CORPORATE NON-DISCLOSURE IN SOUTH AFRICA

PLUGGING LEAKAGES TO ENHANCE GOVERNMENT'S CAPACITY TO MONITOR AND ENFORCE COMPLIANCE IN THE MINING INDUSTRY

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OPEN SOCIETY FOUNDATION FOR SOUTH AFRICA

1. Introduction

'Transparency' has become a buzzword in the 21st century as various social actors, including government, civil society, the private sector and new media, seek to win the trust of the public and claim the 'legitimacy space' in representing the hard-to-define concept 'public interest' or 'interests of society'. The global rise in inequality[1] has sustained the interest of these actors in understanding the various patterns of wealth accumulation in the world, and how to change them. As world governments slowly began to recover from the last global economic crisis, it became obvious that the traditional capital-exporting states were also 'victims' of the unregulated activities of powerful multinational corporations, and that the problem of illicit financial flows was no longer a problem solely of the so-called capital-importing states.[2] As a result, there has been an unprecedented global convergence towards the regulation of financial flows across the world as states come together to stop leakages from state economies into private hands in the hope that the certainty of increased corporate and wealth taxes will help create more equal societies.

South Africa has joined this global network of states agreeing to various international commitments that attempt to curb illicit financial flows.[3] In South Africa, the mining industry attracts the highest number of multinational corporate investors and the industry generates 60% of South Africa's exports.[4] There are several areas of contestation within the extractive industry. These include wage disputes between the mining companies and miners, disputes between mines and host communities, and disagreements between government and mining companies. The common player in these various spheres of contestation is the mining company, and, as a result, there is increasing public demand for accountability with regard to the management of the nation's natural resources. The extractive industry has attracted considerable attention in terms of the demand for transparency within the industry in relation to profits, tax payments, the negotiation of wages, and the funding of local socio-economic development initiatives. This paper attempts to consolidate the various proposals that have been made so as to enhance the government's capacity to monitor and enforce compliance with disclosure requirements in the mining industry.

1 OXFAM's 2016 report states that the richest 1% have more wealth than the rest of the world combined and that just 62 people have the same wealth as the bottom 3.6-billion people on earth. Available at: https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf.

2 The Organisation for Economic Co-operation and Development (OECD) adopted the 2014 Model Tax Convention that in part addresses these concerns.

3 Examples include South Africa's Action Plan with regard to the G20 High Level Principles on Beneficial Ownership Transparency and the Financial Action Task Force, among others.

4 PricewaterhouseCoopers (PwC), 'SA Mine', 2015, 7th edition, p. 5.

2. Monitoring compliance: The gaps in regulation

The Promotion of Access to Information Act (PAIA) 2 of 2000 is the overarching law that gives effect to the constitutional right of access to information, a right that applies to the private sector and allows the public to access information, provided that the requested information is meant for the exercise or protection of a right.[5] However, PAIA is limited in scope because of the exemptions relating to disclosure that are embodied in the law, particularly the exemption concerning confidentiality and the commercial information of third parties.[6] There are a number of other applicable sectoral laws that also require disclosure, but which are also constrained by the exemption regarding confidentiality that can be exercised at the discretion of the mining proponent. Such confidentiality provisions are often couched in the guise of protecting commercially sensitive information, but, as this class of information remains legally undefined, it can be employed to cover a whole range of information that the company in question would prefer not to disclose.

Examples of these kind of 'claw-back provisions' pertaining to disclosure rules include the Mineral and Petroleum Resources Royalty Act 28 of 2008, which provides that the records referred to in terms of section 8 of the Act are not publicly available and are governed by the provisions on preservation of secrecy contained in section 19, provisions that are similar to those in the Income Tax Act 58 of 1962.

Another problem relates to the lack of verification of records received or the insufficiency of information received. For example, the Trust Property Control Act 57 of 1988 allows the Registrar to maintain records in relation to the founders, trustees and beneficiaries, and these records are available to oversight authorities. However, the records maintained are not verified, and, where the party to a trust is a legal person, there is no obligation to submit information on the beneficial owner of the legal person.[7]

The Tax Administration Act 28 of 2011 currently provides for the disclosure of arrangements that might lead to undue tax benefits. This is an indication that the South African Revenue Service (SARS) already has the legislative authority to collect information in relation to tax avoidance, something that could facilitate the disclosure of the new, comprehensive payments that a number of states have been championing (including country-by-country payments). The latter involve payments made by a company to each government where such company operates, including payments made by the subsidiary of each such company. Other comprehensive disclosure practices necessarily include project-by-project reporting, the disclosure of beneficial ownership, and the publication of information about commercial contracts that the government signs.[8]

The current framework applicable to disclosure in South Africa is therefore incapable of breaking the mould of secrecy in the private sector and a different form of regulation needs to apply. Some of these emerging forms of global regulation – which are yet to find a firm footing in South Africa – include the notion of open contracting. 'Open contracting' refers to the publication of government contracts (licences and associated documentation in a South African context) from the time of the award process up to and including the monitoring and evaluation of contract implementation. It also refers to the norms and practices related to increased disclosure and participation in public contracting.

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5 Section 32 of the South African Constitution, 1996.

6 See section 36, 37, 64 and 65 of PAIA.

7 International Monetary Fund (IMF), 'Report on observance of standards and codes on FATF recommendations for anti-money laundering and combating the financing of terrorism,' 2009, p. 10 (hereafter 'IMF report').

8 See African Union Commission/Economic Commission for Africa, Conference of Ministers of Finance, Planning and Economic Development, 'Illicit financial flows: Report of the High Level Panel on Illicit Financial Flows from Africa,' 2015.

