_issuers36.pdf (investors representing more than \$2.85 trillion in assets under management).

⁷⁵ Comment submitted by Columbia Center on Sustainable Investment (30 Oct. 2015), pp.3, 9. Available at:

<http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-17.pdf>.

⁷⁶ Comment submitted by Global Witness (24 Feb. 2012), p.2; Comment submitted by Presbyterian Church (USA) (15 Feb. 2012), p.2; Comment submitted by 14 Members of the US House of Representatives (15 Feb. 2012); Comment submitted by Conflict Risk Network (7 Feb. 2012); Comment submitted by five US Senators (31 Jan. 2012), p.1; Comment submitted by TIAA-CREF (2 Mar. 2011), p.2; Comment submitted by British Columbia Investment Management Corporation (2 Mar. 2011), p.1; Comment submitted by Bon Secours Health System (1 Mar. 2011); Comment submitted by PGGM Investments (1 Mar. 2011); Comment submitted by SNS Asset Management (28 Feb. 2011); Comment submitted by Railpen Investments (25 Feb. 2011); Comment submitted by Global Witness (25 Feb. 2011), p.2; Comment submitted by Syena Investments (17 Feb. 2011), p.1; Comment submitted by Senator Carl Levin (1 Feb. 2011), p.1; Comment submitted by Calvert Asset Management Company (1 Mar. 2011), Exhibit B.

⁷⁷ Comment submitted by Calvert Asset Management Company (1 Mar. 2011), Exhibit B p.3. Available at:

<http://www.sec.gov/comments/s7-42-10/s74210-40.pdf>.

⁷⁸ Comment submitted by Columbia Center on Sustainable Investment (30 Oct. 2015), pp.7-8.; Comment submitted by Steve Berexa, Allianz Global Investors, et al., (28 Apr. 2014), pp.3-4; Comment submitted by 14 Members of the US House of Representatives (15 Feb. 2012); Comment submitted by British Columbia Investment Management Corporation (2 Mar. 2011), p.1; Comment submitted by Newground Social Investment (1 Mar. 2011); Comment

- Identify anomalous, individual payments that could indicate particular risks to investments – such as conflict-related insecurity or government interference in a project – or internal problems such as corruption that would otherwise be hidden by a high level of aggregation.⁷⁹
- Differentiate projects within countries that have different risk-profiles.⁸⁰
- Analyze individual companies for exposure to unexpected changes to tax and other regulatory regimes.⁸¹
- Analyze industry cost curves to identify projects that would be more susceptible to declining commodity prices.⁸²
- Better understand the impact of effective tax and royalty rates on individual projects.⁸³
- Calculate the profitable life of significant projects as part of general algorithms for analyzing individual investment targets.⁸⁴
- Properly discount future production of individual issuers in resource-rich countries based on analysis of each country’s dependence on the extractive sector and historical scenarios.⁸⁵
- Analyze how individual project payments will affect development costs or operating cash flow in case of disruptions, as in Nigeria, where shutdowns have affected operating performance.⁸⁶
- Mitigate investment risk regarding smaller companies whose assets are concentrated in a small number of countries.⁸⁷
- Make socially responsible investment decisions.⁸⁸

The Commission has recognized the investor benefits of Section 1504. For example, during the meeting at which the 2012 rule was announced, former Commissioner Aguilar stated plainly, “[t]he final rule we consider today is in the interest of investors,”⁸⁹ and former Commissioner Walter reiterated that the

submitted by Bâtirente (28 Feb. 2011); Comment submitted by California Public Employees Retirement System (28 Feb. 2011); Comment submitted by Syena Investments (17 Feb. 2011), p.1.

⁷⁹ Comment submitted by PWYP US (20 Dec. 2011), p.5; Comment submitted by EarthRights International, (20 Sep. 2011) p.7.

⁸⁰ Comment submitted by EarthRights International (20 Sep. 2011), p.7; Comment submitted by Global Witness (25 Feb. 2011), pp.16-17.

⁸¹ Comment submitted by Calvert Asset Management Company (1 Mar. 2011), p.2 Ex. A and Ex. B (listing regulatory, taxation, political, and reputational risks, as well as threats of unanticipated natural resource tax and permitting policy changes up to and including resource nationalization, even in developed countries); Comment submitted by Global Witness, (25 Feb. 2011), p.2; Comment submitted by Oxfam America (21 Feb. 2011), p.8.

⁸² Comment submitted by Columbia Center on Sustainable Investment (30 Oct. 2015), p.6. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-17.pdf>.

⁸³ See e.g. Comment submitted by Simon Clements, Alliance Trust (28 Oct. 2015), p.1; Comment submitted by Columbia Center on Sustainable Investment (30 Oct. 2015), p.8.

⁸⁴ Comment submitted by Calvert Asset Management Company (1 Mar. 2011), p. 2 Ex. A. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-40.pd2 Ex.A>.

⁸⁵ Ibid.

⁸⁶ Ibid., 3, and 1 – 2 Ex. B.

⁸⁷ Comment submitted by Railpen Investments (25 Feb. 2011); Comment submitted by SNS Asset Management (28 Feb. 2011).

⁸⁸ Comment submitted by Catholic Relief Services and the Committee on International Justice and Peace of the United States Conference of Catholic Bishops (9 Feb. 2011), p.1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-67.pdf>.

⁸⁹ Commissioner Luis A. Aguilar’s remarks. Available at:

<http://www.sec.gov/news/speech/2012/spch082212laa-extraction.htm>.

disclosures would “benefit investors, by among other things, helping investors model project cash flows and assess political risk, acquisition costs, and management effectiveness.”⁹⁰ In defense of the 2012 rule during litigation, the Commission argued that disclosure would “provide valuable information to investors when assessing risks and making investment decisions.”⁹¹ The Commission also argued that some investors legitimately want to avoid being seen as complicit in socially unjust ventures where companies are not paying a fair price for natural resources.⁹² Crucially, the Commission acknowledged that these benefits would accrue only if the information were available on an issuer-by-issuer basis.⁹³ The Commission should go further in acknowledging the benefits to investors and the substantial investor support for a robust rule, and the Commission must ensure that these interests are reflected in the rule by providing the level of detail necessary to make the information useful.

V. There is no basis for any categorical exemptions

Although industry commenters have previously sought sweeping rule-based exemptions from reporting, there is no evidence in the record justifying such exemptions, and the experience of companies reporting in other jurisdictions has only further demonstrated no such exemptions are needed.

A. No foreign laws prohibit disclosures

For years, the API and a small fraction of its members called for broad rule-based exemptions from disclosure based on the unsupported claim that certain countries prohibit the types of disclosures mandated by Section 1504. While API and ExxonMobil originally cited four countries – Angola, Cameroon, China, and Qatar – they subsequently dropped the claim with respect to Angola and Cameroon in the 2015-2016 rulemaking period.⁹⁴ There has never been any evidence to support API’s claims. Legal analysis submitted by PWYP and other coalition members showed no laws in China or

⁹⁰ Commissioner Elisse B. Walter’s remarks. Available at: <http://www.sec.gov/News/Speech/Detail/Speech/1365171490910>.

⁹¹ *API v. SEC*, No. 12-1668 (JDB), Oral Argument Tr. at 51 (D.D.C. June 7, 2013); see also SEC Rel. No. 68197, Order Denying Stay at 9 n.5 (8 Nov. 2012).

⁹² *API v. SEC*, No. 12-1668 (JDB), Oral Argument Tr. at 57:24 – 58:2.

⁹³ See *API v. SEC*, No. 12-1398, Br. of Resp. SEC, at 44 (D.C. Cir. Jan. 2, 2013) (“such information would be relevant to investors only if it were disclosed on an issuer-by-issuer basis.”) (emphasis in original); *API v. SEC*, No. 12-1668 (JDB), Oral Argument Tr. at 37-38 (D.D.C. June 7, 2013) 37 (“aggregated, anonymised [sic] disclosure mechanism” sought by API “would effectively eliminate one of the two legs on which this provision stands, and that’s providing information to investors.”).

⁹⁴ See 81 Fed. Reg at 49,412 (recognizing the claims with respect to Angola and Cameroon were dropped). This is unsurprising, since Cameroon became an EITI-compliant country in October 2013, meaning it must require, rather than prohibit, disclosure of resource extraction payments. See e.g. Comment submitted by Publish What You Pay US (16 Feb. 2016) at 53-54. Available at <https://www.sec.gov/comments/s7-25-15/s72515-45.pdf>. And Norwegian oil giant Statoil has been publishing its project-level payments to the Angolan government in its reports to the Norwegian government without issue since 2015. See, e.g. Statoil 2016 Annual Report and Form 20-F, pp. 250-255. Available at: <https://www.statoil.com/content/dam/statoil/documents/annual-reports/2016/statoil-2016-annual-report.pdf>.

Qatar barred disclosures, and that in any event, carve-out provisions in extractive contracts allowing disclosure of information where required by regulators has long been standard industry practice.⁹⁵

Reporting underway in the EU, Norway, and Canada, which notably do not allow any exemptions from reporting, now confirms beyond question no such laws exist and no foreign law-based exemptions are warranted. Analysis of the payment disclosures made by seven of the API's largest members (BHP,⁹⁶ BP,⁹⁷ ExxonMobil,⁹⁸ Maersk,⁹⁹ Shell,¹⁰⁰ Statoil,¹⁰¹ and Total¹⁰²) reveals that the parent and/or subsidiaries of those companies have collectively reported project-level payments of over \$28 billion to Angola, China, and Qatar.

In Angola, eight companies, including five API members (BP, ExxonMobil, Maersk, Statoil, and Total), have already disclosed project-level payments. One of the largest projects by payments disclosed, Block 17, is a joint venture between Total (as operator - 40% equity share), Statoil (23.33%), ExxonMobil (20%), and BP (16.67%).¹⁰³ Total, Statoil, ExxonMobil, and BP disclosed a total of \$2.4 billion in production entitlements, taxes, and fees for this project in 2016. Similarly ExxonMobil (as operator - 40% equity share), BP (26.67% equity share), Eni (20%), and Statoil (13.33%) as equity shareholders in Block 15 disclosed a combined \$2.5 billion in production entitlements and taxes for this project in 2016.¹⁰⁴ For both of these projects, the disclosing companies own 100% of the equity share in the project. Other

⁹⁵ See e.g. Comment Submitted by Oxfam America and Earthrights International (8 Mar. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-59.pdf>; Comment submitted by Oxfam America and EarthRights International (2 May 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-68.pdf>;

⁹⁶ BHP Billiton, Economic contribution and payments to governments Report 2016. Available at: <https://www.bhp.com/investor-centre/-/media/bhp/documents/investors/annual-reports/2016/bhpbillitoneconomiccontributionandpaymentstogovernments2016.pdf>.

⁹⁷ BP, Report on Payments to Governments 2016. Available at: <https://extractives.companieshouse.gov.uk/company/00102498/year/2016/version/1/zip>.

⁹⁸ ExxonMobil (ExxonMobil Luxembourg et Cie), Report on Payments to Governments in respect of Extractive Activities, Year Ended December 31, 2016. Submitted to and available at: Luxembourg Trade and Companies Register - <https://gd.lu/rcsl/1SdlcZ>

⁹⁹ Maersk Oil, Report On Payments To Governments For The Year 2016. Available at: http://files.shareholder.com/downloads/ABEA-3GG91Y/5029435967x0x926945/32C79691-85A9-4E4B-BACF-686B7C85DCD4/Maersk_Government_Payments.pdf.

¹⁰⁰ Royal Dutch Shell Plc. Report on Payments to Governments for the Year 2016 (13 Jun. 2017) Available at: https://www.shell.com/sustainability/transparency/revenues-for-governments/_jcr_content/par/textimage_569728713.stream/1497344461477/2a405ab3befd1a4f3639369b63b9a6ae14c219354d96dbecf22ccd6006cfd6bb/rds-report-payments-to-governments-2016.pdf.

¹⁰¹ Statoil, 2016 Annual Report and Form 20-F. Available at: <https://www.statoil.com/content/dam/statoil/documents/annual-reports/2016/statoil-2016-annual-report.pdf>.

¹⁰² Total, Registration Document 2016 (17 Mar. 2017) Available at: https://www.total.com/sites/default/files/atoms/files/ddr2016_va_web.pdf.

¹⁰³ Total, Total in Angola. Available at: <https://www.total.com/en/Angola>

¹⁰⁴ ExxonMobil, Operations in Angola. Available at: <http://corporate.exxonmobil.com/en/company/worldwide-operations/locations/angola/about/overview>.

companies, including Chinese company Sinopec¹⁰⁵ and Russian state owned company Gazprom,¹⁰⁶ have also made project-level payment disclosures for Angola.

In Qatar, four API members (BP, Shell, Maersk, and Total) have disclosed a combined \$6 billion in project-level payments. In 2016, Maersk as operator of Al Shaheen, the largest oil field in Qatar, disclosed \$2.7 billion in production entitlements, taxes, and fees.¹⁰⁷

In China, ten companies, including three Chinese companies and four API members (BP, BHP, Shell, and Total), disclosed over \$3.3 billion in project-level payments. In 2016, Total paid over \$210 million in production entitlements and taxes for the Sulige gas field, in which it holds a 49% equity share.¹⁰⁸ The Chinese National Petroleum Corporation (CNPC) is the operator and owner of the remaining 51% equity share in the project.¹⁰⁹ The US-listed Chinese state-owned companies CNOOC and China Petroleum & Chemical Production Corporation (Sinopec) have reported their project-level payments to China without issue.¹¹⁰

In Cameroon, two UK-incorporated companies, Dana Petroleum and Aggregate Industries, have disclosed over \$20 million in payments under the UK's payment disclosure law.¹¹¹ Cameroon implements the EITI, which requires all companies (including ExxonMobil and a subsidiary of Royal Dutch Shell) to report their payments to governments in a public report.¹¹²

¹⁰⁵ China Petroleum & Chemical Corporation, Report on Payments to Governments for 2015 and 2016. Available at: <http://tools.morningstar.co.uk/tsweu6nqxu/globaldocuments/document/rnsNewsItem.aspx?DocumentId=384822627888182>.

¹⁰⁶ Gazprom, Consolidated Report On Payments To Governments For The Year 2016. Available at: <http://www.gazprom.com/f/posts/44/307258/gazprom-consolidated-report-2016-en.pdf>.

¹⁰⁷ Maersk Oil, Report On Payments To Governments For The Year 2016. Available at: http://files.shareholder.com/downloads/ABEA-3GG91Y/5029435967x0x926945/32C79691-85A9-4E4B-BACF-686B7C85DCD4/Maersk_Government_Payments.pdf.

¹⁰⁸ Total, Registration Document 2016 (17 Mar. 2017). Available at: https://www.total.com/sites/default/files/atoms/files/ddr2016_va_web.pdf.

¹⁰⁹ Total, Total in China. Available at: <https://www.total.com/en/china>.

¹¹⁰ CNOOC Ltd. et al. Extractive Sector Transparency Measures Act Report (22 May 2017). Available at: http://www.cnooltd.com/jcms/jcms_files/jcms1/web5/site/attach/0/1705261738577119669.pdf; China Petroleum & Chemical Corporation, Report on Payments to Governments for 2015 and 2016 (30 June 2017). Available at: <http://tools.morningstar.co.uk/tsweu6nqxu/globaldocuments/document/rnsNewsItem.aspx?DocumentId=384822627888182>.

¹¹¹ Dana Petroleum Ltd., Report on Payments to governments 2016. Available at: <https://extractives.companieshouse.gov.uk/company/03456891/year/2016/version/1/zip>; Aggregate Industries UK, Report on Payments to governments 2015. Available at: <https://extractives.companieshouse.gov.uk/company/00245717/year/2015/version/1/zip>.

¹¹² Extractive Industries Transparency Initiative. Rapport De Conciliation Des Flux Financiers Et Des Volumes Relatifs A L'exploration Et L'exploitation Des Hydrocarbures Et Des Mines Solides Au Titre De L'annee 2015. Available at: <https://eiti.org/sites/default/files/documents/rapportitiecameroun2015-msversionfinale-signee29122017.pdf>. In 2017, the EITI Board moved to require project-level reporting for all reports covering fiscal years ending on or after December 31, 2018. Extractive Industries Transparency Initiative. Guidance note 29 on project-level reporting. (Sep. 2017). Available at: https://eiti.org/document/guidance-note-29-on-projectlevel-reporting#Step_1.

Beyond those four countries, substantial reporting is underway around the world. A survey by NRGi found under UK law alone, companies had reported more than US\$136 billion paid to governments in 112 countries for FY 2015.¹¹³ Despite the absence of any exemptions, no companies have reported any problems with foreign laws, nor any material impact on cash flow or any other negative effects from disclosure in any countries. This new evidence confirms there is no basis for any rule-based exemptions based on foreign laws – nor any other basis.

B. Any consideration of exemptions on a case-by-case basis must be coupled with robust transparency and substantial safeguards that provide for careful scrutiny

PWYP-US has consistently shown that no exemptions from reporting are warranted, and the positive experience of companies in other markets reporting without any exemptions at all further undermines any purported need for exemptions. An approach allowing issuers to apply for case-by-case exemptions in a new rule, despite this new evidence, would only be acceptable if more substantial safeguards are put in place (as compared to the 2016 rule) to allow careful scrutiny of any claimed exemptive need, to prevent misuse and abuse of the exemptions process, and to ensure any approved exemptions are narrowly tailored in duration and scope.

Over the course of this rulemaking, issuers have repeatedly made dishonest and misleading claims as to the existence and scope of foreign disclosure prohibitions.¹¹⁴ Transparency in the process is thus essential. Any process that allowed companies to unilaterally exempt themselves from reporting for a particular country (or on other grounds) or eschewed transparency in a closed process would be wholly unacceptable.¹¹⁵

VI. The new rule should be based on substantially revised cost assessments

As the Commission prepares a new rule, it must take into account new evidence with respect to costs. The experience of companies reporting in other jurisdictions shows that the Commission's cost predictions in the 2016 rule release were inaccurate in several respects.

First, the Commission's 2016 rule release should not have included potential costs associated with hypothetical laws in China and Qatar prohibiting disclosure,¹¹⁶ since the evidence showed no such laws existed. Now that numerous companies are reporting project-level payments in China and Qatar without issue, the cost assessments in a new rule should exclude potential losses issuers might experience if forced to shed assets in a fire sale because of nonexistent laws that might prohibit Section 1504

¹¹³ NRGi, "Oil company data on payments to governments is now coming thick and fast", June 2017, <https://resourcegovernance.org/blog/oil-company-data-payments-governments-now-coming-thick-and-fast>

¹¹⁴ See Comment submitted by Oxfam and ERI at 16. (8 Mar. 2016). Available at <https://www.sec.gov/comments/s7-25-15/s72515-59.pdf>

¹¹⁵ See Comment submitted by Oxfam and ERI at 15-17. (8 Mar. 2016). Available at <https://www.sec.gov/comments/s7-25-15/s72515-59.pdf>

¹¹⁶ See 81 Fed. Reg. at 49,414-17.

disclosures. Doing this will substantially – and accurately – reduce the projected costs associated with the rule.

