

EXTRACTIVE COMPANIES AND TRANSPARENCY

EXPLORING DISCLOSURE PRACTICE IN SOUTH AFRICA AND THE IMPLICIT AND EXPLICIT DRIVERS OF DISCLOSURE

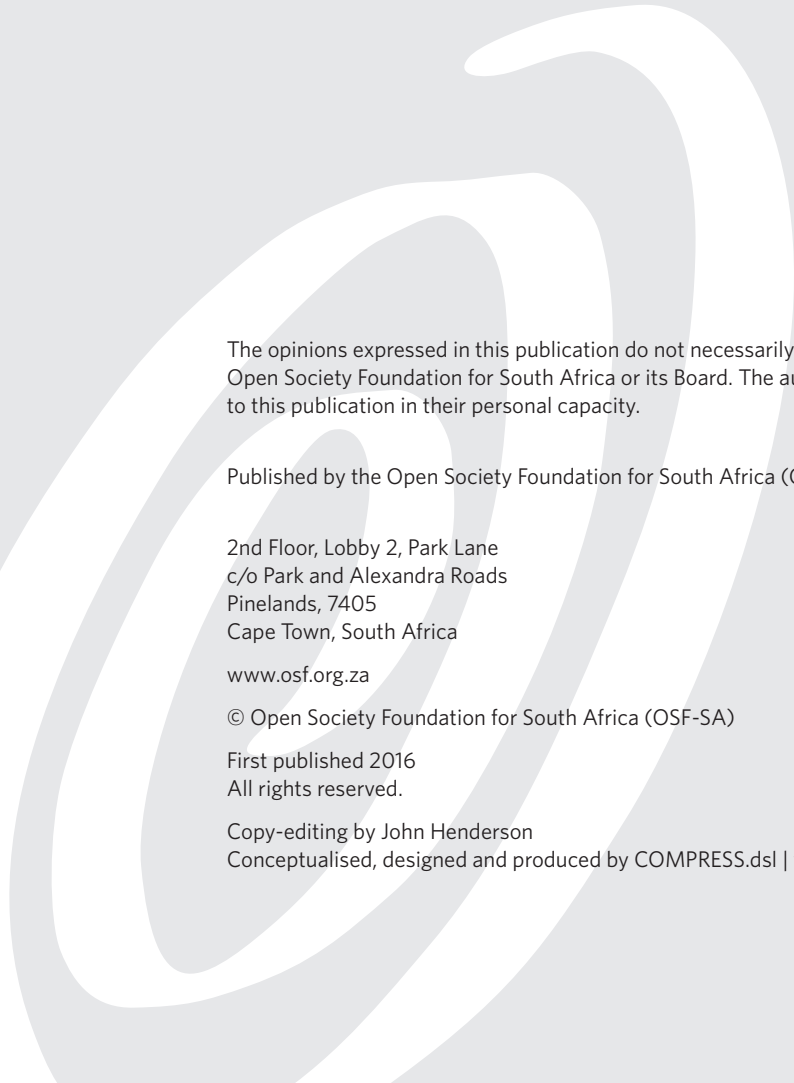
Prof. Tracy-Lynn Humby and Dr Olufolahan Adeleke

2

WORKING PAPER TWO



OPEN SOCIETY FOUNDATION
FOR SOUTH AFRICA



The opinions expressed in this publication do not necessarily reflect those of the Open Society Foundation for South Africa or its Board. The authors contributed to this publication in their personal capacity.

Published by the Open Society Foundation for South Africa (OSF-SA)

2nd Floor, Lobby 2, Park Lane
c/o Park and Alexandra Roads
Pinelands, 7405
Cape Town, South Africa

www.osf.org.za

© Open Society Foundation for South Africa (OSF-SA)

First published 2016
All rights reserved.

Copy-editing by John Henderson
Conceptualised, designed and produced by COMPRESS.dsl | www.compressdsl.com

1. Introduction

Transparency, public disclosure, and accountability are the buzzwords of an increasingly elaborate transnational governance regime for the extractive industry. In recent years, the Extractive Industries Transparency Initiative (EITI), the United States (US) Dodd-Frank Wall Street Reform and Consumer Protection Act, the European Union (EU) Accounting Directives, the United Kingdom's (UK) Reports on Payments to Government Regulations 2014, Norway's Country-by-Country Reporting Law, and Canada's Extractive Sector Transparency Measures Act have been formulated to promote fairer and more prudent stewardship of the revenues generated by oil, gas and mineral extraction.¹ In Africa, revenue transparency, transfer pricing and beneficial ownership have been identified as challenges to the implementation of the African Mining Vision,² and a number of African countries have passed laws mandating increased transparency in their extractive sectors.³ There are international and national non-governmental organisations (NGOs) wholly devoted to the issue of transparency or that adopt transparency as a key strategic focus.⁴ Furthermore, professional organisations are increasingly offering advice on transparency and disclosure practice.⁵

Transparency, public disclosure and accountability have been entrenched in post-1994 South African governance through the 1996 Constitution's commitment to an 'open' society⁶ and through specific and justiciable human rights, of which the most salient for purposes of this paper is the right of access to information codified in the Constitution as follows:

Everyone has the right of access to -
 (a) *any information held by the state; and*
 (b) *any information that is held by another person and that is required for the exercise or protection of any rights.*⁷

-
- 1 The EITI is a global, voluntary standard dependent for its application to companies on individual country membership. Whilst companies can identify themselves as EITI-supporting companies, disclosures are limited to payments made in EITI member countries. By contrast, the EU Accounting Directives and the other nationally based transparency regimes use various connecting factors to establish mandatory country-by-country and project-by-project reporting on the part of companies in each country of operation. The EITI has been in place for a longer period of time than the other initiatives, which are still in their earliest phases of implementation. The new EU Accounting and Transparency Directives entered into force on 20 July 2013 and member states are required to implement the directives by July 2015. The UK's Reports on Payments to Government Regulations 2014 entered into force on 1 December 2014. Norway's regulations came into force in January 2014, while Canada's Extractive Sector Transparency Measures Act entered into force in June 2015.) The EITI also goes further than the other initiatives in requiring government information on the collection and allocation of revenues, and in scaffolding a dialogue between the state, industry and civil society through the establishment of a multistakeholder group (MSG). The MSG plays an important role in defining the parameters of the reporting regime, for example, by defining materiality levels for reported payments and reporting time frames, which are preset in the newer country-by-country and project-by-project mandatory reporting regimes. Further, in its 2015–2016 Budget, the Australian government announced that it would implement country-by-country reporting following the Organisation for Economic Co-operation and Development's (OECD) new transfer pricing documentation standards. The change is being implemented through the Tax Laws Amendment [Combating Multinational Tax Avoidance] Act of 2015 – see <https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Transfer-pricing/Country-by-Country-reporting-and-transfer-pricing-documentation/>.
- 2 O. Bello, 'Africa's extractive governance architecture: Lessons to inform a shifting agenda', 2014, SAIIA Policy Briefing.
- 3 These include: Ghana (Petroleum Revenue Management Act); Nigeria (Nigeria Extractives Industry Transparency Initiative Act); and Tanzania (Tanzania Extractive Industries (Transparency and Accountability) Act of 2015).
- 4 International examples include Publish-What-You-Pay, Transparency International and the Open Society Foundation. National examples include the Open Democracy Advice Centre, the South African History Archives, and the Centre for Environmental Rights.
- 5 See, for example, Ernst & Young, *Tax transparency: Seizing the initiative*, 2013.
- 6 The preamble to the Constitution describes the Constitution as laying the foundation for a 'democratic and open society'; the founding values described in section 1 include universal adult suffrage, a national common voters' roll, regular elections, and a multiparty system of democratic government 'to ensure accountability, responsiveness and openness'; and the criteria for the limitation of fundamental rights set out in section 36 critically include an 'open' society.
- 7 See section 32(1) of the 1996 Constitution.

The right of access to information has, in turn, been elaborated on and operationalised in the Promotion of Access to Information Act 2 of 2002 (PAIA). In line with the right of access to information, PAIA institutionalises the right of access to information held by the state, as well as information held by private entities, such as extractive companies.

In the light of this constitutional and statutory framing, Hughes, in his recent contribution on increasing transparency and accountability in extractive industries, highlights an apparent conundrum: while debate on the politics of the extractive sectors in South Africa is intense, and particularly so for mining, debate with respect to transparency and accountability in such sectors is not.⁸ In years past, heated discussions on transformation, black economic empowerment and nationalisation were not driven by attempts to enhance transparency and accountability in the sectors concerned.⁹ More recently, however, lack of transparency has been cited as a key failing in the debate relating to state capture, the mining industry, and the mining interests of key members of President Zuma's family.¹⁰

This relative neglect of transparency includes South Africa's 'shunning' of the EITI. In late 2013, a spokesperson for the Department of Mineral Resources (DMR) was quoted as saying that South Africa was not reconsidering becoming a signatory to the EITI, a view which has since prompted criticism.¹¹ The reason proffered at the time was that South Africa had a redistributive fiscal regime and had put in place adequate governance procedures and systems of accountability to sufficiently account for revenue generated and distributed. The narrative of a transparent budgeting process also draws on South Africa's status as a founding member of the Open Government Partnership, and flows from the country's second place position in the Open Budget Index 2012, an initiative of the Open Budget Partnership.¹² For example, in March 2015, Roger Baxter, the chief operations officer of the Chamber of Mines of South Africa, remarked at an Extractive Futures Dialogue that none of the 19 sub-Saharan EITI country members had fared well in the Open Budget Survey, unlike South Africa, which had been placed second. Other non-EITI-compliant extractive jurisdictions, such as Botswana and Uganda, had also featured prominently in this survey. The implicit message, therefore, is that, while the voluntary EITI Standard is appropriate for countries with poor levels of budgetary disclosure, weak securities regulations, ineffective corporate boards, and weak investor protection, it is an unnecessary governance overlay for countries such as South Africa, which could serve as 'a good example for colleagues on the Southern African continent'.¹³

However, as Van Zyl has pointed out, a high ranking with regard to the Open Budget Index does not necessarily translate into improved credit ratings and service delivery.¹⁴ The prescience of this view is now being confirmed in 2016 when, despite a third-place ranking in the 2015 Open Budget Index,¹⁵ South Africa teeters on the brink of a 'junk' investment rating and service delivery protests have become even more violent and widespread. Moreover, there is often a mismatch between the information contained in budget documents and the more detailed information needs of individuals

8 T. Hughes, 'South Africa: A driver of change – increasing transparency and accountability in the extractive industries, 2012, Working Paper Series, Transparency and Accountability Initiative & the Revenue Watch Institute, p. 2.

