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ADVANCING MANDATORY PAYMENT DISCLOSURE IN SOUTH AFRICA'S EXTRACTIVE SECTOR

Advocacy for Civil Society

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Introduction and Background

In 2016, The Open Society Foundation- South Africa (OSF- SA) and Oxfam published a report on ***South Africa's Extractives Industry Disclosure regime: Analysis of the legislative and regulatory regime and selected corporate practices.*** The report's analysis looks at global revenue disclosure standards set by EITI, Dodd-Frank Wall Street Reforms in the USA, European Union Accounting and Transparency Directives, Canada and Norway reporting measures. The report aims to foster a deeper and more critical debate on the notion of disclosures in the extractives industry in South Africa.

The extractive sector is vital to South Africa's economy, contributing about 7.9% of gross domestic product (GDP) and directly employing almost 460 000 people.[1] South Africa mines approximately 53 minerals and accounts for 96% of the global reserves of the Platinum Group Metals (PGMs), 74% of chrome, 32% of manganese, 26% of vanadium and 11% of gold reserves.[2]

Historically, some policy-makers have always highlighted the South Africa extractive sector as overregulated. This notion has been given reason for South Africa not joining the Extractive Industry Transparency Initiative (EITI), like other countries that depend heavily upon extractives. However, the report by OSF- SA and Oxfam indicates gaps in proactive disclosure of ownership, operational and financial information by companies.

An analysis of legislation governing the extractive industry reveals limited disclosure rules apply in South Africa. Where applicable, they are fragmented and are found mostly in tax laws, with the relevant information subject only to disclosure to oversight bodies like the South African Revenue Service (SARS) and the Johannesburg Stock Exchange etc.

[1] Department of Mineral Resources Annual Report 2016/ 17
[2] Department of Mineral Resources Annual Report 2016/ 17

Informed by the OSF-SA and Oxfam publication, this report gives an analysis of the opportunities and possible challenges in advocating for a mandatory disclosure regime in South Africa. Looking at four pieces of legislation that directly affect the extractive sector disclosure of financial and operational information:

- Mineral and Petroleum Resources Development Act (MPRDA)
- Mineral and Petroleum Resources Royalty Act (MPRRA)
- Tax Administration Act
- Johannesburg Listing Requirements

The report will identify possible opportunities for reform and amendments that have the potential to ensure South Africa implements international standards on mandatory disclosure of payments. It will explore how government departments differ in policies regarding the disclosure of information. Some, like the treasury and water and sanitation departments, have gone beyond PAIA in proactive disclosure of information. While some, mainly those responsible for the extractive sector, still use PAIA as the standard for information disclosure.

This analysis will focus on seven payment categories informed by the PWYP South Africa mandatory disclosure strategy that seeks to ensure that the payment categories are more pronounced in South Africa's legislation. The selected categories constitute the global mandatory disclosure standards and are taken from Chapter 10 of the EU Accounting Directive.[3] It will also identify which of the categories already exist in policy and legislation:

1. Production entitlements;
2. Taxes levied on the income, production or profits of companies,
3. Royalties;

[3] https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/public-country-country-reporting_en

4. Dividends;
5. Signature, discovery and production bonuses;
6. Licence fees, rental fees, entry fees and others;
7. Payments for infrastructure improvement

Legislation governing disclosure of information for extractive companies in South Africa

Promotion of Access to Information Act (PAIA)

PAIA governs the overall disclosure of information in South Africa, with several specific legislation focusing on extractive sector companies. The OSF- SA and Oxfam report analysed several of these documents. Any advocacy for mandatory disclosure of payment faces the first challenge of PAIA, as it sets limitations and minimum standards for access to information. It gives limitations on the information that companies can publicly proactively disclosure, and it sets limitations on the type and how much information companies can disclosure upon request. 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 by the public 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 proactive approach to transparency

Mineral and Petroleum Resources Development Act (MPRDA)

The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) provides the overarching framework governing the extractives industry. It sets out the prerequisites for granting prospecting, mining, exploration or production rights.[4]

[4] OSF- SA and Oxfam report.

MPRDA gives authority to the Regional managers, Council of Geoscience, the Mining and Petroleum Titles Registration Office, and the Minister to be custodians of operational and financial information submitted by companies.[5] Section 88 of the act is critical to this analysis, which stipulates that all information should be disclosed as prescribed by PAIA. A conservative approach to disclosure of information.

The act covers the record-keeping and disclosure to the relevant institutions of the following information relevant to this report:

1. Audited financial and expenditure information
2. Licence fees payable
3. Profit and loss accounts
4. Social and labour plans

While the act aligns the disclosure of information to PAIA, there are opportunities to advocate for the act to go beyond PAIA on proactive disclosure of information. This will ensure South Africa follows international standards.