Second, the revised assessment should include a reassessment of compliance costs, as the 2016 rule relied on limited data that was substantially dated and failed to properly represent the realities of compliance.

Cost estimates put forth by Exxon (and relied on by the Commission) in particular, which were based on the 2010 proposed rule, were significantly overstated. Experience over the last two years further confirms these numbers lack any basis in reality, and show the assessments put forth by Claigan Environmental are far more accurate.

Claigan Environmental, a company that specializes in material disclosure in oil, gas, and mineral supply chains, carried out a comprehensive cost analysis in 2016 to estimate the total aggregate cost for companies to comply with the project-level reporting requirement of Section 1504.¹¹⁷ Claigan's costing methodology uses the total number of fields and mines and the average number of SEC issuers per field or mine to calculate the total cost for affected issuers. This methodology is far more accurate than previous cost estimates, because it draws on significantly more data (rather than relying on anecdotal data), reduces estimation errors, and provides estimates of compliance costs for both a single company and all SEC issuers.

Claigan's study concluded that the total initial industry cost is expected to be \$181 million in the first year and \$74 million per year for ongoing costs. The study took a conservatively high estimate of the initial compliance costs in the first year given the need for companies to implement accounting systems and processes upfront to aggregate the data and to ensure accurate disclosures. Once these systems are in place, the level of effort will likely go down significantly by another factor of two. Claigan states that its costs calculations are also conservative because they cover all SEC issuers and do not take into account the fact that many SEC issuers will already be collecting and disclosing this information to comply with reporting obligations in other jurisdictions. The study estimates that the actual compliance cost could be at least 30% lower, assuming that over 30% of issuers are subject to similar laws in other jurisdictions, according to Commission estimates.¹¹⁸ Claigan also analyzed companies' submissions to the Commission on compliance costs and concluded that most of these submissions grossly overstated their compliance cost estimates.

Claigan's conclusion that many companies had overestimated their compliance costs is strongly supported by new information provided by UK-incorporated and London Stock Exchange-listed Tullow Oil. Tullow, which discloses under UK and EU law its payments in Côte d'Ivoire, Equatorial Guinea,

¹¹⁷ Comment submitted by Claigan Environmental. (16 Feb. 2016). Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-72.pdf>

¹¹⁸ Claigan study references the review of affected issuers by the SEC that found that 268 out of a total of 877 will already be subject to similar laws in other countries. See Securities and Exchange Commission, SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80093. Available at:

<http://www.gpo.gov/fdsys/pkg/FR-2015-12-23/pdf/2015-31702.pdf>

Ethiopia, Gabon, Ghana, Guinea, Ireland, Jamaica, Kenya, Madagascar, Mauritania, Mozambique, Namibia, the Netherlands, Norway, Pakistan, Republic of Congo, South Africa, Uganda, and the UK, states that “[i]mplementation costs were low given that we began reporting just as our internal processes were changing. We estimate the cost to have been less than US \$150,000 for the initial report, and ongoing costs (including assurance work) would be about the same. This is calculated using internal Tullow rates, so the actual opportunity cost will be lower as we have not employed any extra people or services to facilitate this reporting.”¹¹⁹

Additionally, the Commission’s revised cost assessment should exclude the portion of compliance that is attributable to other laws and regulations – this includes not only the costs for cross-listed issuers already fully reporting on all payments under rules in other markets, but also costs for US-listed issuers that are partially reporting project-level payments for their subsidiaries listed in other markets, such as Exxon, Chevron and ConocoPhillips. In addition, with 50 countries already implementing EITI, thousands of companies are participating in EITI reporting each year,¹²⁰ including a substantial number of US-listed issuers, and will already have systems in place for tracking and disclosing project-level payments for at least some of the countries they operate in, if not all. Following two years of reporting through the USEITI process, any issuers with operations confined to the US and within the USEITI materiality thresholds would also be accustomed to a similar reporting process and continue to benefit from efficiencies gained through repeated reporting.

Other record keeping and disclosure rules already in place similarly limit the added costs of Section 1504 disclosures. For example, the Foreign Corrupt Practices Act’s books and records and accounting provisions already require companies to keep reasonably detailed records of all payments and account for all their assets and liabilities.¹²¹ Additionally, U.S. parent entities of multinational corporations must file country-by-country reports with the Internal Revenue Service containing detailed information relating to taxes, profits, stated capital, and revenues, including income taxes paid in each country of operation.¹²² The Commission’s cost analysis should exclude the work companies are already required to do, and only reflect the added costs of specific to Section 1504.¹²³

¹¹⁹ Tullow Oil, email communication to PWYP UK (5 Feb. 2018), quoted with the company’s permission.

¹²⁰ See, e.g. EITI, 2016 Progress Report, p. 32. Available at https://eiti.org/sites/default/files/migrated_files/progressreport.pdf (noting “[a]round 3,000 companies contributed to EITI reporting in the past year”).

¹²¹ Recordkeeping and Internal Controls Provisions, Section 13(b) of the Securities Exchange Act of 1934 [15 U.S.C. §78m]. Available at: <https://www.sec.gov/spotlight/fcpa/fcpa-recordkeeping.pdf>.

¹²² IRS, Country-by-country reporting guidance. Available at: <https://www.irs.gov/businesses/international-businesses/country-by-country-reporting-guidance>.

¹²³ Comment submitted by PWYP-US (16 Feb. 2016), p. 6. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-45.pdf>.

Appendix I

Industry Statements

Anglo American

- “Thank you very much for the invitation to respond on the matter of the US Congress bill to undo the regulations that implement Dodd-Frank Section 1504, on revenue transparency.”

“Firstly, we would like to clarify that we are not listed in the USA and therefore are not subject to the reporting regulations that implement Dodd-Frank Section 1504.”

“However, we are subject to, support and comply with the EU Transparency Directive, which means compliance with the UK/EU project by project reporting requirement. Furthermore, we also comply with the Canadian equivalent from this year forward.”

“Against this background and being a multinational company, we encourage alignment of transparency requirements across jurisdictions. We trust this should provide you with a sufficient answer.”¹²⁴

Barrick Gold

- “We believe that transparency— whether through disclosing payments to governments, reporting on our energy and water use, voluntarily opening ourselves to third-party scrutiny, or otherwise — is integral to being a true partner. As such, we support consistent global standards for payment transparency [...] transparency is a core value at Barrick that we strive to achieve in everything we do.”¹²⁵

BHP Billiton

- “To be meaningful, information and data should be disclosed in a format that is accessible and easy to understand. To this end, we support the establishment of a globally consistent regulatory disclosure framework, including equivalency provisions between jurisdictions. This would create a consistent basis for companies to disclose payments to governments, minimise compliance costs and make it easier for stakeholders to compare information between jurisdictions, sectors and companies. We remain concerned that the number and variety of local

¹²⁴ Response to an inquiry from the Business & Human Rights Resource Centre (Feb. 2017). This statement was signed by Jan Klawitter, Principal, International Relations, Anglo American. The statement is also available at: <https://business-humanrights.org/sites/default/files/documents/Anglo-American-response-re-revenue-transparency-2016.pdf>.

¹²⁵ Response to an inquiry from the Business & Human Rights Resource Centre (Feb. 2017). The full statement is available at: <https://business-humanrights.org/en/publish-what-you-pay-urges-oil-gas-mining-firms-to-support-us-law-on-disclosure-of-payments-to-govts-statements-of-support-by-8-firms#c151944>.

disclosure initiatives introduced in recent years will result in unhelpful complexity and we will continue to engage with governments and regulators to move towards global consistency.”¹²⁶

- “BHP Billiton is aware of on-going developments around the Congressional Review Act now being considered by US Congress and we are in discussion with relevant Washington stakeholders on this matter.”

“As clearly outlined in our Economic Contribution and Payment to Governments Reports of [2015](#) and [2016](#), BHP Billiton supports the establishment of a globally consistent mandatory disclosure framework with equivalency provisions across jurisdictions. Consistency of financial disclosure makes good business sense: It provides regulatory certainty, reduces compliance costs and facilitates ease of comparison of disclosed financial information across jurisdictions, which is in turn critical for civil society and other users of financial disclosure data. BHP Billiton expressed these views to the Securities and Exchange Commission (SEC) during their 2016 rule making process.”

“As a UK-listed company, we will continue to disclose our payments of taxes and royalties under the European Union Directive and support the establishment of a globally consistent mandatory disclosure framework with equivalency provisions across jurisdictions.”¹²⁷

- “A globally consistent mandatory framework will create a level playing field amongst the resource sector while minimizing the reporting burden and compliance costs for companies operating in multiple jurisdictions and ensuring stakeholders are able to access and analyze uniform data. Mandatory disclosure frameworks are an important step to enhanced natural resource governance. However it is critically important that data is meaningful, easily accessible and understandable so that it can contribute to informed debate regarding payments to and use of revenues by Governments from the commercial development of oil, natural gas and minerals.”¹²⁸
- “BHP Billiton is a founding supporter of the Extractive Industries Transparency Initiative (EITI) and an early adopter of best practice in disclosure and transparency. We believe transparency by governments and companies about revenue flows from the extraction of natural resources is an important element in the fight against corruption. We first disclosed our aggregate payments of taxes and royalties around the world 16 years ago. Since then, our level of disclosure in relation to payments to governments has continued to increase in line with our support of the EITI and our commitment to transparency. In FY2015, we publicly supported the EU Accounting Directive and voluntarily produced our BHP Billiton Economic contribution and payments to governments Report detailing our payments to governments on both a country-by-country and

¹²⁶ BHP Economic Contribution Report 2017 (7 Sep. 2017) Available at: <http://www.bhp.com/-/media/documents/investors/annual-reports/2017/bhpeconomiccontributionreport2017.pdf>.

¹²⁷ Response to an inquiry from the Business & Human Rights Resource Centre (Feb. 2017). This statement is also available at: <https://business-humanrights.org/en/publish-what-you-pay-urges-oil-gas-mining-firms-to-support-us-law-on-disclosure-of-payments-to-govts-statements-of-support-by-8-firms#c151634>.

¹²⁸ Comment submitted by BHP Billiton (25 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-9.pdf>

project-by-project basis in advance of any mandatory requirements to do so. We continued this level of disclosure in FY2016 through issuing our second Economic contribution and payments to governments Report.”¹²⁹

BP

- “As a member of EITI, BP works with governments, non-governmental organizations and international agencies to improve the transparency of payments to governments.”

“We disclose information on payments to governments for our upstream activities. We report on a country-by-country and project basis as required by UK regulation. These payments could be made in the form of production entitlements, taxes, royalties, bonuses, fees and infrastructure improvements”¹³⁰

- “BP supports the concept of transparency in revenue flows from oil and gas activities in resource-rich countries. It helps citizens of affected countries access the information they need to hold governments to account for the way they use funds received through taxes and other agreements.”¹³¹

“BP supports “alternative reporting” for foreign private issuers. In the event the Commission does not adopt an exemption for foreign private issuers, BP supports the Commission’s alternative reporting proposal. The option to submit BP’s UK Transparency Initiative report or its USEITI report would not only help to lessen the compliance burden of preparing and providing multiple reports, it would also benefit users of the data by providing a single dataset per company and avoid potentially confusing duplicative disclosures.”

“In addition, the Commission should in its adopting release identify those other jurisdictions whose rules meet the “alternative reporting” standard. BP strongly believes that the EU directives and the UK Transparency Initiative meet this test. Express recognition of which foreign jurisdiction’s disclosure requirement satisfies section 13(q)’s objectives would be highly beneficial to issuers subject to multiple jurisdiction rules.”¹³²

Eni SpA

- “Several legislative initiatives on transparency have/are being developed in different jurisdictions (EU USA, Canada, Norway), potentially creating diverse disclosure obligations. While we are currently working to implement the EU Directives regarding 2016 payments, asymmetry remains between companies that are subject to reporting obligations and companies that are immune. We therefore welcome the new Rule proposed by the SEC in the

¹²⁹ BHP Billiton Sustainability Report 2016. Available at: https://www.bhp.com/~media/bhp/documents/investors/annual-reports/2016/bhpbillitonsustainabilityreport2016.pdf?utm_source=Website&utm_medium=Organic&utm_term=SusDownloadNews&utm_campaign=AR2016.

¹³⁰ BP. “Fostering transparency and anti-corruption.” Available at: <https://www.bp.com/en/global/corporate/sustainability/value-to-society/fostering-transparency.html>.

¹³¹ BP Report on payments to governments, Year ended 31 December 2016, p. 3. Available at: <https://www.bp.com/content/dam/bp/en/corporate/pdf/sustainability-report/group-reports/bp-report-on-payments-to-governments-2016.pdf>.

¹³² Comment submitted by BP (16 Feb. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-25.pdf>.

USA, as it goes in the direction of levelling the field in the industry and addresses the issue of multiple reporting obligations and the associated compliance costs.”¹³³

Goldcorp

- “Goldcorp actively support the objectives of the Extractive Industries Transparency Initiative (EITI), the International Council on Mining and Metals (ICMM), the Global Reporting Initiative (GRI), the United Nations Global Compact (UNGC), and the World Gold Council (WGC), among other initiatives that support transparency in payments to government. Through the Mining Association of Canada (MAC), Goldcorp also participates with the Extractives Sector Transparency Measures Act (ESTMA) Working Group to ensure greater transparency in the extractive industries in Canada and overseas.”

“Goldcorp will participate with industry associations such as ICMM and MAC to continue to advance industry-wide best practices in support of revenue transparency.”¹³⁴

Kosmos Energy

- “Kosmos believes resource revenues are more likely to be managed in the best interests of a country if payments and receipts are made transparently, and if accountability measures are in place for the use of these revenues.”

“In 2014, we made a policy decision to disclose payments to governments at a project level, as laid out in the new European Union Accounting Directive, an initiative that aims to improve corporate accounting practices and transparency. We believe that this type of disclosure is beneficial to investors, civil society, and local communities, and reflects evolving international expectations.”

“In October 2015, Kosmos submitted a comment letter to the United States Securities and Exchange Commission (SEC) as part of the SEC rulemaking process for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which proposes requiring US-listed companies to disclose payments to US and foreign governments as a standard part of their reporting to the SEC. In our comment letter to the SEC, we highlighted our commitment to transparency, including our project level disclosure in accordance with the EU Accounting Directive. A copy of this letter is available here.”¹³⁵

¹³³ Comment submitted by Eni SpA (31 Jan. 2016). Available at:

<https://www.sec.gov/comments/s7-25-15/s72515-12.pdf>.

¹³⁴ Response to an inquiry from the Business & Human Rights Resource Centre (Feb. 2017). This statement was signed by Dominique Ramirez, Director, Corporate Social Responsibility, Goldcorp. The statement is also available at:

<https://business-humanrights.org/sites/default/files/documents/Goldcorp%20response%20to%20Dodd%20Frank%20repeal%20act%2006%202017.pdf>.

¹³⁵ Kosmos Energy website. Available at: <http://www.kosmosenergy.com/responsibility/transparency.php>; See: Comment submitted by Kosmos Energy (19 Oct. 2015). Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-95.pdf>.

Newmont Mining

- “Newmont believes that revenue transparency is essential to generating long-term value. Building broader awareness of how taxes and royalties are spent in-country – and how much is paid – can provide greater clarity around the economic and social benefits natural resource development can bring to local communities. In addition, reporting those revenues according to internationally accepted standards makes that information more credible and accessible to all stakeholders.”

“For more information on Newmont’s commitment to revenue transparency, please visit our annual sustainability report ‘Beyond the Mine.’”¹³⁶

Rio Tinto

- “Rio Tinto supports tax transparency and initiatives like EITI as a cornerstone of good governance and to improve understanding of the mining sector's economic contribution. We voluntarily published our first Taxes Paid report in 2010 and have continued to publish every year since. We also comply with mandatory reporting obligations under the UK Reports on Payments to Governments Regulations and the Canadian Extractive Sector Transparency Measures Act. We support consistent global standards of tax transparency and reporting applying in all countries.”¹³⁷

“Potentially we will face multiple and inconsistent reporting requirements, and will incur significant additional costs in complying with these obligations, often with little or no added public benefit.”

“We therefore believe governments should work together to adopt a consistent global approach, which establishes disclosure requirements and thresholds that are proportionate. We believe any mandatory rules need to remain focused on the ultimate objectives, both for governments and for companies namely: • Good tax governance • Accountability and • Transparency.”¹³⁸

Royal Dutch Shell

- “We support unified revenue reporting rules and standards applicable to all multinationals, irrespective of their ownership or place of business.”

“Shell is actively involved in the revenue transparency discussion and we are working with stakeholders to develop an approach which takes into account the views of the relevant stakeholders involved, i.e. industry, governments and civil society.”¹³⁹

¹³⁶ Response to an inquiry from the Business & Human Rights Resource Centre (Feb. 2017). This statement is also available at: <http://ourvoice.newmont.com/2017/02/02/the-importance-and-value-of-revenue-transparency/>; See: Newmont Mining, “Beyond the Mine.” Available at: <http://sustainabilityreport.newmont.com/2015/>.

¹³⁷ Response to an inquiry from the Business & Human Rights Resource Centre (Feb. 2017). This statement is also available at: <https://business-humanrights.org/en/publish-what-you-pay-urges-oil-gas-mining-firms-to-support-us-law-on-disclosure-of-payments-to-govts-statements-of-support-by-8-firms#c151645>.

¹³⁸ Rio Tinto Taxes paid in 2016 report. Available at: http://www.riotinto.com/documents/RT_taxes_paid_in_2016.pdf.

¹³⁹ Royal Dutch Shell, “Revenues for Governments.” Available at: <https://www.shell.com/sustainability/transparency/revenues-for-governments.html>.

Statoil

- “We welcome initiatives to strengthen revenue transparency legislation, including disclosure of payments per project, as laid out in the EU Transparency Directive and in comparable Norwegian legislation that came into effect in 2014. However, a global standard for revenue disclosure would be even more welcome. For Statoil, it is important that revenue transparency regulation applies globally, is effective, and creates a level playing field for all relevant actors in society.”¹⁴⁰

Total

- “Total considers that the re-introduction of Rule 13q-1 under the Dodd Frank Act should both restore a level playing field among major publicly-listed oil and gas companies and improve transparency to help combat global corruption and increase accountability. Total recognizes that the SEC positively answers its concerns by proposing to adopt an approach similar to European transparency legislation.”