9 Ibid.

10 L. Gosam, 'Zuma, the Guptas and the Russians: The inside story', *Rand Daily Mail*, 19 February 2016 – available at: <http://www.rdm.co.za/politics/2016/02/02/zuma-the-guptas-and-the-russians--the-inside-story>; F. Wild & P. Burkhardt, 'Zuma's son took stake in Tegeta three weeks before it bought Optimum', *Mineweb*, 7 March 2016 – available at: <http://www.mineweb.com/news/companies/zumas-son-took-stake-in-tegeta-three-weeks-before-it-bought-optimum/>.

11 T. Holmes, 'SA shuns transparency initiative', *Mail & Guardian*, 22 November 2013 – available at: <http://mg.co.za/article/2013-11-22-00-sa-shuns-transparency-initiative>.

12 See W.R. Nadège Compaoré, 'South Africa's differing attitudes towards the Extractive Industries Transparency Initiative and the Open Governance Partnership', 2013, Occasional Paper No. 146, Governance of Africa's Resources Programme.

13 Southern African Liaison Office (SALO), 'Extractive Futures Dialogue Series', hosted by SALO and the British High Commission, held on 16 March 2015 in Pretoria, South Africa; Policy Dialogue Report No. 36, 4–5. In the same dialogue series, the Deputy Minister of Mineral Resources, Godfrey Oliphant, restated the other major pillar of South Africa's EITI-resistance, namely that the EITI is a northern standard to which developed nations have not signed up. However, this argument no longer holds water given that the UK, the United States of America (USA) and Germany are EITI candidate countries, with Norway being an EITI-compliant country.

14 A. van Zyl, 'How information can protect the government', *Mail & Guardian*, 23 February 2012 – available at: <http://mg.co.za/article/2012-02-23-how-information-can-protect-the-government/>.

15 See <http://www.internationalbudget.org/wp-content/uploads/OBS2015-OBI-Rankings-English.pdf>.

In a possible turning of the tide, as evidenced at the most recent Mining Indaba held in February 2016, financiers are beginning to join civil society in calling for mining companies to be more open and transparent.

and interest groups. In Van Zyl's view, the publication of budget documents is, therefore, only the first in a series of steps a government needs to take to reap the rewards of budget transparency.¹⁶ There is also a danger that the trumpeting of budget transparency actually masks increased opacity, with the release of even the most innocuous information outside of the published documents needing political clearance.¹⁷

As discussed in greater detail below, civil society has been active in highlighting public disclosure deficits on the part of government (and the DMR in particular) and companies.¹⁸ In a possible turning of the tide, as evidenced at the most recent Mining Indaba held in February 2016, financiers are beginning to join civil society in calling for mining companies to be more open and transparent.¹⁹ Moreover, a number of South African mining companies already participate in EITI processes in other countries and will increasingly be caught in the mandatory cross hairs of the newer national country-by-country and project-by-project reporting regimes in a number of the developed countries. For these reasons, it is appropriate to focus more closely on the public disclosure practices of government departments and companies. The focus of this paper falls predominantly on the public disclosure of ownership, operational and financial information on the part of companies.

In focusing more closely on the disclosure practices of companies themselves, the first set of questions focuses on disclosure practice: how do the disclosure practices of South African companies fare when measured against international and national disclosure and reporting standards? Are there types of disclosure important in a South African context that are not covered by international regimes, and, if so, what is the state of current disclosure practice? The second set of questions focuses on drivers, both internal and external: what forces are motivating, prodding or coercing companies to become more transparent?

This paper contributes to the debate on transparency, public disclosure and accountability in the extractive industry by presenting the results of a survey of the disclosure practices of a sample of five South African extractive companies as manifested in their annual reports and online presence, with such practices being assessed against the requirements of both international and national transparency frameworks. Where relevant, additional information on a company's disclosure practices as reported in the media, in judicial or quasi-judicial proceedings, and by civil society organisations, is taken into account. The patterns of disclosure are discussed in the light of relevant literature on the drivers of disclosure, transparency and accountability in the extractive sector, and of various insights into the relationship between transparency and brand management.

16 A. van Zyl, 'How information can protect the government', *Mail & Guardian*, 23 February 2012 – available at: <http://mg.co.za/article/2012-02-23-how-information-can-protect-the-government/>.

17 Ibid.

18 Examples include, among others: the Centre for Environmental Rights' (CER) ongoing research project on responsiveness to PAIA applications (see <http://cer.org.za/programmes/transparency/>); the CER's work on the disclosure of environmental risks (see <http://cer.org.za/full-disclosure#>); and the Open Society Foundation's (OSF) work on transparency and accountability (see OSF, *In good company: Conservations around transparency and accountability in the extractive sector*, 2015).

19 T. Mongoai, 'Mining companies urged to be more transparent', SABC news, 12 February 2016 – available at: <http://www.sabc.co.za/news/a/ab74ed004ba70296b4b0feab7e8da8e1/Mining-companies-urged-to-be-more-transparent-20161202>.

A key limitation of this analysis is that it involved a survey of the online practices of companies only and did not encompass empirical data-gathering from company representatives. This is an important area in which further research should be undertaken by an impartial research organisation so that the results of the research are considered credible by the mining industry, civil society, and government.

The present paper suggests that the disclosure practices of most of the companies sampled appear slow-footed, with many seemingly ill-prepared for the mandatory reporting regimes currently being put into place. There is little homogeneity in the substance and form of tax disclosures and, in the case of broader transparency vistas (black economic empowerment [BEE], beneficiation, and payments to local authorities), there are no or very few disclosures. Increasingly, however, a number of forces – coercive, mimetic (modelling) and normative (professionalisation) in nature – will function as external and internal drivers to compel extractive companies to situate themselves within the densifying web of transparency governance.

2. Methodological considerations: Selection of companies and analytical matrix

A comprehensive survey of the disclosure of ownership, operational and financial information by South African mining companies and of the drivers of such disclosure is a large-scale project. With a view to informing such a large-scale project, the reported project selected five companies, using non-probability sampling, in an attempt to represent the diversity of extractive companies operating in South Africa. Sasol Limited, Anglo American plc, Impala Platinum Holdings Limited, Harmony Gold Limited, and Coal of Africa Limited were selected in order to illustrate this diversity. Sasol and Anglo American are both established multinationals, whereas Implats and Harmony Gold are smaller multinationals concentrating on a single commodity or a smaller range of commodities. Coal of Africa, on the other hand, is representative of smaller, emerging miners with international linkages. All of the companies selected for analysis have a primary or secondary listing on the Johannesburg Stock Exchange (JSE) and cross-listings on other international exchanges.

The analysis of the aforementioned companies' disclosure practice was undertaken using an international and a national analytical perspective. As an analysis of each company's reporting practice against the information requirements of the EITI and each of the newly developed national reporting regimes was considered cumbersome, and given the extensive degree of overlapping among the different regimes, for compliance with international reporting standards, the project relied on the cross-cutting information categories for transparency and disclosure identified in the Pricewaterhouse Cooper's (PwC) report, 'Tax transparency country-by-country reporting: An ever changing landscape' (2013), namely: profit taxes; other taxes on income, profit or production; licence fees, rental fees, entry fees and other considerations for licences and/or concessions; royalties; dividends; production, signatory, discovery and other bonuses; public subsidies; reserve volumes; production volumes; revenues; number of employees; profit/loss before tax; and social investment.²⁰

While these various categories of disclosure requirements are valuable for South Africa, they may not be sufficient given the country's history and transformational imperatives. For instance, central to ownership requirements in the South African context would be the level of compliance by companies with the affirmative action policy of the state, namely broad-based black economic empowerment (BBBEE), which seeks to impose ownership and other targets aimed at transforming the racial, gender and developmental profile of the extractive industry. In the mining sector, BBBEE has taken the form of the Mining Charter. Further, from a national perspective, South African companies are obliged to disclose a rather narrow range of ownership, operational and financial information to the public, and have a wide discretion to disclose other categories of information. For the national analysis, therefore, information categories were incorporated for which public disclosure

20 The additional category of production entitlements was not considered relevant in a South African context.

is not yet legally required, but in respect of which companies hold records and disclosures could be made. Disclosure practices already covered in the table on international standards (e.g. taxes payable, dividends, mineral reserves, and social investments) were not repeated. The South African analyses accordingly examine the company's compliance and engagement with:

- PAIA;
- corporate-governance information (Memorandum of Incorporation, directors' records, minutes of annual general meetings, and notices and minutes of all shareholders' meetings);
- details regarding prospecting and mining licences;
- records of prospecting and mining activities;
- records of environmental impacts;
- health and safety records;
- compliance with the Mining Charter;
- payments to traditional authorities;
- health and safety information; and
- details on local beneficiation.

