

9 September 2016

**RE: NATURAL RESOURCE GOVERNANCE INSTITUTE SUBMISSION ON THE REVISED DRAFT OF THE IMF'S
NATURAL RESOURCE FISCAL TRANSPARENCY CODE**

Summary

We congratulate the IMF on a strong revised draft of the IMF's Natural Resource Fiscal Transparency Code, and offer the following key recommendations for further improvement:

- **General**
 - If the current draft Natural Resource Transparency Code is meant to serve as a separate and stand-alone code applicable to resource-rich countries, expand and revise the glossary to include definition of terms used in Pillars I through III
 - Include further transparency requirements for national resource companies in the Natural Resource Fiscal Transparency Code or include these requirements in later guide(s) to the Natural Resource Fiscal Transparency Code
 - Include open data requirements in later guide(s) to the Fiscal Transparency Code
- **2.1 Comprehensiveness**
 - Revise to include “natural resource funds” as a type of extra-budgetary fund that should be included in budget documentation as “good” and “advanced” practice
- **3.1 Risk disclosure and analysis**
 - Consider better tailoring the language of 3.1.3 to resource-rich countries by including reference to other sources of long-term fiscal liabilities and distinguishing between stocks and flows
- **4.1 Legal and fiscal regime**
 - Require publication of laws and regulations as “basic”
- **4.2 Allocation of rights and collection of revenue**
 - Require publication of predefined qualification and evaluation criteria at all levels of practice
 - Clarify that “publication of rights” should include type of right granted and recipient of that right
 - Align the beneficial owner disclosure requirements with those of the EITI Standard 2016 to facilitate harmonization of approach
 - Revise structure of section 4.2.4 on “Resource Revenue Audit and Verification”, to require project-level government disclosures as “basic” or “good”
- **4.3 Company reporting**
 - Collapse disclosure of environmental and social impact assessments into one requirement and include disclosure of associated management plans and periodic reports as an additional disclosure requirement
- **Glossary**

- Align the definition for “beneficial owner” with that of the EITI Standard 2016, in order to facilitate harmonization of such disclosures
- Expand the definition of “project” to include circumstances under which multiple agreements may be treated as a single project, in keeping with EU Accounting and Transparency Directives of 2013, the Technical Reporting Specifications for Canada’s Extractive Sector Transparency Measures Act of 2014 and the final rule implementing Section 1504 of the Dodd Frank Act.

About the Natural Resource Governance Institute

The Natural Resource Governance Institute (NRGI) is an international non-profit policy institute and grant-making organization whose focus and expertise is the responsible management of oil, gas and mineral resources for the public good. Our work promotes transparency and governance standards for the management of natural resources and resource revenues by governments, as well as the associated activities of companies, lenders and investors active in the extractive industries. We work in resource-rich countries in Africa, the Middle East, Eurasia, Latin America, South East Asia and the Pacific.

We also work at the international level to inform and implement best practice standards for extractive industry governance, and have played a central role in the establishment of the Natural Resource Charter (NRC)¹, the Extractive Industries Transparency Initiative (EITI) and the Publish What You Pay (PWYP) coalition. NRGI additionally publishes the Resource Governance Index (RGI), which measures the quality of governance of oil, gas and mining sectors across 58 countries producing 85 percent of the world's petroleum, 90 percent of diamonds and 80 percent of copper, generating trillions of dollars in annual profits. A new edition of the RGI is forthcoming. Please find more information on NRGI at: www.resourcegovernance.org.

I. Introduction

We are grateful once again for the opportunity to comment on a revised draft of the IMF’s Natural Resource Fiscal Transparency Code (the “Revised Draft”), having had the opportunity to comment on the initial December 2014 draft of the Resource Revenue Management Pillar (“Pillar IV”) of the Fiscal Transparency Code. We commend the IMF for releasing this Revised Draft for further discussion and comment.