“Furthermore, the SEC's proposal would allow foreign issuers already reporting payments to producing countries to meet the requirements of the commission's proposed rules if the foreign rules were determined by the commission to be substantially similar to the rule adopted under Section 13(q). Total believes equivalency recognition should help global transparency initiatives evolve toward a common standard, thereby improving the quality and comparability of information. It encourages foreign jurisdictions that have not yet adopted resource extraction payment disclosure laws to provide a level of disclosure that is consistent with U.S. and EU rules. Therefore, Total considers it important that the SEC substantially adopt its currently proposed rules in final form and, quickly thereafter, unilaterally make a determination of the equivalency of EU rules as transposed by the Member States of the European Union into their national laws.”¹⁴¹

International Council on Mining and Metals (ICMM)

- “The advantage of the mandatory reporting laws is that they create a level playing-field for industry. The vast majority of ICMM members are required to publish their payments to government, regardless of whether they are operating in a country that implements the EITI standard or not. Furthermore, the data required by the mandatory reporting laws will be much more up-to-date than the EITI data which can be two years old by the time it is published.”¹⁴²
- “In addition to existing commitments under the ICMM *Sustainable Development Framework* ICMM member companies commit to:
 1. Include a clear endorsement of efforts at the international level to enhance the transparency of mineral revenues, including EITI, on their website and/or in their sustainable development reports. To submit a completed international-level self-assessment form to the EITI Secretariat for posting on the EITI website.

¹⁴⁰ Statoil 2016 Sustainability Report. Available at:

<https://www.statoil.com/content/dam/statoil/documents/sustainability-reports/sustainability-report-2016-v2.pdf>.

¹⁴¹ Response to an inquiry from the Business & Human Rights Resource Centre (Feb. 2017). This statement was signed by Patrick Pouyanné, Chief Executive Officer, Total. The statement is also available at:

<https://www.sec.gov/comments/s7-25-15/s72515-14.pdf>

¹⁴² ICMM website. Available at:

<https://www.icmm.com/en-gb/society-and-the-economy/governance-and-transparency/revenue-transparency>

2. Engage constructively in countries that are committed to implementing EITI, consistent with the multi-stakeholder process adopted in each country.
3. Compile information on all material payments by country and by project at the appropriate levels of government. In the case of EITI implementing countries, this should be provided to the body assigned responsibility for reconciling details of payments by companies and revenue data provided by government according to the agreed national template. Material payments by companies are expected to have been independently audited, applying international standard accounting practices.
4. Support the public disclosure (ie publication) of material payments by country and by project. For EITI, this should be in line with the implementation approach adopted in-country.
5. Engage constructively in appropriate forums to improve the transparency of mineral revenues – including their management, distribution or spending – or of contractual provisions on a level-playing field basis, either individually or collectively through ICMM.”¹⁴³

¹⁴³ ICMM, “Transparency of Mineral Revenues.” (July 2009). Available at: <https://www.icmm.com/en-gb/members/member-commitments/position-statements/transparency-of-mineral-revenues-position-statement>.

Appendix II:
Examples of Extractives Data Use

<https://politicsofpoverty.oxfamamerica.org/2017/09/to-stop-losing-mining-revenues-dig-the-details/>

“To stop losing mining revenues, dig the details”

September 29, 2017

By Kathleen Brophy, Oxfam America, and Eneya Maseko, Oxfam in Zambia

How detecting and deterring “transfer mispricing” in Zambia’s billion dollar mining sector can boost government coffers in a time of fiscal crisis.

Corporate tax dodging is not a victimless act. When corporations employ aggressive means to avoid paying tax in developing countries, citizens inevitably foot the bill. Corporate tax avoidance deprives governments of desperately needed tax income for the provision of public goods and services forcing governments to choose between cutting public services or collecting additional tax from citizens. So, while companies report eight and nine figure profits, citizens face eroding hospitals and schools and struggle to pay higher prices for basic goods. However, when companies do this while in the process of extracting a high value, exhaustible commodity from beneath citizens’ feet, the offense is all the more egregious.

According to the [Mbeki High Level Panel on Illicit Financial Flows](#), multinational tax avoidance in the oil and mining sectors across Africa is rampant. In countries like Zambia, where extractive industries contribute a significant portion of the country’s overall revenues, preventing aggressive tax avoidance is all the more critical for reducing inequality. This is especially true now in the context of Zambia’s fiscal crisis as the [country turns to the IMF](#) and capital markets for fiscal support.

According to [a report](#) by the Natural Resource Governance Institute, the mining sector in Zambia accounts for nearly 80 percent of all exports, contributes 12 percent of the country’s GDP and 30 percent of its tax revenue. Despite such positive statistics, ample evidence suggests that the Zambian government also loses a significant amount of mining sector revenue due to tax avoidance by multinational companies operating there as well as lax government regulations and enforcement. It doesn’t have to be this way. Governments are not powerless and can enact strong regulations to help prevent corporate tax avoidance. The situation in Zambia shows how relatively concrete actions taken by government could make a big difference.

Reforms necessary to address avoidance

One central tax avoidance tactic used in the Zambian context is transfer mispricing. Transfer mispricing involves the manipulation of prices used in a sale between two associated companies that serves to artificially shift profits out of a given country to reduce taxes owed. For instance, a subsidiary of a multinational mining company operating in Zambia could sell copper to an affiliated company in Switzerland at an artificially low price in order to minimize its income tax liability in Zambia and transfer the income to Switzerland, thus misrepresenting the true value of the minerals sold and depriving the Zambian government of tax revenue due.

The central challenge for regulators, tax authorities, and oversight institutions is to determine whether transfer mispricing has, in fact, occurred. The example above illustrates one basic challenge for regulators: to determine whether the price at which the mineral or another good was sold or a service rendered between related corporate entities was done at a fair market price.

In order to do this, tax authorities must be able to assess the validity of the transactions by comparing a transaction between two associated entities with other similar market transactions. For tax authority officials in Zambia to undertake this type of comparable analysis, tax authorities and oversight bodies must have the necessary information regarding all controlled transactions between Zambian-based mining companies and their associated entities. Without this basic information, the Zambia Revenue Authority is unable to monitor risky transactions and identify potential transfer mispricing.

Governments around the world commonly require transfer pricing documentation from companies so they must maintain, if not regularly submit, timely and accurate information about their related party transactions. However, there is currently no legal requirement in Zambia for the maintenance of transfer pricing documentation. This oversight is a significant obstacle to tackling transfer mispricing since government officials do not have the basic information they need to monitor and evaluate related party transactions.

Furthermore, Zambia's Income Tax Act, which could be used to regulate transfer pricing losses, currently mandates that mineral prices used in transactions between related entities be based on a reference price from an international exchange market. Unfortunately, the law also allows companies to make adjustments to the price used in transactions to account for specific details that may affect the price downward, such as ore quality. While this is a reasonable allowance, it does pose risk for abuse. This allowance increases the regulatory burden for the government, as it must also be able to evaluate the complex mineral valuation formulas used by companies to underpin the prices used in transactions.

In order to verify the valuation used by companies, the Government of Zambia must independently assess mineral quality. Mineral valuation responsibilities, including the monitoring of mineral exports, are shared between the Ministry of Mines and the Zambia Revenue Authority, along with other agencies all part of an initiative called the [Mineral Value Chain Monitoring Project](#). While agencies are [coordinating their work through the initiative](#), the protocol for mineral valuation procedures between agencies and the agency with ultimate jurisdiction over the matter is still unclear.

Progress made while key gaps remain

Recognizing these challenges and the need to increase revenue collection from the mining sector, the Government of Zambia has recently expanded efforts to improve mining oversight and prevent transfer mispricing. For instance, the government revised the Income Tax Act, strengthening Section 97 which sets out general transfer pricing guidelines and establishes the use of [the arms-length standard](#) as the basis for pricing all transactions between associated entities.

Such efforts are in line with ongoing efforts by Oxfam Zambia and partners including the Zambia Tax Platform to strengthen revenue generation, tax policy and payment transparency in the country's mining industry.

Oxfam welcomes the efforts of the Zambian government to protect the mining tax base by improving its legal and regulatory capacity to address transfer mispricing in the mining sector. Additionally, the government of Zambia must build on its existing practice, and require transfer pricing documentation in the forthcoming regulations ("statutory instruments") to the Income Tax Act. The regulations for the Income Tax Act should also include clear protocols for coordination between government agencies for the independent valuation of minerals.

While the regulations have stalled for some time, it is important that they are passed without further delay so as to provide a strong basis for regulating transfer pricing in Zambia's mining sector.

With these changes, Zambia will have a better chance of capturing much needed tax revenue from corporate tax payers, preventing the need to make regressive policy choices that hurt Zambians.

<http://www.extractafact.org/blog/why-is-niger-still-losing-out-to-areva>

“Why is Niger still losing out to Areva”

September 18, 2017

By Quentin Parrinello, Oxfam France & Publish What You Pay France

In 2014, Niger announced it had successfully renegotiated uranium extraction contracts with French state-owned company Areva to secure a greater share of the wealth deriving from their uranium resources. Three years later, an analysis carried out by Oxfam based on data released by Areva calls into question the benefits for Niger in the contract renegotiation.

This analysis was carried out as part of the data extractor program developed by [Publish What You Pay](#).

You can read more about Areva in Niger and more in the English version of [“Beyond Transparency: Investigating the Investigating the New Extractive Industry Disclosures.”](#) This report was published by [Publish What You Pay France](#), [Oxfam France](#), [ONE](#), and [Sherpa](#).

Understanding the context: why is Nigerien uranium so important for Areva?

Uranium is a strategic commodity for France. More than 75% of electricity produced in France comes from nuclear power. Most of the uranium used for nuclear combustion in France is supplied by Areva. Up to 1 in 5 lightbulbs in France would be lit up thanks to Nigerien uranium.

For years, civil society organizations have [called out Areva](#) for the uneven partnership with Niger. Despite vast resources in uranium, Niger has yet to convert this valuable resource into tangible wealth: the country still ranks second to last in the [Human Development Index](#).

The renegotiation: a game-changer for Niger?

In 2013, Oxfam and ROTAB, a Nigerien NGO – both members of Publish What You Pay – launched a [campaign](#) denouncing the unbalanced partnership between Areva and Niger and calling for the renegotiation of the contracts. Oxfam and ROTAB specifically pointed that [Areva’s contracts included a sweetheart clause](#) enabling Areva to pay a lower rate of royalty than the applicable regime in Niger. Royalties make up the majority of uranium mining revenues to the Nigerien government.

In 2014, after months of pressure from civil society organizations around the world, Areva and Niger agreed to a new contract without the sweetheart clause. In June 2014, a Strategic Partnership Agreement signed between Areva and Niger stressed that Areva would be subject to the legal royalty regime, raising hopes of a fairer share of the revenues for Niger. This agreement was published on the Journal Officiel- the official gazette of the Republic of Niger where major legal official information are published.

In August 2016, Areva [released](#) for the first time the payments the company makes to governments where it mines uranium, as part of new EU regulations. In Niger, it was the first time the public had access to Areva’s payments since the renegotiation took place in Niger. And the results are surprising:

Country / Project	Production entitlements	Taxes or changes	Royalties	Dividends	Premiums	Fees	Infrastructures	Other payments	TOTAL	Currency
Canada										
AREVA Resources Canada	0	14 500 000	49 080 381	0	0	913 376	0	0	64 493 756	CAD
KIGGAVIK	0	0	0	0	0	379 300	0	0	379 300	CAD
McCLEAN	0	0	0	0	0	3 462 133	219 198	0	3 681 331	CAD
Midwest	0	0	0	0	0	314 551	0	0	314 551	CAD
Kazakhstan										
KATCO	0	14 513 014 243	6 300 066 419	20 797 313 824	0	1 294 958 187	0	911 134 345	43 816 487 018	KZT
AREVA Mines SA succursale KAZ.	0	50 958 199	0	0	0	0	0	0	50 958 199	KZT
Niger										
AREVA Mines SA succursale Niger	0	0	0	0	0	61 176 500	0	841 378 467	902 554 967	XOF
SOMAIR	0	0	7 094 970 527	0	0	1 445 811 422	1 248 952 584	678 852 417	10 468 586 950	XOF

Source: Areva Report on payments made to governments for fiscal year 2015

Among the payment listed we find one for Somair – the company owning one of the largest uranium mines in the world in terms of production. Areva owns 64% of Somair. The remaining share is owned by Sopamin a Nigerien public company. Areva’s report shows the French company paid more than 7bn FCFA (around 10.8 million euros) in royalty fees to extract uranium from the Somair mines in 2015. The company’s annual report outlines that Somair extracted 2,509 tons of uranium that year.

Niger is a member of the [Extractive Industry Transparency Initiative \(EITI\)](#). By the time Areva released its first payments to governments report in 2016, the most recent payments data available in Niger were from 2013 – right before the contract renegotiation. Niger’s [2013 EITI report](#) shows that Areva paid almost 10bn FCFA (about 15.3 million euros) in royalty fees to extract uranium in Somair mines. The amount of uranium extracted from the mine is slightly superior – 2730 tons – but not enough to justify a massive decrease in royalty payments.

In two years, Areva’s royalty payments decreased by 4.5 million euros. What went wrong?

How can the royalty decrease?

To answer this question, we first need to take a step back and look at how the royalty regime works in Niger.

Royalties are what companies pay in exchange for the right to mine a particular mineral. They usually represent a fraction of the value generated by the mine - or the gross revenues of the mine – which means they depend on the amount of mineral produced (i.e. the production volume of the mine) and the valorization of the mineral (i.e. the price at which the company value the mineral).

$$\text{Gross Revenues} = \text{Uranium Casks} \times \text{Price} (\$)$$

Since 2006, Niger imposed a sliding-scale royalty regime, which means that the royalty rate increases with the profitability of the company

Mining Code	Profitability less than 20%	Profitability between 20% and 50%	Profitability more than 50%
Royalty rate	5.5%	9%	12%

Profitability corresponds to the net margin of the operator

Following the agreement over the new contracts Areva was subject to this regime for the first time. As [numerous reports](#) previously documented how uneven the partnership was, one would have expected the French company to pay a higher amount of royalty fees. Our comparison with the 2013 royalty payment outlines a small decrease in the production volume, but not enough to explain why Areva paid 4.5 million less in royalty fees. What about the price?

Areva: the price is wrong?

Until 2013, Areva directly negotiated a price of extraction with the government of Niger. This price corresponds to the market value of uranium extracted from the mines operated by Areva in Niger. In 2013, the extraction price was 73,000 FCFA per kilogram of uranium (kgU) (about 111€/kgU). Thanks to data released by Areva, we are able to determine the 2015 extraction price of uranium:

1. Find the applicable royalty rate
2. Calculate the gross revenues
3. Calculate the price

1. Find the applicable royalty rate: 5.5%

In Areva's 2015 annual report, the company discloses Somair's income and revenue that we use to calculate the mine's profit margin. This is the indicator that we need to determine the applicable royalty rate.

2015		
	Imouraren	Somair
(in millions of euros)	Mining	Mining
Country	Niger	Niger
Minority interests	42.34%	36.60%
Revenue	-	197
EBITDA	(34)	40
Net income	(236)	5

Source: Areva 2015 reference document p.223

$$\text{Somair Net Margin} = (\text{Somair Income} / \text{Somair Revenue}) * 100$$

$$\text{Somair Net Margin} = (5/197) * 100$$

$$\text{Somair Net Margin} = 2.5\%$$

Somair Net Margin being 2.5%, the applicable royalty rate is 5.5% according to the sliding-scale royalty regime described above.

2. Calculate the gross revenues: 196 658 415€

If the applicable royalty rate is 5.5%, the amount of money disclosed by Areva as a royalty fee corresponds to 5.5% of the gross revenues of the mine:

$$\text{Royalty Fee} = 5.5\% * \text{Gross Revenues}$$

$$\text{Gross Revenues} = \text{Royalty Fee} / 0.055$$

$$\text{Gross Revenues (FCFA)} = 7\,094\,970\,527 / 0.055$$

$$\text{Gross Revenues (FCFA)} = 128\,999\,464\,127$$

We calculate the price in euros

$$\text{Gross Revenues (€)} = 128\,999\,464\,127 / 655.957$$

$$\text{Gross Revenues (€)} = 196\,658\,415$$

3. Calculate the price: 78.38€/kgU

Using Somair's production volume disclosed by Areva, we can calculate the price:

Gross Revenues = Volume * Price

Price = Gross Revenues / Volume

Price (€/Ton) = 196 658 415 / 2509

Price (€/Ton) = 78 381

Price (€/kgU) = 78.38

According to Areva's payments to governments report, the extraction price for the uranium extracted from Nigerien mines operated by Areva decreased by almost 33€ per kilogram of uranium. The effect of a price decrease is twofold:

1. With a lower valuation of the uranium, the gross revenues generated by the mines are smaller which means the royalty fee – a fraction of the gross revenues – are also smaller
2. With a lower valuation of the uranium, the profits of the mines are less important which means the profitability of the mine is lower and the applicable royalty rate is the lowest possible – 5.5%.

Why is the extraction price down?

Before the new contracts were signed in 2014, the price of uranium was fixed through direct negotiation between Areva and Niger every couple of years. The latest known extraction price was agreed in 2013 and reached 73 000 FCFA per kgU (about 111€/kgU). Our analysis suggests that it was not applicable anymore in 2015.

Backing our analysis is the Strategic Partnership Agreement signed between Areva and Niger. When it was released, civil society organizations paid attention to the provision stating that Areva would be subject to the 2006 mining law.

1. Convention minières de SOMAÏR et COMINAK
Le renouvellement des conventions minières de SOMAÏR et de COMINAK se fera conformément à la loi minière n° 2006-26 du 9 août 2006.

Excerpt from the Strategic Partnership Agreement signed between Areva and Niger in 2014
However, another provision in the document states that the extraction price of uranium for the two mines operated by Areva will be calculated as follows:

3. Prix Niger
Le Prix Niger en euros (1 euro = 655,957 FCFA), par kg d'uranium métal auquel tous les actionnaires des sociétés minières SOMAÏR et COMINAK enlèveront leur quote-part d'uranium du Niger du 1er janvier 2014 au 31 décembre 2016 sera déterminé comme suit :
$$\text{Prix (n)} = (50\% * \text{SPn-1} + 50\% * \text{LTn-1}) * 2,5998.$$

Excerpt from the Strategic Partnership Agreement signed between Areva and Niger in 2014
This rather complicated formula essentially means that the extraction price is to be indexed on both short-term market prices (also called spot market prices) and long-term market prices.

