

USING THE EITI STANDARD TO COMBAT CORRUPTION

Lessons from Transparency International's
mining research in five countries

Transparency International's Accountable Mining Programme is working across TI's global network to look at where and how corruption can get a foothold in the mining sector. By working collaboratively with governments, companies, civil society organisations and communities, we want to build a fairer, clearer and cleaner process for obtaining a mining permit. By building a better system and a fairer process we can prevent corruption before ground is even broken.

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Every effort has been made to verify the accuracy of the information contained in this report. All information was believed to be correct as of October 2020. Nevertheless, Transparency International and Transparency International Australia cannot accept responsibility for the consequences of its use for other purposes or in other contexts.

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INTRODUCTION

There is global consensus about the need to fight corruption within the extractives sector. The Extractive Industries Transparency Initiative (EITI) has a renewed agenda to explore how member countries can use the EITI Standard to reduce corruption in the oil, gas and mining ('extractive') sectors.

Through the EITI, over 50 resource-rich countries have committed to making a range of disclosures that can help fight corruption by addressing risks such as hidden company ownership, opaque licensing procedures and unaccountable revenue collection and management.¹

EITI member countries are expected to implement the requirements of the EITI Standard. This paper focuses on Requirement 2 of the EITI Standard which primarily deals with disclosing information related to the licensing and contracts phase of the extractive value chain where corruption risks are significant.² Requirement 2 of the EITI Standard addresses issues including: (2.1) the legal framework and fiscal regime; (2.2) contract and licence allocations; (2.3) register of licences; (2.4) contracts; and (2.5) beneficial ownership.³

This paper analyses the role that the disclosures under Requirement 2 can play in combatting corruption in mining approvals. To do this, this paper draws on the Transparency International Accountable Mining Programme's assessment of corruption risks in the licensing process of five EITI member countries: Argentina, Ghana, the Kyrgyz Republic, Madagascar, and Mexico.⁴ Transparency International country offices (chapters) in these countries completed a year-long risk assessment in 2019-2020 using the programme's Mining Awards Corruption Risk Assessment (MACRA) Tool.⁵ This paper highlights key findings from these country assessments to support anti-corruption efforts through effective implementation of Requirement 2 of the EITI Standard.

Accountable Mining Programme

Transparency International's Accountable Mining Programme complements existing efforts to improve transparency and accountability in extractive industries by focusing specifically on the start of the mining decision chain: the point at which governments grant and award mining permits and licences, negotiate contracts and make agreements. Accountable Mining Programme research aims to identify the systemic, regulatory, and institutional vulnerabilities to corruption in awarding mining and mining-related licences, permits and contracts and to assess the specific corruption risks created by these vulnerabilities.

Transparency International's Accountable Mining Programme research in over twenty countries found that transparency and disclosure measures are critical to combatting corruption risks.⁶ However the research identified that transparency alone is not sufficient to combat corruption. As this paper demonstrates, additional measures need to be taken for transparency to make an effective contribution to anti-corruption efforts.



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The five case countries were selected because they cover a range of geographic regions, have diverse licensing processes, and offer recent data on the major vulnerabilities to corruption that can undermine the implementation of transparency requirements. Among the countries, some have decentralised licensing processes involving provincial governments, some use first come, first served methods to award licences while others have an option for tender and bidding allocation methods. The lessons drawn from these diverse contexts may be generally applied by other EITI member countries to scale up efforts to implement the requirements of the EITI Standard and reduce corruption in the mining licensing phase.

Specifically, this paper:

- + Presents examples from Transparency International chapter findings that demonstrate the importance of the disclosure requirements in the EITI Standard for anti-corruption efforts
- + Shares lessons from Transparency International chapter research about the complementary measures that countries need to take to ensure that disclosures under the EITI Standard effectively contribute to combatting corruption
- + Makes recommendations to resource-rich countries and EITI Multi-Stakeholder Groups (MSGs) about actions they can take to combat corruption through the EITI Standard.

This paper examines four thematic areas for transparency under Requirement 2 of the EITI Standard – the legal framework (2.1); contract and licence allocations (2.2); register of licences (2.3); and disclosure of licence agreements (2.4). These issues have been selected due to the scope of the Accountable Mining Programme research in the five case countries. Due to the scope of Transparency International Accountable Mining Programme, the focus of this paper is on mining contracts and licences. There are two specific issues that this paper does not cover. First, the fiscal component of Requirement 2.1 is not included because the research did not examine issues relating to taxes and royalties. Second, although beneficial ownership disclosure in Requirement 2.5 is relevant and important for combatting corruption, this issue has received considerable attention elsewhere so is not addressed in this paper.⁷



This paper examines four areas for transparency under Requirement 2 of the EITI Standard.

Unlike previous studies that have examined how the EITI Standard is interpreted and transformed within national contexts or its attractiveness to corruption-prone countries,⁸ this paper focuses on the localised factors that have a bearing on whether implementation of the Standard will contribute to reducing corruption risks in the extractive sector. The paper seeks to show the potential for the implementation of the EITI Standard to support anti-corruption efforts in resource-rich countries. In doing so, the paper aims to help transform the way EITI MSGs view and use disclosures and reporting so that they can achieve concrete accountability and development goals. While the focus of the paper is on the implementation of the EITI Standard, the lessons

and recommendations are applicable to all resource-rich countries seeking to improve transparency and reduce corruption in the mining sector whether implementing the Standard or not.

The paper begins by setting out the requirements in 2.1-2.4 of the EITI Standard and examining the link between the EITI Standard and the Accountable Mining Programme research. The second section presents the analysis and discussion drawing on the five country assessments. The paper concludes with a brief summary as well as some key lessons derived from the analysis and recommendations for resource-rich countries and multi-stakeholder groups.

