Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues by
the Vale Columbia Center on Sustainable International Investment

No. 76 August 13, 2012

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A good business reason to support mandatory transparency in extractive industries

by
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Transparency demands in extractive industries are tied to the complex paradoxical correlation between significant resource endowment and poverty in many resource-dependent countries. Citizens of these countries and international investors alike only have limited means to scrutinize money-flows between governments and companies, disrupting accountability mechanisms.

Improving accountability and access to information is a step toward ending the resource curse. Section 1504 of the Dodd-Frank Wall Street and Consumer Protection Act, known as the Cardin-Lugar Transparency Amendment, requires extractive companies listed at US-securities exchanges to disclose all payments made to host country governments on a country-by-country and project-by-project basis. Amid corporate opposition, the Securities and Exchange Commission (SEC) has only now, more than one year late and after Oxfam America started court proceedings and over 65 Congress members put pressure on the SEC, set a date to vote on the rules.[1] However, despite opposition, there is a business case to be made in support of such mandatory transparency demands.

The debate on the Transparency Amendment has, very broadly, two camps: the opponents -- most expressively represented by the American Petroleum Institute -- and the proponents, including civil society with Publish What You Pay (PWYP) as the main supporter, groups of investors and certain congressional members. While

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[1] The vote is scheduled for August 22, 2012. Securities and Exchange Commission, available at: http://www.sec.gov/news/openmeetings/2012/ssamtg082212.htm.

supporting the Extractive Industry Transparency Initiative (EITI), the corporate lobby opposes the SEC rules for allegedly causing high implementation costs, opposing legal demands and a comparative disadvantage for US-listed companies. The second camp has challenged these claims and has argued in favor of the amendment as a promising answer to the limitations of the voluntary EITI.

Companies maintain that implementation costs can exceed US$ 50 million since they will have to re-devise their accounting instruments to disclose project-based and non-material information. Civil society and even *The Economist* have contested the veracity of this claim, noting that much information is already collected and calculating that US$ 50 million is little more than 0.1% of ExxonMobil's last year's revenue.[2] The claims that demands of the Transparency Amendment contradict host country confidentiality laws are also ill placed.[3] Civil society rebutted this claim by demonstrating that most countries allow for exceptions based on stock exchanges' disclosure demands.[4]

There is no denying that a certain short-term competitive disadvantage is created for impacted companies -- although the European Council's directive for mandatory payment disclosure limits the scope of not-covered competition. Companies contend they will lose bids either because host countries prefer non-disclosing companies or because disclosed information is commercially sensitive. Here is the reality-check: Angola just awarded deep water oil blocks to Statoil, Eni, Total, and BP, which are all EITI-supporters and covered by the Amendment, which incidentally only deals with non-commercially-sensitive fiscal information widely shared by the industry. Lastly, the competitive disadvantage argument is unduly cynical. Part of the complaint has to do with the limitations on bypassing the Foreign Corrupt Practice Act by "creatively" bribing through either "facilitators" or local partnerships. Bribery is illegal both in the US and Europe; "[k]eeping it hard to expose would not make it more legal."[5]

Companies have a choice to play either destructive or constructive roles in the quest for transparency. The choice consists of either accepting narrow capitalism -- which prescribes short-term profitability and concomitant opposition to regulatory limitations on corporate operations -- or believing in a forward-looking and long-term shared value approach to business. Through a shared value lens, companies seek out benefits for both shareholders and the communities in which they operate since the companies understand that they require a social license to operate to attain long-term success. Increasingly, investors seek out companies based on such long-term credentials.

Various studies by the Vale Columbia Center found that transparency -- measured by companies' country-by-country reporting -- holds a promise for better corporate

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[2] "Extracting oil, burying data," *The Economist*, February 25, 2012.

[3] Angola, Cameroon, China, and Qatar have such laws according to API and Shell. API's letter, January 28, 2011: available at: http://www.sec.gov/comments/s7-42-10/s74210-10.pdf. PWYP US (http://www.sec.gov/comments/s7-42-10/s74210-29.pdf and http://www.sec.gov/comments/s7-42-10/s74210-118.pdf) and the Cameroonian organization RELUFA (http://www.sec.gov/comments/s7-42-10/s74210-96.pdf) deny these claims.

[4] VCC's memo to the SEC, available at: http://www.sec.gov/comments/s7-42-10/s74210-52.pdf.

[5] "Transparency rules," *Financial Times* editorial, February 26, 2012.

performance. One such study showed a clear correlation between transparency and better financial results along different measures.[6] Interestingly, those transparent companies are also associated with fewer cases of human rights abuse.

Corporate leaders should change tactics and transform a short-term comparative disadvantage into the comparative advantage of being first-movers. This means to follow in the footstep of BP's former CEO[7] and support recent attempts by the US President to encourage the development of a global transparency regime, which will be achieved either by pushing other stock exchanges -- starting with Europe -- to follow suit or by improving on the disclosure demands of the current host country-led EITI. For their own sakes, companies should acknowledge that the transparency moment is now and the stakes are high.

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The Vale Columbia Center on Sustainable International Investment (VCC – www.vcc.columbia.edu), led by Lisa Sachs, is a joint center of Columbia Law School and The Earth Institute at Columbia University. It seeks to be a leader on issues related to foreign direct investment (FDI) in the global economy. VCC focuses on the analysis and teaching of the implications of FDI for public policy and international investment law.

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[6] The results have been communicated to the SEC: http://www.sec.gov/comments/s7-42-10/s74210-115.pdf; VCC memos are available at http://www.vcc.columbia.edu/content/vcc-memos.

[7] John Browne, "Europe must enforce oil sector transparency," *Financial Times*, April 24, 2012.