Indexing the extraction price on market prices has lowered the value of uranium in Niger. In particular, the indexation on spot market – spot contracts are traded at a lower price – has had an important impact on lowering the price. The problem is Areva is not operating on spot contracts. Uranium extracted in Niger is systematically sold to another subsidiary of the Areva group to be refined into

nuclear fuel. This nuclear fuel is provided to Areva's commercial partners - mostly on long-term contracts. For example, Électricité de France has signed a contract with Areva to secure a supply of 30,000 tons of uranium until 2035.

Debunking Areva's Arguments:
'Royalty payments decreased because uranium prices are down'

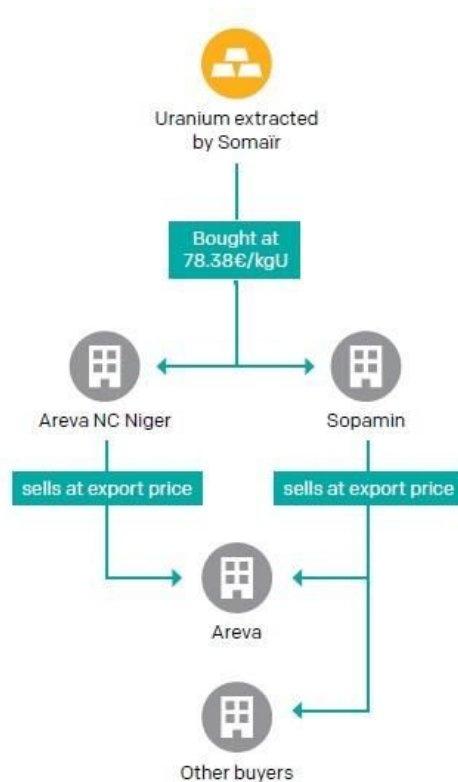
1. Uranium market prices are down, there is no doubt about it. However uranium extracted from Areva's Nigerien mines was not indexed on market prices before the renegotiation. Using a market benchmark to value Nigerien uranium was a decision between Areva and Niger in 2014 – it has nothing to do with the current market trend.
2. The formula used to value uranium include an indexation on spot prices. It does not reflect Areva's economic model. : Nigerien uranium is traded within the Areva group, refined in Europe and sold on long-term contracts to nuclear power companies.

Using the formula disclosed in the Strategic Partnership Agreement together with spot and long-term prices disclosed by Cameco – one of Areva's competitors – [we can double check that the price is indeed 78.38€/kgU.](#)

The stark decrease in price had an important impact on revenues to the Nigerien government. With the new sliding scale royalty regime, we calculated that Niger would have received an extra 15 million€ in royalty fees had extraction price have been left unchanged at 111€/kgU.

Does a decrease in price benefit Areva?

Intuitively, a decrease in a mineral's price would not appear to benefit a mining company: the lower the price, the lower the profits. However in this case, it does benefit Areva because of the way the company structures its activities in Niger:



To formally get ownership over the uranium extracted in the Somair mines, Areva and Sopamin (Areva's minority partner in the Somair's mines) have to buy the uranium at extraction price - 78.38€/kgU. Areva buys this uranium through its Nigerien branch before selling it to another subsidiary that will take care of refining uranium. Areva is therefore not only a seller but also a buyer. It has an incentive to export uranium at a cheaper price: the cheaper the uranium is, the better for the company that can refine and sell nuclear fuel at a lower price than competition.

<http://www.publishwhatyoupay.org/pwyp-news/how-zimbabweans-persuaded-diamond-companies-and-government-to-listen/>

“How Zimbabweans persuaded diamond companies and government to listen”

August 31, 2017

PWYP-Zimbabwe

In the predawn hours of 18 July this year, some 200 people breached the fence of the Zimbabwe Consolidated Diamond Company (ZCDC) and descended upon the main diamond sorting room. They wielded wrenches and machetes “while singing threatening songs,” according to the state-run [Herald](#) newspaper. The security guards warned them to leave, then fired warning shots, then fired directly into the mob. By the time they dispersed, at least two people were injured and one man lay on the ground bleeding to death.

The Herald, a staunchly pro-government outlet, relied mainly upon a single source for its report, and other details are murky. But the shooting is consistent with years of violent confrontations involving illegal miners, private mine security and government forces in the resource-rich, impoverished eastern province of Manicaland.

In one 2008 massacre, a military helicopter swooped over the heads of hundreds of panners mining without permits, scattering them with machine gun fire as barking attack dogs hunted them. “There was a man next to me, he had been digging near me, and the bullet went right through his head,” one miner told [The Guardian](#). “A dog ran for me but there was this woman, she was slower than me and it attacked her.” At least 214 people were killed in a series of such raids, [Human Rights Watch](#) reported. Zimbabwean civil society urgently began monitoring and reporting human rights violations around the Marange diamond fields near the Mozambique border. Amid domestic and international pressure, violent conflict declined, but systemic problems persisted: environmental degradation, economic inequality and, at the root of it all, virtually zero accountability. (The Zimbabwean government, sceptical of international initiatives, has refused to sign up to standards like the Extractive Industries Transparency Initiative.)

Mukasiri Sibanda and his colleagues at the Zimbabwe Environmental Law Association (ZELA) — a member of PWYP Zimbabwe — realised broad, non-specific appeals to decency and good governance would not persuade corporations and politicians to change. But hard data might.

“The potential for a windfall revenue from diamond extraction did not commensurately reflect in the coffers of both national and local government,” Sibanda wrote recently on [his blog](#), which has become a clearinghouse for information about minerals extraction transparency in Zimbabwe. “Opaqueness has been the main challenge,” he added.

That challenge garnered international headlines in February 2016, when President Robert Mugabe complained that diamond mining companies had [failed to pay \\$15 billion](#) in revenue taxes. “Lots of smuggling and swindling has taken place and the companies that have been mining, I want to say, robbed us of our wealth,” [Mugabe said](#). As president, Mugabe presided over a financial system so murky that neither he nor his finance minister seemed to have any idea where the money had gone.

[Advocacy backed by data](#)

In November, [Sibanda traveled to Jakarta](#) to join the inaugural ranks of our “[Data Extractors](#)” — individual members trained in the technical art of identifying, obtaining and analysing financial information from governments and extractive companies. “I realised that it is important to empower communities with data literacy skills to enable them to drive the change process in the governance of mineral resources,” he said.

He brought this knowledge back to Manicaland Province, where PWYP Zimbabwe began working with existing community organisations, like schools and health centre committees, and instilled them with a powerful new mission. For all the diamonds in their soil, there was no reason their classrooms should lack books and their clinics lack medicines. Cyanide runoff shouldn’t pollute their rivers and kill their cattle. And with all the economic activity mines create, local residents shouldn’t be jobless or forced to illegally pan for diamonds, drawing the wrath of air force helicopters.

“Normally data is used by civil society and rarely by the communities themselves,” said Darlington Farai Muyambwa, who is the PWYP Zimbabwe’s national coordinator. “For Zimbabwe, this programme has been unique in how it managed to create interest for data at the grassroots level.”

One of those community groups is the Marange Development Trust, which lobbies public officials and companies on behalf of the residents of the diamond-producing region. “Data really helps us to do exactly what we are supposed to do on our own instead of relying on other organisations on our behalf,” said Malvern Mudiwa, the group’s chairman. Recently, for instance, the Trust persuaded local authorities at the Mutare rural district council to share two years of financial reports. The documents were extremely vague: In a district where mining is the principal economic activity, there was no line item for revenue from mineral taxes. PWYP Zimbabwe and the Trust were forced to deduce mining company contributions themselves, revealing that the local government has “never received a cent of tax revenue from the mining companies,” Mudiwa said.

‘A huge inequality gap’

Mudiwa, a small business owner in Mutare, began rallying his local community in 2006, when diamonds were first discovered in the province. The government raced to issue permits to mining companies and cordoned off the diamond fields. But the companies failed to consult with residents on issues ranging from environmental protections to relocation compensation and employment, Mudiwa said. They also hired non-local employees and contractors based, apparently, on political criteria.

In other words, the diamonds of Manicaland weren’t enriching the residents of Manicaland. And in a country where unemployment [may be as high as 95 percent](#), illicit mining presented one of the few sources of income for Zimbabweans in and around the region. But alongside the black market smuggling operations came drugs and crime, putting further strain on the communities. “What we are trying to advocate for is to stop the illicit financial flows of illegal mining, and we also encourage mining companies to give employment preference to the local community because those are the people living with the effects of the mining,” Mudiwa said.

Using data, PWYP Zimbabwe has made inroads at the national level, earning ZELA a seat at the table during the upcoming national budget consultation in September. Their work, and that of other CSOs, has reached the attention of the cabinet, particularly after they pointed out that a particular export incentive was costing the government more than the income it derived from mineral royalties, a key source of national income. Finance Minister Patrick Chinamasa, who traveled to Europe last year [seeking](#)

[an IMF loan](#) to cover civil servants' salaries, "is keen to hear what we are saying," Sibanda said. "And the ministry of mines is interested in driving investment to that sector."

"For Zimbabwe, the greatest success is how we have made data issues relevant to communities in organising their own advocacy initiatives at the grassroots level," Muyambwa said. "By demystifying data extraction, we've made it an issue beyond just NGOs but also the work of community-based organisations and community members." But incidents like July's standoff at the ZCDC show how far the country still has to go.

"Mining is a huge economic activity, normally occurring in areas that are marginalised with low development," Sibanda said. "It obviously creates a huge inequality gap which fosters illegal activities within the community. Mining companies can be proactive to make sure the benefits from mining are shared fairly with the community."

Empowering the citizens of Zimbabwe to use data is just another way of empowering them to participate in the political life of the country. As Muyambwa put it, the government often listens to what communities have to say; after all, "they are their electorate."

BEYOND TRANSPARENCY

INVESTIGATING THE NEW
EXTRACTIVE INDUSTRY DISCLOSURES



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*Sherpa

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EXECUTIVE SUMMARY

In 2016, French companies extracting natural resources in developing countries made their payments to the governments of these countries public for the first time, detailing the payments for each of their projects. This is a significant step forward in terms of transparency in a notoriously opaque sector.

Nevertheless, while the stated objective of these measures is to facilitate public understanding and monitoring of the activities of companies exploiting natural resources, this report reveals various limitations, such as regarding access to the new data, which remains complicated, particularly for

non-specialists. Lack of contextual data surrounding the disclosure of payments makes understanding the data even more difficult. Furthermore, loopholes in the Directives and their transposition into French law also limit possibilities of studying and comparing the different payments.

However, the disclosure of payments to governments shows that the governance of the sector is improving. This report demonstrates how the disclosure of this new information helped inform analysis of the activities of the **French oil company Total in Angola** and the French **uranium giant Areva in Niger**.

For several years, strong suspicions of embezzlement, corruption and tax evasion have plagued the Angolan oil sector. The first disclosure of payments to governments by the French oil company Total provides the opportunity to cross-reference information published by the Angolan government on the revenues generated by oil with data from the French company. **Analysis of data relating to Block 17 shows a difference of more than USD 100 million in 2015 between Angola's disclosed revenues and company payments based on information disclosed by Total.** The following study shows that **this discrepancy could be explained by a difference between Total and the Angolan government in defining and estimating the data to be published, by misappropriation by the Angolan state owned oil company, or by differences between Total's and the government's valuation of the oil per barrel possibly associated with transfer pricing by Total,** which would allow it to pay less taxes in Angola.

The payment data published by Areva makes possible an initial assessment of the negotiations that took place between Areva and Niger in 2014 when renewing uranium contracts. While civil society hoped to see increased revenues from uranium extraction after this historic agreement, the conclusion is quite clear; the negotiation did not lead to increased payments by Areva to Niger to extract uranium. Nigerien uranium accounts for nearly 30% of the French company's production but Niger receives only 7% of Areva's payments to producing countries. The information published by Areva suggests that **the new pricing formula applied to the royalty fees could have resulted in a 15 million euros decrease in royalty fees paid to Niger.** It also indicates that **Areva's uranium exports from Niger to France could be undervalued compared with prices for Nigerien uranium exports by other companies, which may have reduced Areva's contributions by between 10 million and 30 million euros in 2015.**





FRENCH EXTRACTIVE COMPANIES PUBLISH THEIR PAYMENTS TO GOVERNMENTS FOR THE FIRST TIME: WHAT ARE THE IMPLICATIONS?

Gas, oil and uranium in the energy sector, metals in the construction sector, rare earth elements and new technologies... Extractive resources are increasingly present in our societies and their trade represents a major geopolitical and economic challenge. However, their exploitation is marked by widespread corruption and tax dodging, which affect the populations of resource-rich countries. This is augmented by the lack of transparency in the extractive sector, which severely restricts the possibilities for government accountability. But recent legal developments, including the obligation on French extractive companies to publish their payments to governments, which entered into force in 2016, could help to change the situation.

The extractive sector is characterized by an **asymmetric balance of power and wealth** between the companies that benefit from financial flows linked to extractive activity¹ and the countries where resources are extracted, which are often affected by societal and environmental crises: a situation often referred to as the “resource curse”. In particular, illicit **financial flows resulting from corruption or tax dodging** have plagued the economies of these extractive countries for years².

To root out these problems and to improve the management of revenues from extractive activities, it is essential to know and understand the corresponding financial flows; how much do companies pay to extract resources? To whom are those payments made? Are they fair in the context of the exploited resources? Do the local populations really benefit?

Faced with the opacity that prevails in this sector, transparency represents an essential step for shedding light on the activity of companies. First and foremost, it deters companies from conducting dubious practices and can therefore prevent these from occurring. It also enables citizens, journalists, parliamentarians and civil society organizations to access and verify data and information and hold their local or national institutions accountable for payments they receive, and to ensure that the economic resources benefit the community.

The launch of the Extractive Industries Transparency Initiative (EITI) in 2003 was a crucial step in ending this opacity. This voluntary initiative brings together representatives of governments, businesses and civil society organizations.

Countries deciding to join the EITI must set up a number of transparency measures at national level. At the core of the EITI is the requirement for extractive companies to disclose the payments they make to the host country government and for the government to disclose its revenues from extractive activities, a requirement formulated in the early 2000s by the international coalition Publish What You Pay (PWYP)³. Thanks to the EITI, citizens in many countries engaged in extraction now have insight into the financial flows of the ex-

tractive sector, especially into payments made by companies and the recipients of those payments.

Currently 52 countries are members of the EITI and publish information on the financial flows of their extractive sector. However, many countries that are rich in oil, gas and minerals (such as Angola, Canada, Russia and China) have not joined the initiative yet, which limits the EITI’s ability to ensure transparency of financial flows across the sector worldwide. To complement transparency efforts implemented through the EITI, mandatory disclosure legislation was adopted in the United States in 2010, in Norway in 2013 and in Canada in 2014, which requires extractive companies to publish all project level payments made to governments of countries in which they operate.

The European Union (EU) was not left behind. In 2013, the European Parliament adopted two Directives (the Accounting Directive and the Transparency Directive) requiring oil, gas and mining companies that are registered and / or publicly listed in an EU Member State to publish annually their payments to governments in countries where they conduct exploration and / or extraction activities (these reports are referred to as “reports on payments to governments” or “disclosures” throughout this analysis)⁴. In December 2014, France was the second European country, after the United Kingdom, to transpose these Directives⁵. In 2016, French extractive companies **published for the first time their payments to governments** for financial years starting in 2015⁶.

Thanks to the first disclosures of this information by French extractive companies, civil society organizations ONE, Oxfam France and Sherpa, members of Publish What You Pay, in partnership with Le Basic (Bureau d’Analyse Sociétale pour une Information Citoyenne / Bureau for Social Analysis for Citizen Information), were able to:

- analyse and evaluate the way in which companies in the extractive **sector fulfil their transparency obligations regarding their payments to governments;**
- use these disclosures to **better understand the financial flows in the sector and to detect irregularities that could indicate possible practices of corruption or tax dodging.**

The first part of this report therefore discusses issues arising from the disclosures of six French companies active in the extractive sector⁷: **Areva, EDF, Engie, Eramet, Maurel & Prom and Total**. It evaluates the quality of the information provided by the companies and their compliance with French law, and identifies **potential loopholes to be filled in order to fully meet the transparency challenge in the extractive sector**.

In the second part of the report, two case studies are presented regarding the activities of Total in Angola and Areva in Niger, based on their disclosures of payments to governments. The objective of these studies is twofold:

- To evaluate the usefulness of the payment disclosures to **decipher the real financial flows in the field**;
- To determine the extent to which these disclosures can strengthen the ability of local and international civil society organizations to identify irregularities that could **indicate potential cases of corruption or tax dodging**.

The aim of this report is therefore to contribute to the strengthening of transparency in the extractive industries, as well as to propose recommendations in light of the discussions that will take place before the review of the Accounting Directive in 2018.

Figure 1. Overview of the payment to government disclosure requirements under French law

Sectors	<ul style="list-style-type: none"> • hydrocarbons • coal and lignite • metallic minerals • stone 	<ul style="list-style-type: none"> • rock, sand and clay • chemical minerals and mineral fertilizers • peat • salt and other mineral resources
Activities	<ul style="list-style-type: none"> • exploring • prospecting • discovering 	<ul style="list-style-type: none"> • exploiting • extracting
Companies involved	Listed companies, large companies that meet two of the following three criteria:	<ul style="list-style-type: none"> • Total assets: 20,000,000 € • Net turnover: 40,000,000 € • Average number of employees during the year: 250 <p>It should be noted that for the first year of disclosure, only French companies with more than 5,000 employees were affected by the disclosure requirement.</p>
Payment categories	All payments equal to or greater than 100,000 euros, broken down into the following categories:	<ul style="list-style-type: none"> • Production entitlements • Taxes on the income, production or profits of companies • Royalties • Dividends • Bonuses for signing, discovery and production • Licence fees, rental fees, entry fees and other payments for licences and / or concessions • Payments for infrastructure improvements

The report on payments to governments covers all payments made during the past fiscal year, unlike the EITI, where there may be a two-year delay.



2

TRANSPARENCY OF FRENCH EXTRACTIVE COMPANIES: MORE PROGRESS NEEDED

Analysis of the first disclosures of payments to governments by Areva, EDF, Engie, Eramet, Maurel & Prom and Total makes it possible to determine whether these companies are in compliance with French law and to identify the gaps and limitations in their disclosures. Here follows an overview of the first payment to government data published by French extractive companies.

Overall, companies do comply with the disclosure requirements ...

Of the companies studied, only Maurel & Prom does not disclose all the information required by law, in particular the government entities that receive the payments. However, it should be noted that the company was not required to report for 2015, as it had 329 employees at the end of this year. Only companies with more than 5,000 employees were required to report their payments to foreign governments in the first year that France's law came into force.

... but their statements make it difficult to effectively analyse the payments made

While this is an important step forward in terms of transparency, the disclosures of payments to governments by the six companies studied enable for the moment **only a partial understanding of the financial flows** to the government authorities of the countries in which the companies operate. Our report identifies various gaps: difficulties in accessing the information, lack of contextual explanation and clarification, inconsistencies, interpretation of legislative provisions, etc. It also sets out the potential improvements that could lead to greater transparency in the extractive sector.