Case Country Profiles

Country	Year joined	EITI Status		Extractive industries contributions	EITI Country website
Ghana	2007	Meaningful progress Latest validation - 2018	+ + +	Key minerals – Gold, diamonds Oil and gas GDP – 14% [extractive sector]	https://eiti.org/ghana
Madagascar	2008	Meaningful progress Latest validation - 2019	+ + +	Key minerals – Gold, chromium, cobalt, ilmenite and nickel Oil & gas GDP – 4.6% [Extractive sector -2016]	https://eiti.org/madagascar
Mexico	2017	Yet to be assessed against the 2016 Standard	+ + +	Key minerals – Gold, copper, silver and zinc Oil & gas GDP – 3.5% [oil & gas], 2.4% [mining]	https://eiti.org/mexico
Argentina	2019	Yet to be assessed against the 2016 Standard	+ + +	Key minerals – Gold, copper, silver and zinc Oil & gas GDP – 3.8% [hydrocarbons], 0.8% [mining]	https://eiti.org/argentina
Kyrgyz Republic	2007	Meaningful progress Latest validation – none reported	+ +	Key minerals – Gold, coal GDP – 10% [extractive sector]	https://eiti.org/kyrgyz-republic

THE EITI STANDARD – AN OVERVIEW

The EITI Standard seeks to promote transparency and accountability in how countries govern their natural resources. As part of the organisation's initiatives towards a transparent natural resource sector, member countries are required to implement the EITI Standard by publishing a range of information about their oil, gas and mining sectors. The progress of member countries in meeting the EITI Standard is assessed and validated. Countries that do not make satisfactory progress in implementing the Standard may be suspended or delisted.

Relevantly for this paper, the EITI Standard sets out disclosure requirements across a range of issues to improve transparency and promote accountability in the licensing process. These are contained in Requirement 2 of the EITI Standard, which is the focus of this paper.

Requirement 2.1 (Legal framework) requires disclosures about the relevant laws and regulations governing the extractive sector including the types of contracts and licences used to grant exploration and exploitation rights as well as the roles and responsibilities of relevant government agencies. Effective disclosures in accordance with the Requirement 2.1 indicators are critical because citizens need to know and understand relevant laws and institutions governing the process of awarding an extractive right in order to effectively hold institutions accountable for their decisions about extractive rights.

Requirement 2.2 (Contract and licence allocations) requires that countries comprehensively disclose the contract and licence awards process, including the methods for awarding licences, the technical and financial criteria, as well as grounds for renewing, suspending, or revoking a licence. Member countries are also required to disclose any 'material deviations' from the applicable legal and regulatory framework governing licence transfers and awards. Although licence allocation procedures and awards methods differ among countries, disclosing information about these issues enables citizens to access important information about how decisions are made regarding the extraction of the country's natural resources. Clear and transparent information about the steps in the licensing process also helps to ensure that licences are not obtained through corrupt practices. Comprehensive disclosure of contracting and licensing processes reduces opportunities for questionable

backroom deals or for officials to demand or accept offers for bribes. Where disclosure reveals deficiencies in the licensing system, stakeholders can use this information to press for reforms to create a more transparent and efficient system. Finally, disclosing material deviations from the licensing rules alerts regulators and oversight bodies to investigate circumstances that may involve corruption.

Requirement 2.3 (Register of licences) mandates member countries to maintain a publicly available register or cadastre system that includes important information such as the details of the licence holder, coordinates of the licence area, the duration of the licence and the commodity being produced. The publication of licence registers and related information on extractive rights enables citizens to know which companies have been awarded a licence to exploit their natural resources and can help them to detect corruption red flags such as conflicts of interest, and to monitor compliance with licence conditions and other regulations and standards. It is therefore important that registry systems are kept accurate and up to date. Transparency about the location of new extractive projects can also help prevent or resolve conflicts over property rights and other land claims by equipping rights holders and interested parties with timely information to assert their rights or negotiate compensation.

Requirement 2.4 (Contracts) requires all implementing countries to publicly disclose the full text of contracts and licences entered into or amended after 1 January 2021. Countries are encouraged to disclose any existing licence agreements and contracts. Citizens need access to the agreements negotiated between their government and companies in order to be able to detect if there are any questionable terms that raise red flags of corruption. Citizens and affected communities also need to know the rights and conditions contained in the agreements to be able to monitor company compliance with their fiscal and operating obligations. Disclosure of contracts and licence agreements can lead to more legitimate, effective and transparent award procedures.

TRANSPARENCY INTERNATIONAL'S COUNTRY- LEVEL CORRUPTION RISK ASSESSMENT RESEARCH

The Transparency International Accountable Mining Programme's country-level corruption risk assessment follows a guided process for evidence-based research.

The MACRA Tool was developed by the Accountable Mining Programme to identify the systemic, regulatory, and institutional vulnerabilities to corruption in awarding mining and mining-related licences, permits and contracts and to assess the specific corruption risks created by these vulnerabilities. The Tool pinpoints procedural, contextual and implementation weaknesses in the licensing process that open the door to corruption. Knowing where the process is vulnerable to corruption is the first step to closing the legal and implementation gaps in the licensing process. Transparency International chapters in participating countries used the MACRA Tool to identify and assess the vulnerabilities in their licensing processes. The outcome of their national research is aimed at informing actionable recommendations that address identified corruption risks to build a more transparent, accountable and corruption-free mining licence allocation system.



The Tool pinpoints procedural, contextual and implementation weaknesses in the licensing process that open the door to corruption.



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FINDINGS AND DISCUSSION

Transparency is central to fighting corruption and it in turn depends on the effective and meaningful disclosure of information to all stakeholders (government, companies, civil society and communities) to create incentives to act with integrity.