We note that the Revised Draft contains a number of significant improvements, which address many of the comments we submitted during the last round of consultation. Notably, among other revisions, the Revised Draft includes an improved definition of beneficial owner, which

¹ The Natural Resource Charter is a set of principles to guide governments’ and societies’ use of natural resources. See more here: <http://resourcegovernance.org/approach/natural-resource-charter>

now requires disclosure of natural person or publicly-listed company owners and ensures that the definition does not allow for disclosure of private companies as owners. The Revised Draft also now requires disclosure of beneficial ownership as “basic”, in keeping with requirements of the 2016 EITI Standard.² Such disclosure of ultimate owners can help deter and detect corruption, conflicts of interest, and tax evasion. The Revised Draft now includes project-level disclosure of company payments as “good” and specifies that payments must be disclosed by government payee and payment type at all levels of practice, in keeping with the mandatory disclosure laws passed in recent years³ and the 2016 EITI Standard.⁴ Inclusion of a definition for “project”, which is mostly aligned with the EU Accounting and Transparency Directives of 2013, the Technical Reporting Specifications for Canada’s Extractive Sector Transparency Measures Act of 2014 and the final rule implementing Section 1504 of the Dodd Frank Act will promote consistency in global project-level reporting. We welcome the publication of environmental and social impact assessments, which can enhance stakeholders’ ability to understand the full costs of extraction. We also welcome an expanded definition of resource revenue to include revenues raised not just from extraction, but exploration, transportation, processing and trading activities. The Revised Draft mainstreams natural resource elements throughout Pillars I through III, which is a helpful addition.

We do not seek to repeat our previously submitted comments. Instead, we suggest a few key ways the IMF can build on improvements made to the Revised Draft in the section that follows and refer to our previous comments as applicable.

We look forward to ongoing discussion and consideration of how improved transparency can translate to increased accountability and better governance of countries’ natural resources for the public good, including through the Fiscal Transparency Evaluation process.

II. Key recommendations

General

Relationship between the Natural Resource Fiscal Transparency Code and the Fiscal Transparency Code

We would suggest that the IMF provide clarity on the relationship between the Fiscal Transparency Code and the Natural Resource Fiscal Transparency Code. We are under the impression that the Revised Draft, which mainstreams natural resource elements in Pillars I through III, as well as including a resource revenue management pillar (Pillar IV), is meant to serve in its entirety as a separate version of the Fiscal Transparency Code tailored to resource-rich countries.

² EITI Requirement 2.5.

³ The U.S. Dodd-Frank Act Section 1504, the Amendments to the EU Accounting and Transparency Directives of 2013, regulations adopted in late 2013 in Norway pursuant to the Accounting Act and Securities Trading Act, the U.K.’s Reports on Payments to Governments Regulations 2014 implementing the EU Accounting Directive and Canada’s Extractive Sector Transparency Measures Act of 2014.

⁴ See EITI Requirement 4.7.

If our assumption is correct, then the Revised Draft as it stands is incomplete. For example, the Revised Draft includes a limited glossary that covers only terms used in Pillar IV. Further, the glossaries for Pillars I through III and for Pillar IV are not harmonized: both glossaries contain different definitions for “international standards.” The latter definition refers only to standards for revenue transparency such as the EITI. The definition included in the issued Pillars I through III references standards for government finance statistics and government financial statements, which are applicable to the broader fiscal transparency issues addressed in Pillars I through III. The full glossary from the already issued Pillars I through III should be included in the Revised Draft, and revised or adapted as appropriate.

National resource companies

In our previously submitted comments we noted that while Pillar III of the Fiscal Transparency Code currently covers disclosures related to public corporations—including transfers between the government and public corporations and quasi-fiscal activities undertaken by these corporations—we feel it is important to include a subpart devoted to state-owned enterprises operating in the extractive sector. We noted that national resource companies received special treatment under the previous Guide on Resource Revenue Transparency (the “Guide”) and the importance of these companies⁵ merits their continued separate treatment under the Fiscal Transparency Code.

We note the specific reference to national resource companies in section 3.3.2 of the Revised Draft on public corporations. Nevertheless, in our comments we noted that there are a number of other transparency requirements covered by the EITI Standard, which should be included in the Fiscal Transparency Code as “basic” practice, and offered suggestions for “good” and “advanced” transparency mechanisms that existing research have demonstrated make for effective governance of national resource companies.

We encourage the IMF to consider including these in further revisions to the Revised Draft. Alternatively, we hope the Guide will provide more detail on transparency mechanisms for national resource companies. In particular, the publication of annual audited financial statements including, at a minimum, a balance sheet, cash flow statement and income statement is critical for citizens to understand how national resource companies are managing what are often huge flows of public revenues.