Access to information: an issue to revisit

While the French government assumed that the disclosure requirement would apply to “about thirty companies” in the financial year 2015, only 12 reports on payments to governments were identified in France by members of PWYP, and it is impossible to know whether these 12 constitute all or only some of the companies subject to the French reporting obligation.

All payment disclosures from the companies studied in our report were published online in accordance with the legislation. However, they are not always easily accessible.

The search tool of the Eramet website does not allow users to find the disclosure data of the company using the keywords “payments” or “governments”.

In addition, all companies have published their document in “pdf” format, which, unlike open data formats, encapsulates data and does not allow direct manipulation (calculations, data sorting, aggregations, etc.). It is therefore necessary to manually retrieve the data and to clean it, which is a long and tedious process during which mistakes could be made.

Without context, numbers mean nothing

Like the Directives, French law does not ask for background information on the extractive projects subject to the transparency requirement. Only EDF provides context for a better understanding of its activities. However, raw data only allows for a limited understanding of the payments and leaves many questions unanswered. Some projects are missing from the disclosures of the six companies studied, without any explanation regarding their exclusion.

The Engie website mentions projects in Indonesia and the Philippines that are not reported on in the company's disclosures.

In the absence of contextual information, it is difficult to determine whether these projects were excluded from the disclosures because their payments were below the statutory 100,000 euros threshold or because these projects were deliberately omitted by the companies.

Questionnaires therefore had to be sent to each company in order to understand and analyse their disclosures.

The questionnaire addressed to Total contained no fewer than 67 questions covering barely one third of its disclosures. This number illustrates how difficult it is to understand the data reported by the company if it is not linked to its activities in the various countries.

Four companies replied to the questionnaire that was sent to them: Areva, Engie, Eramet and Total. Their answers, along with the information and comments that accompanied EDF's numerical table, illustrate that greater contextual information about payments can address lingering questions. Information regarding the history and evolution of the presence of companies in the countries concerned, the existing partnerships, details regarding the payment categories used, the projects, etc. are necessary for a better understanding of the payment disclosures.

Finally, additional information such as profits, revenues, the list of subsidiaries and the number of employees in all the countries where the company is present (known as "public country-by-country reporting") is also necessary. This information would make it possible to analyse more precisely whether extractive companies pay their fair share of taxes in their countries of activity or if they artificially shift their profits to tax havens in order to reduce their tax contributions. This step is essential to assess to what extent the extractive activity benefits the development of producing countries.

The great mystery of currency conversion

French law defines a threshold of 100,000 euros for payments to be disclosed. In the absence of further clarification, it is logical to expect that the currency used in the company statements will be the euro. Yet this is not always the case.

Total publishes its payments in dollars, and Areva in local currencies. In both cases, it is necessary to convert the amounts into euro in order for the amounts to be compared within the same statement (in the case of Areva) or with the statements of the other companies.

Even when companies disclose their payments in euro, they do not specify the exchange rates used to convert their payments from other currencies (nor the sources they used for reference), which makes it difficult to cross-check them.

Finally, these rates are likely to vary from one company to another; therefore the euro valuation of payments is also different. For this reason, 100,000 euros disclosed by Engie is quite likely not the same as the 100,000 euros disclosed by EDF.

▶ Unknown payments

Some payments to governments are made in kind (in barrels of oil, for example). Although the Directives require companies to disclose these payments in kind both in terms of volume and in monetary value, French law does not include this obligation. This has created a loophole that companies can use in order not to reveal:

- the volumes paid in kind to the governments;

Total discloses payments in kind only in euro, unlike EDF which publishes both in euro and in volume.

To the extent that Total does not indicate either the corresponding volumes or the price references used for their valuation, it is difficult to verify the correlation between the statements of the company and those of the government authorities that received the payments.

- the raw materials associated with these payments;

EDF uses a unit which is the barrel of oil equivalent (boe), which makes it impossible to know the type of raw materials that it makes payments with (oil or gas), since the payments for these two raw materials are not reported separately.

Again, it is not possible to verify the consistency between EDF's statements and those of the recipient authorities when the latter publish their receipt of payments in kind in other units (e.g., in m³ for gas, or metric tonnes for liquefied gas).

▶ To be or not to be (the one who discloses), that is the question

The law states that companies must report payments for each project. The rule is clear when a sole company is involved in a project. On the other hand, things get complicated when a company operates a project through a partnership or a joint venture. As no precise requirement has been provided by law (neither in the Accounting Directive nor in the Transparency Directive), companies have a margin for manoeuvring when assessing how payments are to be reported in the context of a partnership or joint venture.

Analysis of the disclosures reveals various rationales used by the companies:

Areva discloses all the payments relating to the projects it operates. The company includes the amount of payments made by its partners. The amount disclosed does not correspond to what the company actually paid for its own share in the partnership or joint venture.

Total declares the payments that it actually pays, in proportion to its participation in a joint venture, and for all its projects, whether or not the company is acting as an operator.

On the other hand, Engie deems that it does not need to declare any payments if it does not have the status of an operator, even if it holds an interest in a project, and irrespective of whether its payments exceed the threshold of 100,000 euros.

The current ambiguity resulting from these differences in interpretation of the law makes it impossible to obtain a complete and coherent view of the reality of the financial flows in cases of partnerships and joint ventures, and certain payments in excess of 100,000 euros are therefore presumed to be absent from the disclosures.

Projects with shifting boundaries

In order to improve the transparency of financial flows in each country of production, payments to governments must be disclosed for each project. However, the definition of the term “project” leaves room to manoeuvre, allowing companies to aggregate geographically separate sites or different projects, which in turn can ultimately undermine the visibility of financial flows.

In New Caledonia, Eramet aggregates as a single project payments relating to about ten mines scattered throughout the territory⁸.

Areva has consolidated under one contract the activities of its two mines in Kazakhstan, despite their distance of nearly 100 km apart⁹.

In addition, some companies have published payments at company level, not on a per project basis, an option that is allowed (in respect of obligations imposed at entity level) under the Accounting and Transparency Directives. The companies have in fact created a category of “not attributed to projects”. Disclosing **at company level does not allow for cross-checking or tracking of revenue streams**.

For its payments in Gabon, Total uses a “fields in a non-allocated concession” category which includes more than 40% of all payments made in the country¹⁰.

In the cases cited above, the possibilities for analysing the corresponding payments are undermined.

Payment categories: each does as it pleases

French law requires companies to report their payments according to seven payment categories, without giving a precise definition of those categories. This can be explained by the fact that payments can be understood differently depending on the legal and fiscal regime of the countries in which the companies have extractive activities. As a result, each company has its own reference system to categorize its payments in order to match each specific national tax system using the seven categories mentioned in the law.

For Total, which uses United States and Canadian accounting standards as a reference, a royalty fee is not necessarily the same as for Engie, which used the guidelines developed in the United Kingdom by professional associations in the oil and mining sectors.

According to the companies, a royalty fee can be allocated to the category “taxes”, in accordance with the benchmark used and the tax system of the country¹¹.

In particular, the “taxes” category often turns out to be a sort of aggregated category, containing all the

amounts that could not be allocated elsewhere. In addition, some companies have created an “other” or “miscellaneous” category¹², which is not provided for in the law and which prevents data users from identifying the nature of the payments made.

The heterogeneity of the statements and the absence of a precise definition of the payment categories make it difficult to compare the payments of different companies regarding taxes or royalties, making it akin to comparing apples to pears.

▶ **The identity of the government recipients is not clear**

The companies break down their payments by recipient government authority: ministry, region, municipality, public body, etc. But the disclosures do not allow, with the exception of the data from Areva, users to identify the recipient authorities by project. As it stands, the amounts per project are in one table, and the amounts per authority in another, with no possibility of linking the two tables. However, only by connecting these two pieces of information is it possible to trace financial flows and enable local civil society to ask for accountability.

If, in the case of a certain project, payments were made by a company but it is not clear who the recipient was, possibilities of cross-checking and cross-referencing are limited. Furthermore, some recipient authorities sometimes appear to be mentioned in different ways depending on the reporting company. Companies also sometimes use generic names to indicate recipient authorities rather than their official names.

Total mentions “Brunei government” to indicate the authority that received the payment. However, this wording is too vague to accurately identify the recipient (e.g., Ministry of Finance).



3

TOTAL IN ANGOLA: PARTIAL TRANSPARENCY RAISES QUESTIONS

With its recent presidential election appointing a new leader, Angola is at a crossroads. With a fragile economy, the country continues to suffer from the «resource curse». It remains one of the poorest countries on the planet whilst being the leading oil producer on the African continent¹⁴, a resource exploited by the French company Total, among others. This paradox raises questions about the management of revenues resulting from the exploitation of the country's natural resources. In this context, Total published its payments to the Angolan government for the first time.

OIL GOVERNANCE: LONG-AWAITED TRANSPARENCY

For many years, the Open Society Initiative of Southern Africa (OSISA), which promotes democracy, transparency and human rights in the management of oil revenues in ten southern Africa countries, has been reporting endemic corruption in the Angolan oil sector²⁵. Similar criticisms have

also been made by other NGOs, such as Human Rights Watch²⁶, some US authorities²⁷, and the International Monetary Fund (IMF), which lamented a loss of 4.2 billion euros in public funds between 2007 and 2010, potentially linked to a misappropriation by Sonangol, the national oil company²⁸.

The role of Sonangol

Angola's oil sector is regulated by a 2004 law which affirms the inalienable public ownership of oil fields by the Angolan State and makes Sonangol, the national oil company, the holder of all land rights²⁹. As the "exclusive concession holder" of the State, Sonangol is responsible for all hydrocarbon activities in the country. It can conduct these activities independently or in partnership with other companies. Any company that wishes to carry out oil activities in the country (apart from prospecting permits) must partner with Sonangol.

These accusations led the Angolan government to take steps to improve transparency in oil-related revenue streams. For several years, the Oil Ministry and Finance Ministry have been publishing disaggregated information per block regarding the tax payments received by the Angolan government. This information includes the barrels paid pursuant to Profit Oil³⁰, as well as the applicable selling price³¹. Despite these commendable efforts³², Angola has not yet joined the Extractive Industries Transparency Initiative (EITI) and remains 164th (out of 174 countries) in Transparency International's Corruption Perception Index³³.

Furthermore, recent studies conducted by civil society have shown that **the official data regarding the revenues received by the Angolan State is incomplete and sometimes inconsistent between the various government agencies**³⁴. Disclosure of payments made by Total to the Angolan State now at last makes a new analysis possible in order to clarify how much Angola receives in return for the extraction of its oil.

This study shows how the receipts of Profit Oil reported by the Angolan authorities in 2015 on Block 17 – the largest payment received by Angola – differ by more than USD 100 million from companies' payments based on the payment reported by Total.

TOTAL IN ANGOLA - AN ONGOING STORY

After a decade of economic upturn¹⁵ following the end of Angola's civil war, the dramatic decline in economic growth in recent years has led to a recession in a country where more than a third of the population lives below the poverty line¹⁶ and only 40% of inhabitants have access to electricity¹⁷.

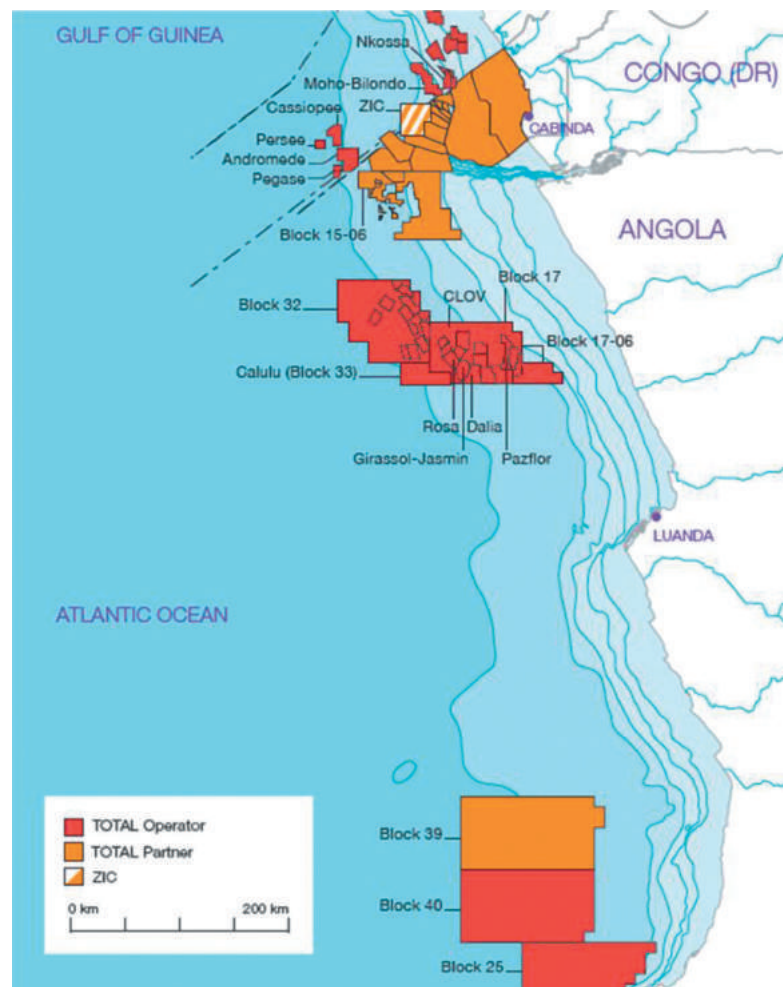
With production of 1.8 million barrels per day (bpd), which accounts for 95% of exports and 80% of the country's income¹⁸, the Angolan population should be able to benefit from the exploitation of the country's natural resources.

But that is not the case. Primarily destined for the Chinese (60%), European (22%) and American (14%) markets¹⁹, Angolan oil mainly comes from off-shore sites. The largest site in Angola is Block 17, located 150 km off the coast. It accounts for about 35% of the country's production²⁰. Although operations started in the 1970s, it was only since the 1990s and following the discovery in deep waters of the Girassol field (which is located in Block 17²¹), that oil and gas production took off in Angola. It more than tripled between 1994 and 2014²².

Claiming to be "the most efficient oil major in 2016²³", Total holds a special place in Angola as the country's largest oil producer²⁴. Total discovered the Girassol field in the 1990s and is currently operating Block 17 in partnership with Exxon Mobil, Statoil and BP. Angola is the second largest oil source for the French multinational and the new agreements signed in 2015 between Total and Angola suggest that its involvement will continue in the years to come.

Figure 1. Total projects in Angola

Source : Total SA – Financial Transparency 2015, Example of Total in Angola



Profit Oil: a guide

Profit Oil corresponds to the number of barrels, or their valuation, to be shared between extractive companies and the host government. It can be in kind or in cash.

covered the Cost Oil (the share of oil intended to cover their costs of exploration or investment in the production site from the beginning). Profit Oil is paid in kind.

In the case of Block 17, there is a breakdown between Total and its partners (BP, Statoil and Exxon) and Sonangol, the concession holder of the operating site, once these companies have re-

Once recovered by Sonangol, the Profit Oil is transferred to the Angolan Ministry of Finance after a charge has been deducted to cover the operating costs of Sonangol.

Figure 2. The distribution of oil produced and the revenues generated between operating companies and the concession holder of Block 17 (source : BASIC)

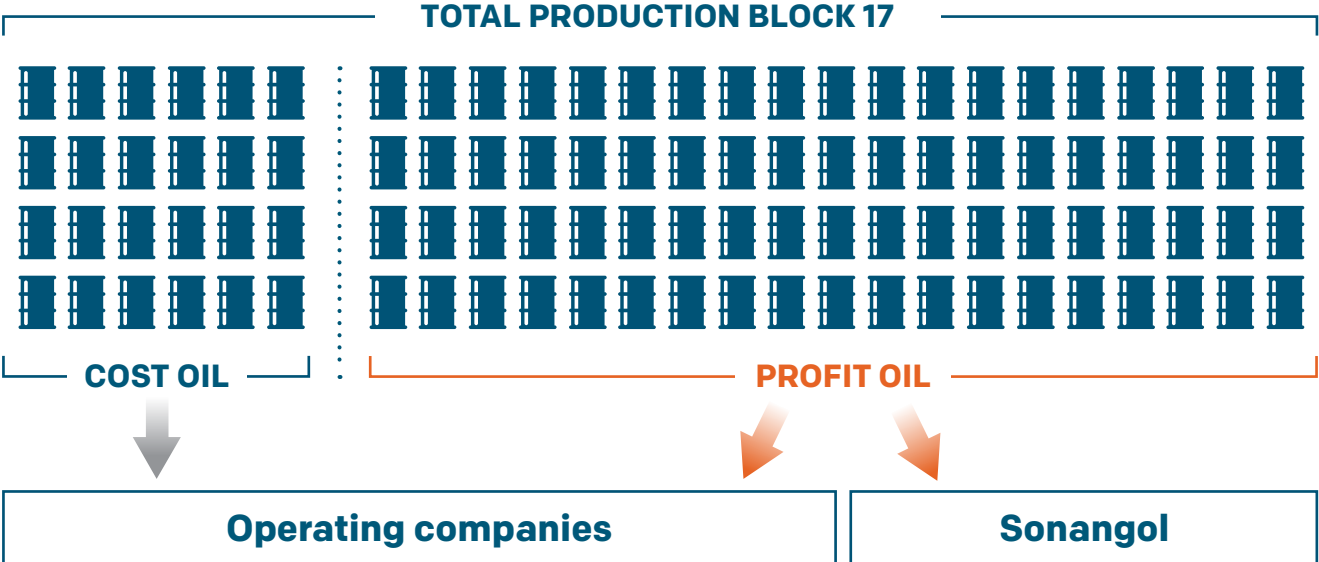
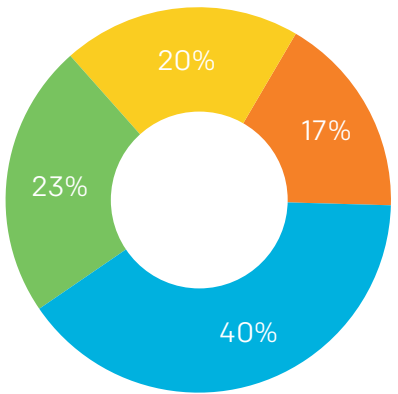


Figure 3. Participation in block 17 (source : BASIC).



● Total ● Statoil ● BP ● Esso (Exxon Mobil)

PROFIT OIL : DIFFERENT TOTALS

In 2015, the Angolan authorities disclosed revenues of more than USD 3.7 billion (USD 3,729,572,262) as Profit Oil from Block 17³⁵.

Two of the joint venture partners operating Block 17 have not disclosed their payments to the Angolan government. Without the statements of Exxon and BP³⁶, it is impossible to trace the payments made by each company paying Profit Oil for Block 17 and to know if the total sum corresponds to the amount reported by the Angolan

authorities. Despite this, the existing statements of Total serve as a starting point for tracing the whole Profit Oil paid for Block 17.

Total states in its payments to governments disclosures that it paid USD 1.5 billion (USD 1,535,173,000) in Profit Oil in relation to Block 17. At a meeting with the authors of this report, the company's management confirmed that the

Profit Oil it paid on Block 17 corresponded to the percentage held by Total in the joint venture operating the block, i.e. 40%. However, the amount reported by Total does not correspond to 40% of the amount reported by the Angolan authorities. Had this been the case, the Profit Oil received by Angola would amount to USD 3.8 billion (USD 3,837,932,500), which means that there is a discrepancy of USD 108,360,238.

Illustration 4. USD100 million gap between Profit Oil disclosed by Angolan authorities and data based on Total disclosure (Source : BASIC)

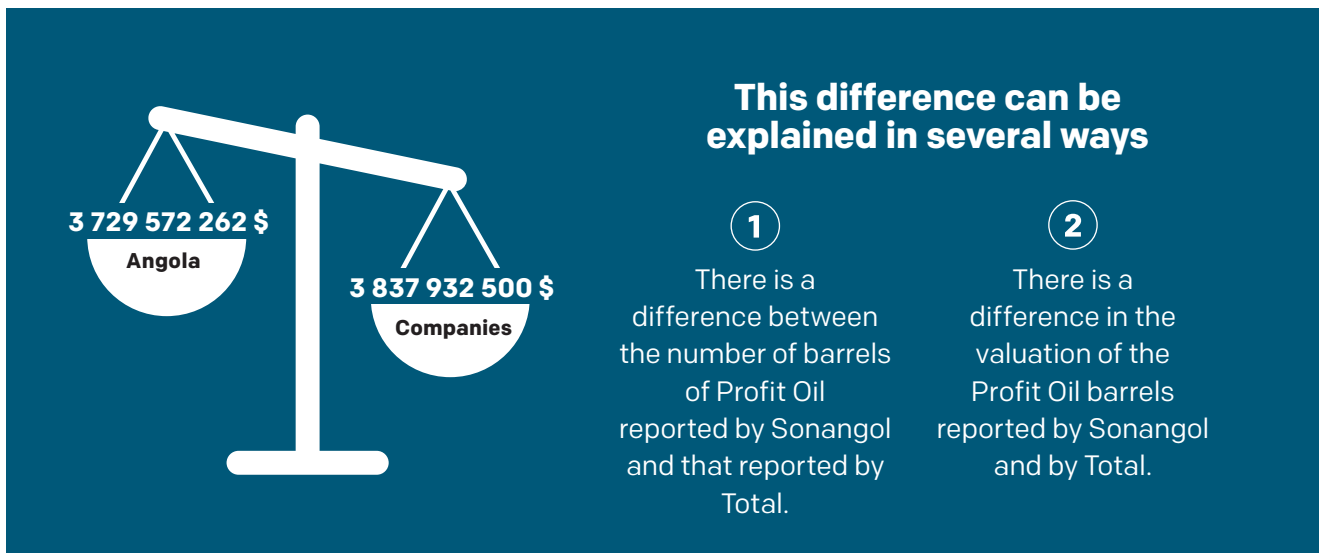
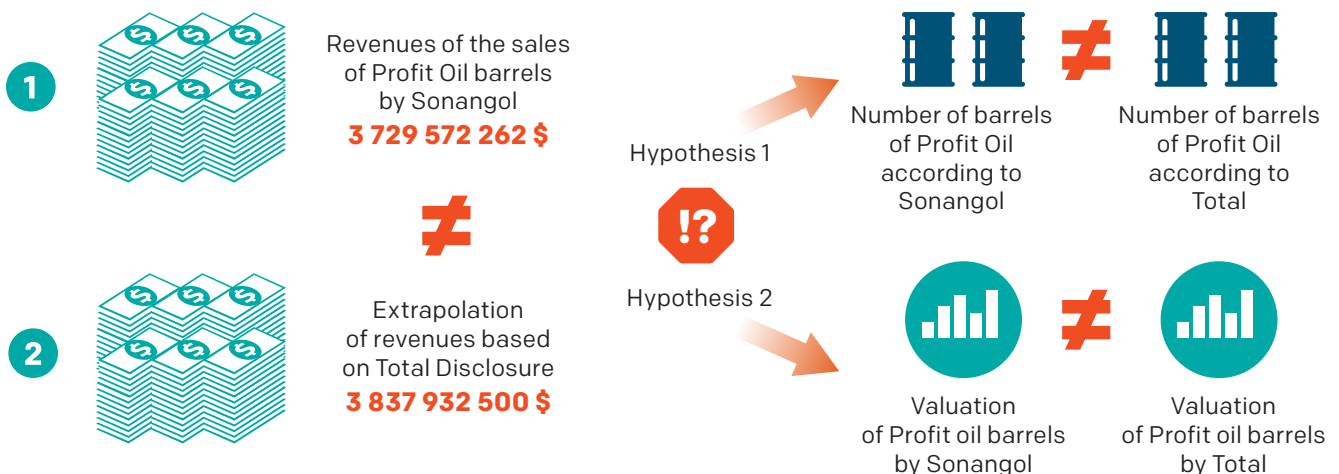


Figure 5. The two possible explanations for the difference in valuation of Profit Oil between Total and Sonangol (source : BASIC)



PROFIT OIL: WHO BENEFITS FROM THE AMBIGUITY?

Theory I: The differences in Profit Oil stem from a difference between the number of oil barrels reported by Sonangol and those accounted for by Total.

In its 2015 financial report, **Sonangol stated that it had received 70,269,382 barrels of Profit Oil for Block 17³⁷**. According to the information from the Angolan authorities, Total's share would therefore be expected to be 28,107,753 barrels, corresponding to its share in Block 17 (40% of total barrels paid).

In its payments to governments disclosures, Total publishes only the valuation of its payments in kind without providing the number of barrels. This obligation under the Directives has not been properly transposed into French law. It is therefore impossible to compare the volumes declared by Total and those disclosed by the Angolan authorities directly. In order to make such a comparison, the reference price published by the Angolan Ministry of Finance must be used to value the Profit Oil paid to Sonangol relating to Block 17³⁸.

Using this information, we can estimate the number of barrels of Profit Oil paid by Total at 29,573,743 barrels³⁹. **This would mean a difference of 1,465,990 barrels according to the data published in Sonangol's financial report.** So how can the difference between the number of barrels in the statements of the Angolan authorities and the estimates derived from the data of Total be explained?

One explanation could be a difference in the definition of Profit Oil used by Sonangol and by Total. Analysis of Total's disclosures highlighted that the French company used US accounting rules to define its payment categories, while the Angolan authorities may use a different reference. This way, when Sonangol receives various kinds of pay-

ments from Total, it may account for certain payments under Profit Oil, while Total does not.

Another possibility could be an under-reporting of the number of barrels received by the Angolan authorities. Sonangol may have received more barrels as Profit Oil than officially declared; some could then have been diverted, although it is impossible to trace the destination or use of those barrels. Officially, Sonangol collects a portion of Profit Oil paid by the companies to maintain its operations. The margin is reported annually by Sonangol and is limited by law to a maximum of 7% of the overall payments⁴⁰. The difference in reported barrels could thus result from a greater share being collected by Sonangol than what it has officially disclosed.

Theory II: The difference in Profit Oil stems from different valuations of the barrels of oil from Block 17.

In 2015, the reference price published by the Angolan authorities to value a barrel of crude paid as Profit Oil for Block 17 was USD 51.91⁴¹.

Without the disclosure by Total of the number of barrels associated with the valuation of the Profit Oil payment for Block 17, and without knowing the Profit Oil valuation method, it is impossible to directly calculate Total's price per barrel. To confirm the valuation per barrel, it is necessary to cross-reference the information with other data.

Total holds its 40% stake in Block 17 via two subsidiaries. One subsidiary, Total E&P Angola, registered in France, manages 35% of the 40% stake of Total in Block 17. Its activity is limited to managing and selling oil from Block 17⁴². The accounts of the subsidiary are held at the French company registry and accessible for a small fee. Use of

the information disclosed in these accounts and Sonangol's filings makes it possible to calculate the price per barrel of Block 17 Profit Oil at USD 49⁴³, giving a valuation difference of USD 2.91 per barrel.

How to explain the fact that Total values the barrels at a lower price than Sonangol does for the same Profit Oil from the same well? The accounts provided by Total E&P Angola indicate that the sole activity of the subsidiary consists of the sale of oil from Block 17. All of the sales by this subsidiary were made to another subsidiary of Total, TOTSA Trading, the international trading platform of the group located in Switzerland⁴⁴, a country known for its "advantageous" taxation for multinational companies⁴⁵. By applying a selling price between its two subsidiaries that is below that set by the Ministry of Finance, Total could reduce its taxable profit in Angola and reduce its tax payments. If Total E&P Angola were to value the barrels at the Ministry of Finance's reference price of USD 51.91 per barrel instead of USD 49, the subsidiary would earn 186 million euros in additional revenue⁴⁶. The tax rate on oil revenues in Angola (50%) would result in **USD 93.4 million (USD 93,388,342) in additional taxes in Angola.**

CONCLUSION

The first disclosures of payments to governments by Total has revealed differences between the information published by the company and that of the Angolan government. In particular, a gap of more than USD 100 million was recorded between Sonangol's reported Profit Oil regarding Block 17 and calculations based on Total's statements. This can be explained either by a difference in the number of reported oil barrels, or by a different valuation of the price per oil barrel. To confirm or invalidate one of these theories, Total would have to publish the number of Profit Oil barrels regarding Block 17 that the company actually paid - a requirement set out in the Accounting and Transparency Directives which has not been transposed into French law. The French company should also indicate its method of valuing Profit Oil for each payment in kind and publish the amount of its profits made in Angola. The disclosure of such information would make it possible to confirm or invalidate each of the two theories by removing the ambiguity around the valuing of payments between companies and the authorities. The reported gap of more than USD 100 million is questionable and could be all the more condemnable if it were the result of illicit practices in a country where nearly one-third of the population lives below the poverty line.

Recommendations

FOR THE FRENCH GOVERNMENT:

- 1 Modify Article L.225-102-3 of the Code du Commerce to incorporate an obligation to disclose payments in kind, value and volume as required by the European Transparency and Accounting Directives.

FOR TOTAL:

- 1 Publish the volumes relating to the company's payments in kind.
- 2 Publish the method used to value each payment in kind.
- 3 Proactively publish a country-by-country report such as required of banks by the EU Capital Requirements Directive IV.



4

AREVA : TRANSPARENCY IN A MINEFIELD

More than 75% of the electricity currently⁴⁷ produced in France is of nuclear origin. Uranium extracted by Areva is an essential component of nuclear fuel production. It comes from a handful of producing countries, most notably Kazakhstan, Canada and Niger. Nigerien uranium accounts for nearly 30% of the uranium produced by Areva, the French state-owned company and one of the leaders in the nuclear market. If the opaqueness that surrounds the extraction of uranium is gradually dissipating, the issue of Areva's fair contribution to the Nigerien budget in return for uranium extraction still remains.

THE OXFAM–ROTAB CAMPAIGN: “NIGER - WHO PROFITS FROM THE URANIUM?”

In 2013, Oxfam and ROTAB (Réseau des Organisations pour la Transparence et l'Analyse Budgétaire/Publish What You Pay Niger) launched a campaign “Niger: who profits from the uranium?” to denounce the lack of contribution from Areva to the Nigerien budget in return for the exploitation of uranium in its territory and to demand the renegotiation of the mining contracts. In France, nearly one in five light bulbs is lit by Nigerien uranium⁴⁸, while in Niger almost 90% of the population does not have access to electricity⁴⁹. In particular, Areva used to pay Niger a royalty fee that is lower than the applicable rate under the country’s 2006 Mining Code⁵⁰.

Thanks to the mobilization of citizens in Niger, France and all over the world, Areva was finally forced to agree to apply the legal royalty regime regarding its uranium contracts with the Nigerien government⁵¹ in 2014.

Royalty fee: company payment in return for the right to exploit natural resources.

Two years later, the company – more than 85% owned by the French government – disclosed the amounts it pays to the Nigerien government for the first time, as a result of the new European reporting requirements⁵².

Despite the negotiations, our calculations show that Areva seems far from contributing its fair share. While Nigerien uranium accounts for nearly 30% of the French company’s production⁵³, Niger receives only 7% of Areva’s payments to producing countries⁵⁴. Analysis of the data published by Areva for Niger highlights two factors that might have allowed the French company to reduce its payments in Niger:

Lowering the extraction price⁵⁵ of the uranium:

The renegotiation of the contracts resulted in a reduced extracting price, which in turn resulted in a decline in profitability of the mine. This decline in profitability has a twofold effect. When profitability declines, the extractive revenues also decline and, with them, the amount of royalty fees paid. Furthermore, since the Nigerien royalty rate is calculated based on the profitability of the mines, the decrease in profitability also results in the application of the lowest rate (5.5%, compared to 9% or 12% if the mine were more profitable).

If the extraction price had not decreased, the amount in royalty fees paid would have increased by nearly 15 million euros in 2015.

Under-valuing the exported uranium:

In 2015, Areva’s Nigerien subsidiary may have sold uranium to its parent company at a price that is significantly undervalued compared to the prices otherwise charged by other players in Niger. The same metric tonne of uranium, coming from the same mines, would be valued at 11,500 euros more if it were not exported by Areva. The price of uranium exported by the French company may barely cover its acquisition cost, which would allow Areva not to pay any taxes on its profits in Niger.

Areva’s uranium exports, valued at the prices charged by other players in Niger, could have yielded between 10 and 30 million euros in additional tax for the government in 2015, i.e. between 8% and 18% of the health budget of Niger for that same year, in a country where life expectancy barely exceeds 60 years⁵⁶.

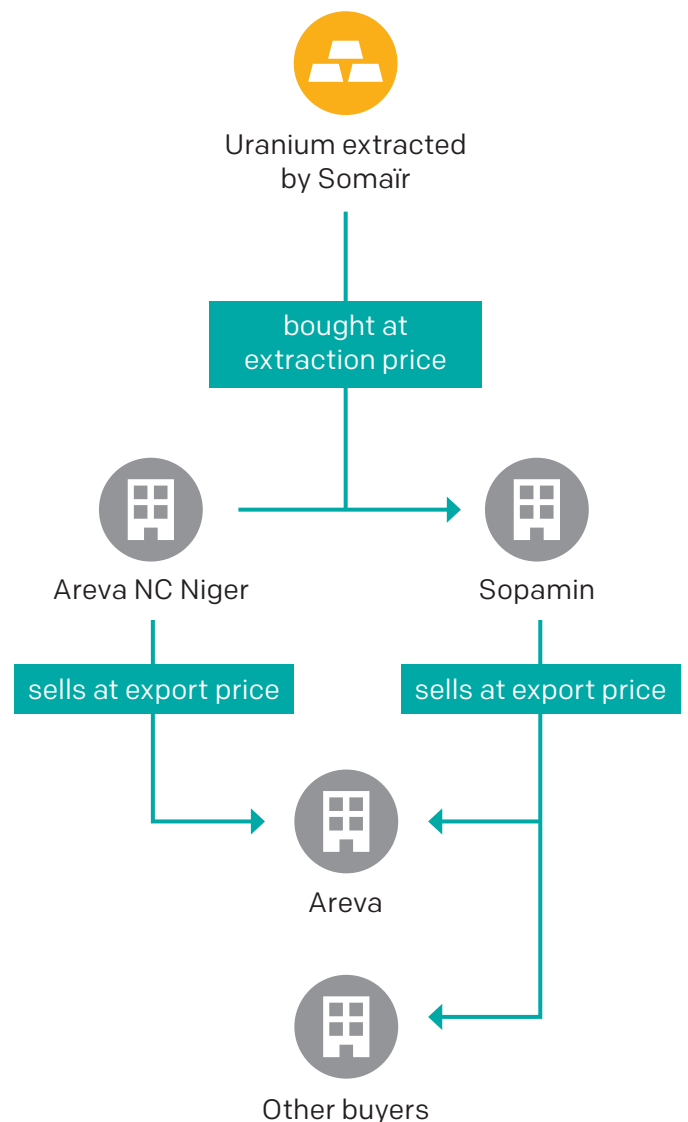
FROM THE MINES OF NIGER TO FRANCE: FROM EXTRACTION TO EXPORT

Areva operates two active uranium mines in Niger, Somair and Cominak, with minority partners⁵⁷. Somair is the largest uranium mine in Niger and one of the five largest uranium mines in the world in terms of production volume⁵⁸. As operator, Areva holds almost 64% of the shares in the Somair mine in association with Sopamin, a company controlled by the Nigerien government, which holds the remaining 36%⁵⁹.

When extracted from Nigerien mines, the uranium is not directly owned by Areva. In order to obtain the uranium, Areva and Sopamin must buy it back at the mine in proportion to their shares for a contractually agreed extraction price. The Areva Mines Niger⁶⁰ subsidiary buys the uranium and then sells it back to the Areva parent company. The French multinational also buys uranium from Sopamin.

Like many mineral-rich countries, Niger imposes royalty fees on the extraction of its natural resources⁶¹. Profits from the extraction of these resources are also taxed according to the national tax regime⁶², similar to other company profits.

Figure 6. Overview of the chain of uranium ownership mined at the Somair mine



Extraction price: price at which Areva buys uranium from Nigerien mines. It is set by contract. When it is extracted from the Nigerien mines, the uranium is not directly owned by Areva, which must buy it back at the mine in order to formally take possession of it.

NEW ROYALTY FEES: AREVA'S PROFITABLE NEGOTIATIONS

In 2014, under pressure from civil society, Areva and Niger signed a Strategic Partnership Agreement (SPA)⁶³, which amended Areva's royalty obligation⁶⁴. The rates are now based on the profitability of the mine. Therefore, according to the profitability of the project, the royalties that the company will have to pay to Niger will be 5.5%, 9% or 12% (see table). Previously, the royalty fee paid by Areva was set at 5.5%, regardless of the profitability of the mines.

At the time of the conclusion of this Agreement, French and Nigerian civil society welcomed the inclusion of the new royalty rates in the text. The Agreement, however, states in its second part that the uranium extraction price will be indexed to market prices. What may seem like minor details actually matter considerably: if market prices fall, the price of extraction also decreases and this

will inevitably cause a decrease in the profitability of the mines, and thus of the royalties due. Since 2014, the indexation of market prices has thus reduced the amount of royalties paid by the French company.