EITI country validation reports indicate that disclosure challenges encountered by EITI member countries in implementing the Standard vary in terms of their nature and intensity.⁹ Through the validation process, however, member countries are required to work towards implementing an effective disclosure system across the extractive value chain in accordance with the EITI Standard. This section uses country examples to discuss the challenges related with countries' disclosure efforts in implementing the Standard.

Requirement 2.1: Disclosure of the legal framework

Disclosure of a description of the legal framework as per Requirement 2.1 is important. However, describing the legal framework without also explaining how the framework is applied or implemented will make little contribution to preventing corruption. For this disclosure to be meaningful and for it to contribute to preventing corruption, the legal and political context within countries must also be explained as the existence of a framework on paper does not guarantee that it is followed in practice, such as when there is political instability. This is relevant to the EITI as many EITI member countries are in regions known to suffer from political unrest. Many EITI countries are emerging states with weak regulatory systems that are undergoing major transition from war, repressive rule or single-party states and thus face a series of transparency challenges. Many have adopted new mining laws, implemented new fiscal regimes and in

some cases suspended existing mining regulations yet these changes are not always reflected in the description provided of the legal framework. It is important that implementing countries ensure that they are actively disclosing all changes that have been made to mining laws and regulations, and that the description of the process accurately represents the current framework. This will help to provide details that are relevant for citizens to hold decision-makers accountable.

In times of political unrest or times of crisis, what is written on paper, even if it is disclosed, means very little if the government has actually suspended the legal framework and begun to administer the sector according to unwritten or unofficial procedures. This leaves room for corruption through individually negotiated deals that are not bound by objective legal requirements or criteria. The opacity of these backroom deals made during times of crisis increase the likelihood of worse outcomes for host countries and communities. In many cases, relevant details of such individually negotiated deals are not properly documented, and this creates huge challenges for disclosure efforts and monitoring by civil society and multi-stakeholder groups. Even if the description of the mining code and legal framework is clear and transparent, in reality ad hoc arrangements by governments subvert the purpose of disclosure under Requirement 2.1. Case study 1 discusses an example from the Accountable Mining Programme research in Madagascar¹⁰ that shows how political unrest can distort the legal framework that governs the licensing process.

Case study 1: Political unrest leads to suspension of the mining award framework in Madagascar

The Mining Code and its implementing decree govern prospecting, research, exploitation, transport, processing, and marketing of mineral substances within the Malagasy National Territory. However, the political crisis of 2009 in Madagascar affected not only the operations of new institutions such as the Madagascar Mining Cadastre Office (BCMM) but also the Mining Code and related regulations. As a result of the political crisis, the government suspended the granting of new mining permits via an official 'Council Note' released in 2011. As the Accountable Mining Programme research in Madagascar sets out, this document was never made public and as a result created significant uncertainty and ambiguity about the specific conditions and circumstances to which it applied, leading in at least one case to seemingly arbitrary decision-making.

In that case, according to the report of the 2015 Episcopal Conference in Madagascar, the Ministry of Mines and Petroleum issued a letter signed by a group of delegates on behalf of the Minister of Mines, ordering BCMM to process and grant three permit applications to a company called Mpumalanga Mining Resources SA in 2011 more than one month after the announcement of the suspension.¹¹ The company itself had also filed its application after the suspension was ordered. The 2015 Mining Title report by the EITI MSG described the regulatory environment created by the Council Note intervention as arbitrary and discretionary,¹² and indeed in 2017 the permits awarded to Mpumalanga were deemed invalid.¹³

The inaccessibility of the Council Note to the public also created uncertainty about the terms of renewal, conversion and transfer of mining permits. This type of uncertainty heightens the potential for favouritism and for negotiations to take place behind closed doors in an accountability vacuum, increasing the chance of corruption between government officials and companies. This example demonstrates that in as much as it is essential for countries to disclose the legal framework governing the extractive sector (in this case the Mining Code), it is critical to be mindful of external political factors that can distort the way it is implemented or functions in reality; and alternative arrangements and changes to the framework must be actively and openly disclosed. This example also shows how disclosures under the EITI can help shine a light on some of these discrepancies but delays in reporting may compromise the speed with which stakeholders can respond.

As part of Requirement 2.1, countries must also disclose the roles and responsibilities of government agencies involved in administering the mining sector. This is critical so that citizens can easily identify and hold government officials accountable for their decisions. However, to properly understand how much such disclosure contributes to combatting corruption, it is important for implementing countries to address the external factors that can influence the performance of these roles and which may lead government officials to make decisions that are not necessarily in the public interest. These factors include the 'revolving door' between government and the private sector, and political donations by mining companies.¹⁴

The 'revolving door' refers to when members of government or employees in the public sector move in and out of jobs with private sector entities and vice versa - which can result in undue industry influence and policy capture by the industry if not properly regulated.

'Revolving doors' can affect the overall design of the legal framework that guides the actions and protocols of government agencies involved in licensing decisions. For instance, special relationships with government officials may enable favoured parties or companies with political connections to gain access to confidential information such as geological information or information about concessions or blocks being opened up, which gives them an unfair advantage in the licensing process.

Political donations, particularly during elections, also have the potential to influence the design of the legal framework and decision-making process in favour of the donor. In order to mitigate industry influence through donations and foster transparency and effective disclosures in licensing decisions, implementing countries should consider strictly regulating political donations by introducing political donation disclosure requirements.

Case study 2 provides a case study from the Accountable Mining Programme's research in Argentina¹⁵ on how the country's political donation

disclosure and transparency law helps to mitigate the risks of undue industry influence on the design of the legal framework.

Case study 2: Political donation disclosure law enhances disclosures in the Argentinian licensing process

In 2019, Law No. 27.504 was passed to introduce modifications to the political party financing regime in Argentina. As highlighted in the Accountable Mining programme's research in Argentina, companies were previously prohibited from making financial contributions to political campaigns, but they found ways to make donations anyway. Sometimes they would hide behind employees and company directors who failed to declare such donations. These hidden political donations made by companies increased the risk of industry influence on the design and implementation of laws and policies, including the design of rules governing the award of mining licences. This was a problem because undue industry influence could result in lower standards and weaker criteria for assessing applications or could even affect the integrity of decision-making on a particular licence application.

Laws to require disclosure of political donations can help government watchdogs and anti-corruption advocates to scrutinise the behaviour of political officials in response to the donation. The new regulations in Argentina mandate proper reporting of the origin of political contributions, including the names of people or companies, their tax identification code, which party the donation is for and for what purpose. This information is accessible in a public database hosted on the website of the National Electoral Chamber.¹⁶ In addition to disclosing the legal framework, as required by Requirement 2.1 of the EITI Standard, this example demonstrates that countries should implement complementary measures to safeguard the integrity of the legal framework by properly regulating political donations and requiring timely and detailed disclosure of any political donations made.

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Requirement 2.2: Disclosure of the licence allocation process

Under Requirement 2.2, EITI member countries must disclose the process for awarding or transferring a licence, including the financial and technical criteria. In practice, extractive projects involve a range of permits and assessment requirements such as environmental permits, land access rights and permits, and community consultation obligations, all of which often involve different government departments and agencies, and even different levels of government in countries where mining sector governance has been decentralised to some degree. The multiple layers of government and the number of institutions can exacerbate challenges associated with the implementation of the licence awards process, particularly in relation to adherence to the technical and financial criteria set out in the mining law. A process that may seem straightforward when described as required under Requirement 2.2 might

be significantly more complex in its implementation, as illustrated in case study 3.

To ensure that the licensing process is transparent and to reduce the risk of corruption, clarity in the steps, application requirements and decision-making responsibility as well as proper coordination within government is critical. The purpose of Requirement 2.2 is to help demystify and provide transparency about these aspects of the awards process, but problems that arise from ineffective coordination among different parts of government undermine the contribution this improved transparency can make to reducing corruption. Case study 3 presents an example from the Accountable Mining Programme research in Ghana¹⁷ to show how, in practice, a lack of coordination between government agencies can make the licence allocation process vulnerable to corruption. It can do so by creating a regulatory environment where financial and technical criteria are not observed by decision-makers.

Case study 3: Ineffective coordination among different parts of government in Ghana undermines the rigorous evaluation of licence applications

In Ghana, the Ministry of Mines is the principal government agency responsible for granting mineral rights. Decisions are based on the recommendations of the Minerals Commission, which is the industry regulator. There are also multiple decision-makers in other parts of government involved directly or indirectly in the processing of applications for mining rights in Ghana and the related permits needed to start mining. These include the Parliament, the Minister of Mines, the Minerals Commission, the Environmental Protection Agency (EPA), the Water Resources Commission, the Chief Inspector of Mines, the District Assembly, the Traditional Authority, the Lands Commission, the Forestry Commission, and the Ghana Publishing Company.¹⁸

While the multiplicity of decision-makers can serve as checks and balances in the award process, weaknesses in the coordination of their respective responsibilities can also create a vulnerability in the application process. The Accountable Mining Programme research in Ghana documented a key observation made by the UNDP that the weak mechanisms for the routine exchange of information between agencies in the mining sector pose a problem that must be consciously addressed.¹⁹ This is a corruption risk as companies may make facilitation payments or other bribes to government officials in order to fast track their application from one agency to another to overcome delays and poor communication between agencies. In such cases, important details including assessment criteria, supporting documents, and requirements to do background checks on applicants could be waived.

Disclosure under Requirement 2.2 of the technical and financial criteria used in licensing decisions is important so that companies and citizens can know on what basis decisions are made and can identify discrepancies that could be red flags for corruption. It is therefore important that countries pay attention to how strictly these criteria are observed and implemented in practice. This example serves to show the importance of addressing coordination between government agencies to ensure that in practice Requirement 2.2 translates into greater accountability in licensing decisions.

In addition to clarity of process and proper coordination it is important that the institutions responsible for receiving and evaluating licence applications or bids have adequate resources and capacity to undertake these assigned duties. Lack of capacity is one of the most obvious challenges that can result in material deviations from the applicable legal and regulatory framework governing licence transfers and awards (Requirement 2.2(a) (iv)). Human resource challenges manifest in terms of the number of staff and their level of training and experience. In many countries, once government officials have built up capacity through training and experience, they become attractive hires for the private sector. Companies can typically offer higher salaries, and hence government agencies often struggle to retain their best employees. Consequently, government capacity tends to be weak, particularly at the local level in developing countries where wages of public officials are low. For example, poorer countries with a higher percentage of GDP coming from natural resource rents are faced with lower performance and efficiency among government institutions.²⁰ When staff are few in number and overworked, and lack adequate skills to effectively assess licence applications, they are likely to fail to follow up on important supporting documents or to conduct background checks on the licence applicant.

Low institutional capacity is a red flag that may result in material deviations from the technical and financial criteria in the legal and regulatory framework. Case study 4 presents an example from the Accountable Mining Programme research in Mexico²¹ of the impact of inadequate human resources in the cadastre (licensing) agency.

Case study 4: Implications of inadequate staff capacity in the cadastre agency in Mexico

Accountable Mining Programme research in Mexico identified concerns that the staff within the Public Mining Registry (PMR) were few in number, overworked and had inadequate skills to manage the workload. The research identified this as a key risk impacting the PMR's capacity to perform its assigned functions. Representatives of a civil society organisation and several company officials mentioned that the skills deficiency was evident in the failures of the PMR to fully comply with the duties established by the Mining Law and its regulations.²² This is reflected in the delays of the PMR in processing concession applications, evidence of incorrect registration of mining companies, as well as breaches of various regulations and procedures, which were largely attributed to inadequate staff capacity. Changes in government were also highlighted as particularly problematic because they are often followed by the departure of trained personnel and the arrival of new employees.

As a result of these various concerns, there is a high likelihood that at least some of the employees in the PMR may lack the experience and skill to be able to appropriately assess licence assessments and conduct due diligence. This enables dishonest companies to submit fraudulent or deliberately misleading information in response to the financial and technical assessment criteria knowing that it is unlikely to be detected by the cadastre staff (a risk that is heightened when criteria are vague). To protect the integrity of the licence allocation process, governments need to ensure the relevant licensing agency is properly resourced and that staff are properly trained. Adding to this, the example emphasises the need for the licensing requirements to be clear and unambiguous to minimise discretion of licensing officials and the potential for abuse in the implementation of the process.



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A lack of resources at the decision-making level can create additional risk. Some EITI countries have a decentralised mining sector which means that the provinces are responsible for awarding licences. Like many countries, wealth is concentrated at the national level and provincial/district governments have limited financial resources. This affects the ability of the provincial governments to effectively administer the licensing process. As the example from the Accountable Mining Programme research in Argentina in case study 5 illustrates, a lack of resources may result in provincial authorities

accepting support from industry. Government agencies that benefit from financial and logistical support from the industry they are meant to regulate may be more inclined to accept incomplete or inadequate applications, turn a blind eye to documents that have not been provided by the company and ignore requirements to report material deviations from the legal and regulatory framework that governs licence awards. This makes the process vulnerable to mismanagement and potentially also to corruption.

Case study 5: Limited financial resources among provincial agencies in Argentina impacts the integrity of the licensing process

The structural lack of budgetary resources at the provincial level in Argentina has resulted in close ties between government officials and mining companies. Accountable Mining Programme research in Argentina found that in the province of Jujuy, for example, government officials have relied on mining companies to supply them with resources including stationery (reams of paper, printer cartridges) and to provide them with transport via company vehicles for inspection visits to mine sites to monitor regulatory compliance.

In an extraordinary case in 2019, the provincial cadastre agency accepted computer equipment donated by the Jujuy Mining Chamber. The Jujuy Secretary of Mines claimed the new equipment was essential to advance the digitalisation of the mining cadastre and would strengthen its institutional capacity.²³ This situation may raise questions about the independence of the provincial authority and give rise to at least the perception of a conflict of interest and a view that the industry is likely to receive an unmerited advantage in the awards process. Such circumstances consequently undermine the legitimacy and independence of the process and leave it open to abuse.

Together with the previous example from Mexico in case study 4, this example demonstrates that safeguarding the integrity of the licensing process requires countries to go beyond disclosure of the steps and criteria to ensure that the implementing institutions of government have adequate and sustainable financial and human resources.

Beyond what is written in the applicable laws about the awards process, countries must be aware that without additional safeguards, the licensing process can be vulnerable to manipulation or interference by political, government or military leaders for personal interests. Interference by these figures in critical issues such as defining the terms of reference, qualification criteria or the scope of assessment or in selecting suitable applicants undermines the integrity of the legal and regulatory framework that governs the licensing process. If such manipulation or interference is possible, disclosing information about the licence allocation process and decision-making criteria as required under Requirement 2.2 is important but not enough. To reduce the risk of political interference in the licensing process and ensure the process is administered in a transparent and accountable way, countries must ensure safeguards are in place such as clear and objective decision-making criteria, limited ministerial discretion, a requirement to publish reasons for decisions, the right of appeal of a decision and an independent judiciary. Case study 6 provides an example from the Accountable Mining Programme research in Ghana to underscore the importance of such checks and balances to mitigate and remedy political interference and potential abuse of power.

Case study 6: Political interference in licensing decisions in Ghana shows the need for checks and balances

The 1992 Constitution of Ghana empowers the President to appoint the Minister for Mines as well as the Board Chair and the Chief Executive Officer of the Minerals Commission (the cadastre agency). The President also appoints the Select Committee on Mines and Energy and has a wide scope of discretion in the exercise of his powers of appointment. This Committee is the Parliamentary body that has oversight of the state institutions mandated to regulate mining in Ghana i.e. the Ministry of Mines and the Minerals Commission. The dominance of political actors in decision-making makes the process for granting mining licenses susceptible to political interference, as the following case highlighted in the Accountable Mining Programme research demonstrates.

In 2016, three mining leases were issued to a company belonging to the younger brother of the then President of the Republic of Ghana, only a week before the President was due to step down after losing the presidential election. According to a later Supreme Court ruling, the grant of the three mining leases to Exton Cubic Group Limited was null and void as it had been done without parliamentary ratification, as required by law.²⁴

This example illustrates how political interference can undermine the integrity of the licensing process and the importance of safeguards such as independent judicial review of government decisions. Countries must promote a strong and independent judiciary that can hold politicians and government officials accountable for their decisions. Also, countries should promote legal measures that limit the powers of the executive arm of government in appointing the heads and members of committees that oversee the licensing process and provide relevant decision-makers with technical recommendations and advice.

Requirement 2.3: Maintenance of a publicly available licence register

An effective licence register (or mining cadastre) should be publicly accessible, and each licence should display: details on the licence holder, licence area and duration, date of application and decision, and the type of commodity, according to Requirement 2.3 of the EITI Standard. However, to implement this requirement successfully, the government agency responsible for the register needs to have the adequate technical and organisational capacity and resources to maintain the register and ensure the information it contains is accurate, complete and up to date. Disclosure under Requirement 2.3 is only truly effective in improving transparency if the register (digital or manual) is not missing relevant information and is also made available to the public.

Where information is missing or inaccessible, licensing agencies and institutions cannot be properly monitored and held accountable for their decisions, which can allow corruption to go undetected. For example, without readily available information about the licence holder, it is more difficult to detect whether the company or individual granted a licence has political connections that raise red flags of a conflict of interest and potential corruption. Beyond the licensing phase, outdated information and gaps in the cadastre can make it harder for regulators to keep track of the companies with licences, undermining their ability to properly collect annual licence fees, taxes and royalties or to monitor compliance with environmental regulations. Similarly, outdated or inaccurate licence registers will make it difficult to detect overlapping licence areas, which can enable applicants to secure rights to areas already under licence or beyond the jurisdiction of the licensing agency through bribery and corruption.



Where information is missing or inaccessible, licensing agencies and institutions cannot be properly monitored and held accountable for their decisions, which can allow corruption to go undetected.

Case study 7 provides a case example from the Accountable Mining Programme research in Mexico that shows how incomplete licence registers undermine the potential of Requirement 2.3 to contribute to reducing corruption.

Case study 7: Gaps in the licence register give rise to corruption risks in Mexico

Accountable Mining Programme research in Mexico found that the register of mining concessions published by the national cadastre agency (CARTOMINMEX) was not publicly available and did not contain the most up-to-date information about which mining blocks were available or which were already subject to a concession.²⁵ In a system where concessions are allocated on a first come, first served basis, this creates room for government officials to manipulate the sequencing of applications to favour particular companies. The fact that the register is not publicly available and is missing information also undermines the ability of communities and civil society to monitor the licensing process as they cannot see where or to whom concessions are being granted.

An incomplete licence register also creates corruption risks if it does not allow companies who have applied for a concession to see the status of their application. This lack of transparency weakens accountability in the system. Several small to medium mining companies reported that they had faced extortion by government officials who threatened that they would otherwise 'lose' the company's application or deliberately delay processing unless the company paid a bribe.

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Requirement 2.4: Disclosure of contracts and licence agreements

Beyond countries publishing data on issued licences, the text of agreements and the conditions of licences are additional information necessary to ensure the accountability of the government, local authorities and companies. Disclosure of the full text of contracts and licence agreements under Requirement 2.4 is mandatory for new contracts or amendments from

1 January 2021. Beyond this obligation it is important that the text of all active licence agreements is disclosed. Accountability actors such as concerned citizens, journalists and civil society groups need disclosure of the licence conditions including environmental obligations in order to be able to detect non-compliance and to call for enforcement actions when these conditions are not met. Case study 8 presents an example from the Accountable Mining Programme research in the Kyrgyz Republic.²⁶

Case study 8: Lack of access to licence agreements undermines transparency in the Kyrgyz Republic

Despite being required by Kyrgyz law,²⁷ not all licences and licence agreements for the right to mine ('use subsoil') are posted on the website of the State Committee on Industry, Energy and Subsoil Use.²⁸ The law requires the following licence data to be published on the website within 10 days of awarding a new licence or making changes to a current licence: the name of the licensee, the geographical coordinates of the licence area, the date of application for the licence, the date of issue of the licence, the validity and type of licence, information about the beneficiaries, the type of mineral, as well as text of the license agreement.

While data on licences are published, licences and licence agreements themselves are not. Without the text of the agreements, access to relevant information on social and environmental obligations and the company's work program is limited. The public may know that a licence has been issued, but they do not have access to information about the conditions attached to the licence. This missing information limits the ability of citizens to scrutinise the adequacy of such conditions, and to detect and hold companies to account for any actions that deviate from the set social and environmental obligations. Most mining-related social conflicts in the Kyrgyz Republic are related to environmental concerns. Improving transparency through the disclosure of the licence conditions and agreements could help to address this problem.²⁹ To ensure the licensing process is sufficiently transparent to help check corrupt practices, licence registers must provide comprehensive, public interest information about the licences awarded so that citizens can hold officials and agencies accountable for award decisions.

LESSONS LEARNED AND RECOMMENDATIONS

Improving transparency is a necessary and important strategy for fighting corruption. However, as the examples above demonstrate, transparency alone is not sufficient to reduce corruption. Implementing the EITI Standard can support anti-corruption efforts in resource-rich countries.

The EITI Standard sets the minimum requirements, and to reduce corruption it is necessary for EITI member states to go beyond disclosing how the process works on paper and address the factors that make the licensing stage vulnerable to corruption in practice.

This part of the paper is divided into two sections: (i) lessons learned and recommendations for resource-rich countries, and (ii) actionable recommendations for EITI multi-stakeholder groups (MSGs).



Beyond disclosure, EITI countries need to address the factors that make the licensing stage vulnerable to corruption in practice.

LESSONS LEARNED AND RECOMMENDATIONS FOR RESOURCE-RICH COUNTRIES

The lessons from the case studies are relevant for governments in all resource-rich countries whether or not they are members of the EITI, as well as for civil society organisations working to strengthen natural resource governance, donors funding natural resource governance projects and companies assessing a country's risk profile as part of investment decisions.

Lesson Learned #1 (Requirement 2.1) – Disclose changes to mining laws

Even if the publicly available information about the legal framework is clear and transparent, if governments introduce ad hoc or 'temporary' arrangements for licensing – for example during times of crisis or political unrest – what is written in the law means very little. Temporary or alternative arrangements can distort the fair and transparent allocation of licences and create opportunities for self-serving deals and corruption hidden from the public eye. Countries must ensure that they actively and openly disclose any changes to existing mining laws and all alternative arrangements that are intended to replace the process set out in the legal framework. Any description or disclosure of the licensing process must accurately represent the framework that is currently being implemented. This will help to provide information essential for key oversight actors in government and civil society to hold decision-makers and companies to account.

Lesson Learned #2 (Requirement 2.1) – Prevent undue influence over mining award decisions

Political financing can lead to campaign donors gaining access to lucrative mining concessions as well as receiving other benefits and advantages by influencing the design of mining laws and regulations. One way to minimise the influence of industry actors is to ban or regulate campaign donations and other political contributions from the private sector. Alternatively, mandatory disclosure of donations is critical to enable public scrutiny. Governments should further foster public oversight by civil society groups and watchdogs to help expose the connection between donations and political decisions. This exposure can deter politicians from engaging in similar questionable arrangements in future. For this to be effective, governments need to introduce and implement comprehensive and robust right to information and whistleblower protection laws, enhance civic space and protect freedom of expression.

Lesson Learned #3 (Requirement 2.2) – Strengthen whole-of-government coordination and communication

Governments can build a more transparent and efficient licensing system by promoting clear and practical coordination measures and communications channels between relevant agencies. This includes coordination between different levels of government – from the national to the provincial to the local, and should include cross-department thematic working groups, such as land commissions, environmental agencies, water resources commissions and others. Strong coordination and communication require adequate resourcing and clear guidelines so that relevant information is shared in a clear and timely manner. In doing this, it is important that the disclosure practices and high levels of transparency are consistent across agencies and departments at all levels of government so that no single agency or department undermines transparency efforts and makes the process vulnerable to corruption.

Lesson Learned #4 (Requirement 2.2) – Strengthen expertise and funding of government agencies responsible for mining approvals

A key lesson from this study is that countries should focus on building strong and well-resourced institutions that are able to address the corruption vulnerabilities. Countries need to identify competency gaps in the workforce and ensure that training and financial resources are targeting the highest priority needs, particularly at the subnational level. It is important that countries set up workforce oversight mechanisms for long-term maintenance of the current and future needs of implementing institutions. Alongside strengthening institutional capacity, countries should ensure that criteria set for evaluating licences are clear and easy to apply by the assessing staff, to avoid improper performance of their functions.



photo: iStock.com / dennisdvw

Lesson Learned #5 (Requirement 2.2) – Strengthen systems for checks and balances in decision-making

Promoting an effective system of checks and balances is crucial in efforts to reduce corruption risks in the licensing process. Given the likelihood of political interference in the extractive licensing process in many countries, the right of appeal and a strong and independent judiciary are important mechanisms for upholding the rule of law, evaluating irregularities in mining contracts, and scrutinising the legality of decisions. Beyond reviewing and detecting irregularity in government decisions, the courts are also an important avenue for the community, civil society organisations and other stakeholders to dispute the claims made by mining companies in their impact assessments. Too often, governments do not adequately check these assessments before giving companies the green light to conduct exploration or mining activities. Strong mechanisms for checks and balances can help to uncover weaknesses in the system which enable people to press for reforms to ensure decisions are made for the public benefit. For such actions to be possible, governments should consider implementing measures that aim to protect the safety of anti-corruption advocates in civil society.

Lesson Learned #6 (Requirements 2.3 and 2.4) – Keep the licence register easy to access, complete and up to date

Countries should promote a user-friendly licence register that allows the public to view detailed information about issued mining rights and the full text of licence agreements, including their terms and conditions. Given the diverse but important roles that actors in the extractive development process play, keeping the licence register accurate and up to date is crucial to help local communities, journalists and other companies applying for licences to clarify issues around ownership of mining rights. The registry database should have detailed and regularly updated information about each licence, including its status, the identity of licence holders, the exact location of the exploration or mining project, the government agency issuing the license, and text of license agreement. The registry should also display related information about each licence such as details about the beneficial ownership of each licence-holding company, which would support beneficial ownership transparency in Requirement 2.5.

ACTIONABLE RECOMMENDATIONS FOR EITI MSGS TO ADDRESS CORRUPTION RISKS

EITI MSGs can use the EITI framework to reduce corruption in the licensing process in several ways:

- + **Embrace systematic disclosure:** Systematic disclosure should be prioritised by EITI MSGs to ensure that relevant up to date information needed to help prevent and detect corruption is transparent and readily available on an ongoing basis, not just reported on a one-off basis each year. Establishing a regularly updated and accurate licence register or cadastre with the full text and conditions of agreements in implementation of Requirements 2.3 and 2.4 would be a significant step towards systematic disclosure and transparency. Similarly, timely and systematic disclosure would ensure that all changes made to the mining laws and regulations (Requirement 1), as well as material deviations from the normal process (Requirement 2.2) are adequately reported. This would provide vital information about corruption red flags, as details on material deviations within licensing process are rarely adequately reported by many EITI countries.
- + **Disclose political donations from extractive companies:** Given the potential for companies to improperly influence the design of legal framework and licensing decisions through political donations, it is important that reporting on political donations be given significant consideration within the framework of the EITI Standard. In countries where there is no political donation disclosure law, EITI MSGs should require disclosure of political donations by extractive companies and recipients within the framework of the EITI. On the other hand, in countries with such regulations, EITI MSGs could require reporting companies and the country's electoral institution to disclose this information in the annual EITI reports. EITI member companies should also be required to disclose their policy on political contributions. MSGs should pay critical attention to provincial governments which are often more vulnerable to this type of corruption, particularly in jurisdictions where there are no strict rules against political contributions or donations.
- + **Promote capacity building initiatives:** EITI MSGs should consider capacity building activities on the legal framework as a critical step towards combatting corruption in the licensing process. In doing this, the EITI MSGs could hold training sessions to build the institutional capacity of government officials responsible for implementing the licensing process. Ensuring implementing officials understand the process and licensing criteria would equip them to perform their function with integrity and make them less vulnerable to pressure to deviate from the legal framework. Accountability actors such as civil society organisations could also be trained on the legal framework to help build their oversight capacities. It is important that EITI MSGs pay close attention to provincial governments which are more prone to capacity challenges. To draw attention to potential capacity gaps which make implementing agencies vulnerable to corruption, the EITI MSG should report on the funding, number, and training of staff in the licensing agency/department, especially at a provincial level.
- + **Establish a technical working group:** EITI MSGs should establish and resource a technical working group that may involve relevant actors from different government departments for increased government coordination (including land, environment, water resources, forestry etc.). The technical working group could commission an evaluation of inter-agency coordination, report on efforts to improve inter-agency coordination, and hold coordination workshops to advocate for a more transparent and effective coordination among state agencies and departments.
- + **Map out the anti-corruption framework:** It would be valuable for EITI MSGs to map out the key elements of the anti-corruption legal framework in their country such as corruption offences, authorities responsible for investigating and prosecuting corruption, the penalties and how these apply to the licensing process. To ensure this is effectively done, EITI MSGs could collaborate with or draw on the work of the country's anti-corruption agency. Similarly, the EITI MSG could engage with the anti-corruption agency to demonstrate how the information disclosed under the Requirement 2 of the EITI Standard supports efforts to prevent and detect corruption in the licensing process, and to identify additional information that would assist in preventing corruption.

How the MACRA Tool can support implementation of the EITI Standard

In order to successfully implement the disclosure requirements in the EITI Standard in a way that helps combat corruption, EITI countries need to understand and respond to gaps in the legal framework, identify vulnerabilities in the licence allocation process and detect discrepancies in the licence register which create corruption risks.

The MACRA Tool provides guidance on how to map the licensing process as an easy-to-understand chart, which helps assessors analyse the process to detect where there are gaps in the legal/regulatory framework, where roles and responsibilities are not clear, and where practice deviates from the process set out in law. The list of over 80 common corruption risk indicators can help EITI multi-stakeholder groups (MSGs) detect, assess and find solutions to transparency gaps in the design and practice of the licensing process.

MSGs can also use the tool's explanations about how a lack of transparency increases the risk of corruption to reinforce to other stakeholders the importance of the disclosure requirements in the EITI Standard. The MACRA Tool can help MSGs transform disclosure and reporting to achieve concrete accountability and development goals by guiding them to build the evidence for change and to articulate targeted reforms to enhance transparency and accountability and mitigate corruption risks in the award of licences.

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ANNEX

EITI Requirement 2 – Legal and institutional framework, including allocation of contracts and licenses

EITI REQUIREMENT 2

DETAILED GUIDANCE

2.1 Legal framework and fiscal regime

a) Implementing countries must disclose a description of the legal framework and fiscal regime governing the extractive industries. This information must include a summary description of the fiscal regime, including the level of fiscal devolution, an overview of the relevant laws and regulations, a description of the different types of contracts and licenses that govern the exploration and exploitation of oil, gas and minerals, and information on the roles and responsibilities of the relevant government agencies.

b) Where the government is undertaking reforms, the multi-stakeholder group is encouraged to ensure that these are documented.

2.2 Contract and license allocations

a) Implementing countries are required to disclose the following information related to all contract and license awards and transfers taking place during the accounting period covered by the most recent EITI disclosures, including for companies whose payments fall below the agreed materiality threshold:

- i. a description of the process for transferring or awarding the license;
- ii. the technical and financial criteria used;
- iii. information about the recipient(s) of the license that has been transferred or awarded, including consortium members where applicable; and
- iv. any material deviations from the applicable legal and regulatory framework governing license transfers and awards.

In cases where governments can select different methods for awarding a contract or license (e.g. competitive bidding or direct negotiations), the description of the process for awarding or transferring a license could include an explanation of the rules that determine which procedure should be used and why a particular procedure was selected.

Where there are gaps in the publicly available information, these should be clearly identified. Any significant legal or practical barriers preventing comprehensive disclosure of the information set out above should be documented and explained, including an account of government plans to overcome such barriers and the anticipated timescale for achieving them.

b) Where companies hold licenses that were allocated prior to the period covered by EITI implementation, implementing countries are encouraged to disclose the information set out in 2.2(a).

c) Where licenses are awarded through a bidding process, the government is required to disclose the list of applicants and the bid criteria.

d) The multi-stakeholder group may wish to include additional information on the allocation of licenses as part of the EITI disclosures. This could include commentary on the efficiency and effectiveness of licensing procedures, and a description of procedures, actual practices and grounds for renewing, suspending or revoking a contract or license.

EITI REQUIREMENT 2**DETAILED GUIDANCE****2.3 Register of licenses**

a) The term license in this context refers to any license, lease, title, permit, contract or concession by which the government confers on a company(ies) or individual(s) rights to explore or exploit oil, gas and/or mineral resources.

b) Implementing countries are required to maintain a publicly available register or cadastre system(s) with the following timely and comprehensive information regarding each of the licenses pertaining to companies within the agreed scope of EITI implementation:

i. License holder(s).

ii. Where collated, coordinates of the license area. Where coordinates are not collated, the government is required to ensure that the size and location of the license area are disclosed in the license register and that the coordinates are publicly available from the relevant government agency without unreasonable fees and restrictions. The disclosures should include guidance on how to access the coordinates and the cost, if any, of accessing the data. The government should also document plans and timelines for making this information freely and electronically available through the license register.

iii. Date of application, date of award and duration of the license.

iv. In the case of production licenses, the commodity being produced.

It is expected that the license register or cadastre includes information about licenses held by all entities, including companies and individuals or groups that are outside the agreed scope of EITI implementation, i.e. where their payments fall below the agreed materiality threshold. Any significant legal or practical barriers preventing such comprehensive disclosure should be documented and explained, including an account of government plans for seeking to overcome such barriers and the anticipated timescale for achieving them.

c) Where such registers or cadastres do not exist or are incomplete, any gaps in the publicly available information should be disclosed and efforts strengthen these systems documented.

2.4 Contracts

a) Implementing countries are required to disclose any contracts and licenses that are granted, entered into or amended from 1 January 2021. Implementing countries are encouraged to publicly disclose any contracts and licenses that provide the terms attached to the exploitation of oil, gas and minerals.

b)...

ENDNOTES

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