The international and national analyses were based on:

- the companies' most recent integrated annual reports, annual financial statements, and mineral resource and reserve statements;
- Stock Exchange News Service (SENS) reports;
- reports submitted as a result of cross-listing requirements; and
- information available on the companies' websites or otherwise available in the media as of February 2015.

In April 2016, the research was updated to incorporate information on the disclosure practices of the selected companies reported in the media, in judicial or quasi-judicial proceedings, or as presented by civil society organisations (CSOs).

3. Results

3.1 Context: Caught in the cross hairs of mandatory transparency reporting

In order to contextualise each of the selected companies' disclosure practices, for each company, the business and corporate structure, details of ownership and cross-listings, and pertinent information regarding claims to good corporate governance (including whether the company supports the EITI), were taken into account. These findings are set out in detail in an extensive report on South Africa's extractive industry disclosure regime²¹ and are summarised in Table 1.

Obviously, the burden of country-by-country and project-by-project reporting will be felt most acutely by Sasol and Anglo American, since each has extensive global operations. However, the need to adapt to rapidly changing market conditions can change reporting obligations over a relatively short period of time. Anglo American is a case in point, having commenced with a far-reaching restructuring process that will see the group concentrating on a core portfolio of 16 assets in diamonds, platinum-group metals, and copper.²² Nevertheless, and reinforcing the metaphor of mandatory transparency reporting 'cross hairs', all of the companies selected will shortly be subject to country-by-country and project-by-project reporting as a result of their primary or secondary listings on the New York Stock Exchange (NYSE), London Stock Exchange (LSE) or other European exchanges.

21 T. Humby & F. Adeleke, 'South Africa's extractive industry disclosure regime: Analysis of the legislative and regulatory regime of selected corporate practice', 2016, OSF-SA (hereafter 'Main project report').

22 Anglo American, 'Strategic focus on world-class assets and sustainable positive free cash flow to strengthen balance sheet – creating the new Anglo American'. Available at: <http://www.angloamerican.com/media/press-releases/2016/16-02-2016a> [accessed 1 April 2016].

Table 1: Contextual information on selected companies

	Sasol	Anglo American	Implats	Harmony Gold	Coal of Africa
Type of company	Publicly listed holding company; approximately 50 subsidiaries, and direct interests in a further 17 entities	Publicly listed holding company; has a number of wholly- and partly-owned subsidiaries	Publicly listed holding company; has at least seven publicly listed and 11 private subsidiaries	Publicly listed holding company; has a number of public and private subsidiaries in South Africa and Papua New Guinea	Publicly listed company
Core business	Fuel, coal mining, oil and gas exploration; chemical operations	Locates areas for mining, and plans and develops mines; undertakes mining operations; processes, moves and markets bulk commodities (iron ore, manganese, and metallurgical and thermal coal), base metals and minerals (copper, nickel, niobium and phosphates), and precious metals and minerals (platinum and diamonds)	Explores areas for mining, and mines, refines and markets platinum-group metals, nickel, copper and cobalt	Explores areas for mining, and mines, refines and markets gold	Explores areas for mining, and mines and markets coking coal
Scale of operations	Exploration, development, production, marketing, and sales relating to fuel, gas, mineral and chemical operations in 37 countries around the world (but all mining operations are based in South Africa)	Operates in ten countries (Australia, Botswana, Brazil, Canada, Chile, Colombia, Namibia, Peru, South Africa, and Zimbabwe)	Operates in South Africa and Zimbabwe	Operates in South Africa and Papua New Guinea	Operates in South Africa only
Listing and cross-listing	JSE; NYSE	LSE; JSE	JSE; NYSE	JSE; NYSE; Berlin Exchange	Australian Stock Exchange (ASX); JSE; LSE (alternative investment markets)
Major shareholders	Pension and provident funds (26.8%); unit trusts (23.2%); and other managed funds (11.5%) (as of June 2014); South African Government Employees Pension Fund (14.4%); South African Industrial Development Corporation (8.2%)	Public Investment Corporation (PIC) (8.35%); Coronation Asset Management (Pty) Ltd (5.41%); Black Rock Inc. (4.54%)	Royal Bafokeng Proprietary Holdings Limited (13.2%); PIC (14.1%)	African Rainbow Minerals Limited (14.6%); Allan Gray Unit Trust Management Limited (11.1%); PIC (6.75%)	Haohua Energy International (Hong Kong) Resources Co. Ltd (23.6%); M & G Investment Management Ltd (15.3%); Arcelor Mittal SA (12%)

.../continued

Table 1: Contextual information on selected companies

	Sasol	Anglo American	Implats	Harmony Gold	Coal of Africa
Company-endorsed governance frameworks	South African Companies Act of 2008; JSE Listing Requirements; US Securities and Exchange Commission (SEC) and NYSE legal requirements Global Reporting Initiative	UK Corporate Governance Code; United Nations (UN) Global Compact; Anglo American Human Rights Policy; Voluntary Principles on Security and Human Rights; UN Guiding Principles on Business and Human Rights	South African Companies Act of 2008; JSE Listing Requirements; King III Code on Corporate Governance; Global Reporting Initiative; UN Global Compact	South African Companies Act of 2008; JSE Listing Requirements; NYSE Listing Requirements; King III Code on Corporate Governance; UN Global Compact; Global Reporting Initiative; International Council on Mining and Minerals (ICMM) Position Statements; Cyanide Code	ASX Corporate Governance Council's Corporate Governance Principles and Recommendations Australian Accounting Standards; Australian Corporations Act of 2001; International Financial Reporting Standards; King III Code on Corporate Governance; Global Reporting Initiative
EITI-supporting company²³	No	Yes	Yes	No	No

The disclosure of beneficial ownership is not yet a universal or comprehensive requirement across the various transparency regimes.²⁴ In their annual reports, all of the selected companies provided information only on their major shareholders and, in all cases, these were institutional shareholders. With the exception of Coal of Africa, the South African state sector is a significant shareholder in all the extractive companies, mainly through the PIC.

All of the selected companies associate themselves with a variety of corporate governance frameworks. Unsurprisingly, legislation relating to the company's jurisdiction of primary listing features prominently, as do the relevant listing requirements of the stock exchange of primary or secondary listing. The King III Code on Corporate Governance, the UN Global Compact, and the Global Reporting Initiative were the most frequently cited governance frameworks. Only two of the companies sampled for the survey have publicly supported the EITI.

Before presenting the results of corporate disclosures from an international and national transparency perspective, it is worthwhile to dwell for a moment on what information could be gleaned from the online survey on the locus of responsibility for disclosure. Companies are not homogenous entities and are likely to display differences in how responsibility for disclosure is institutionalised. Nevertheless, for three of the five companies (Anglo American, Implats and

23 The EITI has a platform for a variety of stakeholders to officially support the initiative – see <https://beta.eiti.org/stakeholders>.

24 For example, under the EITI, a beneficial owner in respect of a company means the natural person(s) who, directly or indirectly, ultimately owns or controls the corporate entity. Publicly listed companies, including wholly-owned subsidiaries, are not required to disclose information on their beneficial owner(s) in terms of the EITI. However, the 2016 EITI Standard requires that, by 2020, all implementing countries ensure that all companies disclose beneficial owners, with a road map required by 1 January 2017. Globally, and in South Africa, the beneficial-ownership movement is growing quickly. In its 2015–2017 Open Government Partnership Commitment, the South African government has agreed to formulate an implementation plan on beneficial-ownership disclosure. Further, the Financial Intelligence Centre (FIC) Amendment Bill, which aims to improve South Africa's anti-money laundering laws, was recently tabled in Parliament. The bill introduces the concept of beneficial ownership into South African law and mandates ongoing due diligence in relation to 'foreign and domestic prominent influential persons'.

Harmony Gold), responsibility for disclosures at board level vests in the Audit Committee or a committee responsible for social issues, ethics or transformation. In the case of Sasol, tactical management lies with the president, the chief executive officer and a six-member Group Executive Committee (GEC).²⁵ There are nine sub-committees of the GEC, comprising GEC members and functional managers, including a Combined Assurance and Disclosure Committee. This latter committee oversees compliance with the disclosure requirements of the JSE, the US SEC, and the NYSE, among others.²⁶ Sasol's 'Annual integrated report' noted that 'the company's disclosure controls and procedures ensure the accurate and timely disclosure of information to shareholders, the financial community and the investment community'.²⁷ Notable, here, is that disclosure is not regarded as extending to a broader range of stakeholders. Most companies also report on their whistle-blowing programmes and/or the processes to ensure business integrity.