Open data

We noted in our previous comments that the IMF has the opportunity to take the lead in the growing movement to ensure that government information and data are not just available but also accessible and useable through dissemination in machine-readable, open data format. We are of the understanding that inclusion of open data in the Revised Draft was not appropriate, given the format, but that the intention is to instead mainstream and elaborate upon open data

⁵ In several countries, national resource companies control larger shares of public revenues than any other public entity. For example, per the findings of the RGI, national resource companies bring in more than two thirds of total government revenue in such countries as Azerbaijan, Iraq and Yemen. Chile’s Codelco is the world’s largest producer of copper, while Botswana’s partially state-owned Debswana is a leading producer of diamonds.

principles in the forthcoming guide(s) to the Fiscal Transparency Code. We would certainly encourage this inclusion and look forward to further discussion on this point.

2.1 Comprehensiveness

2.1.1 Budget unity

We note that natural resource funds are actually extra-budgetary funds. As currently drafted, this provision unnecessarily distinguishes inclusion of natural resource funds in budget documentation as “advanced” practice, while budget documentation incorporating other extra-budgetary funds is designated “good” practice. **We would therefore suggest revising the language for “good” and “advanced” to read: “extra-budgetary funds, including natural resource funds....”**

3.1 Risk Disclosure and Analysis

3.1.3 Long-term fiscal sustainability analysis

We note that Pillars I through III have already been issued and the IMF may seek to make only limited additions to these pillars for the Revised Draft. However, we do note that the singling out of health and social security funds is more relevant to European, North American and other advanced economies than most middle- and low-income resource-rich countries. In addition to social security and health funds, there are a number of other sources of long-term fiscal liabilities in those countries, including development banks, natural resource companies, and other extra-budgetary funds that take on debt⁶ and should perhaps be included. Further, the references to resource revenue “flows, reserves, and savings” combine flows and stocks, whereas fiscal sustainability is mostly concerned with net flows.

The IMF might consider tailoring 3.1.3 to resource-rich countries and more clearly distinguishing stocks from flows. We would suggest for “basic”: **“The government regularly publishes fiscal sustainability projections, which take into account long-term assets such as reserves and fiscal savings, depletion of subsoil natural resource assets, as well as liabilities including public debt and liabilities of extra-budgetary funds and natural resource companies.”** “Good” practice could then include reference to “macroeconomic assumptions, including prices of relevant commodities,” while “advanced” includes reference to “other assumptions, including prices and production of relevant commodities.”

4.1 Legal and fiscal regime

4.1.1 Legal framework for resource rights

⁶ For example, Ghana Infrastructure Investment Fund.

In our previous comments we noted that publication of regulations should be considered “basic” practice and that model licenses or contracts should be considered “basic” or “good” practice, given that publication of the full text of terms and conditions associated with resource rights was designated “good” practice.⁷ We note that publication of model licenses and contracts has been moved from “advanced” to “good” practice, but that publication of regulations is still designated “good” and publication of laws has now moved from “basic” to “good.”

We strongly believe that a transparent legal framework requires at the very least the publication of laws which define the rights, obligations and responsibilities of all those involved in exploration, development, production and sale of natural resources. Without such publication, the legal framework cannot be deemed transparent and all stakeholders will be unable to have a full understanding of what the rules governing the extractive sector actually are. We also would like to again point out that the rules governing the extractive sector may be spelled out in only general terms in the law, so that publication of the associated regulations, where they exist, is necessary for full clarity and transparency of the law. Such publication has been shown to be well within the means of countries currently facing capacity constraints.⁸ **We would suggest revising to make publication of laws and regulations basic practice.**

4.2 Allocation of rights and collection of revenue

For the heading of 4.2, **we note that that the language specifies open and transparent procedures for granting of “rights for resource extraction” instead of transparent procedures for granting “resource rights”** more broadly. The principle for 4.2.1 addresses an open process for allocation of “resource rights”, which per the Glossary covers exploration, extraction, transportation, processing and trade. **We believe the heading should be revised to correspond to 4.2.1.**⁹

