

Dodd-Frank 1504 and Extractive Sector Governance in Africa

It is estimated that up to 34 countries in Africa are mineral dependent – with over a quarter of their total exports generated from fuel and non-fuel minerals (Haglund 2011). In spite of the continent's sizable natural resources, many resource-rich African countries are poor and conflict-ridden. This contrast between resource wealth, slow economic growth and poverty is described as the 'natural resource curse' (Auty 1993).

Transparency in the governance of Africa's extractive sector is a major policy issue, given the implications for local economic development. Good governance of Africa's extractive sector can certainly mitigate the 'resource curse', but this requires institutional responses at the national and global level. Section 1504 of the U.S. Dodd-Frank Act signals that extractive sector transparency is now a transnational policy issue, but how does this important reform resonate in Africa?

Africa's extractive sector has become the epicenter of a global resource 'scramble', as emerging economies such as Brazil, Russia, India, China and South Africa (BRICS) displace longstanding trade and economic relations between Africa and the West. This geopolitical shift is complemented by increasing global scrutiny of corporate ethics in the extractive sector. Robust governance of the extractive sector can mitigate the 'resource curse' in Africa. Low resource revenue transparency, weak regulatory institutions, public corruption, resource-driven conflict and political crises are all linked to poor extractive sector governance.

Given the economic importance of the extractive sector in Africa, multi-level governance initiatives are needed to tackle the gloomy predictions of the resource curse. Does the emergence of transnational resource governance initiatives such as Dodd-Frank 1504, which address extractive sector transparency, present an opportunity for Africa to turn the resource 'curse' into a 'blessing'?

The United States Dodd-Frank Act (2010) is an ambitious legislative reform to enhance transparency and accountability in the U.S. financial system. Section 1504 of the Act introduces mandatory disclosure requirements for extractive companies.

This Policy Brief, an output of the NSI's Transnational Governance of Natural Resources (TGNR) project, examines the implications of Dodd-Frank 1504 for the governance of Africa's extractive sector.

The rise of 'transnational' natural resource governance

Global attention on the 'resource curse' in developing countries has led to an increased emphasis on *natural resource governance* as an instrument of economic growth and development. However, the term natural resource governance is often used interchangeably with natural resource management; although the concepts are distinct. While natural resource management is concerned with how human populations interact with the natural landscape, natural resource governance addresses the structures and institutions that determine these interactions. Thus, natural resource governance refers to the *rules, norms and principles that determine the management of natural resources*.

Early approaches to natural resource governance in the Cold War era were focused on the actions of nation-states within the resource-security nexus of U.S. political diplomacy (Keohane 1984). However, several interdependent shifts in global political economy have led to the globalization of natural resource governance as a *transnational* and not a wholly *national* policy issue. First, the transition from a unipolar to multipolar global political economy, with the rapid ascent of the East Asian Tigers and BRICS, and the emergence of a global middle class, raise implications for the equitable management of natural resources (Goldthau and Witte 2010). Furthermore, rising demand for natural resources, including petroleum and rare minerals, to feed a mushrooming global population is driving volatility in global resource markets (Lee et. al. 2012), and severe environmental damage. The growing

sophistication of global commodity markets and role of financial actors in swaying market fundamentals also calls for stronger regulation of the global trade in natural resources. Yet still, many resource-rich African states have been blighted by civil strife and conflict over the control of natural resource rents, and require long-term support to rebuild and strengthen local institutions that can effectively govern their extractive sectors.

The new global political economy of natural resources is underwritten by a consensus around supranational collective action by domestic and international stakeholders - governments, civil society, multilateral institutions and extractive companies. A specific grouping of transnational governance initiatives has emerged in response to campaigns by global civil society activists to address the low transparency and accountability in extractive sector governance.

These transnational extractive transparency initiatives, including the Extractive Industries Transparency Initiative (EITI), the Kimberly Process for the Certification of Diamonds, OECD Due Diligence Guidelines, the IMF Resource Revenue Transparency Guidelines, the Equator Principles and the International Financial Corporation (IFC) Performance Standards, have been structured around improved disclosure of payments made by extractive companies to national governments, transparency in financing and contractual agreements, adoption of social and environmental impact assessments, and overall transparency in extractive sector governance. The proliferation of transnational extractive sector transparency initiatives shows the relative clout of non-state actors, notably global civil society groups, in influencing the current framework for natural resource governance. However, this also points to the growing importance of voluntary (private) self-regulation by global players in the extractive sector.

What is Dodd-Frank 1504?

In 2010, the U.S. Congress carried out a sweeping overhaul of the financial industry with the passage of Dodd-Frank Wall Street Reform and Consumer Protection Act. The Dodd-Frank Act was designed to address lapses in financial sector regulation that contributed to the economic crisis in America and a deep global recession. Buried within this arcane legislation is a section sponsored by U.S. Senators Richard Lugar and Ben Cardin. Section 1504 or the 'Cardin-Lugar Amendment' requires extractive companies listed in the U.S. to provide details of payments made to the U.S. and foreign governments. Dodd Frank 1504 is derived from the Energy Security through Transparency Act 2009 which requires mandatory disclosure of payments by extractive companies to foreign governments, and complements the global EITI framework of resource revenue disclosure.

In 2012, the U.S. Securities and Exchange Commission (SEC) adopted final rules for the implementation of Dodd-Frank 1504. This important legislative reform emerged after years of advocacy on extractive sector transparency by global civil society groups, particularly the Publish What You Pay (PWYP) coalition, and bipartisan support across the U.S. political establishment. There are several provisions of Section 1504 with implications for the governance of Africa's extractive sector.

Disclosure of payments

The SEC final rules place statutory disclosure requirements on 'resource extraction issuers' to provide information in their annual reports on payments made to the U.S. or foreign governments for the commercial development of oil, natural gas and minerals on a country and project basis. 'Commercial development' of

extractives covers exploration, processing, export and the granting of licenses for these activities. A wide range of payments are to be reported including taxes, royalties, fees (license and acreage fees), production entitlements, bonuses and other material revenues arising from commercial development of extractive sectors.

The minimum threshold for reporting payments is US\$100,000 in the most recent fiscal year. The extensive reporting requirements of Dodd-Frank 1504 will affect the world's leading oil, gas and mining multinational companies and extractive companies from BRICS that are listed in the U.S. Furthermore, around 100 U.S.-listed Canadian mining companies are also likely to be affected by the SEC rules. These comprehensive disclosure requirements represent a major victory for civil society and should create room for greater scrutiny of extractive sector governance by citizens of resource-rich countries in Africa, which are host to the world's largest extractive companies, but have seen little benefit from natural resource extraction.

No exemptions, at all

To tighten the noose around corrupt practices in the global extractive sector, there are no exemptions to the provisions of Dodd-Frank 1504. All listed extractive companies will be expected to disclose information on payments for foreign country operations, and on specific extractive sector projects. Importantly, the SEC final rules broadly define foreign governments to include regional and subnational governments, as well as departments, agencies, government-owned companies and the 'instrumentality of a foreign government'. U.S. listed extractive companies must also comply with the SEC rules, even though the foreign countries in which they operate do not have similar disclosure requirements.



Global reverberations

Since its enactment, Dodd-Frank 1504 has created global aftershocks. The May 2011 G8 Summit in Deauville, France, endorsed mandatory disclosure of extractive industry payments to governments. The European Union will soon approve corresponding guidelines called the EU Directive on Accounting and Transparency, which will apply to the oil and gas, mining and logging industries, and directly affect large extractive companies listed on the London Stock Exchange. In 2010, the Hong Kong Stock Exchange adopted disclosure requirements for extractive companies that include payments to foreign governments, and the Tokyo Stock Exchange is reportedly considering similar reforms.

In Canada, there is growing pressure to adopt complementary legislation to Dodd-Frank 1504, which would harmonize securities legislation for mining companies with cross-border listings (PWYP Canada 2010). The narrow defeat of Bill C-300 (the Responsible Mining Bill) in 2010 was a setback for extractive sector accountability in Canada, although there are signs that the legislation will be re-introduced in the country's Parliament.

The impact of Dodd-Frank 1504 will also be enhanced by the application of related anti-corruption legislation such as the U.S. Foreign Corrupt Practices Act, the UK Bribery Act 2010 and the OECD Anti-Bribery Convention. The pressure for extractive sector regulatory reform across the globe indicates that Dodd-Frank 1504 is here to stay, and extractive sector transparency, once considered the obsession of vocal civil society groups at the fringe of global policy circles, has now become a mainstream issue. It remains to be seen if this global wave of extractive sector transparency will have any impact in Africa, where such reforms are sorely

needed to improve the contribution of natural resources to local economic development.

Will Dodd-Frank 1504 be effective?

The emergence of Dodd-Frank 1504 has unsurprisingly provoked a fierce debate on the limits of transnational resource governance. The most prominent critics of the reform have been its intended targets in the extractive industries. A lawsuit filed by the US Chamber of Commerce, the American Petroleum Institute (which has as its members ExxonMobil, Shell, Chevron, BP and other oil industry groups) and the National Foreign Trade Council against the SEC in October 2012 seeks to nullify Dodd-Frank 1504 on the grounds that it undermines the national sovereignty of oil producing countries and will harm the competitiveness of America's energy companies.

Within the SEC, there have been voices of dissent over the legislative overreach of the U.S. Congress in extending the regulatory boundaries of the Commission beyond its primary mandate of monitoring capital market efficiency. Such critics argue that while the SEC may have good intentions, Dodd-Frank 1504 will not realistically improve accountability in global extractive sector governance, and will impose "significant costs on resource extraction issuers and thereby, shareholders" (Gallagher 2012). The SEC itself estimates initial compliance costs of Dodd-Frank 1504 in the region of US\$ 1 billion, and continuing costs of US\$ 200 to 400 million for the entire extractive industry (Matthews 2012). In contrast, extractive sector transparency advocates have argued that the SEC rules only cover payments and not proprietary information that can be viewed as 'trade secrets', companies such as Statoil and Newmont that disclose payments have not suffered a loss in competitiveness, and extractive sector investors expect that the reform will aid risk management

and strengthen market efficiency (Revenue Watch 2012).

Other critics note that transnational revenue disclosure frameworks such as Dodd-Frank 1504 do not directly target extractive sector corruption but rely on informed stakeholders with the right incentives and capacity to utilize disclosed information. Furthermore, the SEC lacks the information to police extractive companies on the accuracy of reported payments to foreign governments (Firger 2010). The presence of complementary disclosure rules for extractive companies domiciled in emerging economies (such as BRICS) could also influence the global efficacy of Dodd-Frank 1504. In 2011, China's leadership approved the 8th Amendment to the Criminal Law which includes a provision that makes bribery of foreign government officials by Chinese citizens and firms a criminal offense. This demonstrates a growing international consensus on the importance of ethical, transparent behavior by corporations.

African buy-in?

The greatest challenge to the impact of Dodd-Frank 1504 in Africa is not the global extractive sector and its allies, but the political leadership of the continent's resource-rich countries. So far, there has been no indication of a high-level systematic response to Dodd-Frank 1504 from countries with well-known lapses in extractive sector transparency, such as Angola, Nigeria, Gabon and Equatorial Guinea. Under-reporting of payments made to governments by extractive companies is a serious problem in Africa.

Nigeria's 2006-2008 EITI audit report found that oil companies did not comply with guidelines on the assessment of tax liabilities, and there was inadequate information on payments of signature bonuses and royalties (Hart Resources & Afemikhe and Co. 2011). Likewise, a Nigerian government panel discovered that Shell withheld US\$ 946 million in gas sales from a strategic

offshore concession in 2009 (Nigeria Petroleum Revenue Special Task Force 2012).

Weak technical capacity in key state institutions responsible for extractive sector governance (state regulators, legislatures) aggravates lapses in enforcing disclosure rules, and it is doubtful that Dodd-Frank 1504 will stop institutionalized extractive sector corruption without strong domestic mechanisms for public accountability and transparency in Africa. Widespread impunity and repression of state critics by national governments awash in resource rents further undermines extractive sector transparency. This reveals the limits of transnational natural resource governance initiatives such as Dodd-Frank 1504. Extractive transparency campaigns driven by Northern civil society groups can only be effective in Africa if they are supported by the existence of domestic mechanisms through which public accountability can be exercised, capable and efficient extractive regulatory institutions; and a well-informed citizenry willing to challenge the rulers on the mismanagement of resource revenues. In sum, Dodd-Frank 1504 may not end the 'resource curse' in Africa, although it could potentially open up opaque elements of Africa's extractive sector to greater international scrutiny.

Policy suggestions

In the aftermath of the Dodd-Frank 1504 reform, to improve extractive sector governance, African governments should:

- Harmonize domestic legislation and guidelines on the disclosure of extractive sector payments (such as EITI and extractive regulatory codes) with Dodd-Frank 1504.
- Honour international commitments on extractive sector transparency, human rights and anti-corruption treaties.

- Enforce national anti-corruption legislation on erring extractive companies and public officials.
- Strengthen the capacity of regulatory institutions to monitor extractive sector companies.
- Provide access to information on extractive sector operations to the general public and civil society, to improve public accountability.
- The global donor community should provide technical support to local civil society and advocacy groups on Dodd-Frank 1504 disclosure rules as an instrument of extractive sector transparency.

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