In 2013, an MPRD Amendment Bill was tabled in parliament, and two years later, the bill was returned to parliament by then-President Jacob Zuma. The President cited, among other reasons, limited public consultations and the unconstitutionality of some sections of the bill. The Minister of Mineral Resource later withdrew the bill in October 2018 because the department believed it caused uncertainty to the industry.

Opportunities

- The MPRDA amendment bill provides an opportunity to establish a mandatory disclosure regime in South Africa. The withdrawal of the bill creates a fresh opportunity for civil society to advocate for the amendment of the MPRDA to include provisions and language on mandatory disclosure of the payment. The provisions need to align with global standards and the needs of mining

[5] Please OSF-SA and Oxfam report on Part 2 on detailed information on disclosures.

communities.

- Amendments to MPRDA should focus on two critical areas of the legislation, sections 30 and 88, pertaining to submitting and disclosing information to relevant institutions. There are arguments to be made on the legislation to encourage the disclosure of information beyond the parameters set by PAIA in line with international transparency standards for better economic management of resources.
- The Minerals and Mining Policy for South Africa (White Paper, 1998) has guided the department of mineral resources in policy development. The policy highlights the need for transparent and efficient regulation of South Africa's mineral resources and industry to meet national objectives and bring optimum benefit to the nation. There is a need to review the minerals and mining policy to include mandatory disclosure of payments and information relating to extractive companies.
- The Department of Mineral Resources Strategic plan 2014-19 is coming to an end. There is an opportunity for stakeholders to influence the next strategic plan 2020- 2024 to be more progressive and to contain language on mandatory disclosure of payments. The strategic plan guides the goals and objectives of the department of mineral resources for the next six years. This will ensure that mandatory disclosure of payments is included as an objective for the department that will be beneficial to achieving the goal.

Challenges

- The withdrawal of the MPRD bill means a window of opportunity has been lost. There is now a need for stakeholders to influence the new mineral resources strategic plan process 2020- 2024 currently underway to prioritize the amendment of the MPRDA. The last review of the MPRDA was included as a critical objective of the 2014- 2019 strategic plan.

Mineral and Petroleum Resources Royalty Act (MPRRA)

The Mineral and Petroleum Resources Royalty Act 28 of 2008 (MPRRA) regulates the imposition and calculation of mining royalties. Mining royalties are deductible for income tax purposes. In South Africa, the liability to pay mining royalties arises when mineral resources that have been extracted from within the Republic are transferred. The 'transfer' of the mineral resources is the trigger for the imposition of the royalty.

The act covers the record-keeping and disclosure to the relevant institutions of the following information relevant to this report:

1. Royalties
2. Taxes levied on the income, production or profits of companies,
3. Dividends

The MPRRA is administered by the Ministry of Finance ("treasury") and the South African Revenue Service (SARS). Sections 5 and 19 of the legislation stipulate reports and information to be disclosed to a SARS Commissioner and the Minister of Finance, respectively. More so, section 19 speaks directly to the disclosure of data and aligns to PAIA's limitations on disclosure of information.

Opportunities

- The Constitution of South Africa (Chapter 13) mandates the National Treasury to ensure transparency, accountability and sound financial controls in the management of public finances. National treasury has been progressive in the proactive disclosure of budget information and some procurement information, going above limitations set by PAIA. There is an opportunity to encourage treasury to align the disclosure of royalties, levies and dividends payment information with its policy and its precedent of proactive disclosure of information. There are arguments to be made on the business and economic case for mandatory disclosure and the benefits associated with it.

Tax Administration Act (TAA)

The Tax Administration Act recognises the existence of 'transfer pricing', 'profit-shifting' and illicit financial and requires companies to disclose to SARS tax returns, profits, agreements and dividends etc. While this information is disclosed to SARS, the act in sections 67, 68 and 69 prohibits the disclosure of such information as it deems it "secret" and "confidential" as described by PAIA.

The act covers the record-keeping and disclosure to the relevant institutions of the following information pertinent to this report:

1. Taxes levied on the income, production or profits of companies,
2. Royalties;
3. Dividends;
4. Signature, discovery and production bonuses;
5. Licence fees, rental fees, entry fees and others;
6. Payments for infrastructure improvement

However, treasury and SARS recognise the need for country-by-country reporting in line with OECD and G20 standards. Action 13 of the BEPS Action Plan, which G20 Leaders endorsed in September 2013, proposed the development of "rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business.

To comply with the OECD and G20 standards, South Africa developed regulations under section 25 of the Tax Administration Act that require companies to file country-by-country reports, master files and/or local files with SARS. The disclosure of this information is protected by the non-disclosure clauses of the Tax Administration Act. Article 2 defines the "Ultimate Parent Entity" and "Surrogate Parent Entity". Article 4 establishes the need for the regulation to aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated

capital, accumulated earnings.[6] Unlike the EU directives or the Dodd-Frank, the regulations focus on high-level assessment of transfer pricing risks and other base erosion and profit shifting related risks. The regulations do not cover categories of payments and do not assess the project-by-project level to be in line with global standards.