4.2.1 Allocation of resource rights

We note the Revised Draft now includes a definition for an “open process,” providing welcome clarity on the need for the process to be sufficiently advertised and accessible to all qualified potential applicants in order to qualify as “open.” **We would, however, repeat our recommendation that at all levels of practice the word “published” be inserted before “predefined qualification and evaluation criteria”** in order to provide full transparency and

⁷ In keeping with the increasingly widespread practice of contract disclosure. 25 countries now disclose their natural resource contracts systematically and more than 1,000 such contracts and associated documents are now publicly available. See www.resourcecontracts.org

⁸ For example, Myanmar’s Ministry of Natural Resources and Environmental Conservation publishes the current Mines Law and Mines Rules on the ministry’s website: <http://www.mining.gov.mm/LAWS/Default.asp> and the Democratic Republic of Congo’s Ministry of Mines publishes the current Mining Code and Mining Regulations on the ministry’s website: <https://www.mines-rdc.cd/fr/index.php/legislation>

⁹ The previous Pillar IV also included reference to a broader set of rights than just extraction in the equivalent of the Revised Draft’s 4.1.2, referring to “rights to explore for, extract and trade natural resources.”

assurance to all stakeholders that results of tenders are in keeping with the predefined criteria. Publication of prequalification and evaluation criteria has already been recognized as a good governance practice that can help deter corruption and ensure that licenses go to companies who have the capacity to carry out the work program.¹⁰ At a minimum, publication of “predefined qualification and evaluation criteria” should be a “good” and “advanced” practice.

We note the Revised Draft now clarifies that “publication of all rights granted” is a requirement for all levels. The content of such publication still remains unclear, however. We would recommend that the wording be modified to specifically provide for publication of the type of right granted and the recipient in each case.

4.2.2 Disclosure of resource rights holdings

We are heartened to see that disclosure of beneficial ownership has been included as “basic” practice. **We would recommend aligning the language with the more explicit requirements of the EITI Standard 2016.**¹¹ This would both ensure that sufficiently detailed information is disclosed by countries seeking to adhere to the IMF’s Fiscal Transparency Code and help to facilitate harmonization of disclosures on beneficial ownership. To this end, **“details of the beneficial owner of the rights” should be replaced with “the identity(ies) of their beneficial owner(s), the level of ownership and details about how ownership or control is exerted.”**

4.2.4 Resource revenue audit and verification

Sections 4.3.1 and 4.3.2 contain a number of improvements, including designating project-level disclosure “good” practice rather than “advanced”. In our previous comments we recommended that project-level disclosure be designated “basic” or at least “good”, in line with the growing

¹⁰ See, e.g., Chatham House Guidelines for Good Governance in Emerging Oil and Gas Producers 2016, p. 19: “General terms for prequalification should be laid out in the petroleum law, with more detailed rules to be included in regulations.

...

A pre-qualification process that is transparent (publishing the criteria, candidates and winners) or is conducted by an independent entity is more likely to result in the more qualified bidder being selected.”

See also, Norway’s Oil for Development program’s check-list for the state of petroleum-related governance in OfD-countries, which includes the item “Criteria for awarding licenses are published well in advance of the actual awarding, and licensing decisions are justified according to the criteria and made publicly available.” Available at: <https://www.norad.no/globalassets/import-2162015-80434-am/www.norad.no-ny/filarkiv/ofd/petroleum-sector-governance-check-list.pdf>

See also World Bank, “Mineral Rights Cadastre: Promoting Transparent Access to Mineral Resources”, p. 14, referring to the need to have “predefined eligibility conditions”, “simple and objective criteria” and that any “interested individual or corporation must be able to access detailed information about the requirements and conditions of applying for mineral rights”. Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/18399/486090NWP0extr10Box338915B01PUBLIC1.pdf?sequence=1&isAllowed=y>

¹¹ See EITI Requirement 2.5.

global movement toward project-level disclosure.¹² However, section 4.2.4 is out of alignment with these sections and the previous draft of Pillar IV, which designated project-level government reports as “good” practice. **As currently drafted, the format “one of the following applies...” and so on, would only require project-level disclosure for “advanced” practice.** A country could meet the “good” practice standard by having an annual report reconciling resource revenue collected with audited company reports that is “(i) independently validated in line with international standards” and “(ii) containing only minor unexplained discrepancies” but that is not disaggregated by project.

We recommend revising the format to require “(i) disaggregated by project” at the basic level, both “(i) disaggregated by project, (ii) independently validated...” at the good level and all of “disaggregated by project, (ii) independently validated... (iii) containing only minor unexplained discrepancies” at the advanced level. If the desire is to keep project-level disclosure as “good” throughout the Revised Draft, both with respect to government disclosures and independent company disclosures, then basic practice could require independent validation only, while good practice would require both independent validation and project level disclosure.

4.3 Company reporting

4.3.2 Reporting on worldwide payments

The word “**exploration**” seems to be missing from the language of the principle.

4.3.3 Operational, social, and environmental reporting

We commend the IMF for including publication of environmental and social assessments in the Revised Draft, in recognition of the fact that requirements for such disclosure are increasing¹³ and can provide important transparency for all stakeholders as to the overall impacts of extractive activities and how such impacts will be managed. However, **we recommend combining (i) and (ii) to read “project environmental and social impact assessments are published.” Assessments of environmental and social impacts together are now common practice**¹⁴, so disclosure of environmental impact assessments is likely to be synonymous with disclosure of social impact assessments.

We also note that publication of management plans and periodic reports associated with environmental and social impact assessments is missing. Disclosure of the management plans and associated reports on implementation of these plans is key to ensuring transparency and accountability for management of the environmental and social risks that were identified in the impact assessments. Further, disclosure of management plans and reports is often included in the requirement for disclosure of the impact assessments, where such requirements exist.¹⁵ We

¹² For example, recent mandatory disclosure laws in the EU, U.S., Norway and Canada.

¹³ For example, see IFC Environmental and Social Performance Standard 1 and Guidance Note, and laws or regulations in Myanmar, Sierra Leone and Zambia requiring such disclosure.

¹⁴ Ibid.

¹⁵ Ibid.

would therefore recommend replacing the current (ii) with: **“(ii) management plans and periodic reports associated with environmental and social impact assessments are published.”**

Glossary

Beneficial owner: The definition of beneficial owner in the Revised Draft has been greatly improved. However, we suggest the following revision both in order to align the definition with the EITI Standard 2016, which will allow for greater harmonization of disclosure, and also to ensure those who ultimately *control* the resource right holder, whether or not they have an economic interest in the holder, are disclosed: **“the natural person(s) or publicly-listed legal entity(ies) which directly or indirectly ultimately own or control the holder of a natural resource right within the country, usually through a chain of related parties which may be held in different jurisdictions.”**

Project: We agree with the IMF approach to align the definition with that used by the EU Accounting and Transparency Directives of 2013. However, while the European Union, Canada and United States all define “project” on the basis of a single legal agreement, these jurisdictions also allow for multiple agreements to be considered a single project in certain circumstances where those agreements are operationally and geographically interconnected or integrated. We would therefore suggest expanding the project definition to include such language. We propose the following wording, which combines the wording of the EU Accounting and Transparency Directives of 2013 and the final rule implementing Section 1504 of the Dodd Frank Act:

“Agreements with substantially similar terms that are both operationally and geographically integrated may be treated by the company as a single project.”¹⁶

<u>Contact information</u>

¹⁶ Rule 13q-1 and an amendment to Form SD to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to the disclosure of payments by resource extraction issuers provides: “Agreements that are both operationally and geographically interconnected may be treated by the resource extraction issuer as a single project.”

Directive 2013/34/EU of the European Parliament and Council provides: “Nonetheless, if multiple ... agreements are substantially interconnected, this should be considered a project.” A recital to the Directive goes on to explain: “‘Substantially interconnected’ legal agreements should be understood as a set of operationally and geographically integrated contracts, licenses, leases or concessions or related agreements with substantially similar terms that are signed with a government, giving rise to payment liabilities. Such agreements can be governed by a single contract, joint venture, production sharing agreement, or other overarching legal agreement.”

The Technical Reporting Specifications for Canada’s Extractive Sector Transparency Measures Act of 2014 largely correspond to the European project definition.

We are grateful for this second opportunity to comment, and would be pleased to discuss these inputs in more detail at the IMF's request.

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