In the case of South Africa, the environmental management regulation model might be worth exploring. In terms of the disclosure of environmental information, there are a number of applicable laws and regulations as well. However, there is a new requirement in the Environmental Impact Assessment Regulations and the Financial Provisions Regulations that require applicants to upload their environmental information and financial provisioning on their websites for the purpose of public access.

To develop a robust disclosure practice in South Africa, it is necessary for the government to embrace the notion of proactive disclosure of information which PAIA itself espouses. This can be achieved by making the rights-application process in South Africa a fully open process, while, at the same time, providing limited privacy rights for applicants in order to protect their trade secrets. The government also needs to enhance public accessibility to data on contracting, as well as increase the opportunities and mechanisms for participation throughout all phases of contracting.

Not all payments by companies are necessarily payments in respect of tax, royalties or licences. As a result, it is necessary that any form of applicable regulation adopted by South Africa includes payments in kind that cover commitments for, among others, social-infrastructure development.

South Africa would also benefit from joining global initiatives such as the Extractive Industries Transparency Initiative (EITI) and so move towards common global mechanisms and create an opportunity for multiple levels of oversight in relation to the extractive industry.

While the notion of proactive disclosure is essential, it is important that disclosure should be prescriptive rather than voluntary. Prescriptive disclosure would ensure that the focus is on substance and not form. It will also lessen the opportunity for private corporations to tailor their disclosures and therefore use the system as another form of 'brand management'.

One of the ways in which illicit financial flows occur is through trade misinvoicing or abusive transfer pricing. These activities involve the misrepresentation of 'the price or quantity of imports or exports in order to hide or accumulate money in other jurisdictions'.[9] Such activities further allow tax evasion, money laundering and profit-shifting from a high-tax jurisdiction to a lower-tax jurisdiction. A big risk for South Africa in terms of illicit financial flows is the extent to which her trading partners allow financial secrecy. Some jurisdictions allow confidentiality with regard to banking or financial information in almost all circumstances, and, with South Africa's economy being heavily dependent on exports of the commodities produced, the risk of illicit financial flows will only be mitigated if there is greater transparency with regard to invoicing and pricing.

In addition to ensuring that there are stringent regulations to address these issues, a review of double-taxation treaties with jurisdictions that are potentially financial-secrecy jurisdictions is also necessary.

3. Enforcing compliance: Strengthening oversight institutions

Ultimately, regulations are weak without strong institutions. As a result, it is necessary that regulatory and oversight bodies are adequately equipped to exercise their oversight functions effectively. Many oversight bodies currently receive records from mining companies that can be used to monitor and enforce compliance by mining companies with applicable regulations. However, the weakness of the enforcement mechanisms has made some of the regulations ineffective.

Parliament has sought to remedy this problem as far as PAIA is concerned and has introduced a new oversight body, to be called the Information Protection Regulator, established in terms of the Protection of Personal Information Act 4 of 2013 in order to monitor violations of the provisions of PAIA. Despite the passage of this law in 2013, the government is yet to establish this body. It is

9 Ibid, p 112.

The South African government's commitment, in its 2015–2017 Open Government Partnership Commitments, to formulating an implementation plan on beneficial ownership disclosure is a welcome development. This initiative should be used to build momentum for a comprehensive law on beneficial ownership.

important that the appointment of this Regulator be prioritised. With very extensive enforcement powers conferred on the Regulator, there is significant potential that this might improve disclosure practices in the private sector.

4. The way forward: 'The fierce urgency of now'

Corruption is a significant impediment to the realisation of South Africa's National Development Plan. As a result, the development of a resilient anti-corruption system to strengthen various multi-agency anti-corruption strategies is necessary.

Currently, there is no legal requirement in South African law for the identity of beneficial owners to be verified. As a result, this creates a loophole for potentially corrupt and economically harmful practices such as illicit financial flows. While there is a company registry that covers both domestic and foreign companies, including the details of shareholders, and although there are record-keeping requirements which are applicable to companies in the extractive industry, this information does not cover beneficial owners, especially in cases where shareholders are nominees and the information submitted by companies is not verified.[10] Information on the corporate structure of companies to be formed or the beneficial ownership of such companies is not required to be submitted to the companies' oversight body.

As it would be cumbersome to amend the broad spectrum of regulations governing disclosure in the extractive industry, a law that focuses on beneficial ownership should be seriously considered. The South African government's commitment, in its 2015–2017 Open Government Partnership Commitments, to formulating an implementation plan on beneficial ownership disclosure is a welcome development. This initiative should be used to build momentum for a comprehensive law on beneficial ownership.

The South African government also recently introduced the Financial and Intelligence Centre (FIC) Amendment Bill, which aims to improve South Africa's anti-money laundering laws by introducing new concepts into South African law.[11] These include the introduction of beneficial ownership, ongoing due diligence and 'foreign and domestic prominent influential persons'.[12] The powers of the FIC are also extended to adequately supervise suspicious transactions. The aim of the introduction of these concepts is to assist financial institutions in properly identifying their clients, thereby enabling them to apply appropriate standards of due diligence.[13]

These are welcome developments and steps in the right direction. Hopefully, the government will appreciate 'the fierce urgency of now' in developing, improving and implementing a robust regulatory framework backed by strong oversight institutions so as to ensure sustainable outcomes with regard to the extraction of the country's mineral resources.

10 IMF report, p. 10.

11 Financial Centre Amendment Bill B-2015.

12 See the definitions section of the Bill.

13 See IMF report.

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About the series (briefing 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 briefing papers commissioned in 2016 on select topics related to transparency, disclosure practices and accountability in South Africa's extractive sector.

The series focuses on the role of transparency in sustainable mineral development, the intersection between public and private sector accountability in mining, and reflections on enhancing government's capacity to address non-disclosure in the mining industry.

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.

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Notes

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BRIEFING PAPER **ONE**

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