Opportunities

- The Tax Administrative Amendment bill of 2018 is an opportunity for stakeholders to encourage and influence the adoption of a mandatory disclosure payment regime. Stakeholders need to promote the amendment of sections 67, 68 and 69 that prohibit disclosing information and any information deemed trade secrets and sensitive.
- Stakeholders should advocate for the review of the country-by-country regulations to include the disclosure of project-level information. The fact that South Africa has regulations guiding the disclosure of country-by-country reports gives a starting point.
- Treasury and SARS, as the primary custodians of the TAA, are guided by the values of transparency and good governance. Treasury has shown indications to advance transparent international standards if one looks at fiscal transparency and open contracting regulations. Stakeholders need to encourage the alignment with the transparency policy of treasury for the review of the country-by-country regulations.

Challenges

- Government's pressure to develop country-by-country regulations in 2016 was due to OECD and G20 commitments made by South Africa. However, the OECD and G20 guidelines have seldom been accused of being weak compared to EU directives or Dodd-Frank. This presents a significant challenge for stakeholders who seek to encourage South Africa to move beyond its current

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[6] South Africa Country-by-country regulations published on 23 December 2016.

position. The government see the OECD and G20 guidelines as the leading standards effectively dealing with issues related to disclosures.

Johannesburg Stock Exchange Listing Requirements (JSE)[7]

The JSE offers secure, efficient primary and secondary capital markets across various securities, supported by post-trade and regulatory services. JSE is the 19th largest stoke exchange globally, open to local and international investors looking to gain exposure to markets in South Africa and the broader African continent. Just over 58 companies working in the extractive sector are listed with the JSE.[8] Section 12 of the JSE Listing Regulations focuses on the listing of 'mineral companies', which covers solid minerals, oil and gas and any companies with substantial mineral assets.

Furthermore, listed mineral companies must submit a Competent Person's Report (CPR) on mineral assets and projects, which a Readers Panel approves. The CPR complies with the South Africa Code for Reporting of Exploration Results, Mineral Resources and Mineral Reserves (SAMREC) and the South Africa Code reporting on Mineral Asset Valuation (SAMVAL).

Section 16 of the JSE Listing Regulations stipulates documents to be submitted with an application for listing. The following critical documents for the purpose of this report are submitted to the JSE:

1. Capitalisation issues and scrip dividends
2. Acquisitions and disposals
3. Payments to securities holders
4. Share capital authorised shares and rights attaching to a class/es of shares
5. Annual financial statement and annual reports
6. General mandates to make payments
7. Scrip dividends and cash dividends

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[7] About JSE https://www.jse.co.za/about/history-company-overview
[8] JSE Listed Companies https://www.african-markets.com/en/stock-markets/jse/listed-companies

More so, the listing requirements defines a beneficial owner and requires companies to keep information and disclose the beneficial owners to comply with the Black Economic Empowerment (BEE) policy. All documents and information submitted to the JSE become its property and remain private and confidential to comply with PAIA.

Opportunities

- Unlike any other government department, the JSE holds in one place all the information critical for mandatory disclosures in the extractive sector in South Africa. It pays particular attention to the extractive sector companies due to their importance to the economy and large securities involved. The JSE provides an essential advocacy target in getting mandatory disclosures in South Africa. Since all the information once disclosed becomes the JSE property, they hold the authority through regulations to proactively disclose the information if they choose to do so.
- The JSE is supervised by the Financial Sector Conduct Authority (FSCA), an independent statutory board, with prudential supervision from the South African Reserve Bank (SARB). Section 1.31 of the JSE regulations gives authority to the institutions to make amendments to the regulations via a public consultation process. JSE amendments do not require any parliamentary bureaucracy process. Therefore, JSE provides an easier route to get mandatory requirements actionable in South Africa without lengthy legislative processes. However, stakeholders are responsible for weaving convincing arguments for the business, economic and political value add of mandatory disclosure in South Africa.
- Any amendments to the JSE Listing Regulations need to focus on some key areas:
    - ✓ Section 3.12 allows for companies to not publicly disclose dividends and distributive payments if they are deemed price sensitive;
    - ✓ Section 3.4 prohibits companies from publicly disclosing confidential information;

- ✓ Sections 3.5, 3.6, 3.7 and 3.8 which deal with issues of non-disclosure of financial information that is confidential and price-sensitive;
- ✓ Section 3.10 allows the non-public disclosure of information that may affect the legitimate interest of a company;

Political Culture and Mandatory Payment Disclosure

Mandatory payment disclosure in the extractive sector has grown globally, especially in countries signed up to EITI. The economic and social value proposition for compulsory payment disclