SOUTH AFRICA'S EXTRACTIVES INDUSTRY DISCLOSURE REGIME

Analysis of the legislative and regulatory regime and selected corporate practice

By Prof. Tracy-Lynn Humby and Dr Olufolahan Adeleke

OPEN SOCIETY FOUNDATION
FOR SOUTH AFRICA

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Prepared for
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ABBREVIATIONS AND ACRONYMS

AGM	annual general meeting
AMDC	African Minerals Development Centre
AMV	Africa Mining Vision
ANCL	African Network of Constitutional Lawyers
APPA	Atmospheric Pollution Prevention Act
AU	African Union
BBBEE	broad-based black economic empowerment
BCEA	Basic Conditions of Employment Act
BEE	black economic empowerment
CDM	Clean Development Mechanism
CER	Centre for Environmental Rights
COIDA	Compensation for Occupational Injuries and Diseases Act
CSI	corporate social initiative
DMR	Department of Mineral Resources
DRC	Democratic Republic of Congo
ECA	Environment Conservation Act
EIA	environmental impact assessment
EITI	Extractive Industries Transparency Initiative
ESG	environment, society and governance
EU	European Union
FSB	Financial Services Board
GDP	gross domestic product
GEC	Group Executive Committee
GHG	greenhouse-gas emissions
GRI	Global Reporting Initiative
IASB	International Accounting Standards Board
IFF	illicit financial flow
IFRS	International Financial Reporting Standards
ILO	International Labour Organization
JORC	Joint Ore Reserves Committee
JSE	Johannesburg Stock Exchange
LRA	Labour Relations Act
LSE	London Stock Exchange
MEC	Member of the Executive Council
MPRDA	Mineral and Petroleum Resources Development Act
MPRRA	Mineral and Petroleum Resources Royalty (Administration) Act
MPTRO	Mineral and Petroleum Titles Registration Office
MSG	multistakeholder group

NAEIS	National Atmospheric Emission Inventory System
NEITI	Nigeria Extractive Industries Transparency Initiative
NEMA	National Environmental Management Act
NEMAQA	NEM: Air Quality Act
NEMBA	NEM: Biodiversity Act
NEMICMA	NEM: Integrated Coastal Management Act
NEMPAA	NEM: Protected Areas Act
NEMWA	NEM: Waste Act
NERSA	National Energy Regulator of South Africa
NGO	non-governmental organisation
NWA	National Water Act
NYSE	New York Stock Exchange
OECD	Organisation for Economic Co-operation and Development
OHSA	Occupational Health and Safety Act
OSF-SA	Open Society Foundation for South Africa
PAIA	Promotion of Access to Information Act
PGM	platinum-group metal
PIC	Public Investment Corporation
PPPFA	Preferential Procurement Policy Framework
PWYP	Publish What You Pay
RBN	Royal Bafokeng Nation
RCR	recordable case rate
RoM	Run of Mine
SAAQIS	South African Air Quality Information System
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SAICA	South African Institute of Chartered Accountants
SAMRAD	South African Mineral Resources Administration
SAMREC	South African Mineral Resources Committee
SAMVAL	South African Code for Reporting of Mineral Asset Valuation
SARB	South African Reserve Bank
SARS	South Africa Revenue Service
SEC	US Securities and Exchange Commission
SENS	Stock Exchange News Service
SOE	state-owned enterprise
SRI	socially responsible investment
UK	United Kingdom
UN	United Nations
US	United States
USA	United States of America
USD	United States dollar
VAT	value-added tax
$	Canadian dollar

ACKNOWLEDGEMENTS

In 2014, the **Open Society Foundation for South Africa (OSF-SA)** established a ***Research and Advocacy Unit (RAU)*** to focus on specific Initiatives led by OSF-SA. RAU undertakes operational initiatives in areas identified as important to our mission of creating and supporting an open, inclusive and democratic society in South Africa.

Since 2014, RAU has worked on a specific portfolio focusing on *Promoting Extractive Sector Transparency and Accountability*, by leveraging existing grantee and partner efforts and finding new partners to work with on jointly improving governance in South Africa's extractives sector.

One of our first focus areas included working on the legislative and regulatory regime governing information flows and public access to information in the extractive sector. For this reason we commissioned **Prof. Tracy Lynn Humby and Dr Olufolahan (Fola) Adeleke** who are based at the University of the Witwatersrand (Commerce, Law and Management Faculty) to examine the disclosure regime applicable to South Africa's extractives sector and guide our understanding of that framework to identify both best practice and policy gaps. Their research forms the basis of this publication.

We would like to offer our thanks to both Tracy and Fola and the interviewees as well as **Isabella Munila (Oxfam USA)** for reviewing and commenting on the first draft, Adv. Johnlyn van Reenen for her very useful input, Alan Wallis and Ella Scheepers for initially conceptualising the research project, and finally Felicity Gallagher from COMPRESS.dsl, who edited and designed the report.

This report is available on our website at **www.osf.org.za**.

FOREWORD

The last few years have seen a shift in the extractive sector transparency landscape.

Concerted efforts by international and local civil society organisations have resulted in remarkable progress towards advancing the goal of financial transparency in extractive sector operations and transactions. Multinationals based in the European Union and the United States of America are now required to disclose detailed and disaggregated information related to their global extractive operations.

Rules that help to shine a light on corporate practices are especially relevant when companies are resistant to voluntary disclosure, because these rules facilitate greater accountability of behalf of both governments and private companies.

However, as we are all too familiar in a post-Marikana context in South Africa, transparency by and on its own will not create the material changes we need or seek. But what a new set of pioneering disclosure standards *can* achieve is to equip citizens and communities with key information that enables them to pursue state and corporate accountability.

This Report by Prof. Tracy-Lynn Humby and Dr Olufolahan (Fola) Adeleke is timely and important. It identifies both the successes and gaps in South Africa's legislative and regulatory framework as they relate to *ownership, operational and financial disclosures* in the extractive sector, including reviewing at least 30 laws and regulations applicable to the industry in South Africa.

In a comparative analysis, the Report also considers the recently adopted disclosure standards used in the European Union, United States of America, United Kingdom, Norway and Canada. In addition, the Report reviews international and regional disclosure standards including the Extractive Industry Transparency Initiative (EITI) and the Africa Mining Vision (AMV).

Using five case studies that look at certain companies operating in South Africa, the Report takes a realistic look at South Africa's disclosure rules and considers how these companies have interpreted and operationalised these rules. The Report argues that most companies in this sector are veering towards secrecy instead of proactive disclosure, in the areas of mining and related licences, contracting practices, and Social and Labour Plans (SLPs).

These findings are important, because information disclosure underpins accountability especially now, post-Marikana, when conflict continues in mine-affected communities amidst a global slump in commodity prices.

The free flow of information, or proactive/mandatory disclosure, also assists mine-affected communities to organise around common issues, such as in addressing the increasing pollution of water resources and the need for financial transparency and meaningful inclusion in policy-making processes. Specifically, over the last three years, several mine-affected communities across multiple provinces have been involved in a consultation process on a 'People's Mining Charter', and this year, civil society organisations and community-based organisations have jointly launched the South African chapter of Publish What You Pay (PWYP). In May 2016, the South African government itself committed to develop a Beneficial Ownership Registry within the framework of the Open Government Partnership (OGP), in line with commitments made in the *G20 High Level Principles on Beneficial Ownership Transparency*. Civil society will also engage government and Parliament on the pending Mineral and Petroleum Resources Development Bill and the Mining Charter review process.

The Report contains a set of recommendations and discussion points related to disclosure, transparency and accountability. Importantly, the findings can also be used by policy-makers as guidance to improve existing legislation.

We hope that this Report will prove useful for the work of our grantees, our partners and the many mine-affected communities in South Africa.

Fatima Hassan and Ichumile Gqada

OSF-SA
Cape Town
October 2016

EXECUTIVE SUMMARY

On 26 January 2015, the long-awaited Mineral and Petroleum Resources Development Act (MPRDA) Amendment Bill was referred back to Parliament by the President of the Republic of South Africa.[1] The grounds for this referral stemmed largely from the fact that provisions of the Bill dealing with certain aspects of socio-economic development were thought to be unconstitutional. Among the concerns of the Presidency regarding the Bill was the elevation of codes and regulations to the status of national legislation, which gave the Minister of Mineral Resources the discretion to amend such codes and regulations without following constitutionally mandated legislative procedures.[2] In addition, the Presidency was concerned about the limited public participation that had taken place with respect to the Bill during the parliamentary process. A further concern was the failure to refer the Bill to the National House of Traditional Leaders in view of the fact that the Bill ignored the consent principle in customary law when extractives companies consult with communities.[3]

The proposed Bill is the third amendment to the MPRDA within the last six years, and the corporate sector has noted the effect of this regulatory uncertainty on the performance of the industry. It is often stated that South Africa's extractives sector is overregulated. However, given the historical nature of this industry within South Africa, as well as the apparent harmful effects that extractives operations have on local people, communities and the environment, a number of legislative requirements have been developed to govern the extractives industry so as to mitigate these risks.

Since the early 1990s, stakeholders have clamoured for 'governance by disclosure', which has been described as a light-touch way of correcting market failures and of being 'in sync' with the broader trends of market-driven and neo-liberal environmental governance.[4] In many jurisdictions, the extractives industry has increased foreign direct investment, export earnings, government revenues and, to a lesser extent, gross domestic product (GDP) and job growth, but in a way that has not meaningfully enhanced development. In response, and challenging one dimension of extractives' potential contribution, namely to state revenue, there have been calls for transparency initiatives to ensure oversight in respect of the administration of resources and the revenue generated. It has often been argued that the equitable use of natural resources is central to sustainable development, and this has been the guiding mantra for the establishment of comprehensive disclosure practices.[5]

The research report that follows therefore aims at fostering a deeper and more critical debate on the notion of disclosures in the extractives industry. Such a debate will, it is hoped, enable South Africans to better understand the ways in which disclosures could be conceived with a view to social transformation in South Africa's mining sector, as well as the extent to which transparency is a useful concept for the purpose of public scrutiny relating to the activities of extractives-industry companies. The report thus examines the legal and regulatory landscape that governs the disclosure of ownership, operational and financial information in the oil, gas and mining industries and how this landscape limits the flow of information to the public and the levels of social accountability to the public.

It has often been argued that the equitable use of natural resources is central to sustainable development, and this has been the guiding mantra for the establishment of comprehensive disclosure practices.

By way of an analysis of 30 laws and regulations, the report finds that very limited disclosure rules relating to ownership, operational and financial information apply to extractives-industry companies. Further, in contrast to a consolidated law governing the extractives industry, the limited disclosure rules that apply in South Africa are fragmented and are to be found mostly in tax laws, with the relevant information subject only to disclosure to oversight bodies like the South African Revenue Service (SARS), which has a monopoly when it comes to public disclosure, albeit a limited one. The present research report has also noted the overlapping of certain issues in various laws. In addition, various laws often need to be read together in order to understand an applicable legal regime fully, with royalty payments being a case in point.

To analyse the strength of the current information-disclosure regime governing South Africa's extractives industries, the report provides a comprehensive overview of the prospects and limitations of various institutions that oversee the industry, including the legislative framework governing the establishment of these institutions and their powers regarding non-compliance and enforcement. The institutions considered in this context include those that have a broad-ranging oversight function across various sectors, as well as specific extractives-industry institutions. In examining ten oversight bodies that govern the extractives industry, the report found that institutions often have a discretionary power publicly to disclose information submitted to oversight bodies. However, strict rules of confidentiality also restrict the exercise of their discretionary powers.

To provide a comparative analysis of the state of transparency in South Africa's extractives industry, the present research report examines:

- The reluctance of the state to align its laws to international best-practice standards as exemplified by the Extractive Industries Transparency Initiative (EITI);
- The relevance of transparency practices adopted in other countries to the South African context; and
- The adequacy of the regulatory framework governing the extractives sector in relation to the disclosure of ownership, operational and financial information of companies in the extractives industry.

On an international level, the report analyses the EITI, an initiative introduced to ensure good governance and accountability within the extractives industries, overseen by a multistakeholder group (MSG) within each member country. The EITI has been complemented by the development of other statutory transparency initiatives intended to govern the extractives sector globally, initiatives such as the United States (US) Dodd–Frank Wall Street Reform and Consumer Protection Act that was passed in 2010 and requires companies listed in the United States of America (USA) to disclose payments to governments when submitting their annual reports to the US Securities and Exchange Commission (SEC). The research report also analyses the European Union Accounting and Transparency Directives established largely to ensure disclosure of payments by large extractives-industry companies to governments of countries in which such companies operate. Other laws considered are those of the United Kingdom (UK), Norway and Canada. As far as comprehensive disclosure affecting tax-planning strategies of multinationals is concerned, Norway has been progressive in its establishment of an extensive, country-by-country reporting regime aimed at countering tax havens by obliging companies to report to the host nations where they operate on the payment of taxes. A similar initiative is being considered in Canada as well as in the UK, where regulations have been published on country-by-country reporting requirements in respect of extractives-industry payments. All of these initiatives are relevant for a progressive review of South Africa's legislative framework.

What the research report has found is that companies tend to disclose specific sets of information proactively more than others. Moreover, in terms of the identified, applicable disclosure practices in other jurisdictions, most companies listed on the JSE do not disclose such sets of information.

In Africa, the African Mining Vision was adopted by heads of state of the African Union (AU) in 2009. Among other lofty objectives is the objective of integrating mining into local, regional and national development policy so that local communities may benefit from mining and in order that the environment is protected. Some African countries have even adopted EITI standards, which has improved the governance of the extractives industry and offers significant lessons for South Africa.

The present research report therefore considers:

- The similarities and differences between the various transparency regulations applicable to the extractives industry;
- The applicability of these regulations to the companies that need to comply;
- Payments made, as well as the level at which payments are made to the respective governments;
- The applicable payment threshold that triggers reporting;
- The time frame for reporting;
- Who the report is made to;
- The level of disaggregation;
- The type of payment required to be disclosed; and
- The audit requirements.

This analysis is done with a view to determining the extent of the alignment gap between South African and international standards, and the potential challenges that may be encountered in bridging this gap.

On a practical level, this report analyses a sample of companies (Sasol, Anglo American, Impala Platinum Holdings, Harmony Gold Limited, and Coal of Africa Limited) in terms of how they have interpreted various listing requirements pertaining to disclosure both in South Africa and internationally. These five companies are representative of the variety of extractives companies operating in South Africa, from diversified and established multinationals to smaller multinationals that concentrate on a narrower range of commodities, to emerging mining companies. All of the companies selected for analysis have a primary or secondary listing on the Johannesburg Stock Exchange (JSE), and cross-listings on other international exchanges.

What the research report has found is that companies tend to disclose specific sets of information proactively more than others. Moreover, in terms of the identified, applicable disclosure practices in other jurisdictions, most companies listed on the JSE do not disclose such sets of information. To provide the necessary context, the report examines each company with reference to its business and corporate structure, as well as the details of its ownership and cross-listings. Pertinent information regarding the company's structure of corporate governance and its claims to good corporate governance is also considered. A detailed analysis – in table format for ease of reference – of the company's compliance with South African (including mandatory and non-mandatory, and public and non-public disclosure requirements) and international disclosure requirements follows. The analysis has in the main been based on:

- The company's most recent integrated annual report, its annual financial statements, and its statements of mineral resources and reserves;

- Stock Exchange News Service (SENS) reports;
- Reports submitted as a result of cross-listing requirements; and
- Information available on the company's website or to the media.

The report identifies rules that promote substance over form through primary laws like the Promotion of Access to Information Act (PAIA). What is necessary under the Act is the disclosure of material information that reveals actual performance and shows accountability to stakeholders. Also of importance is the release of information to stakeholders in an accessible, accurate manner. One of the grounds on which an organisation may refuse to disclose information in terms of PAIA is commercial confidentiality. However, to invoke any ground for refusal under the PAIA, the body concerned must show that there is a likelihood of harm. Further, there needs to be a factual basis for reliance on the relevant ground. Notwithstanding this, PAIA provides that, regardless of any application of a ground for refusal, information can be disclosed if it points to a serious contravention of, or failure to comply with, the law, or to an imminent and serious public-safety or environmental risk, and if the public interest clearly outweighs the harm contemplated in the provision. The application of the public-interest test in responding to information requests by private bodies has generally not been observed. Therefore, corporate institutions still have a long way to go to achieve the right level of transparency. The extent to which PAIA aids or restricts transparency imperatives is therefore considered in this report.

For a robust disclosure regime to succeed in South Africa, it is necessary for it to be linked to other initiatives, including environmental sustainability, corporate social responsibility and investment, tax reform, as well as the development of extractives areas by the government. A considerable challenge facing such initiatives in South Africa is the attitude of industry practitioners and government officials, both of whom believe that the current regulatory environment governing the extractives industry is both robust and, if not internationally, certainly regionally acclaimed.[6] This has been reaffirmed by the international commendation of the King Reports on Corporate Governance developed locally by the South African Institute of Directors[7] as well as the JSE, as evidenced by the placement of such reports in the World Economic Forum's Global Competitiveness Survey for 2013–2014 as first in the world in terms of the regulation of securities exchanges. However, neither the JSE nor King III provides any guidelines relating to disclosure, either to the public or to shareholders, of specific ownership, operational and financial information.

In assessing information disclosure and the practices adopted by the extractives sector, therefore, there are three matters to consider. Firstly, globalisation has complicated the traditional relationship between state, business and society. Moreover, it is commonly accepted that this has partly been the cause of the breakdown in the relationship between mining companies, workers and local communities. Secondly, there has been an inadequacy on the part of the state to mediate between community and commercial needs. Thirdly, there is a need to bridge the divide between powerful corporate institutions and the poor communities in which they operate.

The findings of the research report point, among other things, to:

- The prevalence of secrecy over transparency in the extractives industry;
- The inadequacy of PAIA in promoting the disclosure of information;
- A resistance to open contracting practices; and
- Limited disclosure practices that apply only to the submission of information to oversight bodies and not to the general public.

As a result, some of the recommendations made in this report include:

- Mainstreaming existing global initiatives;
- Ensuring that information disclosed is relevant to local communities in terms of form, content and accessibility;
- Ensuring that the objectives of various laws relating to poverty reduction and sustainable development are realised, together with building the local and national capacity of countries – including civil society and communities;[8]
- Consolidating the various disclosure rules that currently apply, as well as other regulatory amendments relating to the disclosure of specific types of payments made by companies;

- Disaggregating payments made to the South African government on a national level, as well as disbursement to provincial and municipality levels; and
- Strengthening regulatory and oversight bodies in order that they can exercise their oversight functions effectively and allowing them immediately to make public the information submitted to them, with rare exceptions of confidentiality applying.

Finally, the present report also supports the involvement of civil society organisations in holding government and private corporations accountable, as well as the adoption of proactive and prescriptive disclosure of information.

Endnotes

1 'Social aspects of MPRDA "likely unconstitutional", Presidency explains.' Available at: http://www.polity.org.za/article/social-aspects-of-mprda-likely-unconstitutional-presidency-explains-2015-01-26 [accessed 4 February 2015].
2 Ibid.
3 Ibid.
4 See PricewaterhouseCoopers (PwC), *Tax transparency and country-by-country reporting: An ever changing landscape*, October 2013.
5 Ibid.
6 See National Democratic Institute for International Affairs, *Transparency and accountability in Africa's extractive industries: The role of the legislature, 2007*, edited by Shari Bryan and Barrie Hofman: 'South Africa's mining industry is highly regulated and grounded in a legal framework that could serve as a model for other African countries' (p. 90).
7 See 'SA firms need not fear EU auditing reforms.' Available at: http://www.skillsportal.co.za/content/sa-firms-need-not-fear-eu-auditing-reforms [accessed 14 December 2014].
8 See Emma Wilson and James van Alstine, *Localising transparency: Exploring EITI's contribution to sustainable development*, 2014, University of Leeds.

PART 1

Introduction and background

The aim of this research is to detail and evaluate the current information-disclosure regime regulating the extractives industries[1] in South Africa, and to provide a comparative analysis that includes internationally developed standards in this regard. Such analysis is aimed at mapping out the specific legislative and regulatory requirements in South Africa and assessing whether these meet the standards developed elsewhere. The ultimate objective of this approach is to inform advocacy work in this respect and to strengthen transparency practices within South Africa's extractives industries.

Through a review and assessment of the legal and regulatory regime applicable to public disclosure of ownership, operational and financial information in the extractives industries, this research will, it is hoped, foster debate about the notion of transparency as currently regulated, understood and applied in the South African extractives sector. The legal and regulatory choices made by the South African government with regard to the extractives industry, the reluctance of South Africa to become part of the Extractive Industries Transparency Initiative (EITI), and the relevance to South Africa of transparency practices in other countries will be discussed.

The focus of this report is on the 'ownership, operational and financial'[2] disclosure requirements that currently exist in South Africa and the extent to which these requirements are consistent with international standards. Although corporations in South Africa are required to keep other sets of information in terms of various laws, the analysis of such records falls outside the scope of the present report. The information analysed in this report relates to the three categories of information disclosed – particularly in relation to financial disclosures – the purpose of such disclosures, and whether these are sufficient for adequate oversight and accountability in the extractives industry. The other sets of information mentioned present opportunities for future research to audit the extent to which corporations are complying with the record-keeping and disclosure requirements in respect of such sets of information.

The synopsis that follows should serve to provide the reader with a good idea of what the present research report encompasses:

- The report commences in this Part 1 with a broad overview of the ownership, operational and financial information required by the EITI and a number of other country disclosure regimes that are in the vanguard of further developing transparency in the extractives sector;
- In Part 2, the report outlines the South African legislative and regulatory provisions requiring the disclosure of ownership, operational and financial information by oil, gas and mining companies in South Africa;
- Part 3 entails a discussion of the role played by oversight institutions in enforcing disclosures;

The focus of this report is on the 'ownership, operational and financial' disclosure requirements that currently exist in South Africa and the extent to which these requirements are consistent with international standards.

- Part 4 presents a tabular overview of the nature and content of disclosure requirements in South Africa;
- Part 5 provides a more detailed comparison of the South African disclosure regime with the EITI and country regimes already presented;
- Part 6 examines the role and relevance of the African Mining Vision with regard to ownership, operational and financial disclosures;
- Part 7 discusses the experiences in respect of disclosure in a number of African EITI-compliant countries;
- Part 8 presents an analysis of the disclosure practice of five oil, gas and/or mining companies that operate in South Africa with listings on the Johannesburg Stock Exchange (JSE) and cross-listings on the New York Stock Exchange (NYSE), the London Stock Exchange (LSE) or other international exchanges;
- In Part 9, an analysis of the adequacy of the Promotion of Access to Information Act (PAIA) with respect to the public disclosure of information is undertaken;
- In Part 10, an evaluation of the extent to which the South African disclosure regime can be amended or elaborated upon, and the obstacles to such amendment and elaboration, is presented; and
- The report concludes, in Part 11, with a discussion of the arguments for and against South Africa aligning itself with the ownership, operational and financial disclosure requirements of other jurisdictions.

1.1 Overview of ownership, operational and financial information required in terms of international standards: Considerations for South Africa

The necessity for transparency within the extractives sector is increasingly being advocated, for several reasons. Governments across the world are gradually recognising the importance of transparency to ensure that companies duly pay what is owed to the state. The sharpened focus on transparency in the extractives industry is also due to the ownership of natural resources in most states being vested in the public, with the state as the custodian of the resources – a situation that also pertains in South Africa. These resources are limited and non-renewable and, as a result, there is a legitimate expectation that they be managed sustainably and that the revenues derived from their exploitation should compensate for the loss in natural capital. Consequently, effective oversight and governance is necessary for the effective management of resources. With this in mind, various global initiatives have been developed to exercise this oversight, with the EITI receiving acclaim for the most comprehensive oversight model for the extractives industry.

The EITI aims to address information deficits relating to extractives revenue through the publication and verification of information on revenue paid by the extractives industry to the state, and by way of the involvement of a multistakeholder group (MSG) that includes civil society, government and the private sector, in order to monitor implementation and the subsequent sharing with the public of the information collected.[3] In the case of the EITI model, as well as other global and national initiatives developed subsequently, various questions arise, including, among others: Which information should be provided? What should be the level of detail of the information? Who should have access to the information? For which purpose should access be provided?

The EITI is a globally recognised standard that promotes transparency and accountability in the extractives sector. The disclosure requirements of the EITI are largely focused on financial disclosure, with the aim of assisting governments to determine the exact amounts paid to them by companies.

What governments claim to have received and what ought to have been received is reconciled with what companies claim to have paid in order to determine the exact payments made to governments. Through financial disclosure, some ownership and operational information is incidentally disclosed, such as production figures, ownership of licences and government participation in the extractives sector. For example, the EITI has recently introduced a pilot project relating to beneficial ownership.

The beneficial-ownership project aims to reveal the ultimate beneficiaries of companies' activities, with the recommendation that implementing countries 'maintain a publicly available register of the beneficial owners of the corporate entity(ies) that bid for, operate, invest in extractive assets, including the identity(ies) of their beneficial owner(s) and the level of ownership'.[4] However, publicly listed companies, including wholly owned subsidiaries, are not required to disclose information on their beneficial owners, even though publicly listed shareholders (trusts, for example) may obfuscate the identify of such owners.[5]

Ultimately, the purpose of the EITI is to improve the tax-collection process of government, to develop a more trustworthy process between government and the companies, and to ensure a level playing field for companies in terms of what they publicly disclose.[6] With the EITI, the public is expected to be in a better position to hold government and the operating companies to account concerning revenues generated, because all companies operating in a country that has adopted the EITI are required to disclose their payments to government.

For any governance initiative like the EITI to succeed, the role of government is vital in ensuring that the relevant regulatory frameworks are strengthened. Further, a vibrant and well-equipped civil society is also necessary in pursuing accountability. In embracing the objectives of the EITI, various country governments have developed global initiatives to complement the disclosure requirements that are being imposed on companies. This report focuses on the United States of America (USA), the European Union (EU), the United Kingdom (UK), Canada and Norway, because these have capital markets representing a significant number of the largest oil, gas and mining companies in the world.

The United States (US) Dodd–Frank Wall Street Reform and Consumer Protection Act was passed in 2010 to improve transparency and accountability in the financial system. It included a mandatory reporting requirement obligating listed US oil, gas and mining companies to disclose what they pay to the US *and foreign governments* on a country-by-country and project-by-project basis.[7]

The US rules were adopted in recognition of the crucial role played by resource revenues in the global economy, and to assist developing countries to 'make the most of the money they earn from natural resources, discourage corruption, reduce conflict and enable enhanced investor analysis'.[8] These rules cover financial disclosure[9], and operational disclosure[10] to a limited extent, but they do not deal with ownership disclosure.

The US rules complement the EITI in that while the EITI has been adopted in over 35 countries, large corporations such as Shell and Total operate in over 90 and 130 countries, respectively; hence the need for country-by-country reporting.[11] The additional benefit of the US rules is the project-level reporting that allows investors to properly assess risk, governments to track company compliance fully, and citizens to monitor development activities that impact their lives and livelihoods.[12]

Norway[13] and Canada[14] have adopted similar regulations to the US rules, and these are also discussed in this report.

For any governance initiative like the EITI to succeed, the role of government is vital in ensuring that the relevant regulatory frameworks are strengthened. Further, a vibrant and well-equipped civil society is also necessary in pursuing accountability.

In relation to financial disclosure requirements, a key issue for South Africa – and one not necessarily featuring in existing global initiatives – is that of payments to traditional authorities and communities that are not necessarily encompassed by the materiality requirements for payments disclosed by companies.

The EU Accounting and Transparency Directives seek to improve the transparency of payments made to governments all over the world by the extractives and logging industries. This is done by encouraging active citizenship that will hold governments accountable, as well as by promoting the adoption of the EITI. The directives complement the EITI by requiring companies registered or listed in the EU to disclose payments to governments along the same lines as the EITI. The EU directives are similar to the US Dodd–Frank Act, but have been extended to the logging industry and apply to large unlisted companies as well.[15]

The EU directives were introduced shortly after the US Dodd–Frank Act and after a formal request by the European Parliament to act in this area.[16] Subsequently, the UK and France have adopted the directives into law. The UK regulations[17] are discussed in this report.

The EITI is different from the US Dodd–Frank Act and the EU directives in that the EITI's internal focus is on companies and their payments to the governments of the country where they operate, whereas the US and EU laws focus on country-by-country reporting that requires companies listed in a country to publish their payments to foreign governments in each country of operation.[18]

The US and EU regulations complement the EITI, and both the EITI standard and country-by-country disclosure standard can be implemented simultaneously. While the US and EU laws focus on how much is paid by companies, the EITI goes further and requires government information on how much was received, as well as further analysis of how much ought to have been received.[19] The EITI process also compels a dialogue among stakeholders, and covers all companies and not only those listed in the US and in EU countries.

While these various categories of disclosure requirements are valuable for South Africa, they may not be sufficient given the country's history and transformational imperatives. For instance, central to ownership requirements for the South African context would be the level of compliance by companies with the affirmative-action policy of the state (i.e. broad-based black economic empowerment (BBBEE)), which seeks to impose ownership and other targets aimed at transforming the racial, gender and developmental profile of the extractives industry. These targets are scored by the state in order to benchmark various companies against their efforts to address socio-economic inequality among various recognised races in South Africa.

Similarly, in relation to operational disclosure requirements, one of the key policy objectives of the South African state is to promote 'beneficiation', which seeks to address local value-addition to minerals and is also linked in various statutory and policy documents to companies' compliance with ownership requirements relating to historically disadvantaged South Africans. Also, the ownership requirements in South Africa affect the operational requirements of a company by prescribing a mandatory procurement policy such that a company may only work with other companies that are meeting the government target concerning ownership by historically disadvantaged South Africans. All such information is subject to disclosure in South Africa and affects both the social and legal licence of a company to operate.

In relation to financial disclosure requirements, a key issue for South Africa – and one not necessarily featuring in existing global initiatives – is that of payments to traditional authorities and communities that are not necessarily encompassed by the materiality requirements for payments disclosed by companies. These payments to traditional authorities are not covered by taxes and royalties and

form a unique set of disclosures that are vital to understanding the operations of a company in South Africa.

Given these considerations, South Africa's approach to ownership, operational and financial disclosures cannot simply be a case of adopting any of the existing transparency initiatives. Rather, what is required is that the country should respond to the local needs of South Africa whilst taking cognisance of global trends.

The next part considers existing South African laws that currently apply to the three categories of disclosure.

Endnotes

1 'Extractives industries' in this research report means oil, gas and mining companies.
2 In general terms, 'ownership information' relates to information held by companies in terms of operational licences and to beneficial interests in listed companies; 'operational information' relates to information held that is of relevance to the functioning of a company, particularly with regard to the production and extraction of mineral resources; and 'financial information' relates broadly to the various forms of payment made by corporations to various governments, which include taxes, royalties and other prescribed payments.
3 A. Ravat & S.P. Kannan, *Implementing EITI for impact: A handbook for policy makers and stakeholders,* 2013, World Bank.
4 'Pilot project: Beneficial ownership.' Available at: https://eiti.org/pilot-project-beneficial-ownership [accessed 5 January 2015].
5 Ibid.
6 A. Ravat & S.P. Kannan, *Implementing EITI for impact: A handbook for policy makers and stakeholders,* 2013, World Bank.
7 Available at: [accessed 5 January 2015].
8 Ibid.
9 'Companies must disclose taxes, royalties, fees, production entitlements, bonuses, dividends and payments for infrastructure improvements. Fees to be reported include rental fees, entry fees, and concession fees; bonus payments are specified to include signature, discovery, and production bonuses.'
10 'Companies must report payments related to the "commercial development of oil, natural gas or minerals", defined in final rules "to include the activities of exploration, extraction, processing, and export, or the acquisition of a license for any such activity", in every country of operation and for each project.'
11 Available at: [accessed 5 January 2015].
12 Ibid.
13 Norway has introduced extended country-by-country reporting that covers: the type and total amount of payment for each project; the type and total amount of payment made to each government; the total amount of payments, by category; the government that received the payments, and the country where the government is located; the project to which the payments relate; the currency used to make the payment; the financial period in which the payment was made; the business segment of the resource-extraction user that made the payment; production (per type); employees; investments; revenues; cash tax; and payable tax debt.
14 Canada's Extractive Sector Transparency Measures Act introduces: disclosure of taxes, other than consumption taxes and personal income taxes; royalties; fees, including rental fees, entry fees and regulatory charges, as well as fees or other consideration for licences, permits or concessions; production entitlements; bonuses, including signature, discovery and production bonuses; dividends, other than dividends paid to ordinary shareholders; infrastructure-improvement payments; or any other prescribed category of payment.
15 European Commission Memo, 'New disclosure requirements for the extractive industry and loggers of primary forests in the Accounting (and Transparency) Directives (Country by Country Reporting) – frequently asked questions', 12 June 2013. Available at: http://europa.eu/rapid/press-release_MEMO-13-541_en.htm [accessed 5 January 2015].
16 Ibid.
17 The UK regulations effectively adopt the EU transparency directives.
18 Ibid.
19 Ibid.

PART 2

South African legislative and regulatory provisions requiring the disclosure of ownership, operational and financial information by oil, gas and mining companies

Given the historical nature of the extractives industry in South Africa as well as attempts by the state to regulate the industry in terms of the promotion of economic and social transformation and the mitigation of some of the harmful effects that extractives operations have on local people, communities and the environment, there are a number of legislative and regulatory provisions requiring disclosure of information by oil, gas and mining companies. However, there can be no information disclosure in the absence of record keeping. Consequently, this section will firstly examine the record-keeping requirements in the various laws applicable to the extractives industry and then identify which of these records require disclosure either to the public or to an oversight body and how material these disclosures are with regard to ownership, operational and financial information.

The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) provides the overarching framework governing the extractives industry and sets out the prerequisites for the granting of prospecting, mining, exploration or production rights. In addition, all companies in South Africa are governed by the Companies Act 71 of 2008, which mandates the disclosure of certain information applicable to the three categories under discussion in this report. Likewise, everyone[1] has a right of access to information under the Promotion of Access to Information Act 2 of 2000 (PAIA), a constitutionally mandated law ostensibly enabling the right of access to information and applicable to both the public and private sectors. This Act compels private bodies to make information available to a requester utilising the procedures set out in the Act, provided that the information requested does not fall within the ambit of the listed grounds for refusal of access, and provided, further, that the information is requested for the purposes of the exercise and protection of a right.[2] Other regulations governing the disclosure of information include the various taxation laws and policies administered by the South Africa Revenue Service (SARS), as well as the Johannesburg Stock Exchange (JSE) listing requirements. In order, therefore, to map out the specific provisions constituting the South African disclosure regime applicable to the extractives industry, this part of the report provides an overview of all relevant instruments, and analyses the extent to which the information-disclosure requirements ensure meaningful levels of transparency in relation, specifically, to ownership, operational and financial information within the extractives industries.

2.1 General right to information from companies: Promotion of Access to Information Act 2 of 2000 (PAIA)[3]

Section 32 of the South African Constitution enshrines the right of access to information held by both public and private bodies, and one of the objectives of its enabling legislation – PAIA – is the promotion of a transparent and accountable society.

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2.1.1 Record-keeping requirements

PAIA does not provide for a duty to create records on the part of public or private bodies. However, it provides that, once a request for information is received, there is a duty on the part of a public body to preserve the requested record until the procedures in relation to that request have been finalised.[4] It also prohibits the deliberate destruction or concealment of a record with the intention to deny a right of access to information.[5]

2.1.2 Information held and disclosure requirements

PAIA applies to all private bodies[6] and provides that a requester must be given access to any record of a private body if that record is required for the exercise or protection of any rights, if the request complies with the procedural requirements as set out in the Act, and if access is not refused in terms of any ground of refusal.[7] Section 52 of PAIA further provides that private bodies may, on a *voluntary* and periodic basis, describe categories of records that are automatically available and how access can be obtained. Despite the existence of seven grounds of refusal, PAIA provides for mandatory disclosure of information in the public interest where:

> *the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law or reveal imminent and serious public safety or environmental risk and the public interest in the disclosure of the record clearly outweighs the harm contemplated.*[8]

With regard to information requests made to private companies in terms of PAIA, the categories of information under which an information request *may* be refused include, commercial information of a private body (section 68). The categories of information in respect of which requests *must* be refused under the Act include:

- Personal information of a third party who is a natural person (section 63);
- Commercial information of a third party (section 64);
- Information which, if disclosed, would threaten the safety of individuals or property (section 66);
- Records privileged from production in legal proceedings (section 67); and
- Research information of a third party or private body (section 69).

However, as stated above, the overriding public-interest clause (section 70) must be applied by the information officer of the private body in considering an information request.

Currently, the South African Human Rights Commission (SAHRC) is mandated, under sections 83 to 85 of PAIA, to monitor the implementation of, and compliance with, this Act. Certain private companies were originally obliged to submit a PAIA Manual to the SAHRC (in terms of section 51). This Manual was supposed to include information on: the types of records kept by the company; the categories of records that were automatically available; and how access could be obtained in terms of section 52. Further, the company's details necessary for a potential requester to make an information request in terms of PAIA had be included.[9] However, the Minister of Justice issued a notice granting extensions to certain companies[10] for the submission of such PAIA Manuals.[11] In addition, the recently passed, but yet to be enforced, Protection of Personal Information Act 4 of 2013 provides that the SAHRC's powers will be transferred to a new institution to be established, namely the Information Protection Regulator, which will have the necessary powers to enforce

compliance with PAIA by companies.[12] In terms of this new law, private companies are still obliged to develop Manuals, but there is no requirement for submission to the oversight body.