With a profitability level of 2.5% for Somair in 2015, Areva paid royalties of 5.5% of the revenue generated by the mine, approximately 10.8 million euros. This is **5 million euros less than the royalties the company paid in 2013 for a roughly equivalent production volume**⁶⁵. To hope to see the application of a 9% royalty fee, the profitability of Somair would therefore need to be eight times greater.

This reduction in the mine's profitability was made possible by a combination of two factors: a reduction in the uranium extraction price and an increase in production costs.

How to check the amount of Areva's royalties in Niger? The example of Somair

Areva's payments to governments disclosures enable us to verify that the amount of royalty fees paid to Niger is indeed as stated by Areva. We can calculate the extraction price of uranium in Niger for 2015 from the royalties paid relating to Somair and compare this extraction price with the formula provided by Areva in the Strategic Partnership Agreement (SPA) and thus verify the amount of royalties paid by Areva.

The new formula for calculating the extraction price described in the SPA, and the uranium production volume of the mine as reported by Areva, can be used to calculate the extractive income from Somair and then to determine if the amount of royalties paid by Areva corresponds to the 5.5% rate.

In 2015, with a price of 78.38 euros per kilo of uranium, and production of 2,509 metric tonnes of uranium, mining revenues from Somair would amount to approximately 196,658,000 euros. The royalties paid are therefore approximately 10,816,200 euros, which corresponds to the amount reported by Areva in CFA francs (Central African francs) in its disclosures of payments to governments.

Figure 2. Applicable royalties according to the Nigerien Mining Code

Mining Code	Profitability less than 20%	Profitability between 20% and 50%	Profitability more than 50%
Royalty rate	5.5%	9%	12%

The royalty rate is expressed as a percentage of the market value of the uranium mined (i.e. the extraction price multiplied by the volume of production). The profitability is the net margin of the mine.

AREVA: A FAIR PRICE?

While the Strategic Partnership Agreement involved a change in the royalty regime, Areva succeeded in obtaining an indexation of the extraction price of uranium to market prices, but not just any market price. The new pricing formula is based on several market prices, including spot market prices, or short-term market prices, that are historically lower than others⁶⁶ and reduce the extraction price at which Areva and Sopamin buy uranium.

Therefore, since the signing of the SPA and the indexation, the extraction prices have been decreasing. Whereas in 2013 the extraction price of a kilo of uranium was **73,000 CFA francs (about 111 euros⁶⁷)**, it was **less than 52,000 CFA franc (or 78.38 euros) in 2015**.

Indexing the extraction price of uranium to so-called spot market prices is surprising, since Areva does not operate on spot contracts. The uranium purchased at extraction price is resold by Areva Mines Niger to the parent company. In reality, Areva has sold uranium to itself since the

beginning of operations at the Somair mine, at that time by the predecessor of Areva, the company Cogema. This has therefore little to do with a short-term contractual commitment.

Even after being processed, Areva's uranium is mainly sold to long-term trading partners, most notably EDF, with which Areva has a contract to supply 35,000 metric tonnes of uranium until 2030⁶⁸. Nigerien uranium, which accounts for nearly 30% of Areva's annual production, is therefore a strategic raw commodity, the sale of which is used to honour long-term contracts.

The reduction in extraction prices due to indexation therefore resulted in a decline in the profitability of the mine, thus reducing the amount of royalty fees paid and de facto locking the applicable royalty rate at the lowest level.

The decrease in extraction prices, however, would not be the only factor diminishing the profitability of the mine; the increase in production costs would be another.

Profitability: profitability is the net extractive margin and is calculated by dividing the operating results of a mine by its operating revenues.

MINING AT ANY COST ALLOWED?

During the 2014 negotiations, Areva and Niger also agreed on the need to reduce production costs, while safeguarding employment to preserve the profitability of Nigerien mines⁶⁹. Since the costs of producing uranium are not made public, it is impossible to know exactly if they have increased since the SPA was signed. But the signs are not reassuring.

In 2014, an internal audit of Somair, which was leaked to the press, showed that the production costs of the mine had more than doubled between 2006 and 2011⁷⁰, without any correlation with production levels. The Nigerien government still refuses to make the complete audit public. According to Areva, this increase is due to new investments. Without the entire audit, it is not possible to verify the company's assertions.

If the rise in production costs reduces the profitability of the Nigerian mines, does it benefit Areva? The company could in fact benefit indirectly from this increase in costs. How? Areva is organized vertically: the company operates mines, transports uranium and converts it into nuclear fuel. It has subsidiaries specialized in logistics, marketing, transport⁷¹, etc. For all these services, Areva could

charge higher prices to the mines it operates. The increase in costs for the mine could thus represent an increase in profits for other Areva subsidiaries. The opaqueness surrounding the structuring of Areva's activities in Niger does not currently make it possible to answer this question properly.

To cope with rising costs, Areva needed in any case to break one of its commitments. In 2015, the French company laid off several hundred Nigerien workers⁷², justifying this in terms of a decline in the profitability of the mines. This decline was in particular due to the indexation of prices that the company itself had negotiated.

This combination of higher production costs and lower extraction prices could explain the very low profitability of the mines and thus the reduction in the applicable royalty fees. If the extraction price in 2013 had been maintained at 73,000 CFA francs (compared to the current price of less than 52,000 CFA francs), the applicable royalty rate for the year 2015 would have been 9%. The royalties paid would have been 25 million euros, nearly 15 million euros more than the current payment.

AREVA'S EXPORT PRICES WELL BELOW THOSE OF COMPETITORS

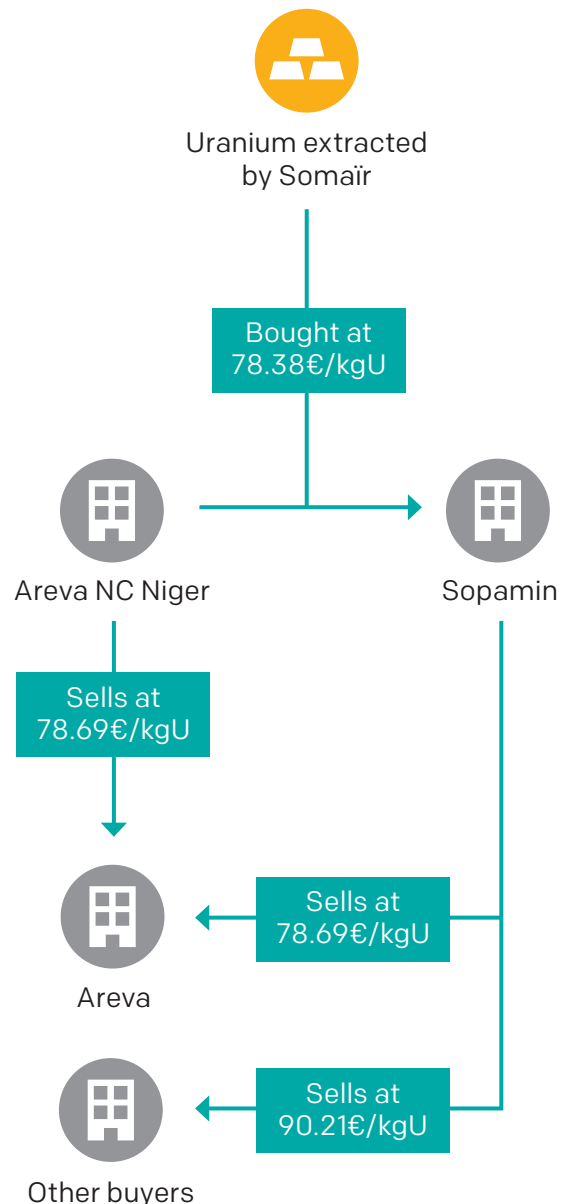
After being bought by Areva Mines Niger at extraction price, the uranium is sold to Areva in France for a price that beats all competition.

The UN Statistics Division and Nigerien Customs both publish information on the volumes and value of Nigerien uranium exports, which makes it possible to obtain an export price⁷³. By comparing the extraction prices and the export prices to France, we can calculate that, for 2015, the margin generated by the sale of uranium from Areva Mines Niger to Areva Mines France is on average 31 cents per kilo (on an average sale of 78.69 euros per kilo of uranium). This margin is intended to cover transport costs, which are high due to the safety measures surrounding the transport of *yellow cake*⁷⁴, as well as a profit to remunerate the employees of Areva Mines Niger. However, the same kilo of uranium from the same mines yields a margin of 11.8 euros per kilo (on a sales price higher than 90.2 euros per kilo of uranium) when it is not sold to Areva. The price of the kilo of uranium sold to Areva therefore seems undervalued compared to the prices charged to other companies.

Export of uranium: whoever loses, wins

In 2015, the uranium exported from Niger came only from the two mines operated by Areva, both subject to the SPA between Areva and Niger, which establishes a single extraction price. This implies that uranium should have been sold at the same price to all partners in both mines. However, exports to France (i.e. Areva's purchases) are on average 11,500 euros cheaper per metric tonne than exports to the rest of the world. They are also well below average uranium prices for 2015. How can this be explained? Two reasons can be given.

Illustration 7. Export Price of Nigerien Uranium



The first reason is Areva's purchase cost. A lower selling price for a producing country as big as Niger offers a significant competitive advantage. Not only is Areva buying uranium from its Nigerien subsidiary at an unbeatable price, but it passes this purchase price on to other suppliers, as indicated by the UN data⁷⁵.

The second reason relates to income tax. The export price of uranium to France leaves a very small profit margin (31 cents per kilo) to cover the transport costs and to pay the employees of Areva Mines Niger. This very low profit margin also allows Areva not to pay income tax for its Nigerien subsidiary⁷⁶. When contacted, the company defended itself for not paying taxes, and explained that it took advantage of a tax credit resulting from pre-paid taxes in 2014⁷⁷. In other words, Areva claims to have paid too much tax in 2014 in relation to its profits, and that the surplus paid in 2014 covered the total amount of taxes due in 2015.

But how much in taxes did Areva's Nigerien subsidiary pay in 2014? According to data from the Nigerien government⁷⁸, in 2014 Areva Mines Niger did not pay income tax, apart from a pre-payment, equivalent to less than 38,000 euros⁷⁹. For the years 2014 and 2015 combined, Areva could have therefore paid less than 38,000 euros in taxes. It is unclear today whether the 2015 payments have exhausted the 2014 tax credit or whether the pre-payment will also cover the taxes due in 2016. This data tends in any case to demonstrate the limited profits of Areva's subsidiary in Niger. Are these profits limited by the underpricing of uranium exported to France?

TANGIBLE LOSSES FOR THE NIGERIEN GOVERNMENT

While Niger is still struggling to raise funds to finance essential services such as access to health or education, the potential underpricing of uranium exported by Areva represents significant potential losses. Since these losses are difficult to quantify with precision, we have identified two possible scenarios based on a comparison of the extraction price and the export prices of 2015, taking into account Areva's economic model:

Scenario 1: If Areva values its uranium at the same price as other Nigerien uranium exporters (90.2 euros per kilo in 2015), the profit of Areva Mines Niger would amount to more than 39 million euros in 2015⁸⁰ and the taxes that Areva would have to pay would be around 11.75 million euros.

Scenario 2: If Areva values its uranium on the basis of long-term market prices that would reflect its activity correctly (109 euros per kilo in 2015), then the profit of Areva Mines Niger would amount to more than 101 million euros in 2015⁸¹ and the taxes that Areva would have to pay would be around 30.5 million euros.

These potential tax losses represent between 8% and 18% of the health budget of Niger in 2015, in a country where life expectancy is just over 60 years.

CONCLUSION

Three years after the renewal of Areva's contracts in Niger, the contracts regulating Areva's activities have still not been made public despite a Constitutional mandate. Disclosure of the SPA, as well as the first set of data published by the French nuclear giant to fulfill its European obligations, make it possible to reach a partial assessment of the outcome of the negotiations.

The change in the royalty regime, one of the main demands of the Nigerien public, unfortunately did not have the expected results. The parallel negotiations on the indexation of the extraction price have frozen profitability, preventing the application of higher royalty rates and de facto decreas-

ing the amount of royalty fees to be paid. Without this modification of the extraction price, the royalties paid could have increased by 15 million euros in 2015. The formula for the extraction price introduced for the financial years 2015 and 2016 should be reviewed every two years, giving Niger an opportunity to readjust the formula in accordance with Areva's economic model.

Moreover, this analysis also shows that Areva's uranium exports could be underpriced, which would allow the company not to pay any income tax. This underpricing would represent estimated losses of between 10 and 30 million euros. It is up to Areva to price sales between its subsidiaries on an arm's length basis⁸², reflecting both the market value of the goods and the business model of the company.

Recommendations

FOR THE GOVERNMENT OF NIGER:

- 1 The contracts regulating the extraction activities of Areva in Niger must be made public in accordance with the provisions of the Constitution.
- 2 The renegotiation of the extractive price of uranium must take into account Areva's economic model.
- 3 The audits of the mines operated by Areva must also be made public so that citizens get a clear idea of how the mines are governed.

FOR AREVA:

- 1 Areva should renegotiate a uranium extraction price that corresponds to its economic model.
- 2 Areva should sell uranium from its Nigerien subsidiary at an arm's length price, in accordance with OECD principles.
- 3 Areva should proactively publish a country-by-country report in order to complete the disclosure of information on its activities in the countries where it operates.

FOR THE FRENCH GOVERNMENT, MAJORITY SHAREHOLDER IN THE COMPANY:

- 1 As the majority shareholder in Areva, the French government must ensure that Areva adheres to the highest standards of transparency and dialogue with civil society. In particular, the French government must require Areva to publish all contracts relating to its mining activities in Niger.
- 2 The French government must commission a public audit of the extractive activities of Areva in order to account for the potential overcharging by the French company of its own subsidiaries operating its mines.



5

GENERAL RECOMMENDATIONS

The first mandatory disclosures by Areva, EDF, Engie, Eramet, Maurel & Prom and Total improve our understanding of the companies' activities and their contributions in the countries where they operate. Yet fully understanding this data is difficult.

The difficulty of accessing this data, the lack of context of the data, the lack of information on the exchange rates used, the insufficient precision of the criteria defining the different categories of projects and recipient entities, etc. are all elements that do not currently allow the public to have a complete understanding of the disclosures published by the French extractive companies.

As the cases of Total in Angola and Areva in Niger show, French extractive companies still appear to benefit from the exploitation and extraction of natural resources at the expense of the development of the countries in which they operate.

Following our analysis of the companies' reports on payments to governments, we make the following recommendations:

FOR THE EUROPEAN UNION

1 Access to data:

- a. Require Member States to create a centralized, public and free registry of company reports on payments to governments;
- b. Require companies to publish reports in both pdf and in an open data format.

2 Putting the information into context:

- a. Require companies to publish the following information for each project: project status (exploration, development, exploitation), partners, start date, production volumes, contextual information about payments linked to infrastructure;
- b. Require companies to include and name projects where payments are of less than 100,000 euros;
- c. Require companies to report per country for all countries where they are present without exception, including the following information: revenues, number of employees, physical assets, sales, profits, a complete list of subsidiaries and the nature of the activity of each subsidiary.

3 Improving the reporting requirement for each project:

- a. Require companies to declare the amounts paid in both their original currencies and in euro, indicating precisely the rate and the reference system used for currency conversions;
- b. Require companies to indicate the source used for defining each payment category;
- c. Differentiate the nature of payments by commodity and provide the method that companies must use to value these payments;
- d. Require companies to publish the payments in proportion to their participation in projects regardless of their status as operator or non-operator;
- e. Clarify the concept of "project"; only projects that are integrated both operationally and geographically and with similar terms can be combined;
- f. Specify that companies disclose the official name of each authority that received a payment.

FOR THE FRENCH GOVERNMENT

The French government should support the recommendations set out above at a European level.

Given the loopholes in the transposition of the European Directives into French law, as highlighted in our analysis, the French government must reinstate the obligation to disclose payments in kind by both value and volume as required by the Directives, and should:

- a.** Consolidate all reports in a centralized, public and free registry and request disclosure of reports on payments to governments in both pdf and an open data format (open data format reporting is required in the United Kingdom for UK-registered extractive companies and will be required for publicly listed non-UK-registered extractive companies when reporting on financial years that start on or after August 1, 2016);
- b.** Raise the upper limit of the current fine of 3,750 euros to make the penalties more dissuasive, as specified in the Directives.

These improvements would allow for a better understanding of the activities of the companies concerned regarding their obligation to report per project and thus meet the objective of transparency in the extractive sector.



6

GLOSSARY

GLOSSARY

Several of these definitions are taken or adapted from *OpenOil (2012), Oil contracts: how to read and understand them* ⁸³

Barrels Of Oil Equivalent (Boe)

Way of measuring energy production or consumption across different energy sources. Other hydrocarbons like natural gas and coal and occasionally even renewables are measured by the amount of energy they produce compared to a barrel of oil.

Barrels Per Day (Bpd)

The standard way of measuring oil production. A barrel is about 42 US gallons or 158 litres, though the exact number varies according to crude oil grades. The world currently consumes around 90 million barrels of oil a day, a quarter of it in the United States.

Block

Method used to designate an area of land into workable areas for separate consortia or companies to operate in. One block can contain several oil fields.

Concession

A lease agreement by which an oil company can enjoy the exclusive right to produce oil in any given area, as ownership of the oil is transferred from the natural owner, such as the state or landowner, to the lease holder at the wellhead.

Crude Oil

A fossil fuel formed from organic material over millions of years and extracted directly from the rocks where it is found, which can be further processed into various fuels and petrochemical products for consumers. Natural gas is often found dissolved in the oil.

Joint venture

Two or more companies share the management of a project, as well as any profits and losses.

Natural gas

Mainly methane. It occurs naturally and is used as a fuel.

Natural resource curse

The theory that natural resource wealth can paradoxically lead to negative development outcomes in producing countries due to the weakening of government institutions, the neglect of other key sectors of the economy, corruption, high inequality of income and/or pollution. Sometimes called the "paradox of plenty".

Offshore

Term for oil and gas deposits and installations at sea.

Onshore

Term for oil and gas deposits and installations located on land.

OPEC

The Organization of Petroleum Exporting Countries was established in 1961 and has 12 member states that agree on a common quota for the production and sale of oil.

Operator

The company partnering in a joint venture that has decision-making authority at the operational level for the extractive project. It is also the company that will meet the financial obligations of the joint venture on behalf of the other partners; to latter contributing their share in proportion to the percentage they hold in the joint venture.

Petroleum

The technical term to denote both crude oil and petroleum products produced by refining.

Production sharing agreement (PSA)

An agreement which regulates the sharing of production between the host government and the oil company, after deduction of the Cost Oil (which allows the company to recover the costs it has borne). The company generally pays the share due to the government in the form of royalties and income tax.

Profit Oil

The portion of revenues divided up between participating parties and a host government in a production sharing agreement, once the operator has recovered its investment by deducting Cost Oil production

Reserves

The quantities of oil and gas whose extraction is profitable under the prevailing economic conditions. A series of definitions has been established by the American Society of Petroleum Engineers. Reserves are divided into subcategories: proved reserves, probable reserves and possible reserves.

Royalty fee

Payment by a company in return for the right to extract natural resources.

Service contract

An agreement whereby a foreign oil company is contracted to produce a country's oil reserves on a simple fee basis. The state maintains sole rights over the reserves, and the contractor is compensated by a fee per barrel, plus cost recovery.

Signature bonus

Lump sum of money paid up front by companies to governments upon signing an exploration contract, production sharing agreement or concession agreement.

Transparency in the extractive industries

Improved access to information such as data on revenues, prices and contractual conditions for better management of natural resources and to prevent illegal practices such as corruption or tax evasion. The concept of transparency gained prominence in the 1990s as governance issues dominated the development debate. Since 2003, the Extractive Industries Transparency Initiative (EITI) has promoted transparency in the extractive sector.

ENDNOTES

FRENCH EXTRACTIVE COMPANIES PUBLISH THEIR PAYMENTS TO GOVERNMENTS FOR THE FIRST TIME: WHAT ARE THE IMPLICATIONS?

1. Oil exports have increased by 25% in value since 2005 and amounted to US\$1,440 billion in 2015. At the same time, gas exports increased by 75% to US\$260 billion by 2015, <http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx> (accessed April 2, 2017).

2. These flows were estimated in 2013 at 75 billion euros for the countries in sub-Saharan Africa alone. See Global Financial Integrity (2015), Illicit Financial Flows from Developing Countries: 2004-2013, p vii, http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf (accessed April 2, 2017).

3. Publish What You Pay (PWYP), Extractive Industry Transparency Initiative, <http://www.publishwhatyoupay.org/our-work/eiti/> (accessed April 2, 2017).

4. It should be noted that these Directives also apply to logging companies.

5. Légifrance (2014), Law number 2014-1662 of December 30, 2014 encompassing various provisions for adapting the legislation to European Union law regarding economic and financial matters, which incorporates a new article in the commercial code (article L 225-102-3 of the commercial code).

6. Ibid.

7. These are the six largest companies among the 12 French companies in the mining, oil and gas sectors whose disclosures were identified.

TRANSPARENCY OF FRENCH EXTRACTIVE COMPANIES: MORE PROGRESS NEEDED

8. Thio, Kouaoua, Népoui-Kopéto, Tiébaghi, Poro, Pinpin, Etoile du Nord, Tontouta-Opoué and Poum. See Nickel Mines & Factories Company, <http://www.sln.nc/mines-et-usine> (accessed April 2, 2017).

9. Muyunkum and Tortkuduk. See Mining Atlas Kazakhstan, <https://mining-atlas.com/operation/Tortkuduk-Uranium-Mine.php> (accessed April 2, 2017).

10. Total does not provide any explanation regarding this point in its disclosures. In response to our questions, the company told us that it has reported payments from each of the major fields in Gabon - which together account for 80% of production - and that all other payments have been allocated to "unallocated concession field" (the majority of these payments relate to non-attributable income taxes).

11. The categories "royalty fees" and "taxes" can sometimes be substituted; whereas in most countries of production, a royalty fee refers to a monetary payment calculated on the basis of revenues in return for an exploitation right, some other countries use that term to indicate a payment based on profits which is considered to be a tax.

12. Areva created a different category for payments in Kazakhstan and Niger. When questioned, the company did not detail what this category encompasses.

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13. Le Monde (2017) Angola : le parti au pouvoir remporte les élections générales (Angola: Party in Power Wins General Elections) http://www.lemonde.fr/afrique/article/2017/08/24/angola-le-parti-au-pouvoir-remporte-les-elections-generales_5176172_3212.html#6LgcxVp1dAHZuyxw.99 Accessed August 25th 2017

14. Jeune Afrique (2016), Pétrole: en 2016 l'Angola éclipse le Nigéria (Petrol: in 2016, Angola eclipses Nigeria), <http://www.jeuneafrique.com/388371/economie/petrole-2016-langola-a-eclipse-nigeria> (accessed April 2, 2017).

15. Le Monde (2016), L'Angola chute après des années de prospérité (Angola plummets after years of prosperity), http://www.lemonde.fr/afrique/article/2016/07/15/l-angola-chute-apres-des-annees-de-prosperite_4970282_3212.html (accessed April 2, 2017).

16. US Energy Information Administration (2016), Country Analysis Brief: Angola, May 2016, p. 2, https://www.eia.gov/beta/international/analysis_includes/countries_long/Angola/angola.pdf (accessed April 2, 2017).

17. Ibid.

18. International Monetary Fund (2015), Angola - Country Report No. 15/302, p. 6, <https://www.imf.org/external/pubs/ft/scr/2015/cr15302.pdf> (accessed April 2, 2017).

19. US Energy Information Administration (2016), op. cit., p. 20. EMIS Insight (2014), Oil and Gas Angola, November 2014, p. 18, <https://www.emis.com/sites/default/files/EMIS%20Insight%20-%20Angola%20Oil%20&%20Gas%20Sectors.pdf> (accessed April 2, 2017).

21. As shown on the map above, Block 17 consists of five fields: Girassol (the most important), Pazflor, Dalia, CLOV and Rosa.

22. EMIS Insight (2014), op. cit., p. 16.

23. Le Monde (2017), Total affiche de bons résultats dans un environnement dégradé (Total shows good results in a deteriorating environment), http://www.lemonde.fr/economie/article/2017/02/09/total-affiche-de-bons-resultats-dans-un-environnement-degrade_5077005_3234.html (accessed April 2, 2017).

24. EMIS Insight (2014), op. cit., p. 18.

25. See in particular OSISA and Global Witness (2012), Oil Revenues in Angola: much more information but not enough transparency, <http://www.osisa.org/other/economic-justice/angola/oil-revenues-angola-much-more-information-not-enough-transparency> (accessed April 2, 2017).

26. Human Rights Watch (2004), Some Transparency, No Accountability: the Use of Oil Revenue in Angola and Its Impact on Human Rights, <https://www.hrw.org/report/2004/01/12/some-transparency-no-accountability/use-oil-revenue-angola-and-its-impact-human> (accessed April 2, 2017).

27. US State Department (2010), Angola, <https://www.state.gov/j/dri/rls/hrrpt/2009/af/135937.htm> (accessed April 2, 2017).

28. International Monetary Fund (2012), Angola - Country Report No. 12/103, p. 39, <https://www.imf.org/external/pubs/ft/scr/2012/cr12103.pdf> (accessed April 2, 2017).

29. Miranda, Correia, Amendoeira & Associados, Sociedade de advogados, English translation of the 2004 Petroleum Activities Law, <http://www.eisourcebook.org/cms/files/attachments/other/Angola%20Petroleum%20Activities%20Law,%202004.pdf> (accessed April 2, 2017).

30. Sonangol (2016), Relatório e Contas 2015 Consolidado (Consolidated Report and Accounts 2015), p. 30,

31. http://www.sonangol.co.ao/Portugu%C3%AAs/A_SonangolEP/Relat%C3%B3rio%20de%20Contas/Documents/relatorio_contas_2015.pdf (accessed April 2, 2017).

32. Ministério das Finanças (2017), Avaliação do Comportamento da Receita Petrolífera (Evaluation of Management of Oil Revenue), <http://www.minfin.gov.ao/PortalMinfin/faces/materiasdereale/publicacoes> (accessed April 2, 2017).

33. L. Mouan (2015), Governing Angola's oil sector: The illusion of revenue transparency?, Unpublished thesis, Coventry University, UK, <https://curve.coventry.ac.uk/open/file/44d3c08f-2d59-4d1a-8ffa-769aa18c7232/1/mouancomb.pdf> (accessed April 2, 2017).

34. OSISA and Global Witness (2011), op. cit.

35. Based on data disclosed by the Angolan Ministry of Finance and taking into account the margin withheld by Sonangol: see the note on methodology. See Ministério das Finanças (2015), Avaliação do Comportamento de Receita Petrolífera Annual 2015 (Evaluation of Management of Oil Revenue 2015), p. 12, <http://www.minfin.gov.ao/PortalMinfin/faces/materiasdereale/publicacoes#> (accessed April 2, 2017).

36. In 2016, US company Exxon (or ExxonMobil) was not listed or registered in a country requiring the disclosure of payments to governments. UK company BP (formerly British Petroleum) only reports payments made when it is acting as an operator. Norwegian company Statoil disclosed the share of Profit Oil it paid to Angola.

37. Sonangol (2016), op. cit., p. 30.

38. Since 2004, the Angolan authorities have required Sonangol and the operating companies to report quarterly to the Finance Ministry and the Oil Ministry both an ex ante estimate and an ex post realization of the price of oil from each block. This information allows the two ministries together to calculate a market price for the barrels extracted from the corresponding sites, which serves as a reference for the valuation of Profit Oil paid by Sonangol. Since mid-2015, only the Ministry of Finance has published this reference price on its website (the most recent publication by the Oil Ministry was in the first half of 2015).
39. The volume is calculated by dividing the Profit Oil reported by Total by the reference price published by the Angolan Ministry of Finance.
40. This rate is calculated based on the fiscal reference price per barrel of oil set by the Angolan government on a quarterly basis. In 2015, the rate was set at 6.72% of the Profit Oil amount realized by Sonangol.
41. The Angolan Ministry of Finance publishes a list of prices per block. For a more detailed calculation, see note on methodology in *Ministerio das Finanças (2017), Exportações e Receitas de Petróleo Consolidado (Consolidated Exports and Oil Revenues)*, http://www.minfin.gov.ao/PortalMinfin/faces/economianacional/petroleo;jsessionid=VspJSK-QUwzQldvqlnn3zRymllu_
42. Total E&P Angola, Annual Report – Year 2015, Registry of the Commercial Court of Nanterre: Registration No. 37426, September 28, 2016.
43. The accounts of Total E&P Angola detail revenues from the sale of oil from Block 17 totalling 2.8 billion euros (USD 3.1 billion). The Sonangol accounts provide information to calculate the number of barrels sold by Total E&P Angola, i.e. 64,228,070 barrels. The price per barrel obtained is therefore USD 49 per barrel.
44. Ibid.
45. Public Eye, *Matières premières (Raw materials)*, <https://www.publiceye.ch/fr/themes-et-contexte/commerce-et-matieres-premieres/matieres-premieres/> (accessed April 2, 2017).
46. Total's revenues are obtained by multiplying the number of barrels (64,228,070) by the price per barrel of USD 51.91, which would amount to USD 3.33 billion in revenues. Given that Total's reported revenues are USD 3.15 billion, the estimated income difference amounts to USD 186 million.
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47. RTE (2015), *Electricity balance 2015*, http://www.rte-france.com/sites/default/files/pictures/actu/rte_be_2015_interactif.pdf, p. 13 (accessed April 2, 2017).
48. Estimate from Oxfam France and ROTAB (2013), *Niger: à qui profite l'uranium ? (Niger: who benefits from the uranium?)*, https://www.oxfam.org/sites/www.oxfam.org/files/niger_renegociations_areva_note_oxfam_rotab.pdf, adjusted according to the latest public statements from Areva. See also *Le Nouvel Observateur (2014), Nouvel accord entre Areva et le Niger sur l'uranium (New agreement between Areva and Niger on uranium)*, May 28, <http://tempsreel.nouvelobs.com/economie/20140528.REU4920/un-accord-areva-niger-sera-signe-dans-la-journee.html> (accessed April 2, 2017).
49. Oxfam France and ROTAB (2013), op. cit., p. 1.
50. For more information, see Oxfam France and ROTAB (2013), op. cit.
51. Oxfam France (2014), *Première victoire sur Areva (First victory over Areva)*, <http://www.oxfamfrance.org/actualites/areva-niger/premiere-victoire-sur-areva> (accessed April 2, 2017).
52. Areva (2016), *Rapport sur les paiements effectués au profit des gouvernements au titre de l'exercice 2015 (Report on payments to governments for the financial year 2015)*, http://www.areva.com/finance/liblocal/docs/2016/Rapport_paiements_gouvernements_2015.pdf (accessed April 2, 2017). Areva's disclosures comprise the following payment categories: production entitlements; taxes; royalties; dividends; bonuses; fees; payments for infrastructure improvements; and other payments.
53. Areva (2016), *Rapport de Responsabilité Sociale 2015 d'Areva Mines (Social Responsibility Report 2015 of Areva Mines)*, p. 24, <http://www.rse-mines.areva.com/PDF/RCR2015-COMPLET-FR.pdf> (accessed April 2, 2017).
54. For our calculations, see the French language version of this report: *PWYP France, Oxfam France, ONE and Sherpa (2017), La transparence à l'état brut – Décryptage de la transparence des entreprises*, April 2017, p. 18, https://www.oxfamfrance.org/sites/default/files/file_attachments/la_transparence_a_letat_brut_one_oxfam_sherpa.pdf
55. Extraction price: sale price of the uranium from the mine to its shareholders. It is set by the latter.
56. Information on life expectancy from the World Bank. Information on Niger's health budget from *Ministry of Public Health (2016), Annuaire des Statistiques Sanitaires du Niger (2015) (Niger Yearbook of Health Statistics 2015)*, p. 25, http://www.stat-niger.org/statistique/file/Annuaire_Statistiques/snis/Annuaire_Statistiques_2015_DS-MSP.pdf (accessed April 2, 2017).
57. This case study concentrates only on Somair. As a consequence of new international accounting rules, Areva does not consolidate the results of its other mine (Cominak), which means that there is no access to the information needed to cross-check the results.
58. Investing News Network (2016), *Top Uranium Mines*, <http://investingnews.com/daily/resource-investing/energy-investing/uranium-investing/top-uranium-mines/> (accessed April 2, 2017).
59. Areva (2016), *Rapport de Responsabilité Sociale 2015 (Social Responsibility Report 2015)*, op. cit., p. 13.
60. Areva Mines Niger is a subsidiary which consolidates the participation of Areva in the Nigerien mines Cominak and Somair.
61. Republic of Niger, *Mining Code*, Art. 84.
62. Republic of Niger, *General Tax Code*, Art. 27.
63. Republic of Niger (2014), *Official Journal, Special No. 12*, June 12, 2014.
64. This Agreement specifies that Areva will now be subject to the *Mining Code of 2006*.
65. In 2013, royalties paid relating to Somair were 15.3 million euros, for a production volume of 2,730 metric tonnes: *EITI Niger (2015), EITI Report 2013*, p. 90, http://www.itieniger.net/images/DOC_SITE_ITIE/Rapport_Definitif_2013_01-12-2015.pdf (accessed April 2, 2017).
66. For example, in 2014 the price for a pound of uranium on the spot market was USD 33.21 versus USD 46.46 on the long-term markets. The company Cameco, a competitor of Areva, publishes on its website the spot and long-term prices according to UxC and TradeTech that are also used by Areva: <https://www.cameco.com/invest/markets/uranium-price> (accessed April 2, 2017).
67. EITI Niger (2015), op. cit.
68. Areva (2012), *Areva et EDF signent deux contrats significatifs pour la fourniture de plus de 30 000 tonnes d'uranium naturel (Areva and EDF sign two significant contracts for the supply of more than 30,000 tonnes of natural uranium)*, <http://www.areva.com/FR/actualites-9532/areva-et-edf-signent-deux-contrats-significatifs-pour-la-fourniture-de-plus-de-30-000-tonnes-d-uranium-naturel.html> (accessed April 2, 2017).
69. Republic of Niger (2014), *Official Journal, Special No. 12*, op. cit.
70. D. Flynn and G. De Clercq (2014), *Atomic Split*, Reuters special report, p. 4, <http://graphics.thomsonreuters.com/14/01/NIGER-AREVA.pdf> (accessed April 2, 2017).
71. Areva TN (2015), *Press release*, [http://china.areva.com/home/liblocal/docs/China%20Offer/AREVA%20TN%20pres%202015%20\[Compatibility%20Mode\].pdf](http://china.areva.com/home/liblocal/docs/China%20Offer/AREVA%20TN%20pres%202015%20[Compatibility%20Mode].pdf) (accessed April 2, 2017).
72. Africa 7 (2015), *Niger: Layoffs of hundreds of Areva employees* <http://www.africque7.com/societe/11298-niger-licenciement-de-centaines-demployes-dareva.html> (accessed April 2, 2017).
73. Data available on the UN databases Comtrade (<https://comtrade.un.org/db/>) and Trademap (<http://www.trademap.org/Index.aspx>) (accessed April 2, 2017).
74. Yellow cake is defined by Areva as a solid uranium concentrate obtained after processing mined rock. It takes its name from its yellow colour and pasty texture.

75. According to customs data for 2015, more than 3,300 metric tonnes of uranium were exported to France. However, Areva's share in Niger for the year amounts to about 2,100 metric tonnes. The French company could have bought 1,200 metric tons from minority partners operating in Niger at an average price of 78.69 euros per kilo of uranium.

76. Areva (2016), Rapport sur les paiements effectués au profit des gouvernements au titre de l'exercice 2015 (Report on payments to governments for the financial year 2015), op. cit.

77. Areva's reply to our questionnaire sent on December 12, 2016.

78. The European Accounting and Transparency Directives only cover payments made since 2015. But Niger has been part of the EITI since 2006, which obligates the Nigerien government to disclose payments received from each extractive company within two years. Payments in 2014 - including Areva Mines Niger's taxes - are available in EITI Niger (2016), EITI Report 2014.

79. EITI Niger (2016), EITI Report 2014, p. 93.

80. This result is based on the margin of 11,800 euros per metric ton between the removal price and the export price, and 3,314 metric tons exported to France. For more information, see the note regarding methodology.

81. This figure is based on the margin of 30,700 euros per metric tonne between the extraction and the export price, and 3,314 metric tonnes exported to France.

82. According to the OECD, under the arm's length principle, the applicable price for transactions within the same group must be identical to the applicable price for two entities that do not belong to the same group: OCDE (2009), Principes de l'OCDE applicables en matière de prix de transfert à l'intention des entreprises multinationales et des administrations fiscales 2009, <http://www.oecd-ilibrary.org/content/book/tpg-2009-fr> (accessed April 2, 2017); English language text (OECD 2010) at http://www.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations_20769717;jsessionid=2ct9jn69kuia6.x-oecd-live-03qsCJYnloRG-H3VEXohl4wYW75l-276812619# (accessed April 2, 2017).

GLOSSARY

83. <http://openoil.net/understanding-oil-contracts/>



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