3.2 Disclosure in the light of international transparency standards: A patchy affair

With the exception of Anglo American, none of the companies included in the sample incorporated a clear commitment to tax transparency on their websites.²⁸ During the course of 2015 (after the primary analysis for the project on South Africa's extractive industry disclosure regime was completed), Anglo American produced a separate report on transparency titled 'Tax and economic contribution report'.²⁹ In the report, Anglo American noted that it had for many years disclosed data on tax and economic contribution in the Group's consolidated income statement in the 'Annual report', with country-by-country details provided in the 'Sustainable development report'.³⁰ The 'Tax and economic contribution report' noted that, as from 31 December 2015, the company would report payments to governments on a project-by-project basis, in line with Chapter 10 of the EU Accounting Directive. The company was also keen to emphasise that the 'Tax and economic contribution report' would continue to be published 'on a voluntary basis' alongside 'statutory requirements' in order to provide additional commentary on Anglo American's tax and economic contribution on a country-by-country basis. Like BHP Billiton in its inaugural country-by-country and project-by-project report,³¹ Anglo American is, therefore, keen to present itself as a corporate player 'volunteering' to do more in advance of statutory requirements. In effect, however, this relates merely to the mode of presenting information – that is, in a separate report as opposed to being hidden away in the Group's consolidated income statement – rather than the information itself. The strategies of voluntary action and action taken in advance of statutory requirements may be a key feature of corporate branding around transparency, thus setting the company apart from its peers.

The analysis of the sampled company disclosures in the light of international transparency standards is summarised in Table 2, with the details recorded for each company dealt with in the main project report.³²

25 Sasol, 'Annual integrated report 2014' (henceforth 'Sasol AIR'), p. 25.

26 Ibid, p. 61.

27 Ibid.

28 The number of hits for the search term 'tax transparency' on the website of Implats was 1, and for Sasol and Harmony Gold it was 0 (as of April 2016). Coal of Africa does not have a search function on its website. Nevertheless, in 2015, Sasol won PwC's Building Public Trust Award for excellence in the field of tax reporting on the part of a domestic company (see PwC, 'GoldFields Limited and Sasol Limited win PwC's Building Public Trust Awards: Excellence in the field of tax reporting' – available at <http://www.pwc.co.za/en/press-room/gold-fields-limited-and-sasol-limited-win-pwcs-building-public-t.html>).

29 Anglo American, 'Tax and economic contribution report 2014' – available at: http://www.angloamerican.com/~/_/media/Files/A/Anglo-American-PLC-V2/investors/tax/anglo-tax-report-web.pdf. This report was finalised after February 2015 and fell outside the data initially gathered for the project.

30 Ibid, p. 1.

31 See BHP Billiton, 'Economic contribution and payments to government: Report 2015', 2015. In the report, Chief Financial Officer Peter Beaven is keen to note that the report is 'in advance' of any regulatory requirements in the jurisdictions in which the company operates.

32 T. Humby & F. Adeleke, Main project report (see n 21).

Table 2: Summary of corporate disclosures evaluated against international transparency information categories³³

Reporting categories	Sasol	Anglo American	Implats	Harmony Gold	Coal of Africa
Profit taxes	✓	✓(c) ³⁴	✓	✓(c)	✓
Other taxes on income, profit or production	✓	✓(c)	✗	As 'cash costs'	✗
Royalties	✗	✓(c)	✓	As 'cash costs'	✗
Licence, rental, entry and other fees	✗	✗	✗	✗	✗
Revenues	✗	✓	✓	✓(p)	✓
Production volumes	(per business segment)	(per commodity)	(per commodity and mine)	(p)	(p)
Profit/loss tax	✓	✓	✓	✓	✓
Dividends	✓	✓	✓	✓	✓
Reserve volumes	✗	✓	✓	✓	✓
Number of employees	✓	✓(by region)	✓	✓(c)	✓(p)
Social investments	✓	✓	✓(c)	✓	✓
Production, signatory, discovery and other bonuses	✗	✗	✗	✗	✗
Public subsidies	✗	✗	✗	✗	✗
Overall country-by-country reporting	To a limited extent	✓	✗	To some extent	Not applicable
Overall project-by-project reporting	✗	✗	✗	To some extent	To some extent

Initially, and arguably still centrally, the nub of concern for the EITI and the various national transparency regimes is the amount of taxes companies are paying to governments in their countries of operation.³⁵ All of the companies sampled already disclose profit taxes, usually in the annual financial report and/or in the company's consolidated financial statements. Sasol, Anglo American and Harmony Gold already practise country-by-country reporting to a limited extent. However, this information is not presented coherently, with a reader needing to consult different annual reports, or different parts of a report, to glean the required information. For example, in its main 'Annual report' of 2014, Anglo American indicated that its 'income tax expense' amounted to USD1.174 billion (or

33 In the table, a 'c' in parentheses indicates a measure of country-by-country reporting; likewise a 'p' in parentheses indicates some level of project-by-project reporting. Other terms (e.g. 'by region') are also used to qualify the aggregation of the data presented. In the case of both country-by-country and project-by-project reporting, the difference between projects controlled by a company and those entered into by way of joint ventures with other companies in which the reporting company does not have a controlling interest, is a potential red flag for the integrity of disclosure regimes. For example, in its 'Tax and economic contribution report 2014', Anglo American highlights the fact that cash tax data presented do not include significant additional tax contributions made by non-controlled joint-venture operations such as De Beer's Debswana business, a joint venture with the government of the Republic of Botswana; see Anglo American (n 29 above), p. 1.

34 A 'c' indicates that the data was disaggregated on a country level, and a 'p' indicates that the data was disaggregated on a project or mine level.

35 South African mining companies are admittedly subject to a complex taxation regime. For a discussion of the range of taxes and the interpretive difficulties associated with a number of key provisions of tax legislation, see A. Myburgh, 'The taxation of South African mining and prospecting companies: Certain and predictable?' – available at: <https://www.ensafrica.com/news/The-Taxation-of-South-African-Mining-and-Prospecting-Companies-Certain-and-Pred?Id=1241&STitle=tax%20ENSight>.

R13.612 billion).³⁶ In the notes to the financial statements (more than 100 pages later), the company presented a breakdown of this information on the basis of tax payable to the South African authorities (USD863 million or R10.0006 billion), with the remainder categorised as 'other overseas tax'.³⁷ Only on reading the company's 'Sustainable development report'³⁸ does one discover a breakdown of the company's profit taxes per country.³⁹

The reporting of Harmony Gold evinces a similar pattern. In its Group income statement and the notes to the financial statements in the 'Financial report', the company indicated that it owed the South African authorities a 'mining tax' of R29 million. However, when taking into account deferred tax, the company was left with a tax credit of R279 million for the 2014 financial year.⁴⁰ In its 'Integrated report', in a section on how the company creates value, Harmony Gold indicated that it had distributions of R281 million in taxes and royalties in South Africa, and R32 million in taxes and royalties in Papua New Guinea.⁴¹ Apart from the fact that these figures do not seem to add up, it is difficult to understand the split between taxes and royalties. The references to deferred tax and value-added tax (VAT) credits in many of the sampled companies' reports signal the generous treatment mining companies still enjoy under South Africa's tax regime. South African mining companies are allowed to write off against tax all capital expenditures in the year of acquisition, and are allowed to carry forward any losses indefinitely.⁴² Further, mining companies pay no tax on exports but are entitled to a refund for all input taxes paid by them.⁴³ Additional special taxation arrangements apply to gold mining.⁴⁴ These generous tax rules reduce the total amount of tax revenues, but also obfuscate tax disclosures, making it difficult to see the linkages between revenues, production and tax payable.

Using a different strategy from that employed by Anglo American and Harmony Gold, Sasol presented an integrated country-by-country report on profit and other taxes on a limited country-by-country basis: the annual financial statements provided a breakdown of net monetary exchanges with governments as follows: South Africa (R35 822 million); the United States of America (USA) (R1476 million); Germany (R265 million); and 'other' (R3158 million).⁴⁵ Concern, here, might centre on the opacity of the 'other' countries, to which more than R3 billion had been paid.

None of the companies sampled currently report on profit taxes on a project-by-project basis. Project-by-project reporting only occurs to a limited extent in the case of reporting on production volumes (Implats, Harmony Gold, and Coal of Africa), revenues (Harmony Gold), and number of employees (Coal of Africa).

Only Sasol and Anglo American disclosed the nature and extent of other taxes payable to the South African government and 'other' governments, and different types of 'other' taxes were reported on. In its 'Annual financial statements', in a section on monetary exchanges with governments, Sasol indicated that it had paid R22.208 billion in 'indirect taxes' to the South African government and

36 Anglo American, 'Annual report 2013: Focused on delivery' (hereafter 'Anglo American AR'), 2013, p. 37.

37 Ibid, p. 169. The pattern of distinguishing between South African taxes and 'other overseas tax' or 'foreign tax' was also discernible in the reporting of Sasol and Implats.

38 The production of a separate sustainable development report is also contrary to the trend toward integrated reporting recommended by the King III Code and other governance frameworks.

39 Anglo American, 'Sustainable development report 2013: Focused on delivery' (hereafter 'Anglo American SDR'), p. 79. However, as noted above, Anglo American intends to remedy this patchy presentation of information by producing a 'Tax and economic contribution report' on a 'voluntary' basis.

40 Harmony Gold, 'Financial report 2014' (hereafter 'Harmony Gold FR'), 2014, p. 32.

41 Harmony Gold, 'Integrated annual report 2014' (hereafter 'Harmony Gold IAR'), 2014, p. 19.

42 M. Curtis, 'Improving South Africa's mining revenues and transparency: The need for government action', Policy Brief of Submissions to the Davis Committee on Base Erosion and Profit Shifting and Mining Taxation prepared for the Economic Justice Network in association with Oxfam, p. 2.

43 Ibid.

44 The taxation of gold mining companies is based on a formula that takes account of the ratio of profits to revenues. If the company makes no profit, or profits are low (in the region of 5% of revenues), the state receives no tax. However, in the latter scenario, it is still possible for shareholders to receive dividends. See n 43 above.

45 Sasol, 'Annual financial statements 2014' (hereafter 'Sasol AFS'), 2014, p. 47.

These generous tax rules reduce the total amount of tax revenues, but also obfuscate tax disclosures, making it difficult to see the linkages between revenues, production, and tax payable.

other governments. Of this, R22.311 billion was for customs, excise and fuel duty; R142 million was for property tax; R115 million was for 'other levies'; and R2.279 billion was for 'other'.⁴⁶ As with its reporting on profit taxes, therefore, the opacity of reporting on 'other' payments to 'other' governments may be a matter of concern.

In its 'Sustainable development report', Anglo American disclosed payments in respect of transactions, labour and capital gains in its areas of operation, on a country-by-country basis.⁴⁷ In its 'Financial report', Harmony Gold distinguished between 'mining tax' and 'non-mining tax'.⁴⁸ In addition, its definition of 'cash costs' in the glossary of terms annexed to its 'Integrated report' indicated the inclusion of royalties and 'production taxes'.⁴⁹ Cash costs would, in turn, presumably be part of production costs, which totalled more than R16 billion in the financial year concerned.

In this small sample of companies, therefore, there was little consistency regarding the types of other taxes that were reported, the manner of their aggregation with other taxes and costs, and the place and form of their presentation.

Unlike Harmony Gold's inclusion of royalties as cash costs, Anglo American and Implats reported on these taxes separately, with the former doing so on a country-by-country basis. Anglo American reported on royalties in its 'Sustainable development report', but appeared to lump this together with 'environmental fees'.⁵⁰ None of the companies sampled reported separately on licence, rental or entry fees, although Sasol's disclosure of property tax possibly covered some of these categories.

What emerges clearly from the preceding analysis of disclosure practice in the area of tax transparency is that country-by-country reporting of direct and indirect taxes on the part of the sampled companies occurred on a very patchy basis, whilst project-by-project reporting has yet to get off the ground. Most striking, however, is the diversity of practice in terms of what companies report, particularly in the case of non-profit taxes and where this information is presented in their annual reports.

There was greater uniformity in the disclosure of revenues, production volumes, profit/loss before taxes, and dividends. This information, which enables the public to assess the profitability and potential of the sector, was presented either in the company's annual/integrated report or in the annual financial statements. With the exception of Sasol, all the sampled mining companies provided either a separate, detailed report on ore reserves and mineral resources, or a mineral resource/reserve statement in the integrated or annual report. The Joint Ore Reserves Committee (JORC) Code or South African Code for Reporting of Exploration Results, Mineral Resources and Mineral Reserves (SAMREC), or a combination of the two (where the company operated in different jurisdictions), were employed.⁵¹

46 Sasol AFS, p. 47. The total amount payable in indirect taxes was offset by an amount of R2 639 million payable to Sasol Limited as VAT under the South African regime.

47 Anglo American SDR, p. 79.

48 Harmony Gold FR, p. 32.

49 Harmony Gold IAR, p. 19.

50 Anglo American SDR, p. 79.

51 The JORC is a professional code of practice developed by the Australian Joint Ore Reserves Committee that sets minimum standards for the public reporting of minerals exploration results, mineral resources and ore reserves. The full title of the code is the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves. The SAMREC code was developed in the mid-1990s under the auspices of the Council of Mining and Metallurgical Institutions. The latest version of the code dates from mid-2007.

All of the sampled companies reported on social investments and number of employees, but, once again, there were significant differences in terms of where this information could be located in the annual reports. In a South African context, reporting on the number of persons employed is a statutory requirement under health and safety legislation and an essential constituent of the social licence to operate.⁵² Most of the sampled companies disclosed this information prominently in their annual or integrated reports (Anglo American, Harmony Gold and Coal of Africa). Sasol provided this information in its 'Annual financial statements'⁵³ and Implats set these figures out in its 'Sustainable development report'.⁵⁴ With the exception of Sasol, all companies also provided information on the number of employees as opposed to the number of contractors. Information on social investments was split fairly evenly between presentation in the annual sustainable development report (larger companies) or in the annual/integrated report (smaller companies).

None of the sampled companies disclosed any information on public subsidies, particularly in terms of payments made to, or received by, state-owned enterprises. There were also no disclosures pertaining to production, signatory, discovery or other bonuses, although this information category is arguably less relevant in a South African mining context, as it applies more to states with petroleum exploration and production industries.

3.3 Disclosure in the light of national transparency standards: A PAIA affair

The analysis of the sampled company disclosures in the light of national transparency standards is summarised in Table 3, with the details recorded for each company provided in the main project report.⁵⁵ While the overall level of compliance with international transparency standards can be described as a patchy affair, in the case of national standards, PAIA dominated as the principal gateway for accessing ownership, operational and financial information.

All of the sampled companies made a PAIA Manual available on their company websites, in advance of statutory requirements. This document, which is typically only a few pages in length, includes information relating to the types of records kept by the company, the categories of records that are automatically available, how access can be obtained in terms of section 52 of the Act, and the necessary company details for a potential requester to submit a PAIA request. In the case of records relating to prospecting and mining activities, records of environmental impacts, health and safety information, and even details of licences and authorisations, persons interested in such information would need to submit a PAIA request to the company and wait for it to consider the request and, if granted, supply this information. This enables the company to redact any information it considers commercially sensitive. The general trend across the sampled companies, therefore, was to provide highly aggregated data in either the annual/integrated reports or the sustainable development reports on records of prospecting and mining activities (data on production volume by mines or commodity, for example), environmental impacts (total greenhouse gas emissions, total water usage, total production of hazardous and non-hazardous wastes, and energy intensity, for example), and health and safety impacts (work-related fatalities or injuries, new cases of occupational diseases, and Lost Time Injury Frequency Rate), with the critical details – standards incorporated in licences, or audit and inspection reports – hidden behind the PAIA shield.

With the exception of Sasol,⁵⁶ none of the companies indicated how many PAIA applications had been received and how these had been dealt with.

52 Even though, according to research conducted by the ICMM, the national macroeconomic contribution of mining to job creation is frequently very small; see Oxford Policy Management, Raw Materials Group & ICMM, *The role of mining in national economies*, 2014, ICMM, p. 24.

53 Sasol AFS, p. 46.

54 Implats, 'Sustainable development report' (hereafter Implats SDR), p. 1.

55 T. Humby & F. Adeleke, Main project report (see n 21).

56 In its 'Annual integrated report', Sasol indicated that it had received two PAIA applications in the financial year reported on, one which it had granted and one which it had refused.

Table 3: Summary of corporate disclosures evaluated against national transparency information categories

Reporting categories	Sasol	Anglo American	Implats	Harmony Gold	Coal of Africa
PAIA Manual available online	✓	Only for Anglo American SA	✓	✓	✓
Indicates number of PAIA requests received	✓	✗	✗	✗	✗
Records of prospecting and mining activities	Only through PAIA	Only through PAIA	Only through PAIA	Only through PAIA	✗
Records of environmental impacts	Only through PAIA	Highly aggregated; otherwise only through PAIA	Highly aggregated; otherwise only through PAIA	Highly aggregated; otherwise only through PAIA	✗
Health and safety information (Mine Health and Safety Act, Occupational Health and Safety Act [OHSA], Compensation for Occupational Injuries and Diseases Act [COIDA])	✓	✓	✓	✓	✓
Register of prospecting and mining licences	✗	✗	✗	✗	✗
Licences available on website	✗	✗	✗	✗	✗
BBBEE status and certificate	✓	✗	✓	✓	✓
Details on compliance with Mining Charter	✗	✗	✗	✓	✗
Payments to traditional authorities	✗	✗	✗	✗	✗
Information on local beneficiation	✓	✗	✓	✗	✗
Corporate governance information	✓	✓	✓	✓	✓

In clear non-compliance with the EITI Standard, and now with new environmental impact assessment regulations in force, none of the companies provided a publicly accessible register of their mining rights and environmental authorisations, or made this information available on their websites.

Most companies referred to their BBBEE status in their annual reports, and Sasol provided a copy of its BBBEE verification certificate on its website.⁵⁷ With the exception of Harmony Gold, none of the sampled companies provided a detailed overview of compliance with the South African Mining Charter, even where the information appeared to have been available. For example, Coal of Africa's 'Integrated report' stated that the company continued to comply with the Mining Charter and filed annual compliance reports with the DMR. A DMR assessment of the company's BEE compliance was also completed in 2014.⁵⁸ However, neither this assessment nor the annual compliance reports are publicly accessible. In the case of Harmony Gold, progress against Mining Charter targets was included in the 'Integrated report' as a separate section. The progress table indicated the company's extent of compliance and where further information on compliance with Mining Charter targets could be found in the report.⁵⁹

57 See: www.sasol.co.za [accessed 15 December 2014].

58 Coal of Africa, 'Integrated report' (hereafter 'Coal of Africa IR'), p. 21.

59 Harmony Gold IAR, p. 145.

Mining Charter compliance, including local beneficiation, is of great importance and interest to the state and society at large.

Implats provided a limited amount of information on local beneficiation, with this topic featuring as a focal point in its 2014 reports. Pressure to provide metals at low cost for local beneficiation in South Africa was identified as a Group strategic risk.⁶⁰ Responding to this risk by indicating what the company was currently doing, the 'Integrated report' elaborated on the Selous-based base-metals refinery refurbishment in Zimbabwe and the company's total investment in the project.⁶¹ The report further indicated that 22% of platinum, palladium and rhodium sales were made to South African customers for further beneficiation.⁶² Sasol's 'Annual integrated report' provided information on the company's synfuels operations in Secunda, on the chemicals operations at Sasolburg and Secunda, on the Natref operations in Sasolburg, and on various other satellite operations.

None of the sampled companies reported on payments made or company benefits accruing to traditional authorities. Although Coal of Africa mentioned engaging with traditional authorities located within close proximity of its Makhado project,⁶³ it did not report on any payments to such authorities.

It should be emphasised that mandatory disclosure of the former three categories of information is not required by law, and non-disclosure of such information on the part of the sampled companies should, therefore, not be surprising. However, Mining Charter compliance, including local beneficiation, is of great importance and interest to the state and society at large. Disclosure of pertinent information could easily be substantiated on the basis of the 'stakeholder-inclusive' approach recommended by the King III Code on Corporate Governance, providing stakeholders with 'sufficient information to record how the company has both positively and negatively impacted on the economic life of the community in which it operated during the year under review'.⁶⁴ Similarly, disclosure of payments made to traditional authorities on the part of mining companies would enable reconciliation with the registers detailing payments and gifts received that traditional councils must keep in terms of national and provincial traditional leadership and governance laws.⁶⁵ This would go some way to responding to reports that mining companies collude with traditional-authority structures to facilitate extractivism and deprive communities of the full benefits of mining in their localities.⁶⁶

In contrast to the very limited information disclosed voluntarily, or shielded by PAIA, all of the sampled companies provided fairly extensive information on corporate governance on their websites. Typically, the company's Memorandum or Articles of Association, board charters, and terms of reference for board committees were made available, with Sasol, Anglo American and Implats also providing a detailed statement of compliance with the King III Code. The larger multinationals also provided archived notices, speeches, transcripts and voting results relating to annual general meetings.

60 Ibid, p. 29.

61 Implats, 'Integrated report' (hereafter 'Implats IR'), p. 35.

62 Ibid, p. 49.

63 Coal of Africa IR, p. 19.

64 Institute of Directors in Southern Africa, 'King Code of Governance for South Africa', 2009.

65 For example, the National Traditional Leadership and Governance Framework Act 41 of 2003.

66 See, for example, the special edition of the Institute of Security Studies' *South African Crime Quarterly* (Volume 49, 2014) which is devoted to the issue of institutions of traditional leadership and mining – available at <https://www.issafrica.org/publications/south-african-crime-quarterly/south-african-crime-quarterly-49> [accessed 7 April 2016].

The preceding review indicates fairly limited disclosures on the part of the sampled extractive companies and a fairly tight rein on information. There are a number of reasons why a limited appetite for increased transparency reporting might be evident.

3.4 A world of leaked information: Mining companies and third party disclosures

The preceding review indicates fairly limited disclosures on the part of the sampled extractives companies and a fairly tight rein on information. There are a number of reasons why a limited appetite for increased transparency reporting might be evident. They include:

- the need to maintain confidentiality regarding key information for the purpose of competition;
- a fear that disclosure will lead to misinterpretation or to the comparison of incomparable information;
- the challenges of collating data from different business units operating in different countries;
- the danger of releasing inconsistent information through different channels;
- the risk that reporting negative results could cause reputational damage; and
- the need to keep the annual reports concise and readable.⁶⁷

Nevertheless, in this information age and society, where the development of a global transparency standard for the extractive industry is well under way through converging initiatives, extractive companies are increasingly not fully in control of the release of information relating to their impact and operations, and of how this information is used in relation to their individual brands and the characterisation of the industry as a whole. Extractive companies have to position themselves in a world that is increasingly 'leaky' from an information perspective, with disclosures potentially coming from a range of other social actors, including the legislative, executive and judicial branches of the state, national and international CSOs, and the media. These actors may disclose information pertaining to a company's impact and operations, its transparency initiatives or its attempts to resist transparency per se.

Disclosures pertaining to companies may occur as part of parliamentary hearings into a particular matter or in the form of responses to questions in Parliament, through the release of official reports, as a result of PAIA requests submitted to state officials, and in the process of judicial and quasi-judicial proceedings. Loss of control over the disclosure of information varies between these sites of state activity, with judicial and quasi-judicial proceedings arguably being the most severe, as Lonmin plc recently experienced before the Commission of Inquiry into the events that took place at Marikana.⁶⁸ However, disclosures by the legislative and executive branches of the state may also have unpredictable and difficult-to-manage consequences for mining companies. For example, in March 2015, the South African Chamber of Mines and the DMR were deadlocked over the interpretation of the ownership clause in the 2004 Mining Charter (as amended in 2010), which required firms to reach a target of 26% black ownership by the end of 2014. The two parties had agreed to approach the courts for a declaratory order on the issue. In April 2015, prior to the matter even being heard in court, Minister of Mineral Resources, Ngoako Ramathlodi, released the Mining

⁶⁷ Ernst & Young, *Tax transparency: Seizing the initiative*, 2013, p. 31.

⁶⁸ See 'Marikana Commission of Enquiry: Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West province' ('Marikana report'). For a discussion of the Commission's findings regarding Lonmin's social and labour plan obligations, see F. Adeleke and T. Humby, 'Where public-sector accountability meets private sector accountability in mining: Lessons in transparency from Marikana', 2016, Briefing Paper, OSF.

Charter results, taking the mining industry by surprise.⁶⁹ A year later, the industry was once again taken by surprise when the new Minister of Mineral Resources, Mosebenzi Zwane, gazetted a new Mining Charter for comment without prior consultation. Whilst the disagreement pertaining to ownership is still before the courts, in June 2016 it was reported that the parties to the court dispute had been in talks and were poised to agree to withdraw the legal action and negotiate a solution to the empowerment debate.⁷⁰

In the case of PAIA requests, however, research has established that state officials frequently act to protect company information. For example, in its long-standing project on the use of PAIA in order to obtain access to environmental information, the Centre for Environmental Rights (CER) initially found that state officials were refusing PAIA requests on the basis that key documents, such as licences, were 'confidential commercial documents not appropriate for public disclosure',⁷¹ and that state officials were causing unnecessary delays in finalising PAIA requests by inviting third-party objections to the requests.⁷² Over the past four years, this trend has intensified, with the latest project report pointing to:

*increased deference by government departments to the wishes of the business sector regarding disclosure, and a perceived need to protect all information relevant to private enterprises from the public and particularly public interest groups.*⁷³

The significance for companies of the CER's PAIA project is that it possibly dilutes a company's capacity to use transparency as a branding and communication tool, thereby constraining the claims the company may make about itself as a transparent organisation by offering alternative and additional information and perspectives, whether on tax transparency or transparency more broadly. Between 2010 and 2014, for example, the CER submitted 34 PAIA requests to private bodies. The vast majority of these were refused, with companies relying on sections 66(b) and 68(1)(a), (b) and (c) of PAIA as grounds for refusal.⁷⁴ The latest report also contains information on Sasol's refusal of a PAIA request relating to the atmospheric emissions licence (AEL) for its oil refinery in Secunda. Sasol refused the application on the grounds that disclosure of air quality information could prejudice the security of the buildings and structure (the refinery is a national key point), and that disclosure of such 'sensitive proprietary information' would place Sasol at a material disadvantage in relation to its competitors.⁷⁵ By disclosing company responses to PAIA requests, and the reasons for refusal, information is placed in the public domain that allows policy-makers, legislators, regulators, and ordinary people to evaluate a company's commitment to transparent corporate governance. This could lead to allegations that transparency is a tick-box exercise, or merely a form of brand management, or that companies and the state are colluding to withhold information from the public.

The work of CSOs in the arena of transparency goes further than disclosing information on disclosure practices per se and penetrates the very information they believe companies should be disclosing, not only to the broader public, but also to immediate stakeholders such as shareholders and investors. For example, the CER recently published a report on the extent to which companies listed

-
- 69 Staff reporter, 'Business and government clash over Mining Charter', *The Economist*, 18 May 2015 – available at: <http://country.eiu.com/article.aspx?articleid=153172399&Country=South%20Africa&topic=Economy&subtopic=-Forecast&subsubtopic=Policy+trends&u=1&pid=424010626&oid=424010626&uid=1> [accessed 7 April 2016].
- 70 C. Paton & A. Seccombe, 'ANC see Mining Charter trade off success', *BDLive*, 6 June 2016 – available at: <http://www.bdlive.co.za/business/mining/2016/06/06/anc-sees-mining-charter-trade-off-success> [accessed 7 June 2016].
- 71 CER, 'Unlock the doors: How greater transparency by public and private bodies can improve the realisation of environmental rights', 2011, OSF-SA, p. 4. See, also, OSF-SA, 'In good company', 2015.
- 72 *Ibid*, p. 6.
- 73 CER, 'Money talks: Commercial interests and transparency in environmental governance', 2014, OSF-SA, p. 1. Section 66(b) provides for refusal of access where the disclosure of the record would prejudice or impair the security of property or methods/plans for the protection of an individual or the public. Section 68(1)(a)–(c) provides for refusal where the record contains: trade secrets of the private body; commercial, financial, technical or scientific information which could harm the commercial or financial interests of the private body; or information that could reasonably be expected to put the private body at a disadvantage in contractual or other negotiations, or prejudice the body in commercial competition.
- 74 *Ibid*, p. 15.
- 75 *Ibid*, pp. 12, 13. Sasol did offer to give the CER access to extracts of its AEL once such licence had been granted.

The preceding discussion does not purport to provide a comprehensive overview of the shifting locus of control of disclosures from the perspective of extractive companies. Its purpose is merely to highlight that this locus of control is shifting, lending weight to the argument that it behoves the extractive industry to engage with the transparency movement in constructive and creative ways.

in the JSE's Socially Responsible Investment Index disclosed non-compliance with environmental laws to shareholders,⁷⁶ a survey that included Sasol,⁷⁷ Anglo American plc,⁷⁸ Implats,⁷⁹ and Harmony Gold.⁸⁰ Through this project, the CER is, therefore, shaping and contributing to a discourse on environmental risk, disclosure and investment which, previously, would arguably have been a conversation developed by companies, shareholders and investors only.

Companies are also being subjected to a variety of civil society, transparency-rating surveys, which can also constrain their capacity to position themselves as transparent organisations.⁸¹ A new threat in the world of information leaks, however, is the mass disclosure of documents by organisations such as WikiLeaks. Mining companies are not immune to such mass exposure. In the latest major disclosure of the 'Panama Papers', for example, Zimplats (a subsidiary of Implats) was implicated in using an offshore company to pay employees in Zimbabwe. This disclosure, refuted by Implats, led to demands on the part of the Zimbabwean authorities for a 'full explanation' from Zimplats, and a warning that the tax authority would deal with the company if it became apparent that it had violated any regulations relating to exchange control or illicit financial flows.⁸²

The preceding discussion does not purport to provide a comprehensive overview of the shifting locus of control of disclosures from the perspective of extractive companies. Its purpose is merely to highlight that this locus of control is shifting, lending weight to the argument that it behoves the extractive industry to engage with the transparency movement in constructive and creative ways.

4. Discussion: The explicit and implicit drivers of disclosure

In a guide on tax transparency compiled by Ernst & Young in 2013, the authors opined that a 'tipping point' had been reached, 'with many organisations now sensing that greater tax transparency reporting will become expected and more routine'.⁸³ The clamour for transparency, and the ensuing moves to rationalise, homogenise and, indeed, bureaucratise disclosures, has been felt first in the extractive industries, where country-by-country and project-by-project reporting will increasingly become the norm.⁸⁴

To recap with regard to the preceding discussion: a survey of the disclosure practices of five South African companies revealed that, as of February 2015, tax transparency reporting on a country-by-

76 CER, 'Full disclosure', 2015 – available at: <http://cer.org.za/full-disclosure>.

77 For the report's findings on Sasol, see: <http://cer.org.za/full-disclosure/company/sasol-limited>.

78 For the report's findings on Anglo American, see: <http://cer.org.za/full-disclosure/company/anglo-american-plc>.

79 For the report's findings on Implats, see: <http://cer.org.za/full-disclosure/company/impala-platinum-holdings-limited>.

80 For the report's findings on Harmony Gold, see: <http://cer.org.za/full-disclosure/company/harmony-gold-mining-company-limited>.

81 A prominent example is Transparency International's 'Transparency in corporate reporting: Assessing the world's largest companies, 2014.

82 T. Karombo, 'Implats unit implicated in Panama report', *Independent Online*, 5 April 2016 – available at: <http://www.iol.co.za/business/companies/implats-unit-implicated-in-panama-report-2005128> [accessed 7 April 2016].

83 Ernst & Young, *Tax transparency: Seizing the initiative*, 2013, p. 31.

84 *Ibid.*, p. 7.

In the case of categories of information pertinent to the South African context (BBBEE), local beneficiation, and payments to traditional authorities, there is a consistent level of low or no disclosure in the annual reports and website presence of the companies sampled.

country basis is patchy, and, on a project-by-project basis, non-existent. Diversity is noted in both the form and substance of reporting. There is a degree of homogeneity in reporting on revenues, dividends, profit/loss before taxes, and corporate governance at an aggregated level, and a similar degree of homogeneity in the use of PAIA as a gateway for certain categories of information, including licences and authorisations and the details of compliance with these instruments. In the case of categories of information pertinent to the South African context (BBBEE), local beneficiation, and payments to traditional authorities, there is a consistent level of low or no disclosure in the annual reports and website presence of the companies sampled. A brief overview of third party disclosures suggests, however, that extractive companies are operating in an environment in which the locus of control over disclosures is increasingly diffuse.

Given this information, what can be said about the explicit and implicit drivers of disclosure? What explanatory frameworks can throw light on the disclosure practices of companies in the context of an increasingly elaborate transparency regime?

In a paper published in 1983, DiMaggio and Powell described three institutional forces that tended to make organisations similar over time.⁸⁵ These forces, or drivers in contemporarily fashionable parlance, function not only to sweep reform and change over an organisational field,⁸⁶ but also to shape reforms toward increasing isomorphism – a ‘constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions’.⁸⁷ Early adopters of organisational innovation are typically driven by a desire to improve performance, and their practices are driven by values responsive to contextual pressures. In the context of transparency, the environmental pressure is the call by an increasingly diverse group of stakeholders to be able to interrogate not only a company’s strategy for growth and profitability, but also its contribution to the economy and, in the case of extractives, the prudent use of natural resource wealth. As these pressures are channelled in various ways, one would expect to find companies responding differently and at different speeds. At this stage, one may therefore expect to find diversity in practice. Over time, as increasing numbers of companies respond to the same environmental pressures and institutionalise their response, one would expect practices to become increasingly isomorphic as companies respond ‘to an environment that consists of other organisations responding to their environment’.⁸⁸

In DiMaggio and Powell’s framework, the institutional forces of isomorphism are coercive, mimetic and normative in nature, as outlined in the following sections.⁸⁹

85 P.J. DiMaggio & W.W. Powell, ‘The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields’, 1983, 48(2) *American Sociological Review*, 147–160.

86 Ibid, p. 148. An ‘organisational field’ is constituted by those organisations that, in the aggregate, constitute a recognised area of institutional life. The extractive sector could be said to be an organisational field.

87 Ibid, p. 149.

88 Ibid.

89 In 2014, De Villiers et al. employed the DiMaggio/Powell framework to analyse the social and environmental disclosures of listed South African companies. Contrary to the prevailing wisdom, they found that smaller companies disclosed the same amount of environmental information as larger companies. This they ascribed to normative isomorphism, which is driven by professionalisation. In the case of smaller and larger companies, the expected differences in disclosures were found. See C. de Villiers, M. Low & G. Samkin, ‘The institutionalisation of mining company sustainability disclosures’, 2014, 84 *Journal of Cleaner Production*, 51–58.

Nevertheless, there are indications that the South African state is stirring from the inertia that has until now characterised its commitment to transparency and the constitutional right of access to information.

4.1 Coercive isomorphism

Coercive isomorphism results from external pressures, both formal and informal, and is thus integrally linked to the social licence to operate. Such pressures encompass: pressure exerted by the state, including pressure through the use of legal controls; organisations on which companies are dependent (examples would include stock exchanges, investors, and financing institutions); and other organisations articulating cultural expectations of companies in the societies in which they function (e.g. transnational and national NGOs).⁹⁰

In the case of pressure from the state, a review of more than 30 laws and regulations in South Africa revealed little evidence of disclosure rules relating to ownership, operational and financial information applicable to companies in the extractive industry.⁹¹ Further, these fragmented laws are to be found mostly in tax laws, with information subject only to disclosure to oversight bodies like the South African Revenue Service (SARS). Nevertheless, there are indications that the South African state is stirring from the inertia that has until now characterised its commitment to transparency and the constitutional right of access to information. Regulations issued under the Petroleum Pipelines Act 60 of 2003, for example, provide that licence applications must be made available for inspection by members of the public and must be stored at the place of business and placed on the website of the licensee, with the National Energy Regulator of South Africa considering requests for confidentiality.⁹² Under the 2014 environmental impact assessment regulations issued under the National Environmental Management Act 107 of 1998, an environmental authorisation, environmental management programme, independent assessment of the financial provision for rehabilitation and environmental liability, closure plans, audit reports, and compliance and monitoring reports must be made available for inspection and copying, (i) at the site of the authorised activity, and (ii) to anyone on request, and, where the holder of an environmental authorisation has a website, on such publicly accessible website. Further, in April 2016, the Department of Environmental Affairs indicated in its latest published PAIA Manual that environmental authorisations issued in terms of the Environmental Impact Assessment Regulations, permits issued in terms of the Biodiversity Act, licences issued in terms of the Waste Act, and atmospheric emissions licences issued in terms of the Air Quality Act would be available for inspection or copying *without* the need for a PAIA application.⁹³ In its first interim report on mining, released in December 2015, the Davis Committee on Base Erosion and Profit Shifting supported meaningful efforts by the state to enhance existing reporting and transparency efforts (including considering joining the EITI).⁹⁴ Moreover, the Financial Intelligence Centre (FIC) Amendment Bill currently before Parliament introduces the concept of beneficial ownership as well as the term 'foreign and domestic prominent influential persons'.⁹⁵

90 P.J. DiMaggio & W.W. Powell, 'The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields', 1983, 48(2) *American Sociological Review*, p. 150.

91 T. Humby & F. Adeleke, 'Main project report'.

92 See Regulation D4.

93 Department of Environmental Affairs, 'Automatically available records and access to such records', GN 435 GG 39922 of 15 April 2016.

94 Davis Tax Committee, 'First interim report on mining for the Minister of Mining', 2014, p. 115.

95 See the definitions section of the bill. 'Beneficial owner, in respect of a legal person, means a natural person who, independently or together with another person, directly or indirectly, (a) owns the legal person or (b) exercises effective control of the legal person.

Until now, PAIA has been used as a means to block rather than facilitate access to information, but judicial precedent and the ongoing efforts of civil society may yet wake this slumbering giant, unleashing additional pressures on affected organisations.

In terms of the bill, financial institutions are obliged to keep identity, verification and transaction records in order to conduct ongoing due diligence.

Until now, PAIA has been used as a means to block rather than facilitate access to information, but judicial precedent and the ongoing efforts of civil society may yet wake this slumbering giant, unleashing additional pressures on affected organisations. As the brief overview of third party disclosures above shows, CSOs are using other creative ways to pressurise corporates into enhanced disclosures. In general, and especially since 2010, the courts have promoted the underlying spirit and purpose of PAIA, opting for broad interpretations of provisions favouring access to information and narrow interpretations of the provisions of PAIA that allow for refusal.⁹⁶ The courts have not shied away from insisting that PAIA is intended to counter a public and private culture secrecy. In one of its most hard-hitting statements to date, in the *Nova Property Group* case decided in April 2016, the Supreme Court of Appeal stated that the manner in which companies operate and conduct their affairs is *not a private matter*.⁹⁷ In this case, the court quickly dismissed the claims of the companies concerned that section 26(2) of the Companies Act 71 of 2008⁹⁸ afforded only a qualified right of access to the securities register of a company, and that requests could be refused based on PAIA grounds and the motive of the requester. The court further opined that companies operate within a context where both the legal framework and the funds mobilised for operations ultimately stem from endorsement or contribution by the members of the community. The benefits inherent in a company being a creature of state are accompanied by responsibilities, among which are statutory obligations of proper disclosure and accountability to shareholders.⁹⁹ The new Companies Act expressly endorses a culture of openness and transparency, recognising that the establishment of a company is not purely a private matter and may impact the public in several ways.

Arguably, however, the most significant coercive pressure on extractive companies at the moment is the global network of national transparency regimes, with the globalisation of this coercive pressure marking a step change from the kinds of external pressures considered by DiMaggio and Powell. Although the materiality requirements of these regimes may allow a lot of payments to remain under the radar, even small companies concentrating on single commodities in a single jurisdiction will be required to consider, engage with, and, where necessary, comply by virtue of their cross-listing on international exchanges. As companies respond to these various regimes, putting in place the organisational controls to honour legal commitments, their structures and practices will increasingly come to reflect the rules institutionalised and legitimated by transnational transparency laws.¹⁰⁰

96 See F. Adeleke & T. Humby, 'The Promotion of Access to Information Act and mining-related disclosure practices in the public and private sectors: Experiences, successes, shortcomings and reform', 2016, OSF-SA.

97 *Nova Property Group Holdings Ltd v Julius Peter Cobbett* Case No. 20815/2014, para 16.

98 Section 26(2) entitles a person who does not hold any beneficial interest in any securities issued by a for-profit company, or who is not a member of a non-profit company, to inspect or copy the securities register of the profit company, or the members' register of a non-profit company, or the register of directors of a company, upon payment of an amount not exceeding the prescribed maximum fee for such inspection.

99 *Ibid.*

100 P.J. DiMaggio & W.W. Powell, 'The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields', 1983, 48(2) *American Sociological Review*, p. 150.

Normative isomorphism stems largely from professionalisation as members of an occupation struggle to define the conditions and methods of their work.

4.2 Mimetic isomorphism

Mimetic isomorphism is the phenomenon whereby organisations model themselves on other organisations. This tends to occur in situations where goals are ambiguous or where technical requirements remain poorly understood.¹⁰¹ This could well be the case in the transparency context where a company may be unsure about the level and detail of response, even in the more limited context of tax transparency. The desire to report more transparently bumps up against the inherent complexity of tax rules, and the value of keeping annual reporting clear and accessible. In this context, leaders emerge to pave the way as regards both form and substance, and one can already see this operating in an extractives context with regard to BHP Billiton's 2015 'Economic contribution and payments to government report' and Anglo American's 2015 'Tax and economic contribution report'. The formats and level of reporting adopted by these mining giants may not, however, be appropriate for smaller companies. Yet it is a feature of isomorphism that, as goals and practices spread within an organisational field, adoption itself provides legitimacy, even though it may not be the most rational or effective strategy for a particular organisation.¹⁰² The modelling that takes place by way of mimetic isomorphism may be unintentional, diffuse, indirect and responsive to both positive (e.g. mining giants' reporting formats) and negative (e.g. various tax justice advocacy toolkits developed by NGOs¹⁰³) models.

4.3 Normative isomorphism

Normative isomorphism stems largely from professionalisation as members of an occupation struggle to define the conditions and methods of their work. Formal education and legitimation in a cognitive base, together with the growth and elaboration of professional networks, are both aspects of professionalisation.¹⁰⁴ To these internal drivers of change one may add the endorsement by professional bodies of particular standards or approaches. For the extractive industries, in the international context, the ICMM potentially plays this role. The ICMM supports the EITI and has consolidated it into a 2009 Position Statement on the transparency of mineral revenues, but has not yet produced detailed guidelines on country-by-country and project-by-project reporting. In a national context, the Chamber of Mines of South Africa has also been slow to respond on this front.¹⁰⁵

Professionalisation of tax transparency practices and other disclosures is likely to occur through the advocacy of various professional organisations, and the legal and accounting professions in particular. In its 2013 guide on tax transparency, for instance, Ernst & Young offer various practical

101 Ibid, p. 151.

102 Ibid, p. 148.

103 An example, here, would be Christian Aid's 'Tax justice advocacy: A toolkit for civil society' – available at: <https://www.christianaid.org.uk/images/completetaxadvocacytoolkit.pdf> [accessed 13 April 2016].

104 P.J. DiMaggio & W.W. Powell, 'The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields', 1983, 48(2) *American Sociological Review*, p. 152.

105 The Chamber of Mines also does not appear to support the EITI unequivocally – see the remarks of Baxter referenced above and the discussion of the African Peer Review Mechanisms compared with the EITI and the Kimberley Certification Scheme as governance instruments in K. Matoti, 'Mineral resource governance can be improved in Africa: Africa Peer Review Mechanism', 2015, July edition of *Mining*, pp. 65–67.

Transparency, in and of itself, is not a panacea for all ills, and needs to be bolstered by broader governance reforms and human rights protections for civic engagement.

suggestions concerning the content and form of tax transparency disclosures, with such suggestions spanning the presentation of historical financial data as well as tax-governance information.¹⁰⁶ As these practices themselves become institutionalised, one would expect normative isomorphism to play a greater role as a driver of transparency and disclosure.

5. Conclusion

While companies more broadly may yet be on the cusp of a tipping point that requires of them to substantially rethink their approach to transparency, disclosure and accountability, it is clear that, for extractive companies, this tipping point has been breached. Coercive forces are compelling, and will increasingly compel, extractive companies to become more transparent about their ownership, operations and finances. The working of mimetic and normative forces is already apparent.

The survey results reported in this paper are based on a small sample of companies and a larger-scale project that examines a broader range of companies and which draws on interviews with key stakeholders may well be indicated.

In moving forward, however, South African society, and extractive companies in particular, should settle upon the key issues for transparency governance in a South African, and broader African, context. The state of disclosure practice, the drivers motivating disclosures and transparency, and whether or not South Africa should join the EITI (as opposed to a broader but as yet undeveloped African transparency initiative), are questions that should probably be displaced by a broader concern with the role transparency governance can play in healing the massive trust deficit that still plagues the relationships among government, the extractive industries, and civil society in South Africa. Transparency, in and of itself, is not a panacea for all ills, and needs to be bolstered by broader governance reforms and human rights protections for civic engagement. Disclosure in the absence of a relationship also runs the risk of constant, and unconstructive, misinterpretation. Instead of responding to transnational transparency governance on the back foot, or baulking at the prospect of more facilitative PAIA disclosures, extractive companies should seize the opportunity to use transparency as a means to build relationships, establish mutual trust, and entrench a collaborative approach to resolving complex and interrelated social, economic and environmental issues.

¹⁰⁶ Ernst & Young, *Tax transparency: Seizing the initiative*, 2013, pp. 25, 26, 28.

About the authors

Prof. Tracy-Lynn Humby is an associate professor at the School of Law, University of the Witwatersrand, and a research associate at the SWOP Institute, Wits University. She holds a PhD from Wits University, an LLM, LLB and B.Proc from the University of South Africa, and a B.Mus from the University of Port Elizabeth.

Dr Olufolahan Adeleke is a senior researcher with the Mandela Institute, University of the Witwatersrand. He is currently a visiting Fulbright Scholar at the Columbia Centre for Sustainable Investment, Columbia University School of Law. He holds a PhD from Wits University, and his LLM and LLB degrees from the University of Cape Town.

About the series (working papers)

The Open Society Foundation for South Africa periodically commissions research papers on topics related to our portfolio on *Promoting Extractive Sector Transparency and Accountability*. This publication forms part of a series of three working papers commissioned in 2016 on select topics related to disclosure practices in South Africa's extractive sector.

The series focus is drawn from the report titled *South Africa's Extractive Industry Disclosure Regime: Analysis of the legislative and regulatory regime and selected corporate practice*, written by Prof. Tracy-Lynn Humby and Dr Fola Adeleke. While related to the larger disclosures report, this series provides deep analysis into beneficial ownership, drivers of disclosure, and experiences with the Promotion of Access to Information Act in mining related disclosure practices.

We hope that the series is a useful knowledge resource for the work of our grantees, our partners and the many mine-affected communities in South Africa.

November 2016