2.2 Disclosure of audited financial statements: Companies Act 71 of 2008[13]

2.2.1 Record-keeping requirements

The Companies Act requires every company to maintain a copy of its Memorandum of Incorporation, records of directors, reports of annual general meetings, annual financial statements, accounting records, notices and minutes of all shareholders meetings, and records relating to the securities register.[14]

People who hold beneficial interests in the securities of a company will have access to these records. In addition, other persons may access these records on payment of a fee in accordance with PAIA. Companies are also required to keep accurate accounting records, but there is no guideline on the required disclosure thereof to the public.

2.2.2 Information held and disclosure requirements

Section 31 of the Companies Act provides that any person who holds or has a 'beneficial interest'[15] in a company can obtain access to the financial statements of such company. Further, section 26 of the Companies Act provides that any person with a beneficial interest in a company may have access to:

- The company's Memorandum of Incorporation and any amendments to it;
- Any rules made by the company;
- The records in respect of the company's directors;
- Reports made to annual meetings;
- The annual financial statements;
- Notices and minutes of annual meetings, as well as communications; and
- The securities register of a for-profit company.

In practice, the financial statements of companies are disclosed not only to holders of beneficial interests, but also to the public at large.

The Companies Act also recognises the supremacy of PAIA in terms of access to information and explicitly does not seek to limit the applicability of PAIA to companies.[16]

With regard to corporate reporting in South Africa, while all companies must prepare annual financial statements, private or non-public companies are not required to have their annual financial statements audited, unless their Memorandum of Incorporation states otherwise.[17] An independent review suffices, except where it will be in the interest of the public to have the statements audited, taking into account the economic and social significance of the company, its annual turnover, the size of its workforce, as well as the nature and extent of its activities.[18] As far as public companies and state-owned entities are concerned, their financial statements must be audited and must furthermore be consistent with the International Financial Reporting Standards (IFRS) of the International Accounting Standards Board so as to ensure standardisation of the accounting methods as well as establish a basis for comparability.[19]

The Companies Act requires every company to maintain a copy of its Memorandum of Incorporation, records of directors, reports of annual general meetings, annual financial statements, accounting records, notices and minutes of all shareholders meetings, and records relating to the securities register.

The Companies Act also recognises the supremacy of PAIA in terms of access to information and explicitly does not seek to limit the applicability of PAIA to companies.

In South Africa, the current transparency regime regulating the private sector, including the extractives industry, is focused largely on enhancing information disclosure to shareholders or investors, rather than more broadly to all stakeholders, which would include the public and local communities. The Companies Act of 2008, for example, provides for the creation of social and ethics committees with reporting functions in relation to company boards and information-disclosure requirements in respect of shareholders, but not necessarily all stakeholders and the general public.[20]

2.3 Records of mining activities, reconnaissance and prospecting: Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002[21]

2.3.1 Record-keeping requirements

The MPRDA provides that the holder of a mining right or mining permit must, at the registered office or place of business of such holder, keep proper records of mining activities and proper financial records in connection with these activities.[22]

In addition, section 21 of the MPRDA provides that the holder of a prospecting right or reconnaissance permission must keep proper records, at the registered office or place of business of the holder, of reconnaissance or prospecting operations, as well as of the results thereof and the expenditure thereon. Moreover, such holder must submit progress reports and data to the Regional Manager[23] regarding the prospecting operations, and the Regional Manager must submit the progress reports and data to the Council for Geoscience.[24] The Council for Geoscience advises the Minister on all prospecting information. Section 21(2) prohibits any person from disposing of, or destroying, any record, except in accordance with the written directions of the relevant Regional Manager in consultation with the Council for Geoscience.

2.3.2 Information held and disclosure requirements

The MPRDA provides, in section 28(1), that holders of rights such as prospecting rights must keep proper records of mining activities and proper financial records in connection with these activities.[25]

The relevant information in section 28(2), which must be submitted by the holder of a mining right to the Mining and Petroleum Titles Registration Office, includes:

- Prescribed monthly returns with accurate and correct information and data;
- An audited annual financial report or financial statements reflecting the balance sheet and profit and loss account; and
- An annual report detailing the extent of the holder's compliance with:
  - The objectives of the MPRDA to achieve transformation;
  - The charter developed by the Minister on socio-economic empowerment; and
  - The company's social and labour plan.[26]

Section 30 of the MPRDA states that the information furnished to the Minister on request by the Minister, or the information to be submitted[27] to the Director-General, can be disclosed to others in order to give effect to the constitutional right of access to information and PAIA.[28] The MPRDA also

provides, in section 88, that, subject to PAIA, all information submitted must be treated as confidential for a period:

> *(a) not exceeding four years from date of acquisition; or (b) ending on the date on which the permit or rights to which such information, data, reports and interpretations thereof relate have lapsed[,] are cancelled or terminated, or the area to which such permits or rights relate [has] been abandoned or relinquished.*

Other requirements of the MPRDA include a provision that requires public consultations on applications that have been submitted, as well as the submission of environmental-management plans by the rights holders.[29] Environmental management plans set out key operational information in relation to environmental-impact assessments, but they need not be disclosed and are, in practice, difficult to obtain.[30] The Constitutional Court, in the case of *Bengwenyama (Pty) Ltd and Others v Genorah (Pty) Ltd and Others,*[31] laid to rest issues relating to consultation requirements by emphasising a good-faith engagement that satisfies the applicant for prospecting rights and landowners. Also, the Court emphasised the importance of access to information for informed decision-making. More importantly, it held that the Department of Mineral Resources had an obligation to inform the community directly of the potentially adverse consequences of an application for prospecting rights. With this ruling of the Constitutional Court now in place, it is expected that the amended MPRDA, which is yet to enter into force and has been referred back to Parliament, will take these considerations into account in developing a robust regime for community consultation and a community's right to information.[32]

The licence fees payable in South Africa with respect to any right, permit or permission are determined by the Regulations made in terms of the MPRDA.[33] The exact fees payable are listed in the Regulations.[34]

Section 30 of the MPRDA provides that records kept in terms of the Act may be disclosed to any person so as to give effect to the right of access to information contemplated in section 32 of the Constitution and to the objectives of the Act in relation to expanding opportunities for historically disadvantaged persons, advancing economic growth, and promoting social and economic welfare. Such disclosures are further permitted if such information or data is already publicly available, or if the relevant right, permit or permission has lapsed or been cancelled, or if the area to which such right, permit or permission relates has been abandoned or relinquished.

However, the Act prohibits disclosure where the information or data was supplied in confidence.[35] All information pertaining to reconnaissance and prospecting is to be kept confidential by the Council of Geosciences until such time as the right, permit or permission has lapsed, is cancelled or is terminated, or the area to which such right, permit or permission relates has been abandoned or relinquished.

2.4 Records on royalties: Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008 (MPRRA)[36]

2.4.1 Record-keeping requirements

In terms of section 8 of the MPRRA, a registered person must retain such records as are necessary to satisfy the requirements of this Act and the Mineral and Petroleum Resources Royalty Act 28 of 2008 ('the Royalty Act'), including:

Other requirements of the MPRDA include a provision that requires public consultations on applications that have been submitted, as well as the submission of environmental-management plans by the rights holders.

- Particulars of earnings before interest and taxes, with sufficient detail to identify all the gross sales, income and allowable deductions in respect of those earnings;
- Particulars of gross sales, with sufficient detail to identify all transferred mineral resources in respect of those gross sales and the persons acquiring those transferred mineral resources;
- The quantity of mineral resources extracted but not transferred and those transferred by that registered person, with sufficient detail to identify those extracted and transferred mineral resources;
- The accounting income, with sufficient detail to identify the earnings before interest and taxes; and
- The financial statements and any information required by the Commissioner.

Such records must be kept for a period of five years.

2.4.2 Information held and disclosure requirements

The MPRRA provides that a person qualifies for registration if they hold a prospecting right, retention permit, exploration right, mining right, mining permit or production right granted in terms of the MPRDA, or a lease or sublease as mentioned in section 11 of the MPRDA.[37]

Such registered person 'must submit an estimate of the royalty payable in respect of a year of assessment within six months after the first day of that year and must make a payment equal to one-half of the amount of the royalty estimated' to SARS.[38] A registered person is to 'submit a return for the royalty payable in respect of a year of assessment within six months after the last day of that year'.[39]

In terms of the auditing of what is paid by registered persons, section 9 provides as follows:

> *If … the Commissioner has reason to believe that a registered person has failed to pay the royalty for which that registered person is liable …; … the registered person fails to furnish a return in respect of the royalty for which that registered person is liable …; or … the Commissioner is not satisfied with a return … furnished by the registered person, the Commissioner may issue to that person a notice of assessment of the royalty payable for the assessment period concerned, … .*

Where there has been a default in payment by registered persons, section 9 provides further:

> *If … a registered person defaults in furnishing a return … or any information in respect of that return; … the Commissioner is not satisfied with the return or information …; or … the Commissioner is not satisfied with the amount of the royalty paid by that person …, the Commissioner may estimate the amount in relation to which the return or information is required (or of the royalty otherwise properly chargeable under this Act) for purposes of the notice of assessment … .*

Section 9(4) provides that 'a registered person that receives a notice of assessment must pay the amount of the royalty so assessed to the Commissioner within 30 days after the date of issue of that notice of assessment'. Registered persons are allowed to object to or appeal notices of assessment.

There are significant penalties for failure to comply with the provisions of the Act. Section 14 provides that, 'if the royalty … in respect of a year of assessment exceeds the amount paid … in respect of that year and that excess is greater than 10 per cent of the royalty …, the Commissioner may impose a penalty that may not exceed 20 per cent of that excess'. Such a penalty is payable within 30 days.

In addition, in terms of section 15(1):

> *[t]he Commissioner may require a registered person to justify any estimated amount paid by that person … or to furnish particulars in respect of that amount and, if the Commissioner is dissatisfied with that amount, the Commissioner may substitute an estimate of an increased amount in lieu of the estimated amount paid … to the extent that the Commissioner considers reasonable.*

The Commissioner of SARS is regarded as an efficient oversight body for effectively monitoring underreporting and underestimation by registered persons.

The Income Tax Act is the principal law regulating tax payments by minerals companies to the state.

Section 8 prescribes the maintenance of records for purposes of the Act, including particulars of earnings before interest and taxes, with sufficient detail to identify gross sales, income and allowable deductions in respect of those earnings. The records required by section 8 are not publicly available and are governed by the provisions on preservation of secrecy in section 19 of the Act, which provisions are similar to those of the Income Tax Act 58 of 1962.

2.5 Detailed financial disclosures: Income Tax Act 58 of 1962[40] and the MPRDA

The Income Tax Act is the principal law regulating tax payments by mineral companies to the state. Other laws such as the MPRDA, the MPRRA, the Tax Administration Act 28 of 2011, and the Customs Duties Act 30 of 2014 are also applicable and are considered in this section.

2.5.1 Record-keeping requirements

Section 73A of the Income Tax Act provides that a person who is required to render a return must retain all records relevant to that return for a period of five years from the date the return was received by the Commissioner. These records include ledgers, cash books, journals, cheque books, bank statements, deposit slips, paid cheques, invoices and stock lists, and all other books of account, as well as any electronic representations of information in any form, relating to any trade carried on by that person in which are recorded details used to prepare that person's returns for the assessment of taxes.

This Act provides, in section 73B, that a 'person must retain all records required to determine the taxable capital gain or assessed capital loss of that person for a period of five years from the date on which the return for that year of assessment was received by the Commissioner'. 'Records' include: any agreement for the acquisition, disposal or lease of an asset, together with related correspondence; details of any asset transferred into a trust; copies of valuations used in the determination of a taxable capital gain or assessed capital loss; and invoices or other evidence of payment records, such as bank statements and paid cheques, relating to any costs claimed in respect of the acquisition, improvement or disposal of any asset.

Other records are required to be kept in terms of the MPRDA and the Royalty Act, which have already been discussed above, and the Value-Added Tax (VAT) Act, discussed below.

2.5.2 Information held and disclosure requirements

2.5.2.1 Profit taxes

Tax at the rate of 28% is payable by South African companies on their worldwide taxable income, and is subject to disclosure to SARS and in such companies' financial statements.[41] The tax is payable by both public and private companies as well as close corporations and also applies to offices of foreign companies operating in South Africa.[42]

2.5.2.2 Other taxes

The largest proportion of companies' corporate tax liability is imposed by the national government. Subnational governments receive a small proportion of a company's total tax payments, mainly through property rates and taxes.[43] The Income Tax Act also provides for a capital allowance for gold mines, which is deducted against capital expenditure and is calculated as a percentage of capital expenditure.[44] Aside from corporate income tax, mining companies are also liable for VAT, capital

gains tax, customs and excise duties, and a skills development levy.[45] No basis and rate are applicable and taxes, including VAT, are not payable on exports.[46] The taxes paid have to be disclosed to the Mining Titles Registration Office and to the public through the audited financial statements that are submitted to other oversight bodies such as the JSE in the case of listed companies.

2.5.2.3 Royalties

As noted above, royalties are payable in terms of the MPRRA, which applies variable royalty percentage rates based on whether the mineral is refined or unrefined.[47] The Royalty Act, the Income Tax Act, the MPRDA as well as the MPRRA overlap in the area of administration of royalties. The royalty liability that is payable is equal to the tax base (gross sales) multiplied by the royalty percentage rate.[48] In terms of the MPRRA, royalties are subject to disclosure to SARS and are also disclosed in the financial statements of companies.

In terms of the MPRDA, mining companies are obliged in the process of prospecting to 'pay the prescribed prospecting fee to the State'[49] and to 'pay the State royalties in respect of any mineral removed or disposed of during the course of prospecting operations'.[50] Also, the holders of a mining right are expected to pay the state royalties,[51] as are holders of production rights.[52]

2.5.2.4 Dividends

The secondary tax on companies has been replaced with a withholding tax on dividends, which is payable at a rate of 15%. This is also subject to disclosure to SARS and in the financial statements.[53]

2.5.2.5 Cost recovery and deductions

During the prospecting and exploration phase, mining companies are allowed to make deductions from the income derived by them from mining operations. In addition, they may deduct any expenditure incurred by them during the year of assessment on prospecting operations, together with any other expenditure which was incidental to such operations.[54] SARS allows the costs of prospecting incurred as unredeemed capital expenditure, which is deducted against mining income once the mine is operational.[55]

For mining companies that are in the development and production phase, deductions are made from the income derived from mining operations expenditure on development, general administration and management, including interest on loans taken out before the commencement of production or during any period of non-production.[56]

Such cost recovery and deductions constitute a type of bonus for companies, which otherwise do not exist under South African law.

For mining companies in the production phase, capital expenditure[57] incurred[58] can be deducted from income.

These deductions are subject to disclosure to SARS in terms of the Income Tax Act.

2.5.2.6 Licence fees

The licence fees payable in South Africa with respect to any right, permit or permission are determined by the Regulations made in terms of the MPRDA.[59] The MPRDA provides that licensing applicants must pay the prescribed application fee to the state for a mining right, mining permit, exploration right, prospecting right or production right, and pay royalties in respect of any mineral removed and disposed of.[60]

2.5.2.7 Other expenditure disclosures

Social contributions made by mining companies are required but are not standardised across the industry. These contributions need to be disclosed as an expenditure item in terms of the Income Tax Act. For example, expenditure in relation to the transportation of minerals, employee housing,

and other social infrastructure is deductible over a ten-year period, while the cost of motor vehicles for employee use will be deducted over five years.[61] These deductions are subject to disclosure to SARS.[62]

2.6 Other tax-benefit disclosures: Tax Administration Act 28 of 2011[63]

2.6.1 Record-keeping requirements

Section 29 provides for the duty to keep records. Chapter 6 refers to tax information that must be kept confidential, and prescribes a general prohibition on disclosure. This applies to any person who is a current or former SARS official. Such person must preserve the secrecy of taxpayer information and may not disclose this information to a person who is not a SARS official.[64] Section 71 refers to criminal, public-safety or environmental matters that can be disclosed by a senior SARS official when ordered to do so by a judge.

2.6.2 Information held and disclosure requirements

This subsection applies to tax-planning strategies. Section 35 of the Tax Administration Act provides that an 'arrangement'[65] must be disclosed to SARS if a tax benefit will be derived, or is assumed to be derived, by virtue of the arrangement. Such arrangement must affect the calculation of interest, finance costs, fees or any other charges, and gives rise to an amount that is, or will be, disclosed as a deduction, but not as an expense, for the purposes of the Income Tax Act. In addition, this arrangement must be disclosed as revenue for purposes of the financial statements but not as gross income for the purpose of the Income Tax Act.

The recognition of 'arrangements' in the Tax Administration Act is a justification for the disclosure of country-by-country reporting, because the law recognises that tax avoidance and profit-shifting happen in practice. Section 35(2) of the Act provides that 'the Commissioner may list an "arrangement" by public notice, if satisfied that the "arrangement" may lead to an undue "tax benefit"'.[66]

The arrangement must be disclosed by the 'promoter'[67] within 45 business days after an amount is first received by, or has accrued to, a 'participant'[68] or is first paid, or actually incurred, by a participant in terms of the arrangement.[69]

Information to be submitted includes: a detailed description of all the steps and key features of an 'arrangement'; a detailed description of the assumed 'tax benefits' for all 'participants', including, but not limited to, tax deductions and deferred income; the names, registration numbers, and registered addresses of all 'participants'; a list of all the agreements concerned; and any financial model that embodies the projected tax treatment with respect to the 'arrangement'.[70] Excluded are arrangements in respect of loans, advances, debts, leases or exchange transactions.[71]

This report does not deal with profit shifting and tax avoidance. The casual reference here without any context is unhelpful. The working paper addresses profit shifting in detail and this sentence should be removed. The arrangements referred to are, however, not disclosed in the financial information of the companies selected and analysed for this report. The necessity for public scrutiny of these sets of information is, therefore, important in order to hold corporations accountable.

The information on arrangements is subject to disclosure to SARS.[72]

2.7 Disclosure of specific payments by diamond companies: Diamond Export Levy (Administration) Act 14 of 2007[73]

2.7.1 Record-keeping requirements

Section 7 provides for the maintenance of records by every registered person for the purposes of the Act. These records include:

- The original note of receipt or purchase in respect of an unpolished diamond as described in section 56 of the Diamonds Act 56 of 1986;
- A register in respect of unpolished diamonds as described in section 57 of the Diamonds Act;
- A record of all unpolished diamonds imported into or exported from the Republic by that person, with sufficient detail to identify diamonds, values, purchasers and sellers involved;
- A copy of any temporary exemption certificate;
- A copy of any permit to export that has been granted;
- Any ledger, cash book, journal, cheque book, bank statement, deposit slip, paid cheque, invoice, other book of account, or financial statement; and
- Any other information required by the Commissioner or the Regulator.

All records must be preserved for five years after the date of submission of the return concerned.

2.7.2 Information held and disclosure requirements

In terms of the Diamond Export Levy (Administration) Act, a person qualifies for registration with SARS if that person is a producer, dealer, diamond beneficiator, or holder of a permit to export diamonds.[74] Payment is required from the registered person, within 30 days after the end of the year of assessment, of any levy due in respect of a return.

Where applicable, the registered person can claim a refund or interest from the Commissioner of SARS in terms of sections 14 and 15, respectively.

Disclosures are made to SARS.

2.8 Access to disclosures relating to research: Mining Titles Registration Act 16 of 1967 and Mining Titles Registration Amendment Act 24 of 2003[75]

2.8.1 Record-keeping requirements

The Mining Titles Registration Amendment Act establishes the Mineral and Petroleum Titles Registration Office, which Office is responsible for the registration of all mineral and petroleum titles. Consequently, the Office maintains records, registers, diagrams, plans or other documents and, where necessary, sends these for archiving as well.[76]

2.8.2 Information held and disclosure requirements

Section 64 of the Act provides that the 'Director-General may permit members of the public to access the Mineral and Petroleum Titles Registration Office for the purposes of research', though access may be refused or records may be inspected only with the supervision of a responsible officer.[77]

2.9 Disclosure of licences of gas companies: Gas Act 48 of 2001[78]

2.9.1 Record-keeping requirements

The Gas Act provides that the Gas Regulator must keep records of all its proceedings.[79]

2.9.2 Information held and disclosure requirements

The Gas Act allows applicants for licences[80] to request confidential treatment of commercially sensitive information and, subject to concurrence by the Gas Regulator, such information may be withheld from public disclosure.[81] Licensees are further required to submit to the Regulator audited annual accounts, as well as annual volume and average price for a year for customers consuming less than 10 million gigoules. Furthermore, the Gas Regulator must publish the aggregated results for categories of customers within residential and commercial classes on a provincial basis.[82]

Applicants for a licence must include the particulars of shareholders and owners of the applicant where a juristic person is the applicant.[83] Further, the applicant must provide the Gas Regulator with documents demonstrating the financial and other abilities of the applicant, as well as a description of the intended facility and use of the gas requested.

2.10 Disclosure of licences of petroleum companies: Petroleum Pipelines Act 60 of 2003 and the Petroleum Pipelines Regulation

2.10.1 Record-keeping requirements

The Petroleum Pipelines Act provides that the Petroleum Pipelines Regulatory Authority must keep a record of its proceedings.[84]

2.10.2 Information held and disclosure requirements

The Petroleum Pipelines Regulation issued by the National Energy Regulator of South Africa (NERSA) specifies the information that must be submitted by an applicant for the purposes of securing a licence to operate a petroleum facility, as regulated by the NERSA. Information submitted must include proof of ownership, as well as proof of administrative, technical and financial abilities to construct and operate such a facility.

D4 of the Petroleum Pipelines Regulation, which deals with the confidential treatment of information, provides that licence applications must be made available for inspection by members of the public and that a copy of a licence application must be kept at the place of business and on the website of the licensee. The NERSA will decide whether or not particular information is confidential.[85] The governing criteria for the assessment of confidentiality in terms of the NERSA Regulation are to be determined by PAIA, with applicants stating in their application for confidentiality which provisions in PAIA they are relying on.[86]

2.11 Disclosure of financial information: Johannesburg Stock Exchange (JSE) Listing Requirements[87]

2.11.1 Record-keeping requirements

The Listing Requirements do not provide that listed companies must keep records. This omission is not material given that listed companies are required to comply with the statutory requirements already discussed above, including the various duties to keep records.

2.11.2 Information held and disclosure requirements

Section 8 of the JSE Listing Requirements deals with disclosures in relation to historical financial information. The 'Report of historical financial information'[88] is the responsibility of the directors of the new applicant, and this is to be stated in the report. A report of historical financial information is required in relation to any substantial acquisition or disposal that has been effected by a new applicant in the current or preceding financial year.[89] The report is to be prepared in accordance with IFRS and the Financial Reporting Guides of the South African Institute of Chartered Accountants (SAICA).[90]

In a report of historical financial information, earnings, diluted earnings, headline earnings, diluted headline earnings, net asset value and tangible net asset value per share, and dividends per share in respect of each class of share, expressed in cents, must be provided for the last financial year.[91]

The report must further include a review of the operations of the applicant, as well as of the applicant's financial position, changes in equity, results of operations, and cash flows.[92]

The report is expected to be audited and to be in consolidated form if the listed company has subsidiaries, unless the JSE agrees otherwise.[93]

Other important disclosures required in the report for the purposes of this research include a statement on compliance with the King Code, as well as information on the aggregate of the direct and indirect beneficial interests of directors; on the major shareholders who are directly or indirectly beneficially interested in 5% or more of any class of the listed company's capital, together with the amount of such shareholder's interest; and on issues for cash, mineral resources and mineral reserves.[94]

The Listings Requirements apply to mineral companies and non-mineral companies with 'substantial mineral assets'.[95] The Requirements provide that, 'if information required to be disclosed ... is confidential' and it can be proved 'to the satisfaction of the JSE that the [applicant's] ... legitimate interests might be prejudiced if the information were to be disclosed, then the JSE may grant a dispensation from the requirement to make the information public'.[96] What constitutes 'legitimate interests' is, however, not defined in the Listing Requirements.

The following information must also be included in documents that are required to be prepared by mineral companies and non-mineral companies in respect of substantial mineral assets:

- A competent person's report[97] complying with the SAMREC[98] and SAMVAL[99] Codes, which have been adopted by the JSE[100];
- Details of any direct or indirect beneficial interest that each director (and his/her associates), competent person, competent valuator and, where applicable, related party has or, within two years of the date of the pre-listing statement, had in any asset (including any right to explore for minerals) of the applicant;
- The share capital of the applicant issuer;
- Financial information;
- A statement by the directors regarding any legal proceedings that may have an influence on the rights to explore or mine; and
- Confirmation that the applicant or its group (including companies in which it has investments) is in possession of the necessary legal title or ownership rights to explore, mine or explore and mine the relevant minerals.[101]

The competent person's report should include expenditure that has been incurred, has been planned for or is expected.[102]

In the financial statements of mineral companies and companies with substantial mineral assets, such companies (which include subsidiaries, joint ventures, associates and investments) are required to disclose details[103] on an attributable beneficial interest basis.[104] They may also report on an aggregated attributable beneficial interest basis where the required details have been previously disclosed and published by separately listed mineral companies in compliance with this listing requirement.[105]

Since 2010, 'integrated reports'[106] have been developed and published by companies listed on the JSE. In instances where such reports are not published, the companies concerned are expected to explain their failure to do so. In an interview conducted in preparing this report, it was stated that integrated reporting is still in its early stages in South Africa and that the JSE still relies mainly on financial disclosures for share-pricing purposes.[107] Given that financial reports are the main source of data on companies and shape share prices, it would seem that other disclosures that give a clearer picture regarding the assessment of a company should be embedded in these reports. A concern that has been raised about integrated reports in South Africa is that they are perceived by companies as an opportunity to engage in impression management. Consequently, they are used as marketing documents with there being only limited engagement with non-financial stakeholders.[108]

2.12 Disclosure of production volumes and value: The South African Mineral Codes

2.12.1 Record-keeping requirements

There is no duty to keep records in terms of the Codes.

The intention behind the SAMVAL Code is that mineral asset valuation should be carried out by appropriately qualified persons and that all relevant information should be fully disclosed to the public.

2.12.2 Information held and disclosure requirements

The SAMREC Code, which has been adopted by the JSE, sets out the minimum standards as well as guidelines for 'public reporting' of exploration results, mineral results and mineral reserves in South Africa. 'Public reports', as defined in the Code, are reports prepared for the purpose of informing investors and potential investors and include annual, quarterly and other reports required by the Companies Act.[109] The Codes were drawn up by the SAMREC and SAMVAL Committee, which comprised representatives of a number of professional associations. The SAMREC Code applies to all types of solid minerals or economic deposit[110] and provides guidelines on exploration results and mineral reserves. The SAMVAL Code, in turn, provides guidelines on the valuation of mineral reserves.

The intention behind the SAMVAL Code is that mineral asset valuation should be carried out by appropriately qualified persons and that all relevant information should be fully disclosed to the public.[111] In terms of the Code, value relates to future expectations and is the present value (or economic worth) of all future benefits expected to be received.[112] The competent valuator chooses two of three approaches in conducting the assessment. The three methods of valuation in terms of the Code are the cash flow approach, which relies on the 'value-in-use' principle, the market approach, which relies on the principle of 'willing buyer, willing seller', and the cost approach, which relies on historical and/or future amounts spent on the mineral asset.[113]

2.13 Disclosures in terms of the Mining Charter[114]

The Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry[115], known as the 'Mining Charter', gives effect to section 100 of the MPRDA.[116] The Charter aims to:

- Promote equitable access to mineral resources;
- Substantially and meaningfully expand opportunities for historically disadvantaged South Africans to enter the mining and minerals industry and to benefit from the exploitation of mineral resources;
- Utilise and expand the existing skills base for the empowerment of historically disadvantaged South Africans and to serve the community;
- Expand the skills base of historically disadvantaged South Africans in order to serve the community;
- Promote employment and advance the social and economic welfare of mining communities and the major labour-sending areas;
- Promote beneficiation of South Africa's mineral commodities; and
- Promote sustainable development and growth of the mining industry.[117]

2.13.1 Record-keeping requirements

The Charter does not provide for an independent duty to keep records. However, it is designed to facilitate the application of the MPRDA, and, consequently, the duties established in terms of the MPRDA will apply to the Charter as well.

2.13.2 Information held and disclosure requirements

The various elements of the Charter relate to ownership, procurement, enterprise development,

beneficiation, employment equity, human resources development, mine community development, housing and living conditions, sustainable development, and growth of the mining industry. Section 2.9 provides that all companies in the mining industry must report their level of compliance with all elements in the Charter annually to the Minister of Mineral Resources as provided for in section 28(2)(c) of the MPRDA. Non-compliance with such provision is deemed a breach of the MPRDA.[118]

The Charter does not state to whom the annual reports should be disclosed, but the Minister of Mineral Resources is responsible for adjudication of the scorecard contained in the Charter.

2.14 Disclosure on corporate governance: King III Code[119]

2.14.1 Record-keeping requirements

The Code does not provide for a clear duty to keep records, but this is implied in the broad disclosure framework developed in the Code.

2.14.2 Information held and disclosure requirements

Successive King Reports have highlighted an approach to governance involving accountability to stakeholders.[120] According to the King III Report:

> *In the 'enlightened shareholder' approach the legitimate interests and expectations of stakeholders only have an instrumental value. Stakeholders are only considered in as far as it would be in the interests of shareholders to do so. In the case of the 'stakeholder inclusive' approach* (which is now recommended in the King III Report)*, the board of directors considers the legitimate interests and expectations of stakeholders on the basis that this is in the best interests of the company, and not merely as an instrument to serve the interests of the shareholder.*[121]

The King III Report led to the introduction of a stock exchange listing requirement for all companies listed primarily on the JSE to prepare integrated reports. The third report on corporate governance in South Africa published in 2009 after the enactment of the Companies Act 71 of 2008 established a code of principles and practices that has been adopted by the JSE as a listing requirement on an 'apply-or-explain' basis to the extent that the Code is relevant to the objectives of the present research.

The King Code recognises the importance of stakeholders in the reporting process by acknowledging that, 'while the first priority of stakeholders of a company is the quality of the company's products or services, the second priority is the trust and confidence that the stakeholders have in the company'.[122] The Code therefore recommends transparent and effective communication with stakeholders.

As a result, the Code introduces a 'stakeholder-inclusive' approach, where the 'legitimate interests and expectations of stakeholders are considered when deciding in the best interests of the company'.[123] In effect this means that the shareholder is not preferred over the stakeholder and it is expected that this level of disclosure will allow stakeholders to comment, and challenge the board, on the quality of its governance. The integrated report recommended in the Code is expected to 'have sufficient information to record how the company has both positively and negatively impacted on the economic life of the community in which it operated during the year under review, often categorised as environmental, social and governance issues (ESG)'.[124]

In effect this means that the shareholder is not preferred over the stakeholder and it is expected that this level of disclosure will allow stakeholders to comment, and challenge the board, on the quality of its governance.

In terms of the Code's adequacy in responding to stakeholders, it recommends the disclosure of 'complete, timely, relevant, accurate, honest and accessible information' while having regard to legal and strategic considerations.[125] It proposes, further, that 'communication with stakeholders should be in clear and understandable language', and that 'the board should consider disclosing in the integrated report the number [of,] and reasons for[,] refusals of requests [for] information that were lodged with the company in terms of the Promotion of Access to Information Act, 2000'.[126]

Governance element 9 of the Code deals with integrated reporting and disclosure. It provides that the integrated report should: '... be prepared every year; ... convey adequate information regarding the company's financial and sustainability performance; and ... focus on substance over form'.

The Code recommends that sustainability[127] reporting and disclosure should be integrated with the company's financial reporting, and that both sustainability reporting and disclosure should be independently assured.

2.15 Disclosure on corporate governance: Socially Responsible Investment (SRI) Index[128]

2.15.1 Record-keeping requirements

This is a governance principle introduced by the JSE that does not impose a duty to keep records.

2.15.2 Information held and disclosure requirements

The JSE launched the SRI Index in South Africa in 2004 in order to:

- *identify those companies listed on the JSE that integrate the principles of the triple bottom line[129] and good governance into their business activities;*
- *provide a tool for a broad holistic assessment of company policies and practices against globally aligned and locally relevant corporate responsibility standards;*
- *serve as a facilitation vehicle for responsible investment for investors looking for non-financial risk variables to include in investment decisions, as such risks do carry the potential to have significant financial impacts; and*
- *contribute to the development of responsible business practice in South Africa and beyond.[130]*

Also focusing on the ESG model, in relation to the environment, companies are expected to: work to reduce and control their direct negative environmental impacts; promote awareness of significant direct and indirect impacts; work to use natural resources in a sustainable manner; and commit to risk reduction, reporting and auditing.[131]

According to the SRI Index, 'the fundamental principle [of] reporting is to provide stakeholders with access to information about aspects of the company's business activities within a reasonable time period, ensuring that relevant information is available on a reasonably regular basis'.[132]

2.16 Disclosure of operational information: National Environmental Management Act 107 of 1998 (NEMA)[133]

2.16.1 Record-keeping requirements

The 2014 Environmental Impact Assessment Regulations require a competent authority to keep a register of all applications received, and records of all decisions in respect of environmental authorisations.[134]

2.16.2 Information held and disclosure requirements

NEMA recognises the importance of transparency in environmental decision-making and in promoting public participation in environmental governance. The Act also recognises the right to access information and protects whistle-blowers.[135] Section 30, which relates to emergency situations and

NEMA recognises the importance of transparency in environmental decision-making and in promoting public participation in environmental governance.

hazardous incidents, prescribes that the relevant authority must publish a report on the situation or incident as soon as reasonably possible.[136] The report must be made available to the public, the Director-General, the police service, the relevant fire-prevention service, the relevant provincial head of government, and all persons affected by the situation or incident.

While Section 31Q of the NEMA recognises the confidentiality of personal information, it excludes such confidentiality where the information relates to: environmental quality or the state of the environment; any risks posed to the environment, public safety, health and the well-being of people; or compliance with, or contraventions of, any environmental legislation.

The 2014 Environmental Impact Assessment (EIA) Regulations require a competent authority to keep a register of all applications for environmental authorisations received, as well as records of all decisions in respect of such authorisations.[137] There is a significant emphasis in the EIA Regulations on mandatory compliance auditing and reporting. An environmental authorisation must specify the frequency of auditing compliance with the conditions of the authorisation, the environmental management programme, and the closure plan.[138] The purpose of the compliance audit is not only to determine whether mitigation requirements as set out in these instruments are being met, but also whether such requirements are in themselves sufficient to protect the environment. Compliance auditing must take place at intervals not exceeding five years.[139] Regulation 26(h) is the crux of the EIA disclosure regime. Significantly, it requires that the environmental authorisation, environmental management programme, independent assessments of financial provision for rehabilitation and environmental liability, closure plans, audit reports, and compliance and monitoring reports be made available for inspection and copying: (a) at the site of the authorised activity; (b) to anyone on request; and (c) where the holder of an environmental authorisation has a website, on such publicly accessible website.

2.17 Disclosure of operational information: National Environmental Management: Air Quality Act 39 of 2004[140]

2.17.1 Record-keeping requirements

The South African Weather Service hosts the South African Air Quality Information System (SAAQIS), which is intended to provide a common platform for managing air-quality information in South Africa. In line with the norms and standards for air-quality monitoring and information management set out in the National Framework for Air Quality Management in South Africa, data and reports from monitoring station owners are uploaded onto the SAAQIS. The National Atmospheric Emission Inventory System (NAEIS) is an Internet-based emissions reporting system for reporting greenhouse gases and other air pollutants and is a component of the SAAQIS. The information on the SAAQIS is available to the public.

2.17.2 Information held and disclosure requirements

A disclosure regime is currently being developed around the power of the Minister of Environmental Affairs to declare greenhouse gases priority air pollutants. This will ensure far more rigorous monitoring and reporting of greenhouse-gas emissions. The greenhouse-gas reporting system is, in turn, integrally linked to the proposed carbon tax, the latest legislative enactment in respect

of which is the Draft Carbon Tax Bill of November 2015. In January 2016, the Minister published the draft Declaration of Greenhouse Gases as Priority Air Pollutants.[141] In terms of the draft Declaration, six greenhouse gases (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride) are declared priority air pollutants. Persons directly emitting (i.e. Scope 1 emissions) more than 0.1 megatonnes of these gases annually measured in carbon dioxide equivalents or $CO_{2\text{-eq}}$ are required to prepare pollution-prevention plans. The draft National Pollution Prevention Plans Regulations,[142] in turn, indicate that only persons involved in undertaking (among others) coal mining, the production and/or refining of crude oil, the production and/or refining of natural gas, and the production of liquid fuels from coal or gas as a primary activity are required to prepare pollution-prevention plans. A pollution-prevention plan must include: details of the types of greenhouse gases emitted as a result of scheduled production processes; the total greenhouse-gas emissions from each production process measured as $CO_{2\text{-eq}}$ for the year; and details of the methodology used to monitor annual greenhouse-gas emissions.[143] This information, together with information on planned mitigation interventions, must be submitted to the Minister of Environmental Affairs for approval.[144]

In a parallel process, the Department of Environmental Affairs is implementing carbon budgets, as envisaged in the National Climate Change Response White Paper.[145] In May 2014, the Department of Environmental Affairs published a note on the Carbon Budget Design for the first implementation phase of 2016 to 2020.[146] As it is currently being implemented in the first phase, the carbon-budgeting process is a mechanism for companies to report on their Scope 1 greenhouse-gas emissions against an emissions allocation determined on the basis of current operations and currently planned expansion. In this context, 'company' means any person undertaking a greenhouse-gas emission activity and includes: the holding company, corporation or legal entity registered in South Africa; all subsidiaries and legally held operations, including joint ventures and partnerships where the company has a controlling interest or where it has been nominated as the entity responsible for greenhouse-gas reporting; and all the facilities generally over which the company has control. At present, carbon budgeting is only being applied to companies engaged in primary activities for which a pollution-prevention plan is required.

In addition to these two processes, draft National Greenhouse Gas Emission Reporting Regulations were published in June 2015.[147] The draft Regulations envisage that 'data providers' will annually report company-level emissions data to the NAEIS. Data providers must ensure that they report on the total greenhouse-gas (GHG) emissions arising from each of the activities set out in an Annexure to the Regulations. Currently, the list of activities triggering GHG reporting is much broader than the list of processes initiating the submission of pollution-prevention plans or the preparation of carbon budgets. For example, the Annexure includes a reference to the very broad category of 'mining and quarrying'. Whether this list will be trimmed down to reflect the narrower foci of the Pollution Prevention Plans Regulations remains to be seen.

2.18 Disclosure of operational information: National Environmental Management: Waste Act 59 of 2008[148]

2.18.1 Record-keeping requirements

Section 40 of the Act provides that 'the Minister must keep a national contaminated land register of investigation areas that includes information on':

- The owners and any users of investigation areas;
- The location of investigation areas;
- The nature and origin of the contamination;
- Whether an investigation area –
  - » is contaminated, presents a risk to health or the environment, and must be remediated urgently;
  - » is contaminated, presents a risk to health or the environment, and must be remediated within a specified period;
  - » is contaminated and does not present an immediate risk, but measures are required to address the monitoring and management of that risk;
  - » or is not contaminated;

A pollution-prevention plan must include: details of the types of greenhouse gases emitted as a result of scheduled production processes; the total greenhouse-gas emissions from each production process measured as $CO_{2\text{-eq}}$ for the year; and details of the methodology used to monitor annual greenhouse-gas emissions.

- The status of any remediation activities on investigation areas; and
- Restrictions of use that have been imposed on investigation areas.

2.18.2 Information held and disclosure requirements

The Act also provides for a public-participation process regarding the application for a licence, but no requirement is laid down for public access to the licence. Where a waste-management plan has been requested by the state from an entity, public access to the plan is permitted.[149] There is also a general duty on manufacturers of products which may result in the generation of hazardous waste to inform the public of the impact of that waste on their health and the environment.[150] Chapter 6 of the Act provides for the establishment of a national waste-information system, which may include information on compliance with the Act. Moreover, the information can be requested subject to the PAIA process.[151]

2.19 Disclosure of operational information: National Water Act 36 of 1998[152]

2.19.1 Record-keeping requirements

While establishing a duty to keep records, the Act does not extend the duty to keep records to companies.

2.19.2 Information held and disclosure requirements

The Act establishes the National Water Information System, which should be publicly accessible. However, the Act largely imposes obligations on the state rather than the private sector in relation to the public availability of information. The Act also provides for the public release, by the Minister, of information relating to potential risks (including floods, etc.), and for making certain other information available to the public.[153]

Section 141 provides that the Minister may require information to be made available to the Department for any national information system, while section 142 states that 'information contained in any national information system established in terms of this Chapter must be made available by the Minster, subject to any limitations imposed by law, and the payment of a reasonable charge determined by the Minister'.

2.20 Disclosure of information to employees: Mine Health and Safety Act 29 of 1996[154]

2.20.1 Record-keeping requirements

The Act and its Regulations provide for a duty to keep certain records consistent with complying with the objectives of the Act to promote safety in mines.

2.20.2 Information held and disclosure requirements

The Act deals with the right of employees to access information dealing with safety, health, hygiene

measurements and the medical records of employees. It also provides for notification of incidents related to accidents in mines.[155]

2.21 Disclosure to the public: Consumer Protection Act 68 of 2008[156]

2.21.1 Record-keeping requirements

The Act provides for a duty to keep records that are consistent with fulfilling the objectives of the Act.

2.21.2 Information held and disclosure requirements

The Act sets out to 'improve access to, and the quality of[,] information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs'.[157] Chapter 2, Part D, of the Act establishes the right to disclosure and information. Section 22 provides for the consumer's right to information in plain and understandable language. Information must be made available to the consumer of a company's products.[158] The Act applies to all transactions within South Africa, subject to exemptions not falling within the scope of this report, as well as to the promotion of any goods or services, or of the supplier of any goods or services, within South Africa, unless those goods or services could not reasonably be the subject of a transaction to which the Act applies.[159]

2.22 Disclosure of operational information: Financial Markets Act 19 of 2012[160]

2.22.1 Record-keeping requirements

Section 19 of the Act requires that, when a document of title relating to listed securities is held by an authorised user, such a person must ensure that a record is kept of the details and information in the document in order that such information may be available for later inspection.

2.22.2 Information held and disclosure requirements

In terms of section 11 of the Act, an exchange must prescribe various listing requirements, including requirements relating to the standards of disclosure and corporate governance that issuers of listed securities must meet and which are binding on the securities issuer.[161] An exchange must submit all intended conditions and listing requirements to the Registrar for approval, and any amendments must be published in the *Government Gazette*.[162]

Under section 14 of the Act, an exchange may require an issuer of listed securities to disclose to it any information held by such issuer that is relevant to fulfilling the objectives of the Act. Further, an exchange may require the issuer to disclose any relevant information to the registered holders of the securities within a set period. Section 14(2) states that, 'when an issuer discloses information [...] to the registered holders of securities that may influence the price of those securities, the issuer must at the same time make the information available to the public'.

Section 25 of the Act requires that transactions in respect of listed securities resulting in a change of beneficial ownership must be reported to the Registrar. The Registrar may prescribe the information required for reporting and the time frames and manner in which the report must be submitted.

Section 25(3) requires that the Registrar must disclose information about a reported transaction to the exchange on which the relevant securities are listed. The section also provides that the Registrar may disclose such information to the public if he or she believes such disclosure would further the objectives of the Act.

Section 69 provides that market infrastructures (defined as licensed central securities depositories, exchanges, trade repositories and clearing houses) are required to submit an annual report to the Registrar four months after the end of the previous financial year. The report must contain information

relating to the particular market infrastructure, audited financial statements, and other details as prescribed by the Registrar.

Section 70 requires the market infrastructure to furnish the Registrar with all notices, minutes and documents that are furnished to members of the controlling body of the market infrastructure.

Information obtained by market infrastructures in the fulfilment of their responsibilities under the Act must remain confidential, according to section 73, except:

- Where the person to which the confidential information relates has consented to disclosure;
- Disclosure is permitted in terms of the law, during legal proceedings, or is authorised by a court; or
- Disclosure is necessary to carry out the functions of the market infrastructure as provided for by law.

2.23 Disclosure of operational information: Compensation for Occupational Injuries and Diseases Amendment Act 61 of 1997[163]

2.23.1 Record-keeping requirements

Section 81 of the Act requires employers to keep records pertaining to the earnings and other particulars of all employees.

2.23.2 Information held and disclosure requirements

Chapter IX of the Act deals with the duties of employers with regard to occupational injuries and diseases. An employer, defined broadly within the Act as any person or body carrying on business in South Africa, must provide the Compensation Commission (established under the Act) with the prescribed particulars of the business. Further, the Commission can request any additional information from the company as required. Such particulars would likely include various operational and risk-management information.

If there are any changes in the particulars of the business submitted to the Commission, such changes must be furnished to the Commission within seven days.[164] The information pertaining to the earnings and other particulars of employees is to be submitted as a register or on microfilm.

By the end of each financial year (31 March), all employers must submit to the Commission a return in the prescribed form detailing all monies paid to all employees for that financial year.[165]

The oversight body is the Compensation Commission.

2.24 Disclosure of financial information: National Payment System Act 78 of 1998[166]

2.24.1 Record-keeping requirements

Notwithstanding anything to the contrary contained in any other law relating to the retention of records, section 13 of the Act requires the South African Reserve Bank (SARB) to retain all relevant records for a period of five years from the date of each particular record.

2.24.2 Information held and disclosure requirements

Section 10 of the Act relates to information held by the SARB with regard to any payment or settlement systems relating to the Act. Section 10 provides that the SARB has access to any necessary information relating to such systems, and that such information is confidential. Section 10(3) states that the SARB may disclose information held by it:

- When required by law;
- For the purpose of legal proceedings;
- When required by a court;

- If the information is considered by the SARB to be in the public interest; or
- If the information is already publicly available.

2.25 Disclosure of financial information: Value-Added Tax Act 89 of 1991[167]

2.25.1 Record-keeping requirements

Section 55 of the Act provides that every vendor must keep books of account to enable the Commissioner to satisfy himself or herself that the vendor has complied with the relevant requirements. These requirements include a record of all goods and services supplied by or to the vendor showing the goods and services, the rate of tax applicable to the supply and the suppliers or their agents, in sufficient detail to enable the goods and services, the rate of tax, the suppliers or the agents to be readily identified by the Commissioner, and all invoices, tax invoices, credit notes, debit notes, bank statements, deposit slips, stock lists and paid cheques relating thereto.

2.25.2 Information held and disclosure requirements

Section 6 of the Act requires information collected and retained to be subject to secrecy, except where: (a) it may contain evidence of an offence in terms of the Act; (b) the information pertains to a serious safety and/or environmental risk; or (c) where the public interest outweighs the harm contemplated to the taxpayer.

SARS can request any person to furnish any information (whether orally or in writing) or documents required for the administration of the Act.[168] SARS is required to obtain full information relating to: (a) the supply chain and services of all vendors and their enterprises; (b) the importation of any goods by any person into South Africa; and (c) the supply of any imported services by anyone.[169] SARS is additionally required to verify the information contained in any return, financial statement, document, declaration of facts or valuation submitted by any taxpayer.[170] There is no requirement for the information to be made public.

2.26 Disclosure of ownership information: Deeds Registries Amendment Act 34 of 2013[171]

2.26.1 Record-keeping requirements

The Act provides for the Registrar to keep a record of all notices, returns, statements or orders of court lodged with him or her in terms of any law.[172] In addition, the Registrar must keep a register of all records necessary for the purpose of implementing the provisions of the Act.[173]

2.26.2 Information held and disclosure requirements

Public registers must be made available for public inspection and copying.[174]

2.27 Financial disclosures by traditional authorities in South Africa

2.27.1 Record-keeping requirements

The MPRDA, in Schedule II, prescribes that any person who or community that receives any consideration or royalty must keep the prescribed records and must submit annual audited financial statements.

In line with the applicable provincial legislation, the traditional councils are expected to keep proper records, to have their financial statements audited, to disclose receipt of gifts and to adhere to the Code of Conduct.[175]

Communities that receive royalties are expected to furnish the Minister, on an annual basis and as required by the Minister, with such particulars regarding the usage and disbursement of the consideration or royalty.

2.27.2 Information held and disclosure requirements

Communities that receive royalties are expected to furnish the Minister, on an annual basis and as required by the Minister, with such particulars regarding the usage and disbursement of the consideration or royalty.[176]

The national Traditional Leadership and Governance Framework Act 41 of 2003[177] provides that a Premier of a province in South Africa (a subnational government) can recognise a traditional community, and that traditional community must establish a traditional council in line with the principles set out in the provincial legislation.[178] A guiding principle concerning the roles and functions of traditional leaders includes the management of natural resources.[179] The traditional councils are, as already indicated, expected to disclose receipts.[180] The Act further provides that a traditional council must 'meet at least once a year with its traditional community to give account of the activities and finances of the traditional council and levies received by the traditional council'.[181] The Code of Conduct applicable to traditional leaders includes the requirement that gifts received must be disclosed as well as the requirement that traditional leaders must perform their functions in a transparent manner.[182] The Minister of Mineral Resources exercises oversight over royalties received by communities.

Some of the applicable provincial legislation is the North West Traditional Leadership and Governance Framework Act of 2005 and the Northern Cape Traditional Leadership, Governance and Houses of Traditional Leaders Act of 2007, which provide in section 30(1) and section 26(1), respectively, that 'the Premier shall cause to be opened for each traditional council a trust account, into which shall be paid such amounts … from which all expenditure incurred in connection with any matter specified within the duties and functions of the traditional community concerned shall be met'.

2.28 Accessing information online: South African Mineral Resources Administration (SAMRAD)[183]

With regard to obtaining public access to mining licences and other related information, the Department of Mineral Resources has established an online portal, SAMRAD, for ease of access to such documents. The extent to which this online system has generated industry transparency is, however, questionable, with numerous accounts of system backlogs and failure to provide requesters with the requested information.

2.29 Summary: Confidentiality provisions and commercially sensitive information

- **The main piece of legislation governing the disclosure of information by the private sector is PAIA. This Act does not, however, include a specific definition of 'commercial information'. Section 68 provides that a private body may refuse a request for commercial information if the record in question includes the following broad categories of information: 'trade secrets >**

of the private body'; 'financial, commercial, scientific or technical information' which, if disclosed, would cause commercial or financial harm to the company; information that would put the company at a 'disadvantage in contractual negotiations' or 'prejudice commercial competition'; or a computer program, as defined, of the company. PAIA also requires that commercial information of a third party not be disclosed. Despite the broad categories of information included in PAIA under the commercial-information exemption from disclosure, all information requests are subject to a public-interest test, as discussed earlier. This test must be applied by the information officer handling the information request. Simply stated, the test lays down that, if the record in question contains information relating to an environmental or public-safety risk, it will be in the interest of the public for such information to be disclosed.

- **The Companies Act and the MPRDA are aligned with PAIA with regard to the disclosure of commercial information. The MPRDA, however, prohibits disclosures where the information or data has been supplied in confidence.[184] All information in the possession of the Council for Geoscience in terms of reconnaissance and prospecting must be kept confidential until such time as the right, permit or permission has lapsed, is cancelled or is terminated, or the area to which such right, permit or permission relates has been abandoned or relinquished.**

- **The MPRRA provides that the records held in terms of section 8 are not publicly available and are governed by the provisions on preservation of secrecy in section 19, which provisions are similar to those in the Income Tax Act.[185]**

- **The Tax Administration Act provides that information collected in terms of the Act may not be disclosed to anyone other than a SARS official. However, section 71 of the Act refers to criminal, public-safety or environmental matters that can be disclosed by a senior SARS official by order of a judge.**

- **The Gas Act allows applicants for licences[186] to request confidential treatment of commercially sensitive information, subject to the agreement of the Gas Regulator.[187] Similarly, with regard to the Petroleum Pipelines Regulation, the NERSA will make decisions regarding requests by companies to keep certain information confidential.**

- **In terms of the Financial Markets Act, information obtained by market infrastructures in the fulfilment of their responsibilities under the Act must, in terms of section 73, remain confidential, except: (a) where the person concerned has consented to disclosure; (b) disclosure is permitted in terms of the law, during legal proceedings, or is authorised by a court; or (c) disclosure is necessary to carry out the functions of the market infrastructure as provided for by law.**

- **Similarly, section 10 of the National Payment System Act deals with information held by the SARB with regard to any payment or settlement systems relating to the Act, provides that the SARB has access to any necessary information relating to such systems, and that such information is necessarily confidential. Disclosure may occur only: (a) when required by law; (b) for the purpose of legal proceedings; (c) when required by a court; (d) if the information is considered by the SARB to be in the public interest; or (e) if the information is already publicly available.**

- **In terms of the Value-Added Tax Act, information collected and retained must be subject to secrecy, except where: (a) it may contain evidence of an offence in terms of the Act; (b) the information pertains to a serious safety and/or environmental risk; or (c) the public interest outweighs the harm contemplated to the taxpayer.**

Endnotes

1 This includes citizens and foreigners.

2 PAIA was the first freedom-of-information legislation in Africa to recognise the extension of this right to private bodies. Since then, Kenya has recognised the right in its 2010 Constitution in Article 35, Nigeria has done so in its Freedom of Information Act of 2011, and the extension of the right to private bodies has also been recognised in the 2013 African Union (AU) Model Law on Access to Information for Africa. However, the common challenges faced in exercising this right as against the private sector are satisfying the conditionality test of demonstrating that the information requested is necessary to protect a right, as well as the reliance on commercial confidentiality by companies as a reason not to grant access to records.

3 Available at: http://www.dfa.gov.za/department/accessinfo_act.pdf.

4 Section 21 of PAIA.

5 Section 90 of PAIA.

6 In terms of PAIA, 'private body' means: (a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity; (b) a partnership that carries or has carried on any trade, business or profession; or (c) any former or existing juristic person, but excluding a public body.

7 Section 50 of PAIA. The grounds for refusal are: the protection of the privacy of a third party who is a natural person; the protection of the commercial information of a third party; the protection of certain confidential information of a third party; the protection of the safety of individuals and the protection of property; the protection of records privileged from production in legal proceedings; the commercial information of a private body; and the protection of the research information of a third party and private body.

8 Section 70 of PAIA.

9 Mining companies with an annual turnover equal to or exceeding R7 million and that employ 50 or more employees are expected to comply with the requirement regarding the submission of a manual, while gas companies that employ 50 or more people and have an annual turnover equal to or in excess of R10 million are also expected to comply with such requirement (Government Notice No. 34914). The provision regarding PAIA Manuals of private bodies has been amended by the Protection of Personal Information Act but is not yet in force. Instead, PAIA Manuals must be made available on a company's website and at its offices (see the Schedule to the Protection of Personal Information Act 4 of 2013, 'Laws amended by section 10').

10 Notably those companies that employ fewer than 50 employees and whose annual turnover is less than the stated amount per industry.

11 The extension expires on 31 December 2020 (*Government Gazette* No. 39504, Government Notice No. 1222) and was introduced to deal with the administrative constraints that the SAHRC had experienced in receiving PAIA Manuals; hence the requirement to submit manuals was limited to large companies only. The new Protection of Personal Information Act has removed the requirement for submission of manuals by all private companies, but still requires them to develop such manuals, which should be publicly available. See section 12 of the Protection of Personal Information Act 4 of 2013; Available at: http://www.justice.gov.za/legislation/acts/2013-004.pdf.

12 See sections 39 to 54 of the Protection of Personal Information Act: Pending the establishment of the Regulator, the SAHRC will continue to exercise its powers under PAIA. The Regulator has far broader powers than the SAHRC, which powers include search and seizure, as well as enforceable orders against non-complying institutions. This is a welcome improvement to the current powers of the SAHRC, which do not include powers of enforcement as far as violations of access-to-information rights are concerned.

13 Available at: http://www.justice.gov.za/legislation/acts/2008-071amended.pdf.

14 Section 50 of the Companies Act provides as follows:

> *(1) Every company must – (a) establish or cause to be established a register of its issued securities in the prescribed form; and (b) maintain its securities register in accordance with the prescribed standards. (2) As soon as practicable after issuing any securities a company must enter or cause to be entered in its securities register, in respect of every class of securities that it has issued – (a) the total number of those securities that are held in uncertificated form; and (b) with respect to certificated securities – (i) the names and addresses of the persons to whom the securities were issued; (ii) the number of securities issued to each of them; (iii) the number of, and prescribed circumstances relating to, any securities – (aa) that have been placed in trust …; or (bb) whose transfer has been restricted; (iv) in the case of … – (aa) the number of those securities issued and*

outstanding; and … (bb) the names and addresses of the registered owner of the security and any holders of a beneficial interest in the security; and (v) any other prescribed information.

15 'Beneficial interest' in relation to a company's securities means the right or entitlement of a person, by way of ownership, agreement, relationship or otherwise, alone or together with another person to: (a) receive or participate in any distribution in respect of the company's securities; (b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or (c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities.

16 See sections 26(4) and 26(6) of the Companies Act 71 of 2008.

17 Section 30 of the Companies Act 71 of 2008. All the companies included within the survey in Part 9 are, however, listed public companies.

18 See section 30 of the Companies Act 71 of 2008.

19 Ibid.

20 A social and ethics committee has the following functions:

(a) To monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters relating to –
  (i) social and economic development, including the company's standing in terms of the goals and purposes of –
    (aa) the 10 principles set out in the United Nations Global Compact Principles;
    (bb) the OECD (Organisation for Economic Co-operation and Development) recommendations regarding corruption;
    (cc) the Employment Equity Act; and
    (dd) the Broad-based Black Economic Empowerment Act;
  (ii) good corporate citizenship, including the company's –
    (aa) promotion of equality, prevention of unfair discrimination, and reduction of corruption;
    (bb) contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and
    (cc) record of sponsorship, donations and charitable giving;
  (iii) the environment, health and public safety, including the impact of the company's activities and of its products or services;
  (iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws; and
  (v) labour and employment, including –
    (aa) the company's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and
    (bb) the company's employment relationships, and its contribution toward the educational development of its employees;
(b) to draw matters within its mandate to the attention of the Board as occasion requires; and
(c) to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.

21 Available at: http://cer.org.za/wp-content/uploads/2014/02/MPRDA-28-of-2002.pdf.

22 Section 28 of the MPRDA.

23 'Regional Manager' means the officer designated by the Director-General as Regional Manager for a specified region.

24 'Council for Geoscience' means the Council established by the Geoscience Act 100 of 1993, which, among other functions, serves as the national custodian of all geoscientific information relating to the earth, the marine environment and geomagnetic space.

25 Sections 21 and 28 of the MPRDA.

26 Social and labour plans, which are a prerequisite for the granting of mining or production rights under the MPRDA, require applicants for mining and production rights to develop and implement comprehensive programmes to, among other things, promote employment and the advancement of the social and economic welfare of all South Africans while ensuring the economic growth and socio-economic development of the areas in which they are operating, as well as the areas from which the majority of the mining workforce is sourced. Social and labour plans are not automatically publicly available and are subject to request in terms of PAIA. Section 25 of MPRDA also provides that the right of registration of mining companies must be lodged with the Mining and Petroleum Titles Registration Office.

27 Such information encompasses: the prescribed monthly returns, together with accurate and correct information and data; an audited annual financial report or financial statements reflecting the balance sheet and profit and loss account; an annual report detailing the extent of the holder's compliance with

the objectives of the MPRDA to achieve transformation and with the Charter developed by the Minister on socio-economic empowerment; and compliance by the company with its social and labour plan.

28 Any data, information or reports lodged with the Council for Geoscience must be kept confidential until such time as the right, permit or permission has lapsed, is cancelled or is terminated, or the area to which such right, permit or permission relates has been abandoned or relinquished.

29 See sections 10, 16, 22 and 27 of the MPRDA.

30 Centre for Environmental Rights, 'Turn on the floodlights: Trends in disclosure of environmental licences and compliance data,' 2012.

31 CCT 39/10 ZACC.

32 See the news report on the Presidency's decision to refer the MPRDA Amendment Bill back to Parliament based on concerns regarding its constitutionality and inadequate consultation on the Bill. Available at: http://www.polity.org.za/article/social-aspects-of-mprda-likely-unconstitutional-presidency-explains-2015-01-26 [accessed 3 February 2015].

33 Regulations 75, 76 and 77 of the Mineral and Petroleum Resources Development (MPRD) Regulations, *Government Gazette* No. 26275: Available at: http://cer.org.za/wp-content/uploads/2014/02/Regualtions.pdf.

34 See the MPRD Regulations.

35 Section 30.

36 Available at: http://www.treasury.gov.za/legislation/acts/2008/Royalty%20Admin%20Act%2029%20of%202008.pdf.

37 Section 2 of the MPRRA.

38 Section 5 of the MPRRA.

39 Section 6 of the MPRRA. The minimum royalty percentage in the case of refined minerals is 0.5%, and the maximum royalty percentage is 5%. In the case of unrefined minerals, the minimum royalty percentage is 0.5%, and the maximum royalty percentage is 7%; see PricewaterhouseCoopers (PwC), 'Corporate income taxes, mining royalties and other mining taxes: A summary of rates and rules in selected countries,' 2012, p. 42. Available at: http://www.pwc.com/gx/en/energy-utilities-mining/publications/pdf/pwc-gx-miining-taxes-and-royalties.pdf.

40 Available at: http://www.into-sa.com/uploads/download/file/12/Income_Tax_Act__1962_.pdf.

41 See section 35 of the Income Tax Act, read with the definition of 'financial reporting standards'.

42 NEXIA SAB&T, *African tax guide 2014/2015*, p. 81. Available at: http://www.nexiasabt.co.za/upload/African_Tax_Guide.pdf.

43 PwC, 'Corporate income taxes, mining royalties and other mining taxes: A summary of rates and rules in selected countries,' 2012, p. 41.

44 M. Curtis, 'Mining and tax in South Africa: Costs and benefits,' Curtis Research, 2009. Available at: http://www.curtisresearch.org/SAfrica.MiningTax.Feb09.Curtis.pdf; section 110 of the Income Tax Act 58 of 1962.

45 PwC, 'Corporate income taxes, mining royalties and other mining taxes: A summary of rates and rules in selected countries,' 2012.

46 NEXIA SAB&T, *African tax guide 2014/2015*, p. 81.

47 Section 4 of the MPRRA.

48 See fn 66 re the minimum and maximum royalty percentages in respect of refined and unrefined minerals.

49 See section 19(2)(f).

50 See section 19(2)(g).

51 See sections 7(c) and 25(2)(g).

52 See section 86(2)(e).

53 According to SARS:

> *In 2007, the Minister of Finance announced that Secondary Tax on Companies would be replaced by Dividends Tax. Since then, legislation has been enacted to provide a legislative foundation for the implementation of Dividends Tax (refer to sections 64D to 64N of the Income Tax Act, 1962). The Dividends Tax legislation (as amended by the Taxation Laws Amendment Act, 2011, promulgated on 10 January 2012) became effective on 1 April 2012. Since then the legislation has been amended by the Tax Administration Laws Amendment Act, 2012 (sections 14 to 17) as well as the Taxation Laws Amendment Act, 2012 (sections 83 to 90).*

– see SARS, 'A quick guide to dividends tax'. Available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/DT-GEN-01-G03%20-%20A%20Quick%20Guide%20to%20Dividends%20Tax%20-%20External%20Guide.pdf.

54 Section 15(b) of the Income Tax Act 58 of 1962.

55 Section 15(a), read with section 36(11)(b), of the Income Tax Act 58 of 1962.
56 Ibid.
57 'Capital expenditure' means expenditure on shaft-sinking and mining equipment – section 36(11)(a) of the Income Tax Act 58 of 1962.
58 Section 15(a), read with section 36(11)(b), of the Income Tax Act 58 of 1962.
59 Regulations 75, 76 and 77 of the MPRD Regulations, *Government Gazette* No. 26275.
60 Sections 19, 22(c), 79(1)(c) and 83(1)(c) of the MPRDA.
61 Section 36(11)(d) of the Income Tax Act 58 of 1962.
62 Ibid.
63 Available at: http://www.lexisnexis.co.za/pdf/download-Tax-Adminstration-Act.pdf.
64 See section 69 of the Tax Administration Act 28 of 2011.
65 Means any transaction, operation, scheme, agreement or understanding.
66 The current public notice issued by the Commissioner has identified a very limited set of what is deemed to be an arrangement. This set includes only hybrid equity and debt instruments that are issued shares: see http://www.sars.gov.za/AllDocs/LegalDoclib/SecLegis/LAPD-LSec-TAdm-PN-2012-05%20-%20Notice%201108%20GG%2036038%2028%20December%202012.pdf [accessed 5 February 2015].
67 Means the 'person who is responsible for organising, designing, selling, financing or managing the reportable arrangement'.
68 Means a company or trust that directly or indirectly derives, or assumes that it derives, a tax benefit or financial benefit by virtue of an arrangement.
69 Section 37 of the Tax Administration Act 28 of 2011.
70 Section 38 of the Tax Administration Act 28 of 2011.
71 See section 36 of the Tax Administration Act 28 of 2011, as regulated in terms of the Securities Services Act 36 of 2004.
72 See sections 37 to 39 of the Tax Administration Act 28 of 2011.
73 Available at: http://www.treasury.gov.za/legislation/acts/2007/Diamond%20Export%20Levy%20(Administration)%20Act.pdf.
74 Section 2.
75 Available at: http://www.saflii.org/za/legis/num_act/mtraa2003383.pdf.
76 Regulations 64 to 68 of the Mining Titles Registration Act Regulations, *Government Gazette* No. 26352.
77 See sections 65 and 66 of the Mining Titles Registration Amendment Act 24 of 2003.
78 Available at: http://www.nersa.org.za/Admin/Document/Editor/file/Legislation/Piped%20Gas/Acts/Gas%20Act.pdf.
79 Section 8.
80 Section 15(1) provides that no person may, without a licence issued by the Gas Regulator, construct gas transmission, storage, distribution, liquefaction and re-gasification facilities or convert infrastructure into such facilities; operate gas transmission, storage, distribution, liquefaction or re-gasification facilities; or trade in gas.
81 Section 16 of the Gas Act. While the Act does not define 'commercially sensitive information', PAIA defines 'commercial information of a private body' as information that:

> *contains trade secrets of the private body; contains financial, commercial, scientific or technical information, other than trade secrets, of the private body, the disclosure of which would be likely to cause harm to the commercial or financial interests of the body; contains information, the disclosure of which could reasonably be expected to put the private body at a disadvantage in contractual or other negotiations; or to prejudice the body in commercial competition; or is a computer program owned by the private body, except insofar as it is required to give access to a record to which access is granted in terms of this Act.*

82 Section 4(11) of the Gas Act.
83 Section 16 of the Gas Act.
84 Section 8.
85 D4(b) of the Regulation.
86 D4(c)(v) of the Regulation.
87 Available at: https://www.jse.co.za/content/JSEEducationItems/Service%20Issue%2017.pdf.
88 8.1 of the JSE Listing Requirements.
89 8.2 of the JSE Listing Requirements.
90 8.3 of the JSE Listing Requirements.
91 8.11 of the JSE Listing Requirements.
92 8.12 of the JSE Listing Requirements.

93 8.60 of the JSE Listing Requirements.

94 8.63 of the JSE Listing Requirements.

95 These are assets of a non-mineral company that represent 25% or more of the total assets or revenue or profits of the company.

96 12.3 of the JSE Listing Requirements.

97 This is a public report prepared on mineral assets and projects. It is signed by the lead competent person and complies with the JSE Listing Requirements, and the SAMREC and SAMVAL Codes.

98 South African Code for Reporting of Exploration Results, Mineral Resources and Reserves.

99 South African Code for the Reporting of Mineral Asset Valuation.

100 12.2 of the JSE Listing Requirements.

101 12.8 of the JSE Listing Requirements.

102 12.9 of the JSE Listing Requirements.

103 Mineral companies must disclose the full name, address, professional qualifications and relevant experience (including the name and address of the body recognised by SAMREC of which the competent person is a member) of the lead competent person authorising publication of the information disclosed. Mineral companies must also include a statement that they have written confirmation from the lead competent person that the information disclosed is compliant with the SAMREC Code and that it may be published in the form and context in which it was intended (12.11 of the JSE Listing Requirements).

Other disclosure-compliance requirements for mining companies include a brief description of any exploration activities, exploration expenditures, exploration results and feasibility studies undertaken; a brief description of the geological setting and geological model; a brief description of the type of mining and mining activities, including a brief history of the workings or operations; production figures, including a comparison with the previous financial year/period; a statement that the company has the legal entitlement to the minerals being reported upon together with any known impediments; the estimated mineral resources and mineral reserves ('Mineral resource and reserve statement'); a description of the methods and the key assumptions and parameters by which the mineral resources and mineral reserves were calculated and classified; a comparison of the mineral reserve and mineral resource estimates with the previous financial year/period's estimates, together with explanations of material differences; whether or not the inferred mineral resource category has been included in feasibility studies and, if so, the impact of such inclusion; any material risk factors that could impact on the 'Mineral resource and reserve statement'; a statement by the directors on any legal proceedings or other material conditions that may impact on the company's ability to continue mining or exploration activities, or an appropriate negative statement; appropriate locality maps and plans; and a summary of environmental management and funding (12.11 of the JSE Listing Requirements).

For exploration companies' annual disclosure requirements, in addition to the above, the following need to be included: summary information of previous exploration work done by other parties on the property; summary information on the data density and distribution; exploration results not incorporated in the 'Mineral resource and reserve statement', including the following, where applicable, or a qualified negative statement: the relationship between mineralisation true widths and intercept lengths; data and grade-compositing methods and the basis for mineral-equivalent calculations (stand-alone); for polymetallic mineralisation or multicommodity projects, separate identification of the individual components; the representivity of reported results; other substantive exploration data and results; comment on future exploration work; the basic tonnage/volume, grade/quality and economic parameters for the exploration target; and sample and assay laboratory quality-assurance and quality-control procedures (12.11 of the JSE Listing Requirements).

104 Also described as beneficial 'see-through' basis. 'Beneficial' in relation to: any interest in a security means the de facto right or entitlement to directly receive the income payable in respect of that security and/or to exercise or cause to be exercised, in the ordinary course of events, any or all of the voting, conversion, redemption or other rights attaching to that security; any other interest means the obtaining of any benefit or advantage, whether in money, in kind or otherwise, as a result of the holding of that interest; and/or in respect of the interests described here means the de facto right or entitlement to dispose or cause the disposal of the company's securities or any part of a distribution in respect of the securities (12.11 of the JSE Listing Requirements).

105 12.11 of the JSE Listing Requirements.

106 Integrated reports are recommended by the King III Code on Corporate Governance in order to help an investor to make a better assessment of:

the economic value of a company which requires companies to report on the value of matters not accounted for in their financial reporting such as future earnings, brand, goodwill, the quality of its

board and management, reputation, strategy and other sustainability aspects as well as the quality of the company's risk management and whether it has considered the sustainability issues pertinent to its business.

2009 King Code on Corporate Governance, p. 12. The report specifically defines 'integrated reporting' as 'a holistic and integrated representation of the company's performance' – 2009, King Code on Corporate Governance, p. 54.

107 Interview conducted with the General Manager, Issuer and Regulation Division, JSE, 1 December 2014.

108 J. Atkins & W. Maroun, 'South African institutional investors: Perceptions of integrated reporting,' Association of Chartered Certified Accountants, 2014. 'Stakeholder' is defined in the Code as 'any group affected by and affecting the company's operations'.

109 See p. 5 of the SAMREC Code.

110 Ibid.

111 See p. 68 of the SAMVAL Code.

112 Ibid.

113 See p. 73 of the SAMVAL Code.

114 Available at: http://www.dmr.gov.za/mining-charter.html.

115 *Government Gazette* No. 26661 of 2004, as amended in September 2010.

116 The Mining Charter comprises regulations that give effect to the objectives of the MPRDA. The amendment process involves Regulations being developed by the responsible Minister in consultation with relevant stakeholders.

117 See the objectives of the Mining Charter.

118 Section 3 of *Government Gazette* No. 26661 of 2004. A breach of the Charter could lead to the suspension or cancellation of an existing right, permit or permission. See section 47 of the MPRDA.

119 The third report on corporate governance in South Africa was developed after the Companies Act 71of 2008 was passed and after changes in international governance trends emerged. The report was compiled by the King Committee and applies to all entities regardless of the manner and form of incorporation or establishment, and whether in the public sector, private sectors or non-profit sectors. The Code applies to entities incorporated in and resident in South Africa.

120 Institute of Directors of Southern Africa, 'King Code of Governance for South Africa,' 2009: Available at: http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/94445006-4F18-4335-B7FB-7F5A8B23FB3F/King_Code_of_Governance_for_SA_2009_Updated_June_2012.pdf.

121 Ibid, p. 12.

122 2009 Code of Governance Principles, p. 8.

123 Ibid.

124 Ibid.

125 Section 8.5.1 of the Code.

126 Ibid.

127 The report defines 'sustainability' as follows:

Sustainability of a company means conducting operations in a manner that meets existing needs without compromising the ability of future generations to meet their needs. It means having regard to the impact that the business operations have on the economic life of the community in which it operates. Sustainability includes environmental, social and governance issues.

Institute of Directors of Southern Africa, King Code of Governance for South Africa, 2009, p. 61.

128 Only publicly available information is considered in the assessment, which consists of two phases: 'scrutiny of most recent publicly available material such as annual reports and company websites; and feedback to preliminary profiles by the company and/or completion of surveys where necessary to clarify research or provide further public information.' In addition, to qualify for inclusion in the SRI assessment:

a company must meet the required number of indicators as set out in each individual area of measurement. In some instances, the indicators are split between core and desirable. Core indicators cover elements that companies should have as a minimum, while desirable indicators are aspirational or advanced, and intended to guide companies to identify all relevant issues they need to address.

JSE, 'SRI Index: Background and criteria,' 2014, p. 2. Available at: https://www.jse.co.za/content JSERulesPoliciesandRegulationItems/Background%20and%20Criteria%202014.pdf [accessed 20 January 2015].

129 These are environmental, social and economic sustainability issues, with good corporate governance underpinning each: Ibid.

130 JSE, 'SRI Index: Background and criteria,' 2014, p. 2.

131 Ibid, p. 4.
132 Ibid.
133 Available at: http://cer.org.za/wp-content/uploads/2010/03/107-of-1998-National-Environmental-Management-Act_2-Sep-2014-to-date.pdf.
134 Regulation 5 of Government Notice No. 733 of 2014.
135 See section 31.
136 See section 10.
137 Regulation 5 of Government Notice No. 733 of 2014.
138 Regulation 26(e) of Government Notice No. 733 of 2014.
139 Ibid.
140 Available at: https://www.environment.gov.za/sites/default/files/legislations/nema_amendment_act39.pdf.
141 *Government Gazette* No. 39578, Government Notice No. 6 of 8 January 2016.
142 *Government Gazette* No. 39578, Government Notice No. 5 of 8 January 2016.
143 Regulation 4 of Government Notice No. 5 of 2016.
144 Regulation 5 of Government Notice No. 5 of 2016.
145 *Government Gazette* No. 34695, Government Notice No. 757 of 19 October 2011.
146 Department of Environmental Affairs, 'DEROS explanatory note no. 4: Carbon budget design document first phase (2016–2020),' 2015.
147 *Government Gazette* No. 38857, Government Notice No. 541 of 5 June 2015.
148 Available at: http://cer.org.za/wp-content/uploads/2010/03/59-OF-2008-NATIONAL-ENVIRONMENTAL-MANAGEMENT-WASTE-ACT_2-Sep-2014-to-date.pdf.
149 Sections 28 to 31 of the National Environmental Management: Waste Act 59 of 2008.
150 Section 16.
151 See section 60(2)(b).
152 Available at: http://cer.org.za/wp-content/uploads/2010/05/36-OF-1998-NATIONAL-WATER-ACT_2-Sep-2014-to-date.pdf.
153 See sections 144 and 145 of the National Water Act 36 of 1998.
154 Available at: http://www.acts.co.za/mine-health-and-safety-act-1996/.
155 Section 32 provides that every manager must notify the health and safety representatives concerned and, if there is a health and safety committee, the employee co-chairperson of that committee in good time of inspections, investigations or inquiries of which an inspector has notified the manager; and as soon as practicable, of any accident, serious illness or health-threatening occurrence, or other dangerous event.
156 Available at: http://www.thenct.org.za/NCTDocs/founding-legislation/f8d6f6aa-994d-4305-b3d0-ea056416bbd0.pdf.
157 The Preamble.
158 It is stated as follows:

> *For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to – (a) the context, comprehensiveness and consistency of the notice, document or visual representation; (b) the organisation, form and style of the notice, document or visual representation; (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and (d) the use of any illustrations, examples, headings or other aids to reading and understanding.*

159 Section 5.
160 Available at: https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/Financial%20Markets%20Act%2019%20of%202012.pdf.
161 Section 11(1)(d).
162 Section 11(6)(c).
163 Available at: http://www.labour.gov.za/DOL/downloads/legislation/acts/compensation-for-occupational-injuries-and-diseases/amendments/Amended%20Act%20-%20Compensation%20for%20Occupational%20Injuries%20and%20Diseases.pdf.
164 Section 80.
165 Section 82.
166 Available at: https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem(NPS)/Legal/Documents/NPS%20Act.pdf.

167 Available at: http://www.acts.co.za/value-added-tax-act-1991/.
168 Section 57.
169 Ibid.
170 Ibid.
171 Available at: http://www.gov.za/sites/www.gov.za/files/37173_gon1022.pdf.
172 Section 3(w).
173 Section 3(y).
174 Section 7.
175 Section 4(2) of the national Traditional Leadership and Governance Framework Act 41 of 2003, as amended.
176 Schedule II of the MPRDA.
177 Available at: http://www.remcommission.gov.za/MediaLib/Home/Library/Legislation/Traditional%20Leadership%20and%20Governance%20Framework%20Amendment%20Act%2041%20of%202003.pdf.
178 Section 3(1).
179 Section 20(1)(m).
180 Section 4(2).
181 Ibid.
182 Code of Conduct in terms of the national Traditional Leadership and Governance Framework Act 41 of 2003.
183 Available at: http://portal.samradonline.co.za/forms/login.aspx?ReturnUrl=%2fdefault.aspx.
184 Section 30.
185 See section 4 of the Income Tax Act 68 of 1962. It allows certain disclosures to other oversight authorities but not to the public.
186 Section 15(1) provides that no person may, without a licence issued by the Gas Regulator, construct gas transmission, storage, distribution, liquefaction and re-gasification facilities or convert infrastructure into such facilities; operate gas transmission, storage, distribution, liquefaction or re-gasification facilities; or trade in gas.
187 Section 16 of the Gas Act 48 of 2001.

PART 3

The role of oversight institutions in enforcing disclosure

To fully understand the strength of the information-disclosure regime governing South Africa's extractives industries, it is necessary to provide an overview of the institutions that exercise oversight over the industry. Accordingly, this part provides a comprehensive outline of the bodies, both voluntary and compulsory (i.e. those created through legislation, regulations, codes or industry initiatives), that monitor and enforce the disclosure of information within the extractives industries, as well as an indication of how these bodies are established and which powers they have regarding both non-compliance and enforcement.

3.1 The Commissioner of the South African Revenue Service: Tax Administration Act 28 of 2011

The Commissioner of the South African Revenue Service (SARS) is appointed by the President. The Commissioner is responsible for the administration of taxes, levies and royalties that are payable by the various registered entities that hold rights under the Mineral and Petroleum Resources Development Act (MPRDA). Where there has been non-compliance with regard to the payment of taxes, or where the Commissioner is of the opinion that the incorrect amounts have been paid, he or she may issue a notice of assessment to the taxpayer and request records in order to assess independently the taxes payable.[1] Penalties for non-compliance range from fines and imprisonment not exceeding five years for relevant officials of the registered entities concerned.[2] The Tax Administration Act establishes a comprehensive confidentiality regime, together with a number of exemptions. However, such exemptions are not applicable in the present research context:[3] Section 68 ('SARS confidential information and disclosure') of Chapter 6 on confidentiality of information reads:

> SARS confidential information means information relevant to the administration of a tax Act that is –
> (a) personal information about a current or former SARS official, whether deceased or not;
> (b) information subject to legal professional privilege vested in SARS;
> (c) information that was supplied in confidence by a third party to SARS the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source;
> (d) information related to investigations and prosecutions described in section 39 of the Promotion of Access to Information Act;
> (e) information related to the operations of SARS, including an opinion, advice, report, recommendation or an account of a consultation, discussion or deliberation that has occurred, if –
> (i) the information was given, obtained or prepared by or for SARS for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; and

(ii) the disclosure of the information could reasonably be expected to frustrate the deliberative process in SARS or between SARS and other organs of state by –
(aa) inhibiting the candid communication of an opinion, advice, report or recommendation or conduct of a consultation, discussion or deliberation; or
(bb) frustrating the success of a policy or contemplated policy by the premature disclosure thereof;

(f) information about research being or to be carried out by or on behalf of SARS, the disclosure of which would be likely to prejudice the outcome of the research;

(g) information, the disclosure of which could reasonably be expected to prejudice the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic, including a contemplated change or decision to change a tax or a duty, levy, penalty, interest and similar moneys imposed under a tax Act or the Customs and Excise Act;

(h) information supplied in confidence by or on behalf of another state or an international organisation to SARS;

… .

3.2 The Mineral and Petroleum Titles Registration Office: Mining Titles Registration Act 16 of 1967

The Mineral and Petroleum Titles Registration Office (MPTRO), which is regulated by the Mining Titles Registration Act, is the office for the registration of all mineral and petroleum titles and related rights, deeds and documents. Documents that are registered at this office are not publicly available but an application to access them can be made in terms of PAIA. For documents accessed from state entities, like the MPTRO, PAIA does not require the requester to provide reasons for the request.

3.3 The South African Diamond Board: Diamonds Act 56 of 1986

The Act establishes the South African Diamond and Precious Metals Regulator[4] with the objectives of ensuring that the diamond resources of the country are exploited and developed in the best interest of the country, and to promote the sound development of diamond undertakings in the country.[5] The Board of the Regulator can direct any person to furnish it with information it considers necessary to perform its functions effectively, and to submit to the Board any register, book or document in the possession or custody or under the control of any such person that contains, or is believed to contain, any such information.

3.4 The Gas Regulator: Gas Act 48 of 2001

The Act establishes the Gas Regulator, which, among other duties, issues licences, gathers information, issues notices and conducts investigations concerning activities for the construction of gas transmission, storage, distribution and liquefaction, for the conversion of infrastructure into transmission, storage and distribution, for the operation of gas transmission, storage, distribution and liquefaction, and for trading in gas.[6]

Regulation 4(9) of the Piped Gas Regulations provides that the Gas Regulator may not make public the content of contracts submitted by licensees if such information is protected in terms of PAIA.[7]

The Regulator has the power to impose fines and can, on application to a court, seek a suspension or cancellation of a licence for non-compliance with the conditions of the licence.[8]

3.5 The Petroleum Pipelines Regulatory Authority: Petroleum Pipelines Act 60 of 2003[9]

This Act establishes the Petroleum Pipelines Regulatory Authority to, among other things: issue licences for the construction and conversion of petroleum pipelines, loading facilities and storage facilities, as well as for the operation of petroleum pipelines, loading facilities and storage facilities; gather information relating to the construction, conversion and operation of petroleum pipelines, loading facilities and storage facilities; undertake investigations into the activities of licensees; set or approve tariffs and charges in the manner prescribed by regulation; and monitor and take appropriate action, if necessary, to ensure that access to petroleum pipelines, loading facilities and storage facilities is provided in a non-discriminatory, fair and transparent manner.[10]

3.6 The Regulator: Precious Metals Act 37 of 2005[11]

The Act establishes a Regulator whose objectives are: to ensure that the precious-metal resources of the Republic are exploited and developed in the best interest of the people of South Africa; to promote equitable access to, and local beneficiation of, the Republic's precious metals; to promote the sound development of precious-metal enterprises in the Republic; and to advance the objectives of broad-based socio-economic empowerment as prescribed.[12] The functions of the Regulator are to, among other things: implement, administer and control all matters relating to acquisition, possession, smelting, refining, fabrication, use and disposal of precious metals; and, in general, perform such acts as may be necessary or expedient for the achievement of its objects.[13]

3.7 The Social and Ethics Committee: Regulations of the Companies Act 71 of 2008

Regulation 43 of the Companies Act[14] establishes social and ethics committees for all state-owned entities, listed public companies, and other companies as prescribed by Regulation 26,[15] with each such committee consisting of three members from the Board of Directors (or prescribed officers), including one non-executive director. The Social and Ethics Committee reports to the Board and to the company's shareholders within the scope of its mandate. The Committee is required to report on all non-financial aspects of the business. The Companies Act also establishes the Financial Reporting Standards Council to advise the Minister on financial-reporting standards.[16]

3.8 The National Consumer Commission: Consumer Protection Act 68 of 2008[17]

The Consumer Protection Act establishes the National Consumer Commission under section 85. This Commission has the power to investigate and report on any matters within the scope of its mandate, and has a reporting line to the Ministry of Trade and Industry.

3.9 The Competition Commission: Competition Act 89 of 1998[18]

The Act provides for the establishment of the Competition Commission, which has the power to investigate, and therefore collect information with regard to, any alleged contravention of the provisions of the Act. Certain Companies that wish to merge are required in terms of section 13A of the Act to notify the Competition Commission of the intention to merge and have to provide certain particulars as required. Such information will cover ownership information, and may include financial and operational information relating to the other particulars required to be submitted. For large mergers, notification regarding the decision on the merger must be publicly published by the Competition Commission in the *Government Gazette*.[19]

3.10 The Financial Services Board: Financial Markets Act 19 of 2012

The Financial Services Board (FSB) is established under section 84 of the Act to exercise oversight over the provisions of the Act and against market abuse. In terms of information disclosure, the Director of the FSB may share information with the following bodies: the Takeover Regulation Panel,

the South African Reserve Bank (SARB), the Independent Regulatory Board for Auditors, a licensed exchange, a licensed central securities depository, a licensed independent clearing house, the Financial Intelligence Centre, the National Treasury, and the Ministry responsible for the Act.

The Registrar of Deeds and the SARB also have minor oversight duties as highlighted in an earlier discussion of the various laws.

3.11 Overview of oversight bodies monitoring disclosure

***Table 3.1:** Oversight bodies monitoring disclosure*

Oversight body	Enabling legislation	Nature of oversight obligations	Proactive disclosure to the public
South African Human Rights Commission (SAHRC) (powers are to be transferred to the Information Protection Regulator)	*Promotion of Access to Information Act 2 of 2000 (PAIA) and Protection of Personal Information Act 4 of 2013*	*Private companies were obliged to submit a PAIA Manual to the SAHRC (in terms of section 51 of PAIA), including information relating to the types of records kept by the company and the necessary company details so as to enable an information request to be made in terms of PAIA.*	*Yes*
South African Revenue Service (SARS)	*Tax Administration Act 28 of 2011 and Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)*	*Under the MPRDA, mining companies are obliged to pay mining, exploration and prospecting fees, as well as royalties.*	*No*
		Under the Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008 (MPRRA), mining companies are obliged to submit their returns to SARS, as well as declare their worldwide taxable income, with such companies being taxed at a rate of 28%.	*No*
		Section 35 of the Tax Administration Act provides that an 'arrangement'[20] must be disclosed if a tax benefit will be derived.	
Mineral and Petroleum Titles Registration Office (MPTRO)	*Mining Titles Registration Act 16 of 1967*	*To maintain records of all mineral and petroleum titles and related rights, deeds and documents (which are essential for security of tenure). Documents that are registered with this office are not publicly available but an application for access can be made under PAIA.*	*No*
South African Diamond Board	*Diamonds Act 56 of 1986*	*The Board can direct any person to furnish it with information it considers necessary to perform its functions effectively, as well as to submit to the Board any register, book or document in the possession or custody or under the control of any such person that contains, or is believed to contain, any such information. Such information should be subject to access by the public in terms of PAIA request-for-access process.*	*No*
Gas Regulator	*Gas Act 48 of 2001*	*The Gas Regulator, among other tasks, issues licences, gathers information, issues notices, and conducts investigations concerning activities for the construction of gas transmission, storage, distribution and liquefaction, for the conversion of infrastructure into transmission, storage* >	*No*

Oversight body	Enabling legislation	Nature of oversight obligations	Proactive disclosure to the public
Gas Regulator	*Gas Act 48 of 2001*	*and distribution, for the operation of gas transmission, storage, distribution and liquefaction, and for trading in gas (section 4). The Regulator, in terms of Regulation 4(9) of the Piped Gas Regulations, may not make public the content of contracts submitted by licensees if such information is protected under PAIA.*	*No*
Petroleum Pipelines Regulatory Authority	*Petroleum Pipelines Act 60 of 2003*	*The Act establishes the Petroleum Pipelines Regulatory Authority to, among other things: issue licences for the construction and conversion of petroleum pipelines, loading facilities and storage facilities, as well as for the operation of petroleum pipelines, loading facilities and storage facilities; gather information relating to the construction, conversion and operation of petroleum pipelines, loading facilities and storage facilities; undertake investigations into activities of licensees; set or approve tariffs and charges in the manner prescribed by regulation; and monitor and take appropriate action, if necessary, to ensure that access to petroleum pipelines, loading facilities and storage facilities is provided in a non-discriminatory, fair and transparent manner. Such information held by the Authority should be subject to access by the public in terms of the PAIA request-for-access process.*	*No*
Social and ethics committees	*Companies Act 71 of 2008*	*Regulation 43 of the Companies Act establishes social and ethics committees for all state-owned entities, listed public companies and other companies as prescribed by Regulation 26[21], with each such committee consisting of three members from the Board of Directors (or prescribed officers), including one non-executive director. The Social and Ethics Committee reports to the Board and to the company's shareholders on matters falling within the scope of its mandate.* *The Committee is required to report on all non-financial aspects of the business, including: labour and employment (and International Labour Organization [ILO] conventions applicable to South Africa); consumer relations, including compliance with consumer-protection laws; environmental, health, and safety matters; compliance with the Ten Principles of the United Nations Global Compact; anti-corruption measures and compliance with recommendations of the Organisation for Economic Co-operation and Development (OECD) regarding corruption; compliance with the Employment Equity Act; compliance with the Broad-Based Black Economic Empowerment Act; compliance with the Promotion of Equality and Prevention of Unfair Discrimination Act; and community philanthropy and donations. Such information is made available to shareholders and the Board.* *The Board of Directors of a company exercises oversight over the Committee.*	*No*

Oversight body	Enabling legislation	Nature of oversight obligations	Proactive disclosure to the public
Johannesburg Stock Exchange (JSE)	*JSE Listing Requirements, King III Code, South African Code for Reporting of Exploration Results, Mineral Resources and Mineral Reserves (SAMREC), and South African Code for Reporting of Mineral Asset Valuation (SAMVAL)*	*Under the JSE Listing Requirements, the JSE receives reports on the financial history of all listed companies in terms of section 8. In a historical financial-information report, earnings, diluted earnings, headline earnings, diluted headline earnings, net asset value and tangible net asset value per share, and dividends per share in respect of each class of share, expressed in cents, must be provided for the last financial year. The report on historical financial information must include a review of the operations of the applicant, its financial position, changes in equity, results of operations, as well as cash flows.* *Other important disclosures required in the report for the purposes of the present research include a statement on compliance with the King Code, on the aggregate of the direct and indirect beneficial interests of the directors, on major shareholders who, directly or indirectly, are beneficially interested in 5% or more of any class of the listed company's capital, together with the amount of such shareholder's interest, on issues for cash, and on mineral resources and mineral reserves.* *In particular, with regard to mineral companies, the JSE Listing Requirements require the disclosure of the following information in respect of substantial mineral assets: the share capital of the applicant issuer and financial information. The JSE is the Regulator for the Exchange, establishing and enforcing listing and membership requirements and trading rules. The Financial Services Board supervises the JSE in the performance of its regulatory duties.*	*Yes*
National Consumer Commission	*Consumer Protection Act 68 of 2008*	*The Consumer Protection Act establishes the National Consumer Commission in terms of section 85. The Commission has the power to investigate and report on any matters referred to it that fall within the scope of its mandate, and has a reporting line to the Ministry of Trade and Industry.*	*No*
Competition Commission	*Competition Act 35 of 1999*	*The Commission has the power to investigate and therefore collect information with regard to any alleged contravention of the Act. Certain companies that wish to merge are required in terms of section 13A to notify the Competition Commission of their intention to merge and to provide certain particulars as required.*	*No*
Financial Services Board	*Financial Markets Act 19 of 2012*	*The Board exercises oversight over the provisions of the Act and against market abuse.*	*No*

Endnotes

1 Section 9 of the Tax Administration Act.
2 Ibid, section 104.
3 Ibid, sections 67–68.
4 The Board shall consist of one officer of the Department of Mineral and Energy Affairs; one officer of the Department of Finance nominated by the Minister of Finance; one member of the South African Police nominated by the Commissioner of the South African Police; one officer of the Department of Trade and Industry nominated by the Minister of Trade and Industry and Tourism; two persons who are either producers or in the opinion of the Minister are capable of representing the producers; one person nominated by an association or by associations which in the opinion of the Minister represent dealers; one person nominated by an association or by associations which in the opinion of the Minister represent cutters; one person nominated by an association or by associations which in the opinion of the Minister represent employees of cutters; one person nominated by the Jewelry Council of South Africa; the executive officer of the Board; so many other persons as the Minister may deem necessary and who in his opinion are able to assist the Board in achieving its objects. Section 5 of the Diamonds Board Act 56 of 1986.
5 Section 4 of the Act.
6 Section 4 of the Act.
7 *Government Gazette* No. 29792, Piped Gas Regulations.
8 Sections 26–27 of the Act.
9 Available at: http://www.saflii.org/za/legis/consol_reg/ppa60o2003rangnr1140676/.
10 Section 4 of the Act.
11 Available at: http://www.randrefinery.com/Precious_Metals_Act_2005.pdf.
12 Section 2 of the Act.
13 Section 3 of the Act.
14 See the analysis of social and ethics committees at: http://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2012/corporate/downloads/Companies_Act_-_Social_and_Ethics_Alert_19_April_2012.pdf.
15 Regulation 26 of the Companies Act covers those companies that score over 500 points.
16 See sections 203 and 204 of the Act.
17 Available at: http://www.thenct.org.za/NCTDocs/founding-legislation/f8d6f6aa-994d-4305-b3d0-ea056416bbd0.pdf.
18 Available at: http://www.saflii.org/za/legis/consol_act/ca1998149.pdf.
19 Section 14 of the Act.
20 Means any transaction, operation, scheme, agreement or understanding.
21 Regulation 26 of the Companies Act covers those companies that score over 500 points.

PART 4

The nature and content of disclosure requirements

Table 4.1: ***Ownership, operational and financial information and record-keeping requirements in terms of relevant legislation, together with relevant oversight bodies***

Type of information	Information held and record-keeping requirements	Relevant legislation	Relevant oversight body	Publicly available?
Ownership	*Director's records*	*Companies Act*	*Board of Directors/ Social and Ethics Committee*	*No*
	Written communications with holders of securities registers	*Companies Act*	*Board of Directors/ Social and Ethics Committee*	*No*
	Proof of ownership	*MPRDA; Petroleum Pipelines Act*	*Minister of Mineral Resources; NERSA*	*No*
	List of shareholders	*JSE Listing Requirements*	*JSE*	*Yes*
	Transactions related to listed securities	*Financial Markets Act*	*Financial Services Board*	*No*
	Share capital	*JSE Listing Requirements*	*JSE*	*Discretionary disclosure*[1]
	Major shareholders	*JSE Listing Requirements*	*JSE*	*Discretionary disclosure*
	Issues of shares	*JSE Listing Requirements*	*JSE*	*Discretionary disclosure*
	Direct and indirect beneficial interest of directors	*JSE Listing Requirements*	*JSE*	*No*
	BEE requirements	*Mining Charter*	*Minister of Mineral Resources*	*Discretionary disclosure*

Type of information	Information held and record-keeping requirements	Relevant legislation	Relevant oversight body	Publicly available?
Operational	*Memorandum of Incorporation*	*Companies Act*	*Board of Directors/ Social and Ethics Committee*	*No*
	Notices and minutes of all shareholder meetings	*Companies Act*	*Board of Directors/ Social and Ethics Committee*	*No*
	Reports of general meetings	*Companies Act*	*Board of Directors/ Social and Ethics Committee*	*No*
	Records pertaining to reconnaissance and prospecting operations, data, results, expenditure, reports	*MPRDA*	*Council for Geoscience*	*No*
	Mining rights and licences	*MPRDA*	*MPTRO*	*No*
	Workplace incidents and hazards	*NEMA*	*Minister of Environmental Affairs*	*Yes*
	Any information regarding risks to the environment, public safety, or the health and well-being of people	*NEMA*	*Minister of Environmental Affairs*	*Yes*
	Environmental permits	*NEMA*	*Minister of Environmental Affairs*	*Yes*
	Production and reserve volumes	*JSE Listing Requirements (SAMREC and SAMVAL)*	*JSE*	*Discretionary disclosure*
Financial	*Annual financial statements and annual accounts*	*Companies Act; MPRDA*	*Social and Ethics Committee (established under the Companies Act)*	*Discretionary disclosure*
	Accounting records	*Companies Act; JSE Listing Requirements; Gas Act; Petroleum Pipelines Act*	*SARS; JSE; Gas Regulator; NERSA*	*Discretionary disclosure*
	Monthly returns	*MPRDA*	*MPTRO*	*Discretionary disclosure*
	Financial statements reflecting balance sheet, as well as profit and loss account	*Companies Act*	*JSE*	*Discretionary disclosure*
	Cash flow	*Companies Act*	*JSE*	*Discretionary disclosure*
	Changes in equity	*Companies Act*	*Minister of Finance*	*Discretionary disclosure*

Type of information	Information held and record-keeping requirements	Relevant legislation	Relevant oversight body	Publicly available?
Financial	*Particulars of earnings before interest and taxes; particulars of gross sales, with sufficient detail to identify all transferred mineral resources in respect of those gross sales and the persons acquiring those transferred mineral resources; and the quantity of mineral resources extracted but not transferred and those transferred by that registered person, with sufficient detail to identify those extracted and transferred mineral resources*	*MPRRA*	*SARS*	*Discretionary disclosure*
	Returns of information: ledgers, cash books, journals, cheque books, bank statements, deposit slips, paid cheques, invoices, stock lists, all other books of account, and any electronic payments	*Income Tax Act*	*SARS*	*No*
	Agreements for acquisitions; disposal or lease of an asset (and related correspondence); details of any assets transferred to a trust; copies of valuations; related invoices and payment records; improvement or disposal of asset	*Income Tax Act*	*SARS*	*No*
	Taxes: profit taxes and other taxes (including VAT, capital gains tax, customs and excise, and skills development levy)	*Tax Administration Act; Income Tax Act*	*Minister of Mineral Resources* *SARS*	*Discretionary disclosure*
	Royalties	*Mineral and Petroleum Resources Royalty Act; MPRDA*	*SARS*	*Discretionary disclosure*
	Dividends withholding tax	*Income Tax Act*	*SARS*	*No*
	Other expenditure disclosures	*Income Tax Act*	*SARS*	*No*

Type of information	Information held and record-keeping requirements	Relevant legislation	Relevant oversight body	Publicly available?
Financial	*Dividends withholding tax*	*Income Tax Act*	*SARS*	*No*
	Other expenditure disclosures	*Income Tax Act*	*SARS*	*No*
	Production expenditure	*Tax Administration Act*	*SARS*	*No*
	Licence fees	*Tax Administration Act*	*SARS*	*No*
	Arrangement if a tax benefit is derived	*Tax Administration Act*	*SARS*	*No*
	Register of unpolished diamonds and those imported or exported; exemption certificate; export permit; and other financial documents (cheque books, bank statements, deposit slips, invoices, and cash books)	*Diamond Export Levy Administration Act*	*JSE*	*No*
	Historical financial information (earnings, diluted earnings, headline earnings, diluted headline earnings, net asset value, tangible net asset value per share, and dividends per share)	*JSE Listing Requirements*	*JSE*	*Yes*
	Beneficial interests of directors	*Companies Act*	*JSE*	*Yes*
	Financial information concerning subsidiaries, joint ventures, associates and investments	*Companies Act*	*SARS*	*Yes*
	Social expenditure	*Income Tax Act*	*SARS*	*No*

***Table 4.2:** Detailed summary of disclosure requirements in respect of ownership, operational and financial information in South Africa*

Type of information disclosure	Legislation/ regulation	Type of regulation	Nature of information disclosure	Disclosure to whom?	Time frame and format
Ownership information	*Gas Act 48 of 2001*	*Mandatory legislation*	*Applicants for a licence from the Gas Regulator must, in their application, include the particulars of shareholders and owners where a juristic person is the applicant (section 16).*	*The Gas Regulator. Also, the Act provides that the applicant may request that all information contained in the application be kept confidential, including commercially sensitive information.*	*Application for a licence*
	Petroleum Pipelines Regulation	*Statutory regulation*	*Applicants seeking a licence from the National Energy Regulator of South Africa (NERSA) for the operation of petroleum facilities must provide documentary proof of ownership and shareholders as part of the application.*	*The Regulation provides that licence applications must be made available for inspection by members of the public, must be stored at the place of business, and must be placed on the website of the licensee. The NERSA will make decisions regarding requests for confidentiality.*	*Application for a licence*
	JSE Listing Requirements	*Voluntary code*	*The Socially Responsible Investment (SRI) Index, which forms part of the Johannesburg Stock Exchange (JSE) structure, provides indicators against which a company's SRI is measured. Indicators include disclosure of key company stakeholders.* *Disclosures in terms of the JSE requirements include the aggregate of the direct and indirect beneficial interests of the directors, major shareholders who directly or >*	*The JSE information is not largely publicly available.*	*Annual report*

Type of information disclosure	Legislation/ regulation	Type of regulation	Nature of information disclosure	Disclosure to whom?	Time frame and format
Ownership information	*JSE Listing Requirements*	*Voluntary code*	*< indirectly are beneficially interested in 5% or more of any class of the listed company's capital, together with the amount of such shareholder's interest, issues for cash, mineral resources and mineral reserves.* *For mineral companies, disclosure is required in respect of substantial mineral assets, including details of any direct or indirect beneficial interest, which each director (and his/her associates), competent person, competent valuator and, where applicable, related party has or, within two years of the date of the pre-listing statement, had in any asset (including any right to explore for minerals) of the applicant; the share capital of the applicant issuer; and confirmation that the applicant or its group (including companies in which it has investments) is in possession of the necessary legal title or ownership rights to explore, mine, or explore and mine the relevant minerals.*	*The JSE information is not largely publicly available.*	*Annual report*
	Companies Act 71 of 2008	*Mandatory legislation*	*Section 26 of the Companies Act provides that any person with a beneficial interest in a company may have access to the company's Memorandum of Incorporation and any amendments to it, as well as to any* **>**	*Any person with a beneficial interest (i.e. a shareholder)*	*Ad hoc requests for information*

Type of information disclosure	Legislation/ regulation	Type of regulation	Nature of information disclosure	Disclosure to whom?	Time frame and format
Ownership information	*Companies Act 71 of 2008*	*Mandatory legislation*	*< rules made by the company, the records in respect of the company's directors, the reports of annual meetings, annual financial statements, the notices and minutes of annual meetings and communications related thereto, and the securities register of a profit company.*	*Any person with a beneficial interest (i.e. a shareholder)*	*Ad hoc requests for information*
	Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)	*Mandatory legislation*	*Section 25 of the MPRDA also provides that the holder of a mining right must lodge such right for registration at the Mining and Petroleum Titles Registration Office (MPTRO).*	*MPTRO; Department of Mineral Resources*	*Application for licence*
Operational information	*MPRDA*	*Mandatory legislation*	*In endeavouring to obtain a prospecting, mining, exploration or production right, some information must be submitted to the Department of Mineral Resources (DMR) (and now to the environmental authorities), including information on baseline environmental conditions, environmental management plans or programmes, and information relating to consultation with land owners or lawful occupiers.* *Section 25 of the MPRDA also provides that a mining right must be lodged at the MPTRO.*	*Public access upon formal request in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA).*	*Application for licence*

Type of information disclosure	Legislation/ regulation	Type of regulation	Nature of information disclosure	Disclosure to whom?	Time frame and format
Operational information	*Gas Act 48 of 2001*	*Mandatory legislation*	*In terms of Section 16, an applicant for a licence from the Gas Regulator must indicate, in the application, the intended facilities and use of the gas.*	*The Gas Regulator. Also, the Act provides that the applicant may request that all information contained in the application be kept confidential, including commercially sensitive information.*	*Application for licence*
	Petroleum Pipelines Regulation	*Statutory regulation*	*Applicants seeking a licence from the NERSA for the operation of petroleum facilities must, as part of their application, provide documentary proof of their administrative and technical abilities to operate such a facility.*	*The NERSA. The Regulation provides that licence applications must be made available for inspection by members of the public, must be stored at the place of business of the licensee, and must be placed on the website of the licensee. The NERSA will make decisions regarding requests for confidentiality.*	*Application for licence*
	Companies Act 71 of 2008	*Mandatory legislation*	*Section 26 of the Companies Act provides that any person with a beneficial interest in a company may have access to any rules made by the company, to the reports of annual meetings, and to the notices and minutes of annual meetings (and communications relating thereto).*	*Any person with a beneficial interest (i.e. a shareholder)*	*Ad hoc requests for information relating to statements, minutes, communications, reports, and security registers*
	The South African Mineral Codes	*Voluntary sector code*	*The South African Code for Reporting of Exploration Results, Mineral Resources and Mineral Reserves (the SAMREC Code), which has been adopted by the JSE, sets out the* >	*'Public reports' as defined in the Code are reports prepared for the purpose of informing investors and potential* >	*Annual report*

Type of information disclosure	Legislation/ regulation	Type of regulation	Nature of information disclosure	Disclosure to whom?	Time frame and format
Operational information	*The South African Mineral Codes*	*Voluntary sector code*	*< minimum standards and guidelines for public reporting of exploration results, mineral results and mineral reserves in South Africa.*	*< investors and include annual, quarterly and other reports required by the Companies Act.*	*Annual report*
	Gas Act 48 of 2001	*Mandatory legislation*	*Licensees are required in terms of section 4(1) to submit to the Gas Regulator audited annual accounts, as well as data on annual volume and average price for a year for customers consuming less than 10 million gigoules. The Gas Regulator must publish the aggregated results for categories of customers within residential and commercial classes on a provincial basis.*[2]	*Publicly available*	*Application for licence*
	Mining Charter	*Mandatory regulation*	*The various elements of the Charter relate to ownership, procurement and enterprise development, beneficiation, employment equity, human resources development, mine community development, housing and living conditions, sustainable development and growth of the mining industry.*	*Report submitted to the Minister of Mineral Resources*	*Annual report*
	National Environmental Management Act 107 of 1998 (NEMA)	*Mandatory legislation*	*In terms of the 2014 Environmental Impact Assessment (EIA) Regulations, environmental authorisations, environmental management programmes, closure plans, and audit >*	*Public access*	*Authorisations, plans and reports*

Type of information disclosure	Legislation/ regulation	Type of regulation	Nature of information disclosure	Disclosure to whom?	Time frame and format
Operational information	*National Environmental Management Act 107 of 1998 (NEMA)*	*Mandatory legislation*	*< reports must be made available on site upon request and on the holder's publicly accessible website if this exists.*	*Public access*	*Authorisations, plans and reports*
	National Environmental Management: Air Quality Act 39 of 2004	*Mandatory legislation*	*In terms of draft regulations on the declaration of greenhouse gases as priority air pollutants, on pollution-prevention plans, and on greenhouse-gas reporting, companies emitting more than 0.1 megatonnes of greenhouse gases per annum are required to report their emissions.*	*Public access*	*Information posted on SAAQIS*
	National Environmental Management: Waste Act 59 of 2008	*Mandatory legislation*	*Where a waste-management plan has been requested by the state from an entity, public access is permitted (sections 28–31).*	*Public access*	*Report upon ad hoc request by the MEC for Environmental Affairs*
Financial information	*Companies Act 71 of 2008*	*Mandatory legislation*	*Audited financial reports are annually submitted to the Director-General of the Department of Trade and Industry, including monthly financial returns (section 28). (Financial statements include information on financial position, comprehensive income, cash flow, changes in equity, accounting policies, and other explanatory information consistent with the International Financial Reporting Standards (IFRS) of the International Accounting Standards Board.)*	*Director-General of the Department of Trade and Industry.* *Financial statements are available to the public.* *Section 31 of the Companies Act provides that any person who holds or has a beneficial interest in a company can obtain access to the financial statements of such company.*[3]	*Annual report*

Type of information disclosure	Legislation/ regulation	Type of regulation	Nature of information disclosure	Disclosure to whom?	Time frame and format
Financial information	*MPRDA*	*Mandatory legislation*	*Mining companies must submit their financial reports and other information to the Director-General of Mineral Resources.* *In terms of tax disclosures, mining companies are obliged in the process of prospecting to 'pay the prescribed prospecting fee to the State' (19(2)(f)), and to 'pay the State royalties in respect of any mineral removed or disposed of during the course of prospecting operations' (19(2)(g)).*	*Public access upon formal request in terms of PAIA*	*Annual report*
	MPRDA	*Mandatory legislation*	*The relevant information in section 25 that must be submitted to the MPTRO includes prescribed monthly returns with accurate and correct information and data; an audited annual financial report or financial statements reflecting the balance sheet; as well as a profit-and-loss account.*	*Public access upon formal request in terms of PAIA*	*Annual report*
	Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008 (MPRRA)	*Mandatory legislation*	*Registered persons must submit an estimate of royalties payable within six months.* *Tax is payable and subject to disclosure to South African Revenue Service (SARS) and in the financial statements of South African companies on their worldwide taxable income.*	*Royalties are paid to SARS. There are no requirements pertaining to public disclosure.*	*Time frame: Six (6) months after year of assessment. Format: Annual (or quarterly) tax return.*

Type of information disclosure	Legislation/ regulation	Type of regulation	Nature of information disclosure	Disclosure to whom?	Time frame and format
Financial information	*Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008 (MPRRA)*	*Mandatory legislation*	*Royalties are also payable in terms of the Mineral and Petroleum Resources Royalty Act 28 of 2008, which applies variable royalty percentage rates based on whether the mineral is refined or unrefined (section 4).* *The MPRDA provides that licensing applicants must pay the prescribed fees to the state and must pay royalties in respect of any mineral removed and disposed of.* *Section 8 provides for the maintenance of records for the purposes of the Act, including earnings before interest and taxes, with sufficient detail to identify gross sales, income, and allowable deductions in respect of earnings.*	*Royalties are paid to SARS. There are no requirements pertaining to public disclosure.*	*Application for licence*
	Tax Administration Act 28 of 2011	*Mandatory legislation*	*Section 35 of the Tax Administration Act provides that an 'arrangement'[4] must be disclosed if a tax benefit will be derived or is assumed to be derived by virtue of the arrangement and affects the calculation of interest, finance costs, fees or any other charges and gives rise to an amount that is or will be disclosed as a deduction for purposes of the Income Tax Act but not as an expense and it is a revenue* **>**	*Information is disclosed to SARS within the prescribed time period.*	*Tax returns. The arrangement must be disclosed within 45 business days after an amount is first received by or has accrued to a 'participant'[5] or is first paid or actually incurred by a participant in terms of the arrangement (section 37).*

Type of information disclosure	Legislation/ regulation	Type of regulation	Nature of information disclosure	Disclosure to whom?	Time frame and format
Financial information	*Tax Administration Act 28 of 2011*	*Mandatory legislation*	**<** *for the purposes of the financial statements but not gross income for the purpose of the Income Tax Act. Information to be submitted includes a detailed description of all the steps and key features of an 'arrangement', a detailed description of the assumed 'tax benefits' for all 'participants', including, but not limited to, tax deductions and deferred income; the names, registration numbers, and registered addresses of all 'participants'; a list of all its agreements; and any financial model that embodies its projected tax treatment (section 38).*	*Information is disclosed to SARS within the prescribed time period.*	*Tax returns. The arrangement must be disclosed within 45 business days after an amount is first received by or has accrued to a 'participant'[5] or is first paid or actually incurred by a participant in terms of the arrangement (section 37).*
	Diamond Export Levy (Administration) Act 14 of 2007	*Mandatory legislation*	*Payment to SARS is required from the registered person[6] within 30 days after the end of the year of the assessment periods.*	*Payment to SARS will be confidential in terms of the Income Tax Act and section 35 of PAIA.*	*Time frame: Within 30 days after the end of the assessment periods (March–August; September–February). Format: Tax return.*

Endnotes

1 'Discretionary disclosure' means that disclosure is subject to the decision of the oversight body.

2 Note that this information also contains operational information.

3 This is extended in section 26, which provides that any person with a beneficial interest in a company may have access to the company's Memorandum of Incorporation and any amendments to it, any rules made by the company, the records in respect of the company's directors, the reports to annual meetings, annual financial statements, the notices and minutes of annual meetings and communications relating thereto, and the securities register of a profit company.

4 Means any transaction, operation, scheme, agreement or understanding.

5 Means a company or trust that directly or indirectly derives, or assumes that it derives, a tax benefit or financial benefit by virtue of an arrangement.

6 A person qualifies for registration if that person is a producer, dealer, diamond beneficiator or holder of a permit to export diamonds – section 38 of the Tax Administration Act.

PART 5

Comparative analysis of various corporate disclosure practices in the extractives industry

South Africa is not a party to the Extractive Industries Transparency Initiative (EITI). To date, such initiative has been considered 'an unnecessary addition to South Africa's regulatory environment considering the existence of PAIA and its extension to the private sector'.[1] However, on an international level, various standards have been developed which provide a robust framework for transparency practices in the extractives industry. In Part 1 of this report, the broad rationale underlying the EITI and various country regimes was discussed. In this part, the report provides a more 'nuts-and-bolts' examination of the extent to which South Africa's legislative and regulatory framework is similar to, or different from, such international practices.

5.1 The Extractive Industries Transparency Initiative[2]

On an international level, the EITI was established to ensure good governance and accountability within the extractives industry, overseen by a multistakeholder group (MSG) within each member country. Member countries of the EITI implement the EITI Standard, which requires full disclosure of all payments – including taxes, dividends and bonuses – made by the extractives industry to government. This is done by way of the publication of an annual report by the MSG. In addition, the EITI initiative arose out of the global civil society movement, Publish What You Pay (PWYP), with all civil society representatives on the EITI Board being members of PWYP.[3]

There has been a consistent call globally for mandatory disclosure of company payments in the extractives industry to governments, and the establishment of the EITI was a response to this call – which the PWYP coalition supported alongside the mandatory disclosure requirements adopted by other countries.

The EITI is designed to influence and improve transparency within country jurisdictions through, among others, legislation or regulation mandating disclosure by companies. Mandatory payment-disclosure regulations have been adopted by countries whose securities and/or rules of incorporation have a large global footprint and impact multiple jurisdictions at once – that is, by countries whose capital markets represent a large proportion of the largest oil, gas and mining companies in the world. Part of the rationale for the adoption of these rules has been the need to complement EITI coverage, which applies only to countries that are party to the EITI and not to countries where multinational companies are also operational.

The EITI requires effective oversight by the MSG, with such oversight involving the government, companies and the full, independent, active and effective participation of civil society. The EITI requires timely publication of EITI reports[4] that contain timely data. The following broad forms of disclosure are required under the EITI:

- Contextual information about the extractives industry, including a description of the legal framework and fiscal regime;
- An overview of the extractives industry;
- The extractives industry's contribution to the economy;
- Production data;
- State participation in the extractives industry;
- Revenue allocations and the sustainability of revenue;
- Licence registers and licence allocations;
- Applicable provisions related to beneficial ownership; and
- Contracts.

Within these broad categories of disclosure, the following specific disclosures are further required:

- Level of fiscal devolution;
- Significant exploration activities;
- Size of the extractives industry in absolute terms and as a percentage of gross domestic product (GDP), including an estimate of informal-sector activity;
- Total government revenue generated (including taxes, royalties, bonuses, fees, and other payments) in absolute terms and as a percentage of total government revenue;
- Exports by the extractives industry in absolute terms and as a percentage of total exports;
- Employment in the extractives industry in absolute terms and as a percentage of total employment;
- Disclosure of key regions/areas where production is concentrated;
- Total production volumes and the value of production by commodity and, where relevant, by state/region;
- Total export volumes and the value of exports by commodity and, where relevant, by state/region of origin;
- Where state participation in the extractives industry gives rise to material revenue payments, the prevailing rules and practices regarding the financial relationship between the government and state-owned enterprises (SOEs);
- Disclosures by SOEs, their subsidiaries and joint ventures regarding their quasi-fiscal expenditure, such as payments for social services, public infrastructure, fuel subsidies and national-debt servicing, are also required;
- Beneficial ownership[5] in mining, oil and gas companies operating within the country's oil, gas and mining sector, including those held by SOE subsidiaries and joint ventures, and any changes in the level of ownership during the reporting period;
- Publicly available register of licence-holder coordinates of the licence area, date of application, date of award, duration of the licence and, in the case of production licences, the commodity being produced;
- In the case of beneficial ownership, it is recommended that implementing countries maintain a publicly available register of the beneficial owners of the corporate entity (entities) that bids for, operates or invests in extractive assets, including the identity (identities) of their beneficial owner (owners) and the level of ownership. Where this information is already publicly available, e.g. through filing with corporate regulators and stock exchanges, the EITI Report should include guidance on how to access this information;
- Implementing countries are encouraged to disclose publicly any contracts and licences that set out the terms relating to the exploitation of oil, gas and minerals;
- A description of each revenue stream, related materiality definitions, and thresholds should be included in the EITI Report. The following revenue streams should be included for revenue collected in cash and in kind:
  - The host government's production entitlement (such as profit oil);
  - National SOE production entitlement;
  - Profits taxes;
  - Royalties;
  - Dividends;
  - Bonuses, such as signature, discovery and production bonuses;
  - Licence fees, rental fees, entry fees and other considerations for licences and/or concessions; and
  - Any other significant payments to and material benefits for the government;
- Where material social expenditure by companies is mandated by law or a contract with the government that governs the extractive investment, the EITI Report must disclose and, where possible, reconcile

The Dodd–Frank Act, which was passed in 2010, requires companies listed in the United States of America (USA) to disclose payments to governments when submitting their annual reports to the United States (US) Securities and Exchange Commission (SEC).

these transactions. Where such benefits are provided in kind, it is required that the EITI Report disclose the nature and the deemed value of the in-kind transaction. Where the beneficiary of the mandated social expenditure is a third party, i.e. not a government agency, it is required that the name and function of the beneficiary be disclosed; and

- Where revenue from the transportation of oil, gas and minerals constitutes one of the largest revenue streams in the extractives sector, government and SOEs are expected to disclose the revenue received. The published data must be disaggregated to levels commensurate with the reporting of other payments and revenue streams.

5.2 The United States Dodd–Frank Wall Street Reform and Consumer Protection Act[6]

The Dodd–Frank Act, which was passed in 2010, requires companies listed in the United States of America (USA) to disclose payments to governments when submitting their annual reports to the United States (US) Securities and Exchange Commission (SEC).[7] The Act requires all extractives companies to disclose all payments, including:

- Taxes;
- Royalties;
- Fees (including licence fees);
- Production entitlements;
- Bonuses; and
- Other material benefits that the Commission, consistent with the guidelines of the EITI (to the extent practicable), determines are part of the commonly recognised revenue stream for the commercial development of oil, natural gas or minerals.[8]

Under the Act, companies are required to disclose information relating to:

- The type and total amount of cash payments made for each project;
- The type and total amount of cash payments made to each government;
- The type of and total payments by category;
- The currency used to make the payments;
- The financial period in which the payments were made;
- The business segment of the 'resource extraction issuer'[9] that made the payment;
- The government that received the payment and the country in which the government is located; and
- The project of the 'resource extraction issuer' to which the payments relate.

There is a materiality threshold of USD100 000 applicable to disclosures under the Dodd–Frank Act. The SEC is required to make the information received publicly available online.

5.3 European Union Accounting Directives[10]

Within Europe, the European Union (EU) has developed an Accounting Directive and a Transparency Directive largely to ensure disclosure of payments (including taxes) by large-scale extractives-industry firms[11] (among other industries) to governments in those countries in which these firms operate.[12] Payments below €100 000 do not need to be disclosed. However, the EU Directives, unlike

EU Accounting and Transparency Directives of 2013 require companies listed on EU stock exchanges, including large non-listed companies, to disclose payments made to governments (project by project as well as country by country).

the US Dodd–Frank Act, apply to both listed and unlisted companies.[13] The EU Accounting and Transparency Directives of 2013 require companies listed on EU stock exchanges, including large non-listed companies, to disclose payments made to governments (project by project as well as country by country).[14]

Disclosures required under the EU Directives include the following:

- Production entitlements;
- Taxes on income;
- Production or profit;
- Royalties;
- Dividends;
- Signature, discovery and production bonuses;
- Licence fees;
- Rental fees;
- Entry fees and other considerations for licences and/or concessions; and
- Payments for infrastructure improvements.[15]

Disclosures on a country-by-country basis are required in respect of the total amount of payments, including payments in kind to each government during the year and the total amount per type of payment to each government.[16]

The United Kingdom (UK) is the first country to domesticate the EU Accounting Directives.[17] In terms of the recently adopted UK Reports on Payments to Governments Regulations 2014, the following disclosures are required:

- The government to which each payment has been made, including the country of that government;
- The total amount of payments made to each government;
- The total amount per type of payment made to each government; and
- Where those payments have been attributed to a specific project, the total amount per type of payment made for each project and the total amount of payments for each project.

A project is defined in the Regulations as 'the operational activities which are (a) governed by a single contract, licence, lease, concession or similar legal agreement and (b) form the basis for payment liabilities with a government'.[18] In addition, where agreements are 'substantially interconnected'[19], these are regarded as a single project.[20] The Regulations further provide that two or more such agreements 'may be governed by a single contract, joint venture, production sharing agreement, or other overarching legal agreement'.[21]

Payments in kind must be reported in value and, where applicable, in volume, with notes provided explaining how the value has been determined.[22] The materiality requirement is GBP86 000.[23] The categories of payments required to be disclosed are:

- Production entitlements;
- Taxes;

- Royalties;
- Dividends;
- Signature, discovery and production bonuses;
- Fees, including licence fees, rental fees and entry fees, and other payments for licences and/or concessions; and
- Payments for infrastructure improvements.[24]

The new Regulations apply to all UK-registered limited or unlimited companies in the extractives sector.[25]

5.4 Norway's country-by-country reporting law

With regard to disclosures, Norway has been progressive in its establishment of country-by-country reporting, which aims to counter tax havens by obliging companies to report to the host nations in which they operate regarding the payment of taxes.

Norway's Regulations, which came into force in January 2014, require disclosures by companies in the extractives industry. Such disclosure entails preparing reports containing information on the total payment to each authority during the course of the accounting year, distributed by country and distributed by type of payment, as well as on payments relating to a project, reported by project and by type of payment.[26]

Payments in terms of the Regulations cover:

- Direct and indirect taxes levied on production or profits;
- Royalties;
- Dividends;
- Signature, discovery and production bonuses;
- Licence, lease and access fees;
- Other payments for licences and/or concessions; and
- Payments for improved infrastructure, and shares, interests in or other ownership rights.

The materiality requirement in the Regulations requires disclosure of payments above NOK800 000. In the case of payments in kind, the value and the amount must be specified.

The extended country-by-country requirement introduced in Norway addresses the following elements:[27]

- The type and total amount of payment for each project;
- The type and total amount of payment made to each government;
- The total amount of payments, by category;
- The government that received the payments, and the country in which the government is located;
- The project to which the payments relate;
- The currency used to make the payment;
- The financial period in which the payment was made;
- The business segment of the resource-extraction user that made the payment;
- Production (per type);
- Employees;
- Investments;
- Revenue;
- Cash tax; and
- Payable tax debt.

The advantage of extended country-by-country reporting is that, while it exposes corruption in instances where company-disclosed payments do not match what governments claim to have received, it also shows in which countries the cash flows of extractives companies end up.[28]

5.5 Canada's Extractive Sector Transparency Measures Act

In December 2014, the government of Canada adopted the Extractive Sector Transparency Measures Act, which came into force in June 2015. The purpose of the law is:

> *to implement Canada's international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities.*[29]

The law applies to:

> *a corporation or a trust, partnership or other unincorporated organization that is engaged in the commercial development of oil, gas or minerals in Canada or elsewhere; or that controls a corporation or a trust, partnership or other unincorporated organization that is engaged in the commercial development of oil, gas or minerals in Canada or elsewhere.*[30]

The value of a payment in kind in terms of the Act is defined as 'the cost to the entity or, if the cost cannot be determined, the fair market value of the goods or services that it provided'.[31] The law applies to all entities that are listed on the stock exchange in Canada, as well as to foreign companies that have a place of business in Canada, conduct business in Canada or have assets in Canada and meet at least two of the following conditions for at least one of their two most recent financial years:

1. $20 million in assets;
2. $40 million in revenue;
3. Employ an average of at least 250 employees.[32]

In terms of this law, reportable payments include those in money or in kind that are made to any government in Canada or to a foreign government, including bodies established by two or more governments or a body performing functions for a government. These payments include:[33]

- Taxes, other than consumption taxes and personal income taxes;
- Royalties;
- Fees, including rental fees, entry fees, and regulatory charges, as well as fees or other considerations for licences, permits or concessions;
- Production entitlements;
- Bonuses, including signature, discovery and production bonuses;
- Dividends other than dividends paid to ordinary shareholders;
- Infrastructure-improvement payments; or
- Any other prescribed category of payment.

All entities are required to disclose these payments not more than 150 days after the end of their financial year.[34] The law requires entities to report any payments made in relation to the commercial development of oil, gas or minerals during a financial year that exceed either the amount prescribed by regulation for a particular category or, if no amount is prescribed, $100 000.[35]

The reporting is to be done on a project-by-project basis and is subject to disclosure to the public. Non-compliance with the law is subject to the payment of fines.[36]

The law also prescribes a record-keeping requirement of seven years and the report submitted is subject to audit.[37] The Canadian government may require the submission of documents in relation to a list of projects for the commercial development of oil, gas or minerals in which the entity has an interest. In addition, the nature of that interest must be indicated, and an explanation must be given of the treatment of payments for the purposes of the report. Further, a statement of policies implemented by an entity for the purpose of compliance with the law must be provided and the results of the audit of its report must be disclosed.[38]

A contentious matter is that, like the US Dodd–Frank Act, the law does not grant any exemptions in relation to disclosures that are prohibited in other countries where the regulated entities are operating.

Table 5.1: ***Comparison of jurisdictions discussed***

(Note: Some of the information in this table has been taken from the 2013 PWC Report on Tax Transparency and Country-by-Country Reporting.)

Initiative designation	EITI Framework	US Dodd–Frank Act	EU Accounting Directive	Norway's Regulations	UK's Payments to Governments Regulations	Canada's Extractive Sector Transparency Measures Act	South Africa's disclosure requirements
Who needs to report?	*Extractives-industry companies involved in exploration and production.*	*All extractives-industry companies registered with the SEC.*	*Companies active in the extractives industry that are listed in EU-regulated markets, or large non-listed companies.*	*Large extractives-industry companies that are issuers, with Norway as their home state.*	*All UK-registered limited or unlimited companies in the extractives sector if they are either a large undertaking or a public-interest entity.*	*All companies involved in the commercial development of oil, gas or minerals in Canada or elsewhere that are listed on the stock exchange, as well as foreign companies that have a place of business in Canada, conduct business in Canada or have assets in Canada worth $20 million in assets or $40 million in revenue and that employ 250 people.*	*Apply to mineral companies whose principal activity is that of mining and/or exploration, and to non-mineral companies with substantial mineral assets.*
Payment to which levels of government?	*Country MSGs decide whether payments to subnational levels of government are material, and if so, how to include them.*	*Payments to subnational levels of foreign governments are included, but payments to subnational levels of government in the USA are excluded.*	*Payment to each government within a financial year (including type of payment). Payments to be attributed to a specific project unless made at an entity level.*	*Payment to each government and subnational government within an accounting year, including type of payment. Payments to be attributed to a specific project.*	*Payments must be disclosed to subnational governments, including type of payment. Payments to be attributed to a specific project.*	*Payments must be disclosed to all levels of government in Canada or a foreign state on a project-by-project basis.*	*There are no requirements concerning payments to subnational governments, except for applicable tax payments such as property taxes.*

Initiative designation	EITI Framework	US Dodd-Frank Act	EU Accounting Directive	Norway's Regulations	UK's Payments to Governments Regulations	Canada's Extractive Sector Transparency Measures Act	South Africa's disclosure requirements
Materiality	*All material revenue streams must be reported. EITI countries are free to establish materiality level for size of payments and size of companies.*	*No materiality levels but cut-off of USD100 000.*	*Companies are required to report all payments over €100 000.*	*Companies are required to report all payments over NOK800 000.*	*The materiality requirement is GBP86 000.*	*The materiality requirement is Canadian $100 000.*	*As a rule of thumb, would normally be equal to or exceed 10%.*[39]
Reporting time frame	*Country MSGs decide on the time period to be covered.*	*Information to be provided for the fiscal year covered by the applicable SEC filings.*	*Reports of payments made to governments need to be disclosed on a yearly basis. Listed companies to report within six (6) months of the financial year-end, with time frames for non-listed companies being determined by member states.*	*Reports of payments made need to be disclosed on a yearly basis.*	*Reports are due within 11 months of the end of the financial year.*	*Reports are due within 150 days of the end of the financial year.*	*Financial reports are due within six (6) months after the end of a financial year.*
Where the data needs to be reported to	*Companies need to report to the EITI Country Programme, and the reports are publicly available.*	*Companies report by way of separate, annual, electronic-format 'exhibits' to be filed alongside reports filed with the SEC.*	*The companies should annually prepare and make public a report on the payments made to government.*	*The companies should prepare the report for submission to the oversight body.*	*Reports are to be made to the Registrar of Companies for England and Wales, and are to be made publicly available.*	*Reports are to be disclosed to a designated Minister who is a member of the Queen's Privy Council, and are to be made available to the public.*	*Reports are to be submitted to the Johannesburg Stock Exchange (JSE) and other regulatory bodies, with there being only limited public access. (The JSE may prevent public disclosure if it is satisfied that the legitimate interests of a company may be prejudiced.)*

Initiative designation	EITI Framework	US Dodd-Frank Act	EU Accounting Directive	Norway's Regulations	UK's Payments to Governments Regulations	Canada's Extractive Sector Transparency Measures Act	South Africa's disclosure requirements
Level of data aggregation	*Data to be reported at an individual-company and individual-project level.*	*Company data to be reported to the SEC on a country-by-country and project-by-project basis.*	*Company data to be reported on a country-by-country basis and to include a consolidated report and report by project.*	*Data to be reported country by country and by project.*	*Data to be reported country by country and by project.*	*Data to be reported on a country-by-country basis and, at the Minister's discretion, on a project basis.*	*Company data to be reported on a project basis only (i.e. regarding mineral reserve and value).*
Reporting basis for payments to government	*Cash not accrual basis. Production entitlements can be reported in cash or in kind.*	*Cash basis in line with the EITI.*	*The total amount and type of payments, including payments in kind, made to each government within a financial year.*	*Payments in cash and in kind must be reported in value and, where applicable, by amount.*	*Payments in cash and in kind must be reported in value and, where applicable, by volume.*	*Payments in cash and in kind must be reported in value and, where applicable, by amount.*	*Form of payments prescribed (i.e. royalties, levies and fees) is only listed in cash.*
Audit requirement	*Where companies are audited in terms of international standards, there is generally no further audit requirement.*	*Payment disclosures are not to be part of the audited financial statements and no audit is required.*	*There is no audit requirement.*	*There is no audit requirement.*	*There is no audit requirement.*	*The reports must be audited.*	*Some of the reports (i.e. the financial report) are required to be audited in the case of listed and public companies. There are no audit requirements with regard to compliance with JSE listings.*

Initiative designation	EITI Framework	US Dodd–Frank Act	EU Accounting Directive	Norway's Regulations	UK's Payments to Governments Regulations	Canada's Extractive Sector Transparency Measures Act	South Africa's disclosure requirements
Payment categories	*The host government's production entitlement (such as profit oil); national SOE production entitlement; profit taxes; royalties; dividends; bonuses, such as signature, discovery and production bonuses; licence fees, rental fees, entry fees and other considerations for licences and/or concessions; and any other significant payments to and material benefits for government.*	*Taxes; royalties; fees (including licence fees); production entitlements; bonuses; and other material benefits.*	*Production entitlements; taxes on income; production or profit; royalties; dividends; signature, discovery and production bonuses; licence fees, rental fees, entry fees and other considerations for licences and/or concessions; and payments for infrastructure improvements.*	*Direct and indirect taxes charged on production or profits; royalties; dividends; signature, discovery and production bonuses; licence, lease and access fees; other payments for licences and/or concessions; payments for improved infrastructure; and shares, interests in or other ownership rights.*	*Production entitlements; taxes; royalties; dividends; signature, discovery and production bonuses; fees, including licence fees, rental fees and entry fees; other payments for licences and/or concessions; and payments for infrastructure improvements.*	*Taxes, other than consumption taxes and personal income taxes; royalties; fees, including rental fees, entry fees and regulatory charges, as well as fees or other consideration for licences, permits or concessions; production entitlements; bonuses, including signature, discovery and production bonuses; dividends other than dividends paid to ordinary shareholders; infrastructure-improvement payments; and any other prescribed category of payment.*	*Profit taxes; other taxes such as VAT; capital gains tax; customs and excise; skills development levy; benefits from tax planning strategies; royalties; dividends; cost-recovery deductions; and licence fees.*
Oversight institutions	*The MSG ensures compliance.*	*US Securities Regulator.*	*The EU requires all member countries to adopt the Directive and to domesticate it in the respective countries.*	*Norway's Securities Regulator.*	*Registrar of Companies for England and Wales.*	*Designated Minister, who is a member of the Queen's Privy Council.*	*The South African Revenue Service (SARS) is the main oversight body.*

Endnotes

1 N. Compaoré, 'Towards understanding South Africa's differing attitudes to the Extractive Industries Transparency Initiative and the Open Governance Partnership', May 2013, South African Institute of International Affairs.
2 Available at: https://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf [accessed February 2015].
3 PricewaterhouseCoopers (PwC), 'Tax transparency country-by-country reporting: An ever changing landscape', October 2013. Available at: http://www.pwc.com/gx/en/tax/publications/assets/pwc_tax_transparency_and-country_by_country_reporting.pdf.
4 In the compilation of the report, disclosures by government and industry are made to an independent reconciler who reconciles the receipts and payments, collects and reviews the other data, and compiles the report. The MSG then oversees the process and signs off on the final report to the public. The government leads the process and provides it with the political space and the authorities needed to mandate disclosure by the companies to the reconciler.
5 In terms of the EITI, a beneficial owner in relation to a company means the natural person(s) who directly or indirectly ultimately owns or controls the corporate entity. Publicly listed companies, including wholly owned subsidiaries, are not required to disclose information on their beneficial owner(s) under the EITI.
6 Available at: https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.
7 Section 1504 Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010.
8 Ibid.
9 Means an entity that is required to file an annual report with the Commission, and which engages in the commercial development of oil, natural gas or minerals.
11 Available at: http://www.oroc.pt/fotos/editor2/diretivacont.pdf.
11 Specifically those firms that have an annual turnover exceeding €40 million, total assets of €20 million, and 250 employees. See PricewaterhouseCoopers (PwC), 'Tax transparency country-by-country reporting: An ever changing landscape,' October 2013; PWYP UK 'FACT SHEET: UK Reports on Payments to Governments Regulations 2014'; Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.
12 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013.
13 Ibid.
14 Ibid.
15 Ibid.
16 Ibid.
17 See UK Reports on Payments to Governments Regulations. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/346331/bis-14-1019-draft-statutory-instrument-reports-on-payments-to-governments-regulations-2014.pdf.
18 Regulation 2(1).
19 Means 'a set of operationally and geographically integrated contracts, licences, leases or concessions or related agreements with substantially similar terms that are signed with a government' – Regulation 2(6).
20 Regulation 2(5).
21 Regulation 2(7).
22 See UK Reports on Payments to Governments Regulations 2014; PWYP UK 'FACT SHEET: UK Reports on Payments to Governments Regulations 2014'.
23 Ibid.
24 Ibid.
25 Ibid.
26 Regulations as translated by PWYP Norway 2014.
27 See PWYP, 'Briefing', available at: http://www.publishwhatyoupay.no/sites/all/files/PWYP_PolicyBriefing_Eng_Web_0.pdf [accessed 3 February 2015]; PWYP, 'An extended country by country reporting standard: A policy proposal to the EU,' available at: http://www.publishwhatyoupay.no/sites/all/files/1007a-PWYPNorway_CBC_Reporting_DOWNLOAD.pdf [accessed 3 February 2015].
28 Ibid.
29 Section 6.
30 Section 2 on definitions.
31 Section 3.
32 Section 8.

33 Ibid.
34 Section 9.
35 Ibid.
36 Sections 9 and 24.
37 Sections 13 and 14.
38 Section 14.
39 The JSE Listing Requirements, in the definitions section, defines 'material' as information that, if omitted or misstated, could influence the economic decisions of users and includes a change in, or constituent of, a particular factor that may be regarded in the circumstances as being material and that, as a rule of thumb, would normally be equal to or exceed 10%.

PART 6

The role and relevance of the Africa Mining Vision for disclosure

The Africa Mining Vision (AMV) was adopted by heads of state of the African Union (AU) in 2009. Among other lofty objectives is that of integrating mining into local, national and regional development policy so that local communities benefit from mining and in order that the environment is protected.[1]

The AMV advocates increased quality of data relating to the potential value of a resource, because 'the less that is known about the potential value of a resource the greater the share of the rents that the investor will … demand, due to the high risk of discovering … the resource, which may turn out to be sub-economic'.[2] Further, the AMV states that most African states lack basic geological mapping, and that this 'increases the risk for investors who consequently demand extremely favourable tax regimes for any operation that may result from their … exploration.'[3] As a result, the AMV promotes increased investment in improving the knowledge-infrastructure resources relating to geological mapping.[4]

The AMV also recommends, as a short-term measure for companies, an improvement in public participation in the mining sector that includes consultation and information sharing which mainstreams environmental and social impact assessments into national policies, laws and regulations.[5] Also, the AMV advocates self-adjusting resources tax regimes that allow the state to obtain windfall rents during commodity booms, rather than direct tax as a result of profit margins, particularly in the oil and gas sector.[6]

In addition, the AMV promotes a governance regime that involves the ongoing auditing, monitoring, regulation and improvement of resource-exploitation regimes, as well as the development of resource-sector linkages in the domestic economy.[7] In particular, it advocates that this capacity development could be enhanced through accession to regimes such as the Extractive Industries Transparency Initiative (EITI) that could, alongside other bodies, act as oversight bodies over resource exploitation.[8]

The AMV promotes the utilisation and management of revenues that are due to resource-rich communities so that such funds are managed in a way that ensures the economic sustainability of these communities after mining activities come to an end.[9]

Since its adoption, the AMV has been the most prominent initiative in Africa relating to extractives. The key results of the Vision are: 'policy and licensing; geological and mining information systems; governance and participation; artisanal and small-scale mining; linkages, investment and diversification; building human and institutional capacity; and communication and advocacy'.[10]

The African Minerals Development Centre (AMDC) is tasked with providing strategic operational

The goal of the AMV is to promote transparent, equitable and optimal exploitation of mineral resources so as to underpin broad-based sustainable growth and socio-economic development.

support with regard to the AMV and its Action Plan. There are six challenges facing the AMV. These are: 'mining and exploration rights allocation; contract negotiation, royalties and technical structuration of extractive deals; revenue transparency; developing capacity for effective oversight; managing resources and conflict dynamics; and wider global regulatory dimensions (such as tax harmonisation, transfer pricing and beneficial ownership).[11]

The goal of the AMV is to promote transparent, equitable and optimal exploitation of mineral resources so as to underpin broad-based sustainable growth and socio-economic development. The success of the AMV is dependent on:

> *strong political will and a commitment to developing strong capable mineral management systems and institutions; an astute understanding of Africa's relative advantages in the global mineral value chain, maximising the benefits of regional integration, and building robust partnerships.*[12]

As regards country-level implementation of the AMV, a substantial shift in policy and practice will need to take place, supported by both companies and government.

The AMV recommends that negotiators should agree on the following as regards any contract involving minerals: an equitable share of the resource rents; a flexible fiscal regime that is sensitive to price movements and stimulates national development; third-party access to the resource infrastructure (particularly transport, energy and water) at non-discriminatory tariffs; development of the local resource supplier/inputs sector where feasible (particularly capital goods, services and consumables) through flexible local-content milestones; the establishment of resource-processing industries through the use of flexible, value-addition milestones and incentives and the upfront stipulation of competitive pricing of resource outputs/products in the domestic market for the life of the project; the development of local human resources and technological capacity through stipulated investments in training and in research and development, preferably in partnership with the state; and provisions that safeguard transparency and good governance as well as enforce internationally accepted safety and health standards, environmental and material stewardship, corporate social responsibility, and preferential recruitment of local staff.[13]

The AMDC is expected to develop the mining vision of the various countries. However, the AMV has failed to live up to its potential as a result of a lack of political will on the part of African states, such that the AMV is not even funded by African governments and its objectives are not being met, including the mainstreaming of EITI principles into national laws.[14] The AMV's success will require the AMDC to learn from the experiences of other global initiatives in order to strengthen challenging areas.

The objective of the various governance initiatives relating to extractives is the promotion of sustainable development, and the success of the AMV also depends on achieving this objective. Effective oversight mechanisms are crucial to the success of this objective and it is important that these mechanisms also take into account the unique context of each African state. In order to avoid the duplication of initiatives, it is important that the existing initiatives currently in operation are distinguished from one another so as to identify the most suitable approach for adoption by South Africa. For the objectives of the AMV to be met, South Africa will need to undertake a review and amendment of the regulatory frameworks applicable to the extractives industry with regard to ownership, operational and financial disclosure requirements.

Endnotes

1 See AU, 'Africa Mining Vision', 2009, available at: http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf.
2 Ibid, p. 15.
3 Ibid.
4 Ibid.
5 Ibid, p. 33.
6 Ibid, p. 15.
7 Ibid, p. 5.
8 Ibid, p. 20.
9 Ibid, p. 36.
10 United Nations Economic Commission for Africa, 'Minerals and Africa's development: International Study Group report on Africa's mineral regimes', 2011, p. 150.
11 O. Bello, 'Africa's extractive governance architecture: Lessons to inform a shifting agenda', 2014, SAIIA Policy Briefing.
12 United Nations Economic Commission for Africa, 'Minerals and Africa's development: International Study Group report on Africa's mineral regimes'.
13 Ibid, p. 135.
14 O. Bello, 'Africa's extractive governance architecture: Lessons to inform a shifting agenda'.

PART 7

African countries with disclosure regimes: A survey of the disclosure regimes of EITI-compliant countries and their successes

The EITI-compliant countries that the present research report evaluates include Nigeria and Ghana, particularly as regards assessing the value of the institutionalisation of the Extractive Industries Transparency Initiative (EITI) through the statutory enactment of the EITI in Nigeria, the effect of delayed audits on EITI reporting in both countries, and the extension of reporting requirements to subnational revenue flows in Ghana. These analyses are done with a view to determining the value of adopting EITI standards in South Africa, and what such a measure can achieve in practice.

Ghana's EITI reports have been successful given the fact that this has enabled Ghana to discover discrepancies in payments and receipts, as well as shortcomings in the disbursement of revenue to the subnational level.[1] According to the EITI, Ghana's mining revenue more than doubled between 2010 and 2011.[2]

However, there are still significant challenges for Ghana in terms of transparency in the extractives industry, such as accountability on the part of companies and government to communities in relation to the distribution of revenue, as well as other social and environmental challenges.[3] The development of the EITI Report itself has also been met with challenges, such as a delay in the production of audit-reporting data used in the compilation of the Report.[4]

A significant development in Ghana's transparency narrative was the disclosures by Jubilee Field, a corporation that had to disclose its contract and joint production agreements, as part of a requirement of its Initial Public Offering, to the United States (US) Securities and Exchange Commission (SEC).[5] As a result, the government of Ghana and the partner in the production agreement, Tullow Oil, also had to disclose their contracts.[6]

The EITI process in Ghana has empowered civil society, state authorities and the media through information-dissemination sessions as well as capacity-building activities.[7]

In Nigeria, the government passed the Nigeria Extractives Industries Transparency Initiative (NEITI) Act of 2007 in order to implement the EITI, at the same time being the first country to do so. The problem of delayed audits has also affected EITI reporting in Nigeria. The NEITI has employed road-shows in disseminating audit reports to civil society, community leaders, and state officials at subnational levels, as well as traditional leaders.[8]

The adoption of the EITI in Nigeria by way of statutory backing has been argued to be a result of both external and internal factors. The external factors include 'global actors and discourses that pushed transparency issues to the forefront of global policy response to the resource curse by highlighting the negative impact of corruption on social, economic and political development in Africa'.[9] As a result, it has been suggested that the need to address the negative international reputation of

However, there are still significant challenges for Ghana in terms of transparency in the extractives industry, such as accountability on the part of companies and government to communities in relation to the distribution of revenue, as well as other social and environmental challenges.

Nigeria provided an opportunity for the Nigerian government to use a commitment to the EITI so as to gain some legitimacy.[10] Internally, what has been described as a populist disenchantment with mismanagement of public resources necessitated the need for the EITI.[11]

In a detailed analysis of the success of the EITI in Nigeria, the following was identified: a limited diagnosis of the 'governance failure complex' in Africa, which shows some of the shortcomings in the EITI process, such as:

> *[the fact that the EITI is treated as] ideationally neutral and devoid of power relations (between the Nigerian state and multinationals and between the Nigerian state and Western states), the emphasis on government revenue earnings with a limited focus on expenditure, a misplaced faith in civil society and [its] ability to demand accountability without regard for their nature, character and capacity, the top-down process of EITI with little space for the marginalised and the failure of the EITI to address [the] entire economic text within which it is to be implemented.*[12]

Some of these identified concerns have been addressed in the new EITI standards by way of the introduction of disaggregated reporting, subnational transfers, and the campaign for country-by-country reporting by Publish What You Pay (PWYP).

A lesson to learn for South Africa based on the Nigerian experience – apart from the institutionalisation of the EITI process through enabling legislation – is the need for state capacity to verify production volumes and value independently without reliance on information provided by production companies, the alignment of disclosures in line with other regulatory structures that monitor the expenditure of government revenue, and the involvement of a holistic multistakeholder group (MSG) that ensures that local communities and capable civil society organisations are represented.

The South African state also needs to recognise its own structural and systemic problems, such as ineffective bureaucratic systems, ineffective oversight systems, and the need for cooperative governmental agencies so that concerns about the potential susceptibility of the EITI process to being captured by the elite who have a vested interest in sustaining corruption, is addressed.[13]

One of the primary limitations identified with regard to the EITI is the inability to correlate revenue transparency with substantive social impacts, particularly for affected communities. As a result, the EITI has been criticised for being process-oriented and, as a result, is seen as an end in itself rather than a means to an end.

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New EITI measures are helpful if we consider matters such as: countries setting their own objectives; presenting appropriate contexts for the reports; new disclosure requirements necessitating comprehensive and accurate disclosures; disaggregated reporting; and the applicability to state-owned entities (SOEs). Others include subnational transfers, social expenditure by companies, and payments from the transit of extracted resources.

For EITI application to succeed in South Africa, it is necessary for the EITI to be linked to other initiatives, including environmental sustainability, corporate social responsibility and investment, tax reform, and the development of extractives areas by the government.

Endnotes

1 E. Wilson & J. van Alstine, 'Localising transparency: Exploring EITI's contribution to sustainable development,' 2014, University of Leeds, p. 28.
2 B. K. Campbell, *Modes of governance and revenue flows of African mining*, 2013, Palgrave Macmillan, p. 124.
3 Ibid.
4 E. Wilson & J. van Alstine, 'Localising transparency: Exploring EITI's contribution to sustainable development,' p. 29.
5 Ibid, p. 30.
6 Ibid.
7 Ibid, p. 31.
8 Ibid, p. 35.
9 U. Idemudia, 'The Extractive Industries Transparency Initiative and corruption in Nigeria: Rethinking the links between transparency and accountability,' in R. Calland & F. Diallo (Eds), *Access to information in Africa: Law, culture and practice*, 2013, Brill Publishing, pp. 134–135.
10 Ibid, p. 135.
11 Ibid. The background paper to the NEITI stated: 'The federal government has recognised that improvements in the transparency of petroleum revenue data are needed for the effective management of public resources and to improve the image of Nigeria at home and abroad.'
12 Ibid, p. 137.
13 Ibid, p. 140.

PART 8

Disclosure practices by oil, gas and mining companies in South Africa

To gauge how both South African and international disclosure requirements are interpreted by a range of influential companies operating in the oil, gas and mining sectors in South Africa, the following companies were selected for analysis: Sasol Limited, Anglo American, Impala Platinum Holdings Limited, Harmony Gold Limited, and Coal of Africa Limited. These companies are representative of the variety of extractives companies operating in South Africa, from diversified, established multinationals such as Sasol and Anglo American, to smaller multinationals such as Implats and Harmony Gold that concentrate on a smaller range of commodities, to emerging mining entities such as Coal of Africa. All of the companies selected for analysis have a primary or secondary listing on the Johannesburg Stock Exchange (JSE) and cross-listings on other international exchanges.

As a necessary context, this part examines each company with reference to its business and corporate structure, to details of its ownership and cross-listings, to pertinent information regarding its corporate-governance structure, as well as to its claims to good corporate governance (including whether or not it supports the Extractive Industries Transparency Initiative [EITI]). A detailed analysis, in table format, of the company's compliance with international and South African disclosure requirements then follows. The table on international standards draws on the cross-cutting categories utilised in PricewaterhouseCoopers' (PwC's) report, 'Tax transparency country-by-country reporting: An ever changing landscape' (2013), and indicates the company's disclosure of information pertaining to: production entitlements; profit taxes; other taxes on income, profit or production; royalties; dividends; production, signatory, discovery and other bonuses; licence fees, rental fees, entry fees, and other considerations for licences and/or concessions; public subsidies; reserve volumes; production volumes; revenues; number of employees; profit/loss before tax; and social investment. As is evident from the table of information disclosures required by South African law, companies are obliged to disclose a rather narrow range of ownership, operational and financial information to the public, but have a wide discretion to disclose other categories of information. Therefore, the table on South African disclosure 'requirements', rather than indicating companies' disclosure practices in respect of information categories for which public disclosure may not yet be legally required, concentrates on those categories of information where companies hold records and where disclosures could be made. Disclosure practices already covered in the table on international standards (e.g. taxes payable, dividends, mineral reserves, and social investments) are not repeated. The South African disclosure tables accordingly examine: the company's compliance and engagement with the Promotion of Access to Information Act (PAIA); corporate-governance information (Memorandum of Incorporation, directors' records, minutes of the annual general meeting, and notices and minutes of all shareholders' meetings); details regarding prospecting and mining licences; records of prospecting and mining activities; records of environmental impacts; health and safety records; compliance with the Mining Charter; payments to traditional authorities; health and safety information; and details on local beneficiation.

The analyses have in the main been based on the company's most recent integrated annual report, its annual financial statements, as well as its mineral resource and reserve statements; Stock Exchange News Service (SENS) reports; reports submitted as a result of cross-listing requirements; and information available on the company's website or otherwise available in the media.

8.1 Sasol Limited

8.1.1 Business and corporate structure

Sasol Limited is the holding company of a group of companies engaged in fuel operations, coal mining, oil and gas exploration, and chemical operations.[1] The business operations of the Sasol Group are divided into: a South African Energy Cluster (including the subsidiaries: Sasol Mining, Sasol Gas, Sasol Synfuels and Sasol Oil); an International Energy Cluster (incorporating the subsidiaries: Sasol Synfuels International and Sasol Petroleum International); and a Chemical Cluster.[2] Sasol's South African mining operations produce approximately 40 Mt of saleable coal per annum, the vast majority of which is used in Sasol's Secunda and Sasolburg plants. Sasol Gas Limited distributes and markets natural gas from Mozambique and methane-rich gas from the Secunda plant, and also owns a 50% stake in the Republic of Mozambique Pipeline Investments Company (which is the owner of the 865 km natural-gas pipeline that traverses South Africa and Mozambique). Sasol Synfuels operates the only commercial, coal-based synfuels manufacturing facility in the world, while Sasol Oil markets synthetic fuels manufactured by the group and refined at the Sasol Natref Refinery (in which Sasol holds a 63.6% stake). Sasol Synfuels International and Sasol Petroleum International develop, implement and manage international business ventures based on Sasol's proprietary knowledge, and manage and develop upstream natural oil and gas exploration and production interests, respectively.[3] These include the production of oil in Gabon and shale gas in Canada.[4] Together with companies such as Statoil and Shell Exploration International and others, Sasol Petroleum International has applied for exploration to undertake fracking in South Africa's Karoo Basin.[5] In June 2014, Sasol Petroleum International granted Eni SpA (an Italian multinational oil and gas company) a 40% interest in a permit allowing for the right to explore for hydrocarbons on an 82 000 km^2 stretch of unexplored coastline on South Africa's east coast.[6] Since the formation of Sasol Limited, the number of subsidiaries in the group is in the process of being reduced from 250 entities to no more than 50.[7] According to a manual published in response to the company's obligations in terms of PAIA, Sasol Limited has a direct interest in 17 other subsidiaries and juristic persons, and an indirect interest in a further 50 companies engaged in mining, energy and chemical operations. Sasol has exploration, development, production, marketing, and sales operations in 37 countries around the world. Sasol Limited is thus a significant player across the oil, gas and mining sectors in South Africa, southern Africa, and indeed globally.

8.1.2 Ownership, listing and cross-listing

Sasol is a public company and is listed on both the JSE and the New York Stock Exchange (NYSE).[8] Sasol's ordinary shares can be bought and sold on both exchanges. As part of a black economic empowerment (BEE) transaction whereby 10% of Sasol's issued share capital was made available to qualifying individuals, groups of individuals and entities, Sasol BEE ordinary shares were listed on the JSE in 2008.[9] As of June 2014, the three largest categories of ordinary shareholders were: pension and provident funds (26.8%); unit trusts (23.2%); and other managed funds (11.5%). Major shareholders include the South African Government Employees Pension Fund (14.4%) and the South African Industrial Development Corporation (8.2%).[10]

Sasol's submissions to the United States (US) Securities and Exchange Commission (SEC) in the form of Form 20-F are freely available on the company's website, archived back to 2005.[11]

8.1.3 Corporate governance

Responsibility for the strategic direction and control of Sasol Limited is vested in a 14-member Board, of which 11 directors are non-executive directors. Tactical management of the company is in the hands of the President, the Chief Executive Officer and a six-member Group Executive Committee (GEC).[12] There are nine subcommittees of the GEC, comprising GEC members and functional

managers, including a Combined Assurance and Disclosure Committee. This committee will continue with the task of the former disclosure committee – that is, oversee compliance with the disclosure requirements of the JSE, the SEC and the NYSE rules, among others.[13] The integrated annual report notes that 'the company's disclosure controls and procedures ensure the accurate and timely disclosure of information to shareholders, the financial community and the investment community'.[14] There is also a standing Nomination, Governance, Social and Ethics Committee.[15] As part of the corporate restructuring that entailed moving a collection of legal entities and structures into a single holding company, most of the subsidiary board and subcommittee structures have been done away with.[16]

Sasol Limited is not a company supporting the EITI.

8.1.4 Disclosure practice: International standards

Sasol Limited maintains that it has implemented controls to provide 'reasonable assurance' of compliance with all relevant requirements of its listings, including the SEC rules, the NYSE 'Listed company manual' and US legislation, particularly the Sarbanes-Oxley Act of 2002. There is no mention of the US Dodd–Frank Act in the company's 2014 integrated report. Nevertheless, the report states:

> *The board considers corporate governance to be a priority and endeavours to go beyond compliance. The board will therefore consider all new non-statutory corporate governance concepts carefully and will implement them if they are deemed to be in Sasol and its stakeholders' best interests.*

The manner in which Sasol Limited complies with the most common reporting criteria laid down by international disclosure standards is set out in Table 8.1.

Table 8.1: Sasol Limited's disclosure practice in respect of common reporting criteria derived from international reporting standards

Reporting categories	Sasol Limited's disclosure practice
Production entitlements	*Sasol Limited did not report on any production entitlements.*
Profit taxes	*Sasol Limited reported on profit taxes at various places in its annual financial statements. Under 'Monetary exchanges with governments', it indicated that, for the 2014 financial year, its direct taxes payable as per the income statement amounted to R12 929 million.[17] Of this, R10 717 million was South African income tax; R82 million was paid as South African 'dividend withholding tax'; and R2 130 million was for foreign tax. The annual financial statements also provided details of tax payable and receivable as per the statement of financial position (incorporating net tax amounts unpaid, net interest and tax penalties, etc.), which led to an adjusted amount in respect of the total tax paid.[18]*
Other taxes on income, profit or production	*As indicated above, Sasol Limited provided an indication of South African normal (income) tax payable, as well as of dividend withholding tax and foreign tax. The tax base for the foreign taxes was not specified. In the section, 'Monetary exchanges with governments', Sasol Limited also indicated that it paid R22 208 million in 'indirect taxes' to the South African and other governments. Of this, R22 311 million was for customs, excise and fuel duty, with the remainder being for property taxes and 'other' levies (see the section dealing with licence fees below), with the total amount being offset by value-added tax (VAT) payable to the corporation.*
Royalties	*Sasol Limited did not explicitly indicate whether it had paid royalties to the South African government in terms of the Mineral and Petroleum Resources Royalty Act 28 of 2008.*
Dividends	*As the two largest individual shareholders, the South African Government Employees Pension Fund and the Industrial Development Corporation benefit from the declaration of any dividend. The annual financial statements indicate that, for the 2014 financial year, the total dividend for the year amounted to R21.50 per ordinary share.[19]*

Reporting categories	Sasol Limited's disclosure practice
Production, signatory, discovery and other bonuses	*Sasol Limited did not report on such bonuses.*
Licence fees, rental fees, entry fees, and other considerations for licences and/or concessions	*In the section, 'Monetary exchanges with governments', Sasol Limited indicated that it paid R22 208 million in 'indirect taxes' to the South African and other governments. Of this R22 311 million was for customs, excise and fuel duty; R142 million was for property tax; R115 million was for 'other levies'; and 'R2 279 million was for 'other'. The total amount payable in indirect taxes was offset by an amount of R2 639 million payable to Sasol Limited as VAT under the South African tax regime. The annual financial statements further provided a breakdown of net monetary exchanges with governments (incorporating direct and indirect taxes) as follows: South Africa – R35 822 million[20]; the United States of America (USA) – R1 476 million; Germany – R265 million; and 'other' – R3 158 million.[21] Contrary to the requirements of the EITI, Sasol Limited did not provide a comprehensive list of its extractives licences.*
Public subsidies	*Sasol Limited did not report on public subsidies received.*
Reserve volumes	*The annual integrated report and annual financial statements did not set out the company's oil, gas and mineral reserves.*
Production volumes	*Sasol Limited's annual integrated report provided information on the production volumes of its various business segments. For instance, during the 2014 financial year, Sasol Mining produced 41.5 Mt of coal at an operating profit of R2 453 million.[22]*
Revenues	*Sasol Limited's annual reports did not provide a specific breakdown of its own revenue streams. However, in line with the EITI's concern with revenues derived from transportation of oil, gas and minerals, it should be noted that Sasol Gas is materially invested in the transportation of natural gas from gas fields in Mozambique to South Africa. For the 2014 financial year, the operating profit of Sasol Gas was R4 175 million.[23]*
Number of employees	*Sasol Limited reported that, in 2014, it had 33 400 employees.[24]*
Profit/loss before tax	*Sasol Limited's annual financial statements indicated that it made a profit of R45 113 million before tax.[25]*
Social investments	*Sasol Limited's annual sustainable-development report detailed the company's various forms of social investment. The report indicated that an additional R479.9 million had been invested in socio-economic development initiatives in Sasol's communities.[26] This investment was targeted at longer-term development of critical and rare skills through the support of learners and professionals in higher and tertiary education.*

8.1.5 Disclosure practice: South African standards

Table 8.2: Sasol Limited's disclosure practice in respect of mandatory and non-mandatory public and non-public disclosure requirements in terms of South African law and regulatory practice

Reporting categories	Company compliance and interpretation
Engagement/compliance with PAIA	*There is compliance in terms of this reporting category.[27] In its integrated report, Sasol indicated that it had received two requests in terms of PAIA, one which it had acceded to, and one which it had refused. The Centre for Environmental Rights (CER) had, in resorting to PAIA, requested the municipality that had issued Sasol with an atmospheric-emissions licence for a copy of this licence. After a delay involving many months, the municipality (which referred to Sasol as its 'client') had provided a heavily redacted copy.[28]*

Reporting categories	Company compliance and interpretation
Corporate-governance information	*Sasol's Memorandum of Incorporation is available on the company website,[29] as is the Board Charter, the Terms of Reference of Board Committees,[30] and notices, minutes and results of annual general meetings (AGMs).[31] A detailed statement of Sasol Limited's compliance with the King Code is also available on the company's website.[32] The statement did not indicate how many PAIA requests were received, and how many were acceded to/refused.*
Prospecting and mining licences	*Sasol does not provide a comprehensive list of all its mining titles. However, according to its PAIA Manual, documents relating to land, prospecting, mining, mineral rights and servitudes may be provided using the PAIA procedures (but subject also to the restrictions contained in the Act). The documents may include approvals, consents, deeds, lease agreements, and documents that must be lodged with the Deeds Registry or with the Director of Mineral Development of the Department of Mineral Resources (DMR), among others.*
Records of prospecting and mining activities	*In its PAIA Manual, Sasol confirms that it maintains records in accordance with the Mineral and Petroleum Resources Development Act (MPRDA), the Gas Act and the Petroleum Pipelines Act, among other production-related legislation. None of this information is available without a person requesting access. In its PAIA Manual, Sasol indicates that the following categories of information may be provided using PAIA procedures (but subject also to the restrictions embodied in the Act):* • *Production statistics;* • *Documents relating to deliveries and receipts of products;* • *Warehouse and storage records; and* • *Pipeline agreements.*
Records of environmental impacts	*In its PAIA Manual, Sasol confirms that it maintains records in accordance with the Environment Conservation Act (ECA), National Environmental Management Act (NEMA), National Environmental Management: Air Quality Act (NEMAQA), National Environmental Management: Biodiversity Act (NEMBA), and National Water Act (NWA). None of this information is available without a person requesting access. In its PAIA Manual, Sasol indicates that the following categories of information may be provided using PAIA procedures (but subject also to the restrictions contained in the Act):* • *Sasol Safety, Health and Environment Policy;* • *Documents relating to business unit/division/country/site best practices;* • *Sustainable-development reports (available on the company website);* • *Safety-, health- and environment-governance audits;* • *Environmental impact assessments;* • *Safety, health and environment audits, inspections, plans, programmes, procedures, training, and emergency response;* • *Reports on safety-, health- and environment-related complaints or information;* • *Documents relating to the investigation and reporting of safety, health and environmental incidents;* • *Documents in respect of permits, authorisations and exemptions;* • *Documents relating to corporate policy, standards and systems of managing and optimising aspects of health and hygiene in the workplace; and* • *Documents relating to water conservation, waste management and emissions.* *For each of its business segments in the integrated report, Sasol Limited reported on the direct greenhouse-gas emissions (GHGs) of its operations.* *In its sustainable-development report, Sasol Limited set out information and statistics relating to its air quality and waste management (including total emissions, in historical perspective, of nitrogen oxides, sulphur oxides, and particulate matter; as well as total production of hazardous and non-hazardous waste); climate change and energy (including total emission of GHGs); and total water use.[33]*
Health and safety information (Mine Health and Safety Act, Occupational Health and Safety Act [OHSA], Compensation for Occupational Injuries and Diseases Act [COIDA])	*Sasol indicated the number of fatalities and safety incidents in its integrated report, provided in terms of the recordable case rate (RCR) for each of its business segments.[34] In its sustainable-development report, Sasol also set out details regarding its employee and service provider safety, occupational health and well-being.[35]*

Reporting categories	Company compliance and interpretation
Mining Charter	*There are numerous references to Sasol's Level 3 broad-based black economic empowerment (BBBEE) status in the integrated report, and Sasol's BBBEE verification certificate is available on the company's website.*[36]
Payments to traditional authorities	*Sasol did not report on any payments made to traditional authorities.*
Information on local beneficiation	*Not applicable.*

8.1.6 Discussion

Once the Dodd–Frank Act enters into force, Sasol will be required to comply with the provisions of such Act in view of the company's listing on the NYSE. Although Sasol Limited is not statutorily obliged to disclose documents relating to its corporate existence and governance (its Memorandum of Incorporation, documents relating to AGMs, etc.) in terms of South African law, much of this information is freely accessible on the company's website. Diagrams depicting the structure of the group are contained in the company's PAIA Manual. Moreover, details of the company's cross-listing in the USA, as well as the most recent and archived reports submitted to the SEC, are also freely available on the company website.

As regards information on *ownership*, particulars regarding the share capital of the company and the majority shareholders are made available in the company's annual integrated report. This shows that the South African government is a major stakeholder in Sasol Limited through the Government Employees Pension Fund *and* the Industrial Development Corporation. Additionally, Sasol is also the country's top corporate contributor to the national fiscus. Information on BEE is available in a variety of forms, such as in references in the annual integrated report, on the company's BBBEE certificate available on the company website, and from information on the remuneration of directors from historically disadvantaged groups. The company's mineral titles are less readily accessible, being available only through the PAIA route. Unlike other companies (Coal of Africa Limited, for instance), Sasol has not published a comprehensive list of its mineral tenements.

As regards *operational* information, Sasol Limited provides an account of production volumes and revenues for all its major business units in its annual integrated report. This may assist civil society to ascertain the scale and profit-generating capacity of the company. More detailed production and logistical information can be requested using the PAIA process. Although Sasol voluntarily publishes its total emissions data in respect of a number of environmental pollutants and its usage of water, time-series data at particular facilities and much of the detailed information regarding the basis of Sasol's compliance with environmental legislation is available only via the PAIA process, even then, as in the case of the atmospheric-emissions licence requested by the CER, Sasol seems intent on keeping its legal obligations relating to particular emission levels secret. Sasol provides fairly comprehensive information on matters pertaining to safety and health. Unusually, however (given the information disclosure of the other mining companies included in this analysis), it does not provide a statement of its mineral resources and reserves.

As regards *fiscal* information, Sasol disclosed information on profit taxes payable to the South African and foreign governments (although these were not specified). It also disclosed information on the types of indirect taxes the company paid to South African and foreign governments (customs and excise duty, property tax), but lumped together other forms of taxation and payments to government under the rubric of 'other'. It also failed to identify *all* the foreign governments to which it had paid taxes. Sasol also provided no separate account of royalties payable to the South African state, although these could have been classified as 'other' taxes or been regarded as part of the cost of production.

8.2 Anglo American

8.2.1 Business and corporate structure

Anglo American is a globally diversified mining business with operations in South Africa, North and South America, and Australia. The company is engaged in finding, planning and developing mines, is involved in mining and various processes, and moves and markets a range of bulk commodities (iron ore, manganese, and metallurgical and thermal coal), base metals and minerals (copper, nickel, niobium and phosphates), and precious metals and minerals (platinum and diamonds).[37] Through a number of wholly and partially owned subsidiaries, Anglo American operates in ten countries: Australia (manganese, metallurgical coal); Botswana (diamonds); Brazil (iron ore, nickel, niobium and phosphates); Canada (metallurgical coal, diamonds); Chile (copper); Colombia (thermal coal); Namibia (diamonds); Peru (copper); South Africa (iron ore, manganese, thermal coal, platinum and diamonds); and Zimbabwe (platinum).[38] Anglo American is the world's leading diamond company, is one of the leading primary producers of platinum-group metals (PGMs), and is among the top three producers of metallurgical coal and niobium.

8.2.2 Ownership, listing and cross-listing

Anglo American, founded in 1917 by Sir Ernest Oppenheimer as a corporate vehicle to extract gold on South Africa's Witwatersrand, is today incorporated under the company law of England and Wales. It is headquartered in London, with its primary listing on the London Stock Exchange (LSE) and a secondary listing on the JSE.[39] Despite the company being headquartered in London, South Africa is still the region in which the group generates most of its underlying operating profit.[40] As at December 2013, entities holding more than 3% of the company's ordinary share capital included, among other institutional investors: the Public Investment Corporation (PIC) (an investment management company wholly owned by the South African government with 8.35% of the voting rights); Coronation Asset Management (Pty) Ltd (with 5.41% of the voting rights); and Black Rock, Inc. (with 4.54% of the voting rights).[41]

8.2.3 Corporate governance

The company complies with the Corporate Governance Code of the United Kingdom (UK).[42] The company is led by a Board, which delegates certain responsibilities to a number of standing committees. Of these, the Audit Committee is most appropriately tasked with dealing with matters relating to ownership, operational and fiscal disclosures.[43] The company also reported separately on its whistle-blowing programme[44] and its Business Integrity Policy.[45] The whistle-blowing programme is a complaints procedure operating alongside a standardised group-wide complaints and grievances procedure that is operated at all managed operations. The programme is monitored by the Audit Committee and enables employees, customers, suppliers, and other stakeholders to raise concerns, on a confidential basis, relating to fraud, corruption or bribery on the part of Anglo American's employees.[46] The Business Integrity Policy is aimed at minimising the risk of bribery.[47]

Anglo American is a company that supports the EITI as a result of its membership of the International Council of Mining and Metals.[48]

8.2.4 Disclosure practice: International standards

Table 8.3: ***Anglo American's disclosure practice in respect of common reporting criteria derived from international reporting standards***

Reporting criteria	Anglo American's disclosure practice
Production entitlements	*Anglo American did not report on any production entitlements with a state or state-owned entity (SOE).*

Reporting criteria	Anglo American's disclosure practice
Profit taxes	*Anglo American provided an indication of its 'income tax expense' (being USD1 174 million or R13 612 million) in its annual reports.[49] In the notes to the financial statements, Anglo American provided a breakdown of this amount. Of the amount payable before the 'special items and remeasurements', USD863 million (R10 006 million) was payable to the South African tax authorities, and USD692 million (R8 023 million) was payable as 'other overseas tax'. In the UK, however, the company enjoyed a tax credit of USD1 million.[50] A breakdown of the company's profit taxes per country was set out at the end of its sustainable-development report. Here, a table entitled 'Taxes paid to government directly and by country' indicated that profit taxes were paid (in order of the amount paid) to South Africa, Chile, Brazil, Namibia, the UK,[51] Australia, and Canada. No profit taxes were paid to either Peru or Zimbabwe.[52] Tax paid by the company's associates and joint ventures was indicated separately in the amount of USD155 million (R1 797 million).[53]*
Other taxes on income, profit or production	*In a table entitled 'Taxes paid to government directly and by country' in its sustainable-development report, Anglo American indicated the taxes it paid on transactions, labour and capital gains in its areas of operation. The company paid the most tax on transactions in South Africa (USD26 million), on labour in Australia (USD104 million) and on capital gains in Chile (USD395 million).[54]*
Royalties	*In a table entitled 'Taxes paid to government directly and by country' in its sustainable-development report, Anglo American indicated the taxes it had paid on 'royalties and environment' to governments in its areas of operation. Royalties and (presumably) environmental fees were paid (in order of the amount paid) to South Africa, Australia, Chile, Namibia, Brazil and Canada. No royalties or environmental fees were paid to Botswana, Peru and the UK during the 2013 financial year.[55]*
Dividends	*Through its shareholding in the Public Investment Corporation, the South African government benefits from any declared dividend. Anglo American provided details of the dividends proposed and payable on ordinary shares. The company proposed an ordinary dividend per share of 53 US cents, and ordinary dividends payable during the year per share of 85 US cents.[56]*
Production, signatory, discovery and other bonuses	*Anglo American did not report on such bonuses.*
Licence fees, rental fees, entry fees, and other considerations for licences and/or concessions	*Other than the reference to 'environmental' (fees) noted above, Anglo American did not separately report on licence, rental and other fees payable to the governments in its areas of operation.*
Public subsidies	*Anglo American did not report on public subsidies received.*
Reserve volumes	*Anglo American provided a separate, detailed report on its ore reserves and mineral resources (see 'Ore reserves and mineral resources report 2013'). This report was prepared in accordance with the Anglo American plc Reporting of Exploration Results, Mineral Resources and Ore Reserves Standard. The Standard requires that the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (Joint Ore Reserves Committee [JORC] Code) be used as a minimum standard. Anglo American subsidiaries that have their primary listing in South Africa use the South African Code for Reporting of Exploration Results, Mineral Resources and Mineral Reserves (SAMREC Code).[57]*
Production volumes	*Production volumes are one of Anglo American's key performance indicators. The company's annual report presents production volumes per commodity in the strategic business unit section of the annual report.[58]*
Revenues	*Anglo American did not provide an explicit account of its various revenue streams or the extent to which the transportation of mineral resources contributed to its overall operating profit.*
Number of employees	*Anglo American provided an indication of the total number of employees worldwide on its website (158 900 people). However, of these, 57 818 were contractors.[59] In its '2013 Annual report'[60] and Fact book,[61] the company provided an indication of the number of employees employed per region. The company employed the most people in South Africa by a large margin.[62]*

Reporting criteria	Anglo American's disclosure practice
Profit/loss before tax	*The company's underlying operating profit (USD6.6 billion), underlying earnings (USD2.7 billion),[63] and loss attributable to equity shareholders (USD1 billion) are reflected as 'performance highlights' on the contents page of the annual report. In the 'More about us' section of the group's website,[64] however, only the 2013 underlying operating profit is reflected, together with the number of people employed by the company worldwide and the company's estimate of its contribution to society (USD24.1 billion).*
Social investments	*Anglo American provided a detailed breakdown of its corporate social initiative spending for the 2013 financial year (USD127.5 million), together with BEE and localised procurement, and businesses support and jobs created through enterprise-development initiatives.[65]*

8.2.5 Disclosure practice: South African standards

Table 8.4: Anglo American's disclosure practice in respect of mandatory and non-mandatory public and non-public disclosure requirements in terms of South African law and regulatory practice

Reporting categories	Company compliance and interpretation
Engagement/compliance with PAIA	*There is compliance regarding this reporting category, but only in respect of Anglo American SA.[66] The PAIA Manual provides particulars of the various kinds of information held by the different organisational units within Anglo American SA.*
Corporate-governance information	*Anglo American's Articles of Association are available on the group website,[67] as are the Company Rules, which include the Terms of Reference of all Board Committees.[68] AGM notices, speeches, transcripts, and voting results are available on the company's group website, archived back to 2006.[69] Anglo American's compliance with the UK Governance Code Checklist is available on its website,[70] and its policy against making political donations is expressly set out in its annual report.[71]*
Prospecting and mining licences	*Anglo American does not provide a comprehensive list of all its mining titles. For the South African businesses, the PAIA Manual indicates that mineral rights records are held by the legal department. These may be requested using the PAIA process.*
Records of prospecting and mining activities	*In its PAIA Manual, Anglo American SA confirms that it maintains records in accordance with the MPRDA, among other production-related legislation. None of this information is available without a person requesting access. Anglo American plc presents production volumes per commodity in the 'Strategic business unit' section of its annual report.[72]*
Records of environmental impacts	*In the section devoted to the environment in its sustainable-development report, Anglo American plc provides information on its: ISO 14001 certification; water consumption (including amounts of water extracted per source); water quality (in general, but not with statistics or an identification of 'incidents' where local quality regulations were breached); energy consumption and GHG emissions (including Scope 1 and 2 emissions); land stewardship (including the total number of hectares of land under Anglo American's control); biodiversity 'incidents'; and waste management (including the management of mine tailings, air quality and hazardous waste). Aspects of the environmental report were audited.[73] Anglo American's policies and standards pertaining to the environment are available on its website.[74] It also has a policy on sustainable development with regard to the supply chain.* **>**

Reporting categories	Company compliance and interpretation
Records of environmental impacts	*In its PAIA Manual, Anglo American SA confirms that it maintains records in accordance with the Atmospheric Pollution Prevention Act (APPA), NEMA, NEMAQA, NEMBA, National Environmental Management: Integrated Coastal Management Act (NEMICMA), National Environmental Management: Protected Areas Act (NEMPAA), National Environmental Management: Waste Act (NEMWA) and NWA. None of this information is available without a person requesting access. In its PAIA Manual, Anglo American SA indicates that its Labour and Environmental Law Unit has records on 'general correspondence' relating to these matters. There is no specific indication of where to find, for example, environmental-impact assessments.*
Health and safety information (Mine Health and Safety Act, OHSA, COIDA)	*Anglo American reported on three key performance indicators pertaining to safety and health: work-related fatal injury rate; new cases of occupational disease; and lost-time injury frequency rate.*[75] *Policies and standards pertaining to HIV/Aids, occupational health, safety, and fatal risk are available on the group's website.*[76] *Anglo American SA's PAIA Manual indicates that information pertaining to medical records, medical policies, clinical policies, etc. is held by Medical and Occupational Health Services and may be accessed using the PAIA procedure.*
Mining Charter	*There are numerous references in Anglo American's annual report to the company's South African businesses' contribution to BBBEE in South Africa.*[77]
Payments to traditional authorities	*Anglo American did not report on any payments made to traditional authorities.*
Information on local beneficiation	*Requirements for local ownership or beneficiation were identified in the annual report as an external risk.*[78] *The company nevertheless reported on its beneficiation of iron ore and phosphates in Brazil.*

8.2.6 Discussion

Anglo American plc already discloses information that assists in determining the nature of the company, the scope of its operations, and its express policies and standards relating to a number of matters.

With a listing on the LSE, Anglo American plc needs to comply with European Union (EU) directives on transparency and with the newly enacted UK Reports on Payments to Governments Regulations 2014. With the exception of licence fees, Anglo American has reported on the governments to which payments have been made, on the total amount of payments made to each government, and on the type of payment to each government. However, this information is difficult to find – it is stuck away at the back end of the sustainable-development report. It is also not clear to which level of government such payments were made, and whether payments were made to traditional authorities. As with all the other companies included in this analysis, Anglo American publishes information on its shareholding and major shareholders, which, again, include the South African government through the vehicle of the Public Investment Corporation. The diversity of Anglo American's shareholders and the number of institutional investors make it difficult to apply the concept of beneficial ownership. However, the company's reporting on the remuneration of its directors appears to be rigorous.

Anglo American's disclosure of its mineral resources and reserves, production volumes, revenue, employees, and profit/loss before tax could enable civil society to determine the company's profitability and potential contribution to development in the host state. However (as with other companies included in the analysis), the role that accounting for 'impairments' plays in the determination of the company's overall tax liability to the government needs closer attention, as well as the impact deferred tax plays on actual payments to governments. Like all the companies included in the survey, Anglo American does not automatically disclose its licences and associated documentation. Similarly, it follows the trend of reporting broad statistics on environmental impacts and on health and safety performance. There is no explanation of how the company arrived at its

estimate of a USD24.1-billion contribution to society and how this factored in, for instance, reduction in natural capital.

8.3 Impala Platinum Holdings Limited (Implats)

8.3.1 Business and corporate structure

Impala Platinum Holdings Limited (Implats) is engaged in the business of refining and marketing PGMs, nickel, copper and cobalt.[79] The Impala Group has its provenance in a platinum mine built in the 1960s (now Impala Platinum) on 27 000 acres of land 'leased' from the Bafokeng tribe (now styled as the 'Royal Bafokeng Nation').[80] The group produces approximately 22% of the world's supply of primary platinum and has mining interests in the two most significant PGM-bearing ore bodies in the world, namely South Africa's Bushveld Complex and the Great Dyke in Zimbabwe.[81] The composition of the Impala group is set out in Note 37.1 to the 2014 consolidated financial statements.[82] The note details the group's principal subsidiaries, as well as non-wholly owned subsidiaries in which the company has a material non-controlling interest. The principal subsidiaries of the group include seven listed companies, one of which is incorporated in Japan (Impala Platinum Japan Limited), one in the Netherlands (Impala Platinum BV), and one in Guernsey (Zimplats Holdings Limited, which is also listed on the Australian Securities Exchange). The group further comprises 11 private ((Pty) Ltd or (Pvt)) companies in which ownership of the mineral rights vests.[83] A number of corporate vehicles established to hold interests of communities in particular mining ventures are subsidiaries of these private companies.[84] As the holders of the mineral rights, it is in such companies that environmental liabilities would vest, particularly on closure.

8.3.2 Ownership, listing and cross-listing

The issued share capital of Implats is held by public shareholders (36 849 shareholders holding 434 234 000 shares) and six non-public shareholders (holding 197 980 000 shares). The six non-public shareholders include the Morokotso Trust, an employee share-ownership plan established in 2006 (holding 8 967 000 shares). However, the two largest shareholders in Implats are Royal Bafokeng Proprietary Holdings Limited (holding 83 115 000 or 13.2% of the company's shares) and the Public Investment Corporation Limited (holding 89 663 000 or 14.1% of the company's shares).[85] The shareholding of the Royal Bafokeng Nation (RBN) has its origin in a 1999 settlement in which Implats reached agreement with the RBN regarding mineral rights and royalties over land on which the Impala Platinum mine was situated, and in subsequent BEE transactions negotiated in 2006 and 2007 in terms of which Implats agreed to pay the RBN all future royalties owing to it. The RBN, in turn, subscribed to 75.1 million shares in Implats (i.e. the holding company, not any of its subsidiaries), giving it a 13.4% stake at that time.[86] The Public Investment Corporation, which, as noted above, is the other major shareholder, is an investment management company wholly owned by the South African government.

Implats' primary listing is on the JSE, and it has a sponsored Level 1 American Depository Receipt Programme in New York.[87]

8.3.3 Corporate governance

Implats is led by a Board of 13 directors, comprising nine independent non-executive directors, two non-executive directors, and two executive directors.[88] The Board, it is stated:

> *fully embraces the principle of ethical leadership in setting and implementing the strategy of the Company, guided by the principles of the King III Code on Corporate Governance …, the Companies Act, 2008, the JSE Listings Requirements, and all other applicable laws, standards and codes.*[89]

The Company also subscribes to the Global Reporting Initiative (G4) as well as the United Nations (UN) Global Compact.[90]

The remit of the Audit Committee and of the Social, Ethics and Transformation Committee relates to the ownership, operational and fiscal disclosures considered in this report.[91] Implats also has a

'zero-tolerance' approach to corruption and fraud and maintains a 'whistle-blowing' toll-free helpline to facilitate the confidential reporting of alleged incidents. These include 'BEE fronting', 'conflict of interest and corruption', 'fraud and theft', and 'misconduct and other'. All allegations are investigated, classified and determined as founded or unfounded, and statistics are published in the group's annual report.[92]

In 2012, Implats took a decision to support the EITI, contributing USD10 000 to the international management of the EITI in 2013.[93]

8.3.4 Disclosure practice: International standards

***Table 8.5:** Implats' disclosure practice in respect of common reporting criteria derived from international reporting standards*

Reporting criteria	Implats' disclosure practice
Production entitlements	*Implats did not report on any production entitlements with a state or SOE.*
Profit taxes	*In its consolidated statement of comprehensive income for the group, Implats indicated that its 'income tax expense' amounted to R144 million.[94] This was substantially lower than usual on account of industrial action, and thus lower profits were made by the group in 2014. In its notes to the annual financial statements, Implats provided an indication of tax payable as 'South African company tax' and 'Other countries' company tax'.[95]*
Other taxes on income, profit or production	*Implats did not provide a further breakdown of taxes paid to governments.*
Royalties	*Implats disclosed that, in the 2014 financial year, it paid royalties in the amount of R693 million.[96] In its notes to the royalty expense, Implats indicated that it paid R99 million as 'stakeholder royalties' and R482 million as 'state royalties'. There was a further R112 million amortisation of royalty prepayments.[97] The company included the risk of 'excessive taxation at Zimplats' under its 'Group strategic risks', noting that 'there are multiple and sometimes conflicting interpretations of the unique special mining lease tax law that is applicable to Zimplats'.[98]*
Dividends	*Implats addressed the issue of dividends in its annual report, indicating that, for the 2014 financial year, no final dividend would be declared.[99] As holder of shares through the Public Investment Corporation, the South African government benefits from any dividend declared.*
Production, signatory, discovery and other bonuses	*Implats did not report on such bonuses.*
Licence fees, rental fees, entry fees and other considerations for licences and/or concessions	*Implats did not report on such fees.*
Public subsidies	*Implats did not report on public subsidies received.*
Reserve volumes	*As a supplement to its integrated annual report, Implats provided a detailed mineral resource and mineral reserve statement.[100] An abridged mineral resource and mineral reserve statement was included in the integrated report.[101] In reporting on its mineral reserves, the group employs the SAMREC and, in the case of Zimplats, the JORC Code.*
Production volumes	*Implats provided a summary and detailed operational review, which included production per commodity[102] and per mine.[103]*
Revenues	*Implats provided an indication of its revenues per commodity and per mine,[104] as well as of its total revenues,[105] but did not provide any further breakdown of its revenue streams.*
Number of employees	*Implats indicated that it employed 55 000 workers, including contractors.[106] Of this amount, 15 602 were contractors.[107]*

Reporting criteria	Implats' disclosure practice
Profit/loss before tax	*Implats indicated a profit before tax of R15 million – after impairments, net finance expenses and net 'other' expenses totalling more than R2 billion were deducted from the gross profit of R3.242 billion.[108]*
Social investments	*In its integrated report, Implats disclosed socio-economic expenditure of R71 million, down from R102 million, primarily as a result of industrial action during the 2014 financial year.[109] The group's sustainable-development report indicated that while R71 million of this was spent in South Africa, an additional R67 million was spent in Zimbabwe.[110]*

8.3.5 Disclosure: South African standards

Table 8.6: ***Implats' disclosure practice in respect of mandatory and non-mandatory public and non-public disclosure requirements in terms of South African law and regulatory practice***

Reporting categories	Company compliance and interpretation
Engagement/compliance with the PAIA	*There is compliance regarding this reporting category. However, unlike Anglo American, Implats' PAIA Manual does cover certain of its international subsidiaries.[111]*
Corporate-governance information	*Implats' Board Charter is available on the company website (but not its Memorandum of Association),[112] along with other significant company rules and policy documents.[113] A detailed statement of Implats' compliance with the King Code is also available on the company's website.[114] This statement did not indicate how many PAIA requests had been received, and how many had been acceded to or refused.* *Implats, in its integrated report, states that group policy prohibits political donations.[115]*
Prospecting and mining licences	*Prospecting and mining licences, permits and licences, mineral and mining leases, and prospecting and mine work programmes are held by Implats but are not automatically available. Access to, and reproduction of, such information may be requested using the PAIA procedure.[116]*
Records of prospecting and mining activities	*In its PAIA Manual, Implats confirms that it maintains records in accordance with the MPRDA and other production-related legislation. Information relating to projects or operations is available using the request procedures in PAIA. One can also obtain copies of compliance reports submitted in terms of the MPRDA, as well as of social and labour plans.*
Records of environmental impacts	*In its integrated report, Implats provided, as part of its summarised operational review, an indication of energy consumption, total water consumed, total water recycled, total CO_2 emissions, and total SO_2 emissions for each of its operations.[117] The figures are presented against backdrop of historical data from 2012 and 2013. There was a significant drop in energy and water used, and (to a lesser extent) in CO_2 and SO_2 emissions, but, as the Chief Executive Office noted in his overview in the sustainable-development report, this could largely be attributed to the five-month strike-induced break in operations.* *Implats' 'Sustainable development report (2014)', 'GRI table 2014', '2014 Communication on progress with the UN Global Compact', 'Environmental policy statement', and 'Sustainable development policy statement' are all available on the company's website (under the tab 'Sustainable development'). The company's sustainable-development report provides further detailed information regarding Implats' water stewardship, climate change programme, air quality management, and waste management. For example, its review of water withdrawn, consumed and recycled indicates water withdrawn from water service providers, other water organisations, dams, rivers and groundwater, with data going back to 2010.[118]* **>**

Reporting categories	Company compliance and interpretation
Records of environmental impacts	< *Implats' PAIA Manual confirms that environmental management programmes and plans, along with water, dust and other reports, can be accessed using the PAIA procedure.*
Health and safety information (Mine Health and Safety Act, OHSA, COIDA)	*Implats reported on safety and health in both its integrated report[119] and its sustainable-development report.[120] Its measures include a fatal-injury frequency rate, and a lost-time injury frequency rate.*
Mining Charter	*Implats reported on its BEE compliance in its integrated report.[121]*
Payments to traditional authorities	*Implats did not report on any payments to traditional authorities in its 2014 annual reports.*
Information on local beneficiation	*Local beneficiation was a focal point in Implats' 2014 reports. The integrated report elaborated on the Selous Base Metals Refinery Refurbishment in Zimbabwe and the company's total investment in the project.[122] Pressure to provide metals at low cost for local beneficiation in South Africa was identified as a group strategic risk.[123] The report further indicated that 22% of platinum, palladium and rhodium sales were to South African customers for further beneficiation.[124]*

8.3.6 Discussion

As a company listed on the NYSE, Implats will be required to comply with the provisions of the Dodd–Frank Act. Implats goes a little further than other companies included in the present review by disclosing its reports under the GRI and the UN Global Compact. Its support of the EITI is also explicit.

Implats' manner of reporting on ownership is standard and one can once again note the significant shareholding of the South African government through the Public Investment Corporation. In its reporting on operational information, Implats goes no further than other companies included in the review, though the statistics it presents on environmental impacts are more refined. Like the other companies, Implats maintains a veil of secrecy concerning its licences. Consequently, none of this information and the associated legal conditions of operation are automatically accessible, thus compelling civil society to resort to the PAIA route. While the company reports on both profit taxes and royalty payments, it does not provide a further disaggregation of its tax payments. It does not confirm that payment to 'other countries' is to Zimbabwe. The company noted the problem of the differing interpretations of the mining lease tax law in Zimbabwe. The corporate structure of the Implats group (in which ownership of the mineral rights rests in private companies) suggests that assets are shifted toward the holding companies, meaning that the entities that hold the rights (and the accompanying obligations to remedy, for instance, environmental degradation) would not be flush with funds to meet such obligations.

8.4 Harmony Gold Limited

8.4.1 Business and corporate structure

Harmony Gold Limited, the third-largest gold-mining company in South Africa and the 11th largest globally, has operations in South Africa and Papua New Guinea. The company prides itself on being the lowest-cost gold producer in South Africa. For some of its operations in Papua New Guinea, particularly the new Wafi-Golpu project, which will entail mining one of the best copper gold porphyries in South-east Asia, it is in a 50% joint venture with Newcrest Mining Limited.[125] The composition of the Harmony group is complex. Apart from a number of dormant direct and indirect subsidiaries, its direct subsidiaries include: a gold-mining exploration company incorporated in South Africa; five gold-mining companies incorporated in South Africa; and three investment holding companies, two of which are incorporated in South Africa and one in Australia.[126] In addition, its indirect subsidiaries include: four exploration companies, one of which is incorporated in South Africa, two in Papua New Guinea, and one in the Philippines; three investment companies incorporated

in Australia; and two mineral rights investment companies incorporated in Papua New Guinea. Through its direct and associated companies, Harmony Gold has been linked to some controversial issues, most notably the liquidation of Pamodzi Gold and the takeover of its mines at Grootvlei on the East Rand and Orkney in the North West province,[127] as well as the treatment of acid mine drainage in the KOSH Basin through its direct subsidiary, African Rainbow Minerals Gold (which subsequently sold the mine to Pamodzi Gold Orkney).[128]

8.4.2 Ownership, listing and cross-listing

Harmony Gold is incorporated in South Africa and its three largest shareholders are African Rainbow Minerals Limited (with 14.6% of the shares), followed by Allan Gray Unit Trust Management Limited (with 11.1% of the shares), and the Public Investment Corporation of South Africa (with 6.75% of the shares).[129] Harmony Gold's primary listing is on the JSE. It is also quoted in the form of American depository receipts on the NYSE, and on the Berlin Exchange as international depository receipts.[130] In 2014 financial year, Harmony was once again admitted to the JSE's Socially Responsible Investment Index and was awarded 'platinum status' on the Exchange for its score of 98% with regard to the Carbon Disclosure Project.[131]

8.4.3 Corporate governance

Harmony Gold states that it complies with: the South African Companies Act of 2008; the Listing Requirements of both the JSE and the NYSE; the King Report on Corporate Governance; and the King Code of Governance Principles (King III). The company also states that it complies voluntarily with the UN Global Compact, the Global Reporting Initiative, the requirements of the International Council on Mining and Metals, and the Cyanide Code.[132] Governance of the Harmony Group vests in the Board and a variety of standing committees. Similar to the other companies included in the present survey, the Audit and Risk Committee and the Social and Ethics Committee are primarily responsible for overseeing the disclosures necessary for compliance with South African and international standards.[133]

Harmony Gold has not expressly endorsed the EITI, although its partner in Papua New Guinea, Newcrest Mining Limited, has issued a statement of support and has been active in supporting Papua New Guinea in becoming an EITI-compliant country.[134]

8.4.4 Disclosure practice: International standards

Table 8.7: ***Harmony Gold Limited's disclosure practice in respect of common reporting criteria derived from international reporting standards***

Reporting criteria	Harmony Gold's disclosure practice
Production entitlements	*Harmony Gold did not report on any production entitlements with a state or SOE.*
Profit taxes	*Harmony Gold indicated South African and foreign tax payable in its group income statement and notes to the financial statements. In the case of South African taxation, it distinguished between 'mining tax' (payable in the amount of R29 million) and non-mining tax (a tax credit of R5 million). Taking into account deferred tax, Harmony Gold was left with a tax credit of R279 million for the 2014 financial year.[135] In the summary account under 'How we create value' in its integrated report, Harmony Gold indicated that it had distributed R281 million in taxes and royalties in South Africa, and R32 million in taxes and royalties in Papua New Guinea.[136]*
Other taxes on income, profit or production	*As defined in the 'Glossary of terms', 'cash costs' included royalties and production taxes.[137] Cash costs presumably constituted part of production costs, which, in the case of the 2014 financial year, stood at R16.088 billion, thus exceeding the revenue of R15.682 billion.[138]*
Royalties	*See the immediately preceding note in this table.*

Reporting criteria	Harmony Gold's disclosure practice
Dividends	*As the third-largest shareholder in Harmony Gold, the South African government benefits from any dividend declared. No dividends were declared during the 2014 financial year, as Harmony Gold's policy is to pay dividends only from profit and not from debt.*[139]
Production, signatory, discovery and other bonuses	*Harmony Gold did not report on such bonuses.*
Licence fees, rental fees, entry fees and other considerations for licences and/or concessions	*Harmony Gold did not report on such fees.*
Public subsidies	*Harmony Gold did not report on public subsidies received.*
Reserve volumes	*Harmony Gold provided a detailed mineral resource and mineral reserve statement, compiled in accordance with the SAMREC and the JORC Code.*[140]
Production volumes	*In the operational section of its integrated report, Harmony Gold provided a detailed breakdown of production at its operations, including volumes milled, gold produced, grade of gold and productivity,*[141] *in addition to a percentage breakdown of gold production per operation and per region.*[142]
Revenues	*Harmony Gold set out its total revenue (R15.682 billion in the 2014 financial year)*[143]*, in addition to providing a breakdown of revenue streams per mine in the section of its integrated report dealing with operations.*[144]
Number of employees	*Harmony Gold indicated that it employed 34 746 people, including contractors.*[145] *Sixteen per cent of this workforce is made up of contractors.*[146] *In Papua New Guinea, Harmony Gold employs 60 people.*[147]
Profit/loss before tax	*Harmony Gold indicated a loss before tax of R1.549 billion – after corporate, administration and other expenditure; social investment expenditure; exploration expenditure; 'other' expenses; losses from associates; finance costs; and other positive items in the balance sheet were added to the gross operating loss of R406 million.*[148]
Social investments	*In its income statement, Harmony Gold indicated social investment expenditure of R88 million.*[149] *In the overview of how the company creates value, an amount of R189 million was indicated as having been spent on 'community and local economic development', an amount inclusive of capital of R106 million spent on hostel accommodation.*[150]

8.4.5 Disclosure practice: South African standards

Table 8.8: Harmony Gold's disclosure practice in respect of mandatory and non-mandatory public and non-public disclosure requirements in terms of South African law and regulatory practice

Reporting categories	Company compliance and interpretation
Engagement/compliance with PAIA	*Harmony Gold's PAIA Manual is available on the company website.*[151] *Compared with other PAIA Manuals analysed in this review, the information included by Harmony Gold as to how to access the various categories using the PAIA procedure is far less detailed.*
Corporate-governance information	*The company's Memorandum of Association is available on its website.*[152] *The Board's terms of reference, along with the terms of reference for all Board committees, are similarly available.*[153]
Prospecting and mining licences	*Harmony Gold's PAIA Manual indicates that operational information related to the day-to-day running of the company, such as 'permits, licences, authorisations, and approvals' may be requested using the PAIA procedure.*
Records of prospecting and mining activities	*Like most mining companies, Harmony Gold provides quarterly reports on its production, which reports are available on the company website. Other records of mining activities are only available using the PAIA procedure.*

Reporting categories	Company compliance and interpretation
Records of environmental impacts	*Harmony Gold incorporated a comprehensive section on environmental performance in its 2014 integrated report, reporting on environmental management at its operations in both South Africa and Papua New Guinea. The report noted that an independent audit had been undertaken of its Hidden Valley operations in Papua New Guinea and that concerns in the report had been addressed (the report itself is, however, not publicly available).[154] The company further reported on environmental incidents;[155] resources used (including cyanide); direct and indirect energy used in terms of MWh;[156] Scope 1 to 3 carbon emissions;[157] engaging with suppliers and their environmental impacts;[158] water usage (including water used from potable and non-potable sources, and surface and groundwater);[159] land management and conservation;[160] and rehabilitation and closure.[161] Harmony also disclosed that, during the 2014 financial year, it spent R68 million on its environmental portfolio (R34 million in South Africa and R34 million in Papua New Guinea, down from R76 million in the 2013 financial year).[162]* *Harmony Gold's environmental policy is available on its website.[163] The policy commits to 'transparent engagement on environmental issues with communities affected by our operations'. Other than this, environmental information (including environmental management plans and programmes) would presumably only be available as 'operational information' accessible using the PAIA procedure.*
Health and safety information (Mine Health and Safety Act, OHSA, COIDA)	*Harmony Gold reported on its safety performance in its integrated report (indicating 22 fatalities for the 2014 financial year), along with investments and interventions in occupational health.[164]*
Mining Charter	*Progress measured against Mining Charter targets was indicated in Harmony Gold's integrated report as a separate section. The progress table details the extent of the company's compliance and where further information on compliance with Mining Charter targets can be found in the report.[165]*
Payments to traditional authorities	*Information on Harmony Gold's payments to traditional authorities (if any) is not available on the website or in the annual reports.*
Information on local beneficiation	*There is almost no information on local beneficiation on Harmony Gold's website or in its annual reports.*

8.4.6 Discussion

Harmony Gold's disclosure practice is fairly similar to that of the other companies included in this review. Unlike Implats, its reports to the GRI and UN Global Compact are not readily accessible on its website, despite Implats' statement of support. Ownership information allows for identification of the largest shareholders and, once again, one notices the holding of the South African government through the PIC. Disclosures pertaining to operational information are also standard, with reporting on high-level statistics in the annual reports. Legal documents setting out the legal parameters of operation are, however, only accessible using PAIA. What is noteworthy is the very limited information that is available in Harmony Gold's PAIA Manual to enable access using PAIA procedures. This compares less favourably with the Manuals of other companies included in the present review. Also, in comparison with the other companies included in the analysis, Harmony Gold's reporting on its tax payments is more restrictive, with the company essentially only reporting on profit taxes payable to the authorities in South Africa and Papua New Guinea.

8.5 Coal of Africa Limited

8.5.1 Business and corporate structure

Coal of Africa was initially touted as an emerging developer and producer of thermal and coking coal, but has recently announced a long-term strategy to dispose of its thermal assets and concentrate on its coking coal projects.[166] The company is incorporated in Australia but operates in South Africa.[167] The company has three operating collieries, including the controversial Vele Colliery situated in close proximity to the Mapungubwe Cultural Landscape World Heritage Site,[168] as well as a number

of exploration and development projects. The company has also registered the Tshipise Energy Gas Exploration Project with the UN as a potential Clean Development Mechanism (CDM) Project. If developed, the project will harness fugitive gas that would otherwise escape into the environment during coal mining.[169]

8.5.2 Ownership, listing and cross-listing

Coal of Africa is incorporated in Australia but operates only in South Africa. [170] As of 30 September 2014, its three largest shareholders were: Haohua Energy International (Hong Kong) Resources Co. Ltd (with 23.6% of the shares); M & G Investment Management Ltd (with 15.3% of the shares); and ArcelorMittal SA (with 12% of the shares).[171] Its primary listing is on the Australian Stock Exchange. It has secondary listings on both the Alternative Investment Market of the LSE and the JSE.[172]

8.5.3 Corporate governance

Coal of Africa Limited is led by a seven-member Board. The company subscribes to the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations.[173] It states that its reporting complies with the Australian Accounting Standards, the Corporations Act of 2001, and the International Financial Reporting Standards, in addition to taking cognisance of the King III Code of Corporate Governance and the GRI Guidelines.[174]

Coal of Africa Limited is not a company stakeholder of the EITI.

8.5.4 Disclosure practice: International standards

Table 8.9: ***Coal of Africa's disclosure practice in respect of common reporting criteria derived from international reporting standards***

Reporting criteria	Coal of Africa's disclosure practice
Production entitlements	*Coal of Africa did not report on any production entitlements with a state or SOE.*
Profit taxes	*Coal of Africa included income tax expense as a line item in its consolidated statement of profit or loss, but no income tax was payable for either the 2013 or 2014 financial years.[175]*
Other taxes on income, profit or production	*Coal of Africa did not report on other taxes on income, profit or production.*
Royalties	*Coal of Africa did not report on royalties.*
Dividends	*Coal of Africa reported that no dividend had been paid or proposed for the 2014 financial year.[176]*
Production, signatory, discovery and other bonuses	*Coal of Africa did not report on such bonuses.*
Licence fees, rental fees, entry fees and other considerations for licences and/or concessions	*Coal of Africa did not report on such fees.*
Public subsidies	*Coal of Africa did not report on public subsidies received.*
Reserve volumes	*In its 2014 integrated report, Coal of Africa provided a reserve and resource statement. Resources and reserves were classified according to the JORC Code.[177]*
Production volumes	*In its integrated report, Coal of Africa provided an account of various operational statistics, including Run of Mine (ROM) production, coal processed, and total coal produced at its various operations.[178]*
Revenues	*Coal of Africa indicated consolidated revenue of USD761 000 for the 2014 financial year in its consolidated statement of profit or loss.[179]*

Reporting criteria	Coal of Africa's disclosure practice
Number of employees	*In its 2013 integrated report, Coal of Africa provided a breakdown of employees and contractors at each of its operations.*[180]
Profit/loss before tax	*Coal of Africa indicated a loss before tax of USD63 545 000. Adding the losses from discontinued operations, the total loss for the year was USD4 120 000.*
Social investments	*Coal of Africa provided details of its corporate social investment in its integrated report, with the focus of such investment being education, skills development and enterprise development. The company reported on: its bursary programme in the fields of mining, metallurgical and chemical engineering, and geology; the construction of four new classrooms at the Renaissance Senior Secondary School; the provision and upgrading of various facilities at the New Ermelo Primary School; an adult basic education and training programme; and the provision of various facilities in support of the Agricultural Youth Co-operative (in conjunction with the Musina Municipality).*[181]

8.5.5 Disclosure practice: South African standards

Table 8.10: ***Coal of Africa's disclosure practice in respect of mandatory and non-mandatory public and non-public disclosure requirements in terms of South African law and regulatory practice***

Reporting categories	Company compliance and interpretation
Engagement/compliance with PAIA	*Coal of Africa's PAIA Manual is available on the company website.*[182] *The PAIA Manual does not, however, indicate the categories of information available for request.*
Corporate-governance information	*The Board Charter and Charters for the Audit, Nomination and Remuneration Committee are available on the company's website.*[183] *Numerous other corporate publications and documents are available on the website.*
Prospecting and mining licences	*The prospecting and mining licences granted to Coal of Africa are not available on its website. Although not identified in its PAIA Manual as categories of information available, they would presumably be available using PAIA procedure. However, as a schedule to its integrated report, Coal of Africa indicated the tenements (portions of land over which a prospecting or mining licence extends) falling under each of its projects.*[184]
Records of prospecting and mining activities	*Coal of Africa set out operational statistics for each of its operational mines in its integrated report. The tables indicated which proportion of total coal produced was exported.*[185]
Records of environmental impacts	*Coal of Africa's integrated report included a narrative section on sustainable development. For the Vele project, all the environmental documents relating to the company's section 24G application (i.e. when a company has failed to obtain an environmental impact assessment) are available on the website.*[186] *However, no environmental information is similarly publicly accessible for Coal of Africa's other projects.* *Similar to the other mining companies in this review, Coal of Africa provided statistics of its environmental performance in its integrated report, for instance concerning the amount of potable and non-potable water, surface water and groundwater used at its various operations.*[187] *The company referenced the quarterly environmental performance reports submitted to the Department of Environmental Affairs (further indicating a compliance score of 92%) in its integrated report.*[188] *However, such reports are not publicly accessible.*
Health and safety information (Mine Health and Safety Act, OHSA, COIDA)	*Coal of Africa reported on safety performance (fatalities and lost-time injuries) and on its safety and occupational health investments in its integrated report.*[189]

Reporting categories	Company compliance and interpretation
Mining Charter	*Coal of Africa's integrated report states that the company continues to comply with the Mining Charter and files annual compliance reports with the DMR. A DMR assessment of the company's BEE compliance was also completed in 2014.[190] However, neither this assessment nor the annual compliance reports are publicly accessible.*
Payments to traditional authorities	*Although Coal of Africa mentioned engaging with traditional authorities located within close proximity of its Makhado project,[191] it did not report on any payments to such authorities.*
Information on local beneficiation	*The integrated report merely mentioned that modifications were made to the Vele plant to enable greater beneficiation opportunities.[192]*

8.5.6 Discussion

Of the companies incorporated in the analysis, Coal of Africa's reporting of tax payments is the most restrictive, although this could in part be ascribed to taxes not yet being payable. Unusually, however, it included a full list of mining tenements (rights held) as a schedule to its integrated report. The manner of reporting on ownership and operational information is similar to that of the other companies included in the review. Like Harmony Gold, Coal of Africa's PAIA Manual does not outline information categories that could assist in focusing a PAIA request. Unusually, documentation for Coal of Africa's section 24G application for the Vele Colliery is available on the company website. This could be ascribed to the extensive civil society intervention in this project. Certainly, the same level of disclosure is not repeated for Coal of Africa's other projects.

Endnotes

1 Sasol Limited, 'Manual of Sasol Limited' (prepared in accordance with section 51 of the Promotion of Access to Information Act 2 of 2000) (PAIA).
2 Sasol Limited, *Sasol facts: 12/13*, 2012/2013 (hereafter '*Sasol facts*'), p. 8. Available at: http://www.sasol.com/extras/sasol-facts-pres-2/ [accessed 5 December 2014].
3 Ibid.
4 Sasol Limited, 'Annual financial statements 2014', 2014 (hereafter 'Sasol AFS'), p. 55.
5 L. Donnelly, 'Fracking spin-offs trump concerns', *Mail & Guardian*, 14 September 2012. Available at: mg.co.za/article/2012-09-14-fracking-spin-offs-trump-concerns [accessed 5 December 2014].
6 Anonymous, 'Italy's ENi acquires 40pc interest in Sasol's gas offshore permit', *South Africa News.Net*, 10 June 2014. Available at: http://www.southafricanews.net/index.php/sid/222782449 [accessed 5 December 2014].
7 Sasol Limited, 'Annual integrated report 2014', 2014 (hereafter 'Sasol IR'), p. 25
8 Sasol AFS, p. 55.
9 Sasol facts, p. 26.
10 Sasol IR, p. 54.
11 See http://www.sasol.co.za/investor-centre/publications/archive/form-20-f-1 [accessed 15 December 2014].
12 Ibid.
13 Ibid, p. 61.
14 Ibid.
15 Ibid, p. 54.
16 Ibid, p. 25.
17 Sasol AFS, p. 47.
18 Ibid, p. 178.
19 Ibid, p. 56.
20 This amount makes Sasol Limited the top contributor to South Africa's national fiscus. See Sasol Limited, 'Sustainable development report 2014' (hereafter 'Sasol SDR'), 2014, p. 57.
21 Sasol AFS, p. 47.
22 Sasol IR, p. 95. See, further, pp. 99, 101, 102, 105 and 108 for the production volumes of other business segments.

23 Ibid, p. 97.
24 Sasol AFS, p. 46.
25 Ibid, p. 106.
26 Sasol SDR, p. 57.
27 See http://www.sasol.co.za/sites/default/files/content/files/Sasol%20Limited%20PAIA%20Manual%20-%20August%20%202014.pdf [accessed 15 December 2014].
28 See http://cer.org.za/news/environmental-rights-blog-despite-the-supreme-court-of-appeals-warning-polluters-persist-with-secrecy [accessed 4 February 2015].
29 See www.sasol.co.za/investor-centre/corporate-governance/memorandum-incorporation [accessed 15 December 2014].
30 See www.sasol.co.za/investor-centre/corporate-governance/board-charter [accessed 15 December 2014].
31 See www.sasol.co.za/investor-centre/annual-general-meeting [accessed 15 December 2014].
32 See www.sasol.co.za/sites/default/files/content/files/King 3 Code 2013.pdf [accessed 15 December 2014].
33 See Sasol SDR, pp. 46–53.
34 See, for instance, p. 95 of Sasol IR.
35 Sasol SDR, pp. 33–36.
36 See: www.sasol.co.za/sites/default/files/content/files/Empowerdex_SasolLimited/G14J00237_combined_0 .pdf [accessed 15 December 2014].
37 Anglo American, 'What we do'. Available at: http://www.angloamerican.com/about-us/what-we-do [accessed 9 December 2014].
38 Anglo American, *Fact book 2013: Focused on delivery* (henceforth '*Anglo Fact book*'), p. 4. See the 'Business overview' on this page to determine the extent of Anglo American's shareholding in its various subsidiaries, as well as for an identification of its joint ventures and shareholding agreements and associates (relevant to PGMs).
39 Anglo American, 'Annual report 2013: Focused on delivery' (hereafter 'Anglo AR'), p. 144.
40 See the table captioned, 'Revenue and underlying profit by origin', Anglo AR, p. 164.
41 Anglo AR, p. 145.
42 Ibid, p. 93.
43 See the terms of reference of the Audit Committee. Available at: http://www.angloamerican.com/about-us/our-approach [accessed 15 December 2014].
44 Anglo AR, p. 114.
45 Ibid, p. 116.
46 Ibid, p. 114.
47 Ibid, p. 116.
48 See: https://eiti.org/supporters/companies/anglo-american [accessed 10 December 2014].
49 Ibid, p. 37. This amount is inclusive of the tax implications of the 'special items and remeasurements' in Anglo AR (2014).
50 Ibid, p. 169.
51 This report appears to contradict the notes to the annual financial statements, which indicate that the company enjoyed a tax credit in the UK.
52 Anglo American, '*Sustainable development report 2013: Focused on delivery* (hereafter 'Anglo SDR'), 2013, p. 79.
53 Anglo AR, p. 170.
54 Anglo SDR, p. 79.
55 Ibid.
56 See Anglo AR, p. 157.
57 Anglo American, 'Ore reserves and mineral resources report 2013', 2013, p. 1.
58 Anglo AR, p. 18. For an indication of the production volumes per commodity, see pp. 54–91 of the report. Quarterly production figures are presented on p. 254.
59 See Anglo SDR, p. 78.
60 Anglo AR, p. 4.
61 *Anglo Fact book*, p. 2.
62 However, on 10 December 2014, it was reported that the company intended to lay off 20 000 people worldwide in a bid to remain competitive.
63 This, however, is the amount prior to deduction of 'special items and remeasurements'.
64 See www.angloamerican.com/about-us/at-a-glance [accessed 10 December 2014].
65 Anglo SDR, p. 78.
66 A PAIA Manual is available for Anglo American SA, which is a wholly-owned subsidiary of Anglo American plc, the company otherwise analysed for purposes of this part of the report. See: http://

southafrica.angloamerican.com/~/media/Files/A/Anglo-American-South-Africa/Attachments/documents/PAIA-Manual-AASA-Oct-2013.pdf [accessed 15 December 2014]. The PAIA Manual applies to 39 direct and indirect subsidiaries of Anglo American SA.

67 See: http://www.angloamerican.com/about-us/our-approach [accessed 15 December 2014].

68 Ibid.

69 See: http://www.angloamerican.com/investors/shareholder-information/agm/agm2013 [accessed 15 December 2014].

70 See: http://www.angloamerican.com/about-us/our-approach [accessed 15 December 2014].

71 Anglo AR, p. 146.

72 Anglo AR, p. 18. For an indication of the production volumes per commodity, see pp. 54–91 of the report. Quarterly production figures are presented on p. 254.

73 Anglo SDR, pp. 55–71.

74 See: http://www.angloamerican.com/sustainability/approach-and-policies [accessed 15 December 2014].

75 Anglo AR, pp. 18–19, 28–30.

76 See: http://www.angloamerican.com/sustainability/approach-and-policies [accessed 15 December 2014].

77 For instance, in the AR, Anglo American notes that Anglo-managed businesses spent USD3.9 billion (R45.8 billion) on historically disadvantaged South African businesses. This *excluded* goods and services procured from the public sector and public enterprises) – see Anglo AR, p. 33.

78 Anglo AR, p. 48.

79 Implats, 'Company profile'. Available at: http://www.implats.co.za/implats/Company-profile.asp [accessed 13 December 2014].

80 Implats, 'Implats history'. Available at: http://www.implats.co.za/implats/Implats-history.asp [accessed 13 December 2014].

81 Ibid.

82 Implats, 'Group financial statements: Notes to the consolidated financial statements – for the year ended 30 June 2014'. Available at: http://financialresults.co.za/2014/implats-financial-statements-2014/notes-to-the-consolidated-financial-statements.php [accessed 13 December 2014].

83 Ibid. These include Afplats (Pty) Ltd, Imbasa Platinum (Pty) Ltd, Inkosi Platinum (Pty) Ltd, Marula Platinum (Pty) Ltd, and Zimbabwe Platinum Mines (Pvt) Limited.

84 See Implats, 'Corporate structure'. Available at: http://www.implats.co.za/implats/Corporate-structure.asp [accessed 13 December 2014].

85 Implats, 'Integrated annual report 2014' (hereafter 'Implats IR'), 2014, p. 121.

86 Implats, 'Implats history' (note 80 above).

87 Implats IR, p. 99.

88 Ibid, p. 94.

89 Ibid.

90 See Implats, 'Group policies and key documents'. Available at: http://www.implats.co.za/implats/Group-policies-key-documents.asp [accessed 13 December 2014].

91 For an outline of the purposes of the Audit Committee, see Implats IR, pp. 95–96, and for the Social, Ethics and Transformation Committee see p. 98 of the same document.

92 Implats IR, p. 101.

93 See: https://eiti.org/supporters/companies/impala-platinum-holdings-limited-implats [accessed 13 December 2014].

94 Implats 'Consolidated statement of comprehensive income – for the year ended June 2014'. Available at: http://financialresults.co.za/2014/implats-financial-statements-2014/consolidated-statement-of-comprehensive-income.php [accessed 13 December 2014].

95 Implats, 'Notes to the consolidated financial statements' (note 82 above), note 31.

96 Implats IR, p. 51.

97 Implats, 'Notes to the consolidated financial statements' (note 82 above), note 27.

98 Implats IR, p. 29.

99 Ibid, p. 52.

100 See Implats, 'Mineral resource and mineral reserve statement 2014'. Available at: http://financialresults.co.za/2014/implats-minerals-report-2014/index.php [accessed 13 December 2014].

101 See Implats IR, pp. 70–75.

102 Ibid, p. 8.

103 Ibid, pp. 10–11. The more detailed operational review for each mine is set out on pp. 76–93 of the IR.

104 Ibid, pp. 8, 10–11.

105 Ibid, p. 48.

106 Ibid, p. 9.
107 Implats, 'Sustainable development report' (hereafter 'Implats SDR'), p. 1.
108 Implats IR, p. 48.
109 Ibid, p. 38.
110 Implats SDR, p. 1.
111 See: http://www.implats.co.za/implats/downloads/2014/Section_51_Manual_for_Impala_Platinum_Holdings_Limited_(October_2014).pdf [accessed 16 December 2014] (hereafter 'Implats PAIA Manual').
112 See: http://www.implats.co.za/implats/Corporate-governance.asp [accessed 16 December 2014].
113 See: http://www.implats.co.za/implats/Group-policies-key-documents.asp [accessed 16 December 2014].
114 See: http://www.implats.co.za/implats/downloads/2013/King-III-principles-FINAL.pdf [accessed 16 December 2014].
115 Implats IR, p. 101.
116 Implats PAIA Manual, p. 6.
117 Implats IR, pp. 10–11.
118 Implats SDR, p. 89.
119 Implats IR, p. 33.
120 Implats SDR, pp. 50–59.
121 Implats IR, p. 121.
122 Ibid, p. 35.
123 Ibid, p. 29.
124 Ibid, p. 49.
125 Harmony Gold, 'About us'. Available at: https://www.harmony.co.za/about-us [accessed 13 December 2014].
126 Harmony Gold, 'Financial report 2014' (hereafter 'Harmony FR), 2014, pp. 126–129.
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141 Harmony IR, p. 106.
142 Ibid, p. 104.
143 Harmony FR, p. 4.
144 Harmony IR, pp. 106–128.
145 Ibid, pp. 5, 7.
146 Ibid, p. 67.
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148 Harmony FR. p. 4.
149 Ibid.
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151 See: https://www.harmony.co.za/sustainability/governance#policies [accessed 16 December 2014].
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153 See: https://www.harmony.co.za/sustainability/governance [accessed 3 February 2015].
154 Harmony IR, p. 81.
155 Ibid, pp. 81–82. Even though there were three 'Level 3' incidents and one 'Level 4' incident, the report

notes that no fines or sanctions were imposed for non-compliance with environmental regulations in either South Africa or Papua New Guinea.

156 Ibid, pp. 84–89.
157 Ibid, p. 90.
158 Ibid, p. 92.
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162 Ibid, p. 100.
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171 Ibid, p. 123.
172 Ibid, p. i.
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174 Ibid, p. i.
175 Coal of Africa Limited, 'Audited financial statements', p. 40.
176 Ibid, p. 10.
177 Coal of Africa IR, pp. 35–39.
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179 Coal of Africa Limited, 'Audited financial statements', p. 40.
180 Coal of Africa IR, p. 31.
181 Ibid, p. 34.
182 See: http://www.coalofafrica.com/assets/policies-procedures/PAIA_section_51_manual.pdf [accessed 4 February 2015].
183 See: http://www.coalofafrica.com/corporate-governance/board-and-charters [accessed 4 February 2015].
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187 Coal of Africa IR, p. 26.
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189 Ibid, pp. 22–25.
190 Ibid, p. 21.
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192 Ibid, p. 30.

PART 9

Evaluation: PAIA and its adequacy; administrative bureaucracy; and the role of international accounting standards

The right of access to information recognised in section 32 of the Constitution is not a blanket right to access information from private bodies. Instead, it imposes conditions which, as a result, have hindered the effective exercise of the right and, consequently, the use of the Promotion of Access to Information Act (PAIA) as an instrument for obtaining information from the private sector.

PAIA has been in existence for the past 15 years but has failed to live up to its lofty objectives owing to several administrative constraints as well as the rudimentary statutory compliance of companies. The administrative constraints are multilayered and stem from the conditionality attached to the right to access information from private bodies, a conditionality that entails that requesters must show that the information requested is for the exercise or protection of other rights. In addition, the inadequacy of the law in terms of a statutory obligation to create records, the delays or refusals on the part of public and private bodies in acceding to requests for information, the extensive exemptions contained in PAIA that justify the denial of requests, the exorbitant fees payable in requesting information, and the lack of an internal appeal mechanism where requests made to private bodies are turned down all contribute to the bureaucratic constraints relating to the use of PAIA.

The courts have ruled on the criteria for determining the applicability of the condition attached to the exercise of the right to access information from private bodies. In *Clutchco v Davis*,[1] the appellant wanted access to the company's books of first accounting entry, such as cash books, ledgers, journals and invoice books. This was denied. The Supreme Court of Appeal laid down an important rule regarding PAIA and private bodies. The Court held that 'the mere whiff of impropriety [is] not enough to access information but such a request could be granted according to a test of substantial advantage or element of need based on the facts'.[2] In *Unitas v Van Wyk*,[3] in a split decision affirming the *Clutchco v Davis* standard of 'substantial advantage or element of need', the Court stated that the records sought must be *essential or necessary* for the exercise or protection of a right. In practice, the courts have found that records will meet the 'substantial advantage or element of need' test for the exercise or protection of a right where: the contents of the record would be decisive in determining whether the requester has a cause of action; to identify the right defendant for litigious action; and where the requester shows that there would be a significant risk of prejudice or harm should there be no disclosure of the information.[4]

As a result, in practical terms, where access to ownership, operational and financial information of an extractives company is sought, a requester would have to prove in which way such records are necessary to protect a specific right, thereby excluding disclosures of information that are required for public-interest measures such as promoting accountability. However, information required for these latter purposes will more often than not be accessible through the proactive disclosure practices of corporations. Nevertheless, proactive disclosure by corporations in South Africa has

Nevertheless, proactive disclosure by corporations in South Africa has been selective. Part 8 of this report, for instance, highlights the information that is being proactively disclosed by corporations and reflects the cosmetic approach that has been taken by them in terms of what is disclosed and how that disclosure is packaged, leaving the recipients of information to see only what corporations want to portray.

been selective. Part 8 of this report, for instance, highlights the information that is being proactively disclosed by corporations and reflects the cosmetic approach that has been taken by them in terms of what is disclosed and how that disclosure is packaged, leaving the recipients of information to see only what corporations want to portray.

PAIA does not establish a duty to create records and, as a result, there is no obligation on the part of companies to maintain records of information that may be the subject of a request for disclosure. As demonstrated earlier in this report in the analysis of applicable South African law, record-keeping is central to the possibility of information disclosure. Without the maintenance and management of records, there will be no information subject to disclosure.

In practice, private companies do not view compliance with PAIA with the level of seriousness required to ensure appropriate oversight over records held by them and also ensure access to these records. The South African Human Rights Commission (SAHRC) is the institution currently tasked with monitoring compliance with PAIA by public and private institutions. However, the section 51 manuals of most companies, which manuals are meant to indicate the records held by companies and the manner of access, are sometimes outsourced to consultants and, more often than not, do not provide for records that are automatically available – as demonstrated by the PAIA Manuals of the five companies considered in this report.

In terms of accessing information from private companies, PAIA provisions prescribe a higher fee schedule than that applicable to the public sector and also provide for an extended list of exemptions applicable to the private sector, which makes it easier for companies to rely on a ground of refusal in order to deny access to information.[5] In addition, while a denial of a request for information in the public sector can be appealed internally, this is not possible in the case of private-sector requests and the only remedy available with regard to requests that have been denied is by way of an application to court.

Seeking remedies through the courts can create a barrier to accessing information owing to the bureaucratic nature of the courts, the high costs involved, as well as the time delays experienced. As a result, 'an infringement of the right of access to information will most likely go unchallenged by requesters of information because while the doors of the courts remain open for recourse, high legal fees and extensive time delays bar entry to the courts'.[6] This has given rise to the trend where most access-to-information disputes heard in South African courts have been brought by public-interest groups rather than private individuals.

A case that illustrates these points is that of *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal*.[7] In this instance, a local community through the applicant, a local non-governmental organisation (NGO), had requested information from a steel company which had located its disposal site within the community. The community requested the information to prove its allegation that the company was illegally dumping hazardous waste at the disposal site, thus adversely affecting the community's right to a healthy environment.[8] The Court held that reliance on the constitutional right to a healthy environment satisfied the threshold that the community had to meet and consequently granted access to the records concerned.[9] The court further held that the community NGO was 'entitled to monitor, protect and exercise the rights of the public at least by seeking information to enable it to assess the impact of various activities on the environment'.[10] The judgment of the Court was consequently unsuccessfully appealed by ArcelorMittal.

The finding in this case demonstrates the practical hurdles in using PAIA to access information from companies, hurdles that include having to demonstrate that a record is necessary for the protection of a right, forming an organised structure with the necessary resources to challenge a refusal, as well as the extended delay in trying to access records (which, in the ArcelorMittal case, was longer than a year).

Within the extractives industry, the South African government is a major shareholder in many of the extractives companies, and this brings a different dynamic to the perception that these companies are private entities. In Sasol's case, which is considered in this report, Sasol Limited is ordinarily a public company because it is controlled by the state and is classified as a 'Type B' public body in terms of PAIA, which means that access to Sasol's records can be obtained without demonstrating that the record is required for the protection of a right. However, because it is a Type B public body, an internal appeal in cases of refusals will not be possible, with the result that the denial of a request can only be challenged in court, as in the case of private bodies.

There are some cases that have dealt with the matter of the classification of a body as public or private where there is a significant state presence in such body. The courts have introduced tests such as the 'control and functions test',[11] but these tests do not assist in changing the nature of extractives bodies to public entities in order to create a slightly easier administrative route for accessing records.

The limits of PAIA become more obvious when its provisions are compared with emerging global initiatives relating to information disclosure. In the case of such initiatives, there is a presumption of transparency that places an onus on companies to justify the prevention of disclosures, whereas, in South African practice, non-disclosure appears to be the rule rather than the exception. An example of the aforementioned emerging global practice is the African Union (AU) Model Law on Access to Information.

The AU justified the need for this law in terms of:

> *exposing corruption, maladministration and mismanagement of resources, increased transparency and accountability which will likely to lead better management of public resources, improvement in the enjoyment of socio-economic rights and to contribute to the eradication of under-development on the continent.*[12]

The Model Law follows through by constantly and implicitly reaffirming the presumption in favour of transparency and recognises the right to access information from private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively. It also identifies a set of 'relevant private bodies' that consist of bodies:

> *owned totally or partially or controlled or financed, directly or indirectly, by public funds, but only to the extent of that financing; or carrying out a statutory or public function or a statutory or public service, but only to the extent of that statutory or public function or that statutory or public service.*[13]

These relevant private bodies are regarded as equivalent to public bodies, with there being no requirement to establish that the information sought from these bodies is required for the protection of a right.

The Model Law establishes a duty to create records, and also establishes a very robust regime that mandates the proactive disclosure of information. The list of proactive information that must be made available in terms of the Model Law cuts across ownership, operational and financial information. While not entirely exhaustive, the Model Law goes a step further and the inadequacy of PAIA is magnified, revealing that PAIA is not enough to access information from private bodies. The failure of the law in South Africa to impose an obligation to create records, the broad exemptions contained in the law, and the discretionary power that the law gives to public and private bodies as to what must be proactively disclosed demonstrates the limitations of PAIA.

Another relevant global initiative that points to the limitations of PAIA is the open-contracting initiative. This broadly entails the publication of government contracts from the time of the award process through to the monitoring and evaluation of contract implementation.[14] It also refers to the norms and practices relating to increased disclosure and participation in public contracting.[15] It promotes the principle that government should recognise the right of the public to access information relating to the formation, award, execution, performance and completion of public contracts, as well as of the publication of the listed information by government to guard against inefficient, ineffective or corrupt use of public resources.[16]

Globally, more than 20 countries now publish some or all of their oil, gas and mining contracts or licences, including less developed countries such as Afghanistan, Colombia, Kurdistan, Niger, Sierra Leone, Guinea, the Democratic Republic of Congo (DRC), Liberia, Ghana, Peru, Ecuador, and East Timor.[17] The revised Extractive Industries Transparency Initiative (EITI) standard also requires contract disclosures, and the International Monetary Fund and the World Bank require disclosure of the contracts for extractives projects in which they invest.[18] All of these point to the emerging trend in favour of disclosure and, as a result, a significant review of the regulatory framework in South Africa will be necessary if the ownership, operational and financial information of the extractives industry is to be publicly disclosed.

9.1 Financial reporting standards

The International Financial Reporting Standards (IFRS) as an international accounting standard developed by the International Accounting Standards Board have played a significant role in the disclosure practices of companies in South Africa. The IFRS is a set of accounting standards that are meant to be applied on a globally consistent basis and allows users of financial statements to compare the financial performance of publicly listed companies with that of international peers.[19] The IFRS is in use in over 100 countries.[20] The Johannesburg Stock Exchange (JSE) Listing Requirements have, since 2005, required both domestic and foreign listed companies to use the IFRS.[21] Also, the Companies Act Regulations adopted in 2011 permit the use of the IFRS. Where a company's listing on the JSE is a secondary listing, such company is permitted to continue to use its home-market accounting standards.[22]

As far as international accounting practices are concerned, South Africa is already applying international best practice but remains constrained by the bureaucratic challenges it faces in terms of the inadequacy of PAIA. This significantly hinders the further development of a disclosure regime that lives up to the potential of global initiatives.

Endnotes

1 2005 (3) SA 486 (SCA).
2 Ibid, paragraph 17.
3 2006 (4) SA 436 (SCA).
4 *Keylite Chemicals v Harmony Gold Mining Company Limited* (2007) ZAGPHC 258; *Pienaar v Jordaan* (2006) ZAGPHC 173; *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA).
5 The grounds for refusal are listed in sections 63 to 70 of PAIA and include protection of the privacy of a third party who is a natural person; protection of the commercial information of a third party; protection of certain confidential information of a third party; protection of the safety of individuals and protection of property; protection of records privileged from production in legal proceedings; the commercial information of a private body; and protection of research information of a third party and private body.
6 F. Adeleke, 'Domestication of the right of access to information: Retrospect and prospects', paper delivered at the African Network of Constitutional Lawyers (ANCL) Conference on the Internationalisation of Constitutional Rights, 2 to 4 February 2011, Rabat, Morocco.
7 (2014) ZASCA 184.
8 Protected in terms of section 26 of the Constitution.
9 At paragraph 95.
10 *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal* 39646/12, paragraph 16.
11 *Mittal Steel SA Ltd (Formerly Iscor) v Hlatshwayo* 2007 (1) SA 66 (SCA). The test entails considering

whether the body has any discretion of its own and, if it has, what the degree of control by the executive over the exercise of that discretion is; whether the property vested in the body is held by it for and on behalf of the government; and whether the body has any financial autonomy. The function test, on the other hand, requires consideration of whether, but for the existence of a non-statutory body, the government would itself almost inevitably have intervened to regulate the activity in question; whether the government has encouraged the activities of the body by providing underpinning for its work or weaving it into the fabric of public regulation or has established it under the authority of government; and whether the body exercises extensive or monopolistic powers. See South African History Archives, 'PAIA unpacked: A resource for lawyers and for paralegals', 2012.

12 See p. 9 of the Model Law.

13 See the definitions section of the Model Law.

14 For further information, see www.open-contracting.org.

15 Ibid.

16 Ibid.

17 See: http://www.open-contracting.org/resources/extractives/ [accessed 22 January 2015].

18 Ibid.

19 IFRS Foundation, International Accounting Standards Board (IASB), 'Who we are and what we do', 2014.

20 South African Institute of Chartered Accountants (SAICA), 'IFRS application around the world', June 2013.

21 Ibid.

22 Ibid.

PART 10

Towards an improved disclosure regime

Having evaluated the applicable laws and policies governing the disclosure of ownership, operational and financial information, and having analysed selected corporate practices in South Africa, we can now make a number of findings that highlight the existing regulatory gaps and the regulatory changes necessary if an approach of governance by disclosure is to be pursued in South Africa.

10.1 Findings

10.1.1 Secrecy is the rule, not the exception

The review of applicable laws and policies reveals that transparency practices can easily be frustrated by provisions allowing for certain information to remain confidential at the discretion of a particular mining entity. 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 also be employed to cover a whole range of information that the company in question would prefer not to disclose. This type of provision remains a key obstacle to promoting wholesale transparency practices in South Africa. Indeed, by and large, what constitutes 'commercially sensitive information' has not been defined by legislation or by regulation and is employed to cover blanket discretions of non-disclosure.

The main piece of legislation governing the disclosure of information by the private sector is the Promotion of Access to Information Act (PAIA). This Act does not, however, include a specific definition of 'commercial information' and permits private bodies to refuse requests for commercial information under broadly formulated categories of exemption. Other examples include the Mineral and Petroleum Resources Royalty (Administration) Act (MPRRA) which provides that records in terms of section 8 are not publicly available and are governed by the provisions on the preservation of secrecy in section 19, similar to the provisions in the Income Tax Act. The Financial Markets Act and the Value-Added Tax Act also provide for the confidentiality of information as the default rule, allowing a limited category of exceptions where disclosure may be permissible.

Some of the laws also allow corporations to assert confidentiality outside the framework of PAIA, which further illustrates the way in which the legislative environment enables companies in the extractives industry to control the public outflow of information while laying claim to adherence to transparency practices. Examples of this include the Gas Act, which allows applicants for licences to request that commercially sensitive information be treated as confidential, and, subject to concurrence on the part of the Gas Regulator, such information may then be withheld from public disclosure.[1] Also, the Listing Requirements of the Johannesburg Stock Exchange (JSE) permit listed

Paradoxically, PAIA has in effect made it harder to obtain access to information by providing private institutions with various loopholes to avoid, rather than enabling, public access to records.

companies to assert confidentiality of information so as to prevent public disclosure of information submitted to the regulatory body.

10.1.2 The inadequacy of PAIA: Bureaucratic resistance to transparency

The framework of PAIA is incapable of breaking the mould of secrecy in the private sector owing to the various conditions that must be met, such as: showing that the information requested is necessary for the protection of a right; complying with various procedures, such as the submission of a form; the payment of fees; and seeking recourse only through the courts. More importantly, PAIA provides a wide range of exemptions that serve as loopholes to enable the circumvention of the spirit of PAIA, which is to promote a default approach to transparency.

In a survey on accessing information from a small sample of extractives companies in relation to environmental information, the highest rate of access to information fully and partially granted through the PAIA process was 33%.[2]

Paradoxically, PAIA has in effect made it harder to obtain access to information by providing private institutions with various loopholes to avoid, rather than enabling, public access to records.

10.1.3 Resistance to the trend of open contracting

'Open contracting' broadly 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 pertaining to increased disclosure and participation in public contracting. In order to fully realise the potential of open contracting, the objectives that must be met include: an increased number of contracts that are publicly disclosed; improved quality of publicly available information on contracting; enhanced accessibility to contracting data; and increased opportunities and mechanisms for participation throughout all phases of contracting. Open-contracting objectives are achievable through affirmative disclosure. Various principles employed internationally can be used for this purpose, such as the recognition of the right of the public to access information relating to the formation, award, execution, performance and completion of public contracts.[3]

What is implied within the framework of PAIA objectives is the proactive disclosure of certain sets of information to the public without the need for an official request for such information. This is evident from the requirement that companies develop PAIA Manuals listing the categories of information held by them, including records that are automatically available, and how access to these can be obtained.[4] Such obligation also extends to the public sector[5] and accentuates a principle of openness that would make public accountability much easier to observe in practice. The review of corporate practice earlier on revealed that none of the companies included in the analysis are automatically making their contracts available.

Principles of open contracting rely on the proactive release of information by public and private bodies, which is much more effective than the individual requests for information that the PAIA model offers.

10.1.4 The veneer of transparency in corporate practice

From the analysis of the five selected companies in this report, it is apparent that the disclosure

The provision in the Tax Administration Act prescribing the disclosure of arrangements that might lead to undue tax benefits is an indication that the South African Revenue Service (SARS) already has the legislative framework to collect information that points to profit-shifting and tax avoidance.

practices of companies do not lift the veil of secrecy that shrouds corporations in the extractives industry. The legislative and policy framework governing the South African mining sector creates the conditions whereby companies in the extractives industry can utilise the language and practice of transparency to assert their social licence to operate and claim credit for accountability that is devoid of any substantive outcomes. Corporations are selective about what they proactively disclose, particularly as regards country-by-country reporting of tax payments, the disaggregation of such payments, and environmental indicators applicable to company operations that do not reference such indicators against legal obligations.

10.1.5 Disclosures on the value of natural capital

While the focus of the transparency movement has rightly been on payments made to governments and on the verification of such payments, a movement aimed at blocking illicit financial flows out of resource-rich countries, attention also needs to be focused on the manner in which companies present and account for impacts on natural and social capital. The review of company practice revealed that companies regularly report on their environmental and social impacts in terms of highly aggregated statistics. Such indicators are, however, not quantified and do not contribute to an overall understanding of the holistic benefit that extraction of natural resources confers, set against the costs it imposes.

10.1.6 Glimmers of hope: Disclosures to oversight bodies and records on tax-planning strategies

Notwithstanding these concerning trends, some of the laws considered in this report provide for the disclosure of information relating to ownership, operational and financial aspects. The Petroleum Pipelines Act, for instance, provides that the licences of applicants must be disclosed. In addition, the Mineral and Petroleum Resources Development Act (MPRDA), the MPRRA and the Income Tax Act provide for the disclosure of several payments that are consistent with the payment categories subject to disclosure in terms of international standards. While these disclosures are not publicly available, they constitute a solid foundation for regulatory amendments concerning public access to the records currently being collected and submitted to various oversight bodies.

The provision in the Tax Administration Act prescribing the disclosure of arrangements that might lead to undue tax benefits is an indication that the South African Revenue Service (SARS) already has the legislative framework to collect information that points to profit-shifting and tax avoidance. This could facilitate the disclosure of payments by companies in accordance with international standards, such as country-by-country payments involving payments made by a company to each government where such company operates, and all subsidiary payments involving the payment responsibilities of each subsidiary within a group of companies to all necessary governments, as well as with regard to each project run by the company.

10.2 Recommendations

On 1 February 2015, the Thabo Mbeki Report on Illicit Financial Flows (IFFs), commissioned by the African Union (AU) Conference of Ministers of Finance, Planning and Economic Development, was released. The report ranked South Africa as third in terms of cumulative IFFs[6] suffered between 1970 and 2008, flows that amounted to USD81 billion and constituted 11% of Africa's total IFFs.[7]

The report noted the particular vulnerability[8] to IFFs of countries like South Africa that depend on natural-resource extraction.[9] It also contains significant findings and recommendations, findings and recommendations that are supported in the present report and are considered below alongside additional recommendations.

10.2.1 Mainstreaming global initiatives

In the Mbeki Report, transparency is considered key with regard to all aspects of IFFs. Consequently, the Report recommends proposals such as:

> *the automatic exchange of information, country-by-country reporting, project-by-project reporting, disclosure of beneficial ownership, public information about commercial contracts that African governments enter or implementation of the recommendations of the Financial Action Task Force.*[10]

The Report further notes that:

> *while voluntary approaches to the exchange of information such as the EITI* [Extractive Industries Transparency Initiative] *are making steady progress* [with regard to] *extractive industries, the push for transparency should encompass all commercial sectors, moving to mandatory requirements such as those contained in Section 1504 of the US Dodd–Frank Act and the European Union Transparency Directive.*[11]

The Report recognises the policy implications of this as, firstly, entailing access to information and the right to obtain it.[12] Secondly, it recognises the importance of moving towards a common global mechanism. Thirdly, it advocates mainstreaming voluntary and mandatory initiatives in national laws with the necessary capacity to 'request, process and use the information that they [countries] obtain'.[13]

While South Africa has an access-to-information law emanating from the Constitution, which recognises the right of access to information, the country has resisted the idea of initiatives such as the EITI. In endorsing the recommendations above that South Africa should move towards emerging, common global mechanisms, it is also recommended that the existing laws and regulations in South Africa governing disclosures should be consolidated. In addition, some disclosure requirements are embodied in voluntary codes rather than mandatory legislation. This presents an opportunity for various regulatory amendments that make these disclosure requirements mandatory.

In view of the finding in this report that confidentiality prevails over public disclosure, it is recommended that South Africa embrace the emerging trend of public reporting on payments made by corporations on each project in each country of operation – and incorporation where various subsidiaries are involved – and that this apply to all companies registered in South Africa and to all companies listed on the Johannesburg Stock Exchange (JSE).

Since payments are often made not only in cash, but could also include commitments for social-infrastructure development, regulatory amendments would be needed to ensure that all fees, royalties, taxes, and levies paid by companies also include any payments in kind.

10.2.2 Strengthening oversight bodies

The Mbeki Report found 'a clear relationship between countries that are highly dependent on extractive industries and the incidence of IFFs',[14] and that such relationship arises as a result of a lack of 'independent means of verifying the precise amount of natural resources extracted and exported',[15] thus leaving countries to rely on extractives companies that have an incentive to underreport, since existing laws do not cover undeclared extracted products.[16]

As a result, the Report recommends the development of:

> *capacities and technology to monitor extraction of ... natural resources better and to negotiate contracts more effectively. They* [African countries] *also need to make greater use of the information and support provided by voluntary existing mechanisms promoting transparency*

in the natural resource sector while calling for the adoption of mandatory global reporting requirements.[17]

The Mbeki Report also recommends that independent institutions be strengthened in order to adequately prevent IFFs and that 'methods and mechanisms for information sharing and coordination among the various institutions and agencies of government responsible for preventing IFFs' should be established.[18]

It is further recommended that amendments be introduced that ensure that all regulatory and oversight bodies are adequately equipped to exercise their oversight functions effectively. Such bodies should also be obliged immediately to make public the information that is submitted to them. Very rare exceptions of confidentiality should apply, but, consistent with the provisions of PAIA, such exceptions should be overridden by disclosure in the public interest if necessary.

Despite the broad exemptions relating to disclosure that are contained in PAIA, the spirit of the law favours proactive disclosure and transparency as the norm and nevertheless provides for disclosure of information in the public interest. The failure of PAIA has also been due to a weak oversight mechanism enforcing compliance. With the recently adopted Protection of Personal Information Act in place, which mandates the establishment of a new body known as the Information Protection Regulator to monitor violations with regard to personal information as well as PAIA, it is recommended that the state prioritise the establishment of this body. The state should also allocate adequate resources to it so as to ensure that it effectively employs its enforcement powers, particularly as far as PAIA compliance by public and private bodies is concerned.

10.2.3 Financial disclosures

It is further recommended in the Mbeki Report that there be clear, harmonised and precise laws that address issues such as mispricing, profit-shifting or tax avoidance. As a result, the AU Report fully supports the provision of reports by multinational corporations that detail their 'disaggregated financial reporting on a country-by-country or subsidiary-by-subsidiary basis'.[19]

These are important recommendations that regulatory amendments in South Africa should incorporate. In addition, such amendments should provide for the disaggregation of payments made to the South African government on a national level as well as the disbursement to provincial and local-municipality levels in order to assist stakeholders in holding these governments accountable for how the received monies are spent.

The materiality definition applicable to companies should be defined in terms of monetary value rather than as a percentage of the turnover of the company so as to adequately ensure consistency and uniformity in the application of the requirements to companies operating in the industry.

In addition, it is recommended that the Minister issue notices in relation to sections 35 and 36 of the Tax Administration Act that will allows SARS to collect information from corporations that will point to evidence of undue tax benefits resulting from various tax-planning strategies employed by multinationals that contribute to IFFs from South Africa.

10.2.4 Disclosure of ownership information

The Mbeki Report further recommends the disclosure of 'ownership and control of companies, partnerships, trusts and other legal entities that can hold assets and open bank accounts' and which is 'critical to determining where illicit funds are moving [to,] and who is moving them'.[20] The Report further recommends the disclosure of beneficial ownership, which should be updated regularly and be available publicly.[21]

It is recommended that, in addition to the above, South Africa's extractives industry adopt practices from other sectors in relation to public access to ownership information, as well as with regard to licensed operations in the extractives industry. For example, the Banks Act[22] provides for public access to the Memoranda of Incorporation, Articles of Association and annual reports of companies, while the Financial Advisory and Intermediary Services Act[23] provides for the public display of

The Mbeki Report recognises the incredibly vital role of civil society organisations (the media, non-governmental organisations, academia and think tanks) and indicates that these 'should be given the operating space and legal freedoms required for advocacy, activism and research in this area'.

licences. Further, the National Nuclear Regulator Act[24] provides that holders of nuclear authorisations must, at all times, 'display copies of the authorisation at such places … to ensure public access to the conditions specified in the authorisation'.[25]

However, the question of disclosure of beneficial ownership requires separate legislation that covers the private sector and lifts the veil of secrecy that company law currently allows in relation to company ownership. It is a welcome development that the South African government has made a commitment in its 2016–2018 Open Government Partnership Commitments to develop an implementation plan on beneficial-ownership disclosure. This initiative should be used to build momentum for a comprehensive law on beneficial ownership.

10.2.5 Third-party oversight

The Mbeki Report recognises the incredibly vital role of civil society organisations (the media, non-governmental organisations, academia and think tanks) and indicates that these 'should be given the operating space and legal freedoms required for advocacy, activism and research in this area'.[26] The ambit of civil society should also be extended to labour, as this is an important role player in the extractives industry for removing the veneer of transparency practices that mask the actual practices adopted by corporations in their daily operations.

10.2.6 Open contracting and proactive disclosure

The Mbeki Report recommends that, since 'non-transparent government procurement and supply chains can provide opportunities for corruption-related IFFs', best practice in relation to open contracting should be adopted.[27]

Government should also develop systems to collect, manage, simplify and publish data regarding the issuing of licences, as well as the formation, award, execution, performance and completion of public contracts in relation to extractives operations. This should be done using an open and structured format and in a way that enables the public to monitor the use of public resources. In addition, the information made available to the public should be as complete as possible, and the private sector should not be given the regulatory authority to resist this initiative on the basis of the assertion of commercial confidentiality.

At a minimum, it is recommended that mining licences and the associated conditions, as well as social and labour plans, be automatically available for public access.

10.2.7 Prescriptive disclosure

It is recommended that South Africa adopt prescriptive disclosure in all areas identified in this report and that this also extend to the mandatory, automatic availability of information, which should be enforced by way of the imposition of severe sanctions for non-compliance. Prescriptive disclosure is consistent with emerging international trends that ensure that multinationals are more accountable for their global operations. Within the JSE, new measures such as integrated reporting provide a foundation for prescriptive disclosure. It is necessary for integrated reporting to be mandatory, and such reporting should focus on substance over form, apply the various disclosure categories applicable in the international frameworks considered in this report, and employ measurements pertaining to the value of the natural capital of corporations.

10.3 Potential challenges regarding the adoption of enhanced disclosure rules

Some of the potential challenges that South Africa may face include political challenges. Although it would appear that there is genuine recognition on the part of the state of the need to promote transparency in the public and private sectors, it remains to be seen whether this recognition will be translated into deliberate action by the state by introducing regulations that open companies and their activities to public scrutiny. At the 2015 World Economic Forum, the former Minister of Mineral Resources in South Africa referred to transparency as the white elephant of mining woes in South Africa.[28] This is not the first time that the government has made a call for greater transparency in the extractives industry. For a government that is fast losing its credibility in terms of fighting corruption, it remains to be seen whether a robust transparency regime applicable to the extractives industry will finally be implemented. However, public support for this and interest on the part of civil society are strong and can be used as leverage in bringing about the necessary political will.

In terms of economic challenges, given the sustained tension in the extractives sector in South Africa – particularly about the demand for increased wages by the trade unions and the allegations that some mining companies are not particularly transparent about their revenues and their ability to offer better conditions for their employees – it cannot merely be assumed that the notion of a more transparent regime will be embraced by companies in the extractives industry in South Africa. This must also be seen against the backdrop of the current dissatisfaction on the part of corporations regarding the uncertain and heavily regulated sector in South Africa.

There are also some regulatory and contractual challenges that will need to be addressed. The claim is often made that the regulatory frameworks in South Africa are already detailed, with a large number of conditions tied to the licensing requirements of corporations. The current regulatory framework in South Africa also plays a significant role in allowing companies the space to assert confidentiality with regard to their existing contracts – something that may hinder attempts at promoting transparency within the industry.

In terms of institutional-capacity challenges, the South African state is already facing a crisis, with state entities being ineffective in exercising appropriate oversight over corporations so as to ensure compliance with licensing conditions. This problem is the result both of a lack of political will and the incapacity within the state to scrutinise corporations effectively and exercise appropriate oversight over them.

It should also be noted that, in cases where disclosures are presently made by companies to state regulatory agencies, the notion of public accountability and the recognition that the public has a right to access these disclosures have not been fully understood by the South African government. Tackling the perception that the South African state does not owe a duty of openness to the South African people is a significant challenge that will need to be addressed.

The failure of the United States of America (USA) to operationalise section 1504 of the Dodd–Frank Act also shows that the challenges faced by South Africa are not unique. In the USA, there has been a successful challenge to prevent disclosures under the Dodd–Frank Act regarding operations in countries where such disclosures are prohibited. This is indicative of the potential resistance that may occur in implementing new disclosure rules. However, the fact that countries like Norway have introduced extended country-by-country reporting standards, with large corporations complying with these standards, is also an indication that the challenges discussed are not insurmountable.

Endnotes

1 Section 16 of the Gas Act.
2 Centre for Environmental Rights, 'Money talks: Commercial interests and transparency in environmental governance', 2014. Available at: http://cer.org.za/wp-content/uploads/2014/11/CER-Money-Talks-Nov-2014.pdf [accessed 4 February 2015].
3 Open-contracting guiding principles were developed by the Open Contracting Partnership in 2013 and were endorsed by the World Bank Institute.
4 Section 52 of PAIA.

5 Section 15 of PAIA.
6 An illicit financial flow is defined as 'money that is illegally earned, transferred or utilised'. These funds typically originate from three sources: commercial tax evasion, trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and bribery and theft on the part of corrupt government officials.
7 'Illicit financial flows: Report of the High Level Panel on Illicit Financial Flows from Africa' (termed the 'Mbeki Report') commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development, 2015, p. 93.
8 The noted vulnerabilities include transfer mispricing, secret and poorly negotiated contracts, overly generous tax incentives, and underinvoicing.
9 Mbeki Report, p. 67.
10 Ibid, p. 65.
11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid, p. 67.
15 Ibid.
16 Ibid.
17 Ibid.
18 Mbeki Report, p. 82.
19 Ibid, p. 81.
20 Ibid, p. 86.
21 Ibid.
22 94 of 1990.
23 37 of 2002.
24 47 of 1999.
25 Sections 26 and 27; see also Centre for Environmental Rights, 'Turn on the floodlights: Trends in disclosure of environmental licences and compliance data', 2012, p. 7.
26 Mbeki Report, p. 84.
27 Ibid, p. 83.
28 See: http://ewn.co.za/Media/2015/01/22/Ngoako-Ramathlodi-Transparency-is-white-elephant-of-SA-mining-woes [accessed 5 February 2015].

PART 11

Conclusion: The rationale for an enhanced disclosure regime in South Africa

The contestation for mineral resources has been a matter of contention since the time of colonisation. Despite the wealth of mineral resources across Africa, the continent remains in a state of poor socio-economic development, a state that has necessitated a strategic intervention through the Africa Mining Vision (AMV). The AMV places emphasis on:

> *transparency, equitable protection of optimal mineral resources to underpin broad-based sustainable growth and socio-economic development, the optimisation of value creation through the exploration of mineral resources to benefit Africa in terms of fiscal value, foreign exchange, employment creation and poverty reduction, technology acquisition, development of skills creation, infrastructure as well as industrial development.*[1]

As South Africa constantly reviews its policies and regulations in order to enhance the regulatory environment and so improve equitable access to mineral resources as well as maximise the benefits from mineral resources through initiatives such as beneficiation in order to contribute to the development of the economy, challenges such as tax evasion, transfer pricing and profit-shifting rob the state of the funds due to it. To overcome these challenges, illicit flows of revenue from the extractives industry need to be curbed through a wholly transparent system.

A more transparent regime would allow effective economic management of the revenue streams derived from the extractives industry. Fully disaggregated disclosures would provide the tax authorities with data on extractives-industry companies in a standardised form, thereby reducing the cost of data collection and ensuring improved communication between tax authorities and companies.[2]

Further, disclosures are required so that tax payments can be transformed into valuable information for investors, the media, civil society and governments in each country where these multinational companies operate. These disclosures relate to investments, production, sales revenue, costs (for the purchase of goods and services, employee costs, other operational expenditure, and net finance cost), number of employees, and payable tax debt.[3]

Minerals are non-renewable and finite and, as a result, it is important that the trade in minerals benefits countries and their citizens through an emphasis on sustainability and long-term growth that leads to development for the benefit of all.[4] Because the extraction of resources requires significant financial capital and expertise, two things that the state does not possess in relation to such activity, the need for private corporations and investors to provide these resources arises, which results in the state placing custodianship in respect of mineral resources in private hands. To ensure proper management of these resources and guarantee that the state obtains what is rightfully due to it on behalf of the people, transparency is necessary in order to build trust.[5] Trust is said to imply a firm

Minerals are non-renewable and finite and, as a result, it is important that the trade in minerals benefits countries and their citizens through an emphasis on sustainability and long-term growth that leads to development for the benefit of all.

reliance on the integrity, ability and commitment to honour an obligation, but 'trust cannot be claimed. It must be earned in the tax line of the financial statement' of a company that discloses profits and incomes earned by the corporation and appropriate payments that are due to the state.[6]

The mining industry contributes significantly to South Africa's gross domestic product (GDP), employment, tax, and export revenues. In 2013, the South African state received 21% of direct tax, mining royalties, and tax on employee income deducted from employees' salaries.[7] However, for the past few years, the South African mining industry has struggled with unrest and strikes that have lowered the levels of production and have weakened the demand for products. In the PwC report assessing the state of revenue generated by the state from mining companies, it was suggested that:

> *the actual contribution received by the state is significantly higher, with indirect taxes like VAT, import and export duties also being collected. As more companies start to report their total payments made to governments in line with the Extractive Industries Transparency Initiative* [EITI]*, we will in future be able to assess that contribution better.*[8]

This acknowledgement from experts within the industry is a further recognition of the importance of full disclosure by mineral companies that is aligned to that of other jurisdictions.

In South Africa, claims of lack of transparency relating to the operational and financial information of mining corporations have often been made against the industry, resulting in calls for more effective oversight over the industry. Other arguments have been advanced that suggest that new regulations are not the solution for holding the mining industry accountable. Instead, better implementation of existing regulations by the state is what is necessary. An example of this is the social and labour plan, which is a licensing condition needed to obtain mineral rights. Such plans have been criticised for their ineffectiveness as a result of the lack of transparency by corporations with regard to these plans. Because of this lack of transparency, other stakeholders are unable to monitor compliance with the commitments by corporations.[9]

In conclusion it can be stated that South Africa needs to align itself to the disclosure practices in other countries in order to ensure the development of a global oversight mechanism that holds multinational companies accountable for their revenues and payments in all the countries where they operate.

Endnotes

1 See Africa Mining Vision, 2009. Available at: http://pages.au.int/sites/default/files/Africa%20Mining%20Vision%20english_0.pdf [accessed 4 February 2015).
2 PWYP Norway, 'An extended country by country reporting: A policy proposal to the EU. Vol. 2', 2013, p. 7.
3 Ibid.
4 Ibid, p. 9.
5 Ibid.
6 Ibid, pp. 9–10. According to the standards proposed by Publish What You Pay (PWYP) to aid the argument for accurate and complete financial disclosure, adherence to such standards offers the following advantages: it provides key stakeholders like investors with key, standardised information to prioritise

their use of funds and give them in their role as owners the information needed to enter into a dialogue with the companies about their priorities; it levels the playing field among extractives-industry companies, as it forces less transparent companies to provide the same level of information as more transparent companies; it provides regulators with key information they need to provide for good regulations in the extractives-industry sectors; it provides data for governments, analysts, the media, and the population at large that will enable them to monitor and challenge companies and government institutions and move towards the most effective economic management of the revenue streams derived from the extractives industry; it provides tax authorities with data on extractives-industry companies in a standardised form, thus reducing the cost of data collection, providing for better communication between tax authorities and companies, and allowing less room for criminal activities by those few companies that are willing to resort to such practices, since it becomes more difficult to move funds from one jurisdiction to another to the extent that a tax authority has asked for insight into the records in respect of a tax jurisdiction – PWYP Norway, p. 26.

7 PricewaterhouseCoopers (PwC), 'Highlighting trends in the South African mining industry', 2013, 5th edition, p. 35. Available at: http://www.pwc.co.za/en/assets/pdf/sa-mine-2013.pdf.

8 Ibid.

9 Benchmarks Foundation, 'Policy GAP 09: South African coal mining: Corporate grievance mechanisms, community engagement concerns and mining impacts', 2014, p. ix. Available at: http://www.benchmarks.org.za/research/policy_gap_9.pdf.

ANNEXURE 1

List of records held in terms of the PAIA Manuals of the five case-study companies

In their PAIA Manuals, the five mining companies analysed in this report list the types of records they keep. Much of this information relates broadly to the operational, ownership and fiscal information that this research has sought to identify. This annexure, therefore, contains a list and overview of the operational, ownership and fiscal information which the five mining companies state, by way of their PAIA Manuals, that they hold.

1. Sasol Limited

1.1 Operational information

- Branding information: policies; standards; branding and advertising material; print and audiovisual advertisements;
- Communications: documents relating to public and internal communications; media releases; CEO (Chief Executive Officer) presentations and speeches;
- Company secretarial services: annual reports; applicable statutory documents; corporate-structure organograms; corporate calendars; documents relating to share-incentive schemes;
- Corporate social investment: agreements; applications for donations; reports; documents on projects;
- Information management and technology: information policies, standards, procedures and guidelines; contracts and agreements;
- Insurance: group-liability policies and other insurance policies; documents on underwriting; claim documents; motor rules; personal accident benefit rules;
- Intellectual property: patents and designs; trademarks; copyright and agreements;
- Internal audit and risk management: audit plans; documents relating to generic risk-management processes;
- Land transactions: documents in connection with land, prospecting, mining and mineral rights, and servitude transactions, including: contracts, approvals, consents, deeds, agreements, forms, securities, cancellations, amendments or substitutions, documents to be registered or lodged at the Deeds Office or Office of the Director of Mineral Development, mining contracts, lease agreements; documents regarding township extension and establishment, as well as land use and zoning; documents relating to acquisition, cession or sale of mineral rights; applications and notices in terms of the Minerals Act;
- Library: bulletins, gazettes, publications, journals;
- Manufacturing and production: specifications, production statistics, documents relating to the delivery and receipt of products;
- Plant maintenance: inspection schedules; procedures and guidelines; emergency-response plans; operating procedures;

- Research: contracts and agreements; technical publications; and
- Safety, health and the environment: Sasol policy; business best practice; sustainable-development reports; governance audits; environmental-impact assessments; safety, health and environmental audits, inspections, plans, programmes, procedures, training and emergency response; documents and reports on complaints, investigations and incidents; documents on permits, authorisations and exemptions; documents on corporate policy, standards, and management systems; documents on water conservation, waste management and emissions.

1.2 Ownership information

- Share registers;
- Memoranda of Incorporation; and
- Investor relations: general investor relations communications; announcements by the Stock Exchange News Service; filings with the United States Securities and Exchange Commission; presentations to analysts.

1.3 Fiscal information

- Statutory returns to the appropriate authorities;
- Share certificates;
- Accounting records; audited financial statements; financial agreements; income tax returns; banking records; invoices and statements; and
- Unemployment Insurance Fund returns.

2. Anglo American

2.1 Operational information

- Technical, engineering, mining-related, geophysical, and safety, health and environmental records;
- Insurance records;
- Safety, health and environmental assessment records, and audit reports;
- Risk-management records;
- Mineral rights records;
- Secretarial records;
- Purchasing records;
- Property records;
- Geological records;
- Geographic information systems records;
- Geological services records; and
- Geological information systems records.

2.2 Ownership information

- Investment records; and
- Share-registration records.

2.3 Fiscal information

- Tax records;
- Forex records;
- Accounting records;
- Treasury dealing and settlement records;
- Transactional records;
- VAT (value-added tax) records; and
- PAYE (pay as you earn) records.

3. Impala Platinum Holdings

3.1 Operational information

- Community-development project information;
- Company code of practice;
- Company policies and procedures;
- Competition notices;
- Mining licences/mining rights;
- Prospecting permits/prospecting rights;
- Environmental management plans for prospecting;
- Environmental management programmes for mining;
- Prospecting work programmes;
- Mine work programmes for mining rights;
- Social and labour plans for mining rights;
- Compliance reports submitted in terms of the Mineral and Petroleum Resources Development Act;
- Mining leases;
- Mineral leases;
- Applications for mining rights and prospecting rights; and applications in terms of the Mineral and Petroleum Resources Development Act;
- Deeds of transfer;
- Cessions/certificates of old-order mineral rights;
- Death reports;
- Occupational-health records;
- Safety reports;
- Incidents and accidents reports;
- Safety data and statistics;
- Safety inspections and audits;
- Claims and compensation;
- Project data and statistics, reports, specifications, quality and standards information;
- Environmental reports and audits;
- Mine plans;
- Surveying and drafting information;
- Department of Mineral Resources applications;
- Mineral resource and mineral reserve statements;
- Geophysical information;
- Exploration and evaluation drilling information;
- Production results;
- Ore accounting;
- Engineering logbooks;
- Maintenance records;
- Environmental management plans;
- Machinery and equipment records;
- Explosives control records;
- Ventilation reports and statistics;
- Fire reports;
- Water reports;
- Gas-emission reports;
- Dust reports;
- Logbooks;
- Feasibility studies;
- Mine plans and mine design;
- Metal accounting analyses;
- Dispatch documentation;
- Standards certificates;
- Intellectual property: trademark, copyright, patents and licences;
- Property: title deeds of land owned by the company; lease and sale agreements; property records and leases; and
- Insurance: policies.

3.2 Ownership information

- Secretarial register of members.

3.3 Fiscal information

- Financial statements;
- Loans to and by third parties;
- Business plans and budgets;
- Financial risk-management records;
- Capital expenditure;
- Taxation;
- Treasury reports;
- Accounting records;
- Fixed-asset registers;
- Financial statements and management accounts;
- Tax records and returns;
- VAT records and returns;
- Bank statements and cheques;
- Price information; and
- Sales reports.

4. Harmony Gold Limited

4.1 Operational information

- Company policies;
- Permits and licences; and
- Authorisations and approvals.

4.2 Ownership information

- (None provided)

4.3 Fiscal information

- (None provided)

5. Coal of Africa

- (No listed information categories in the PAIA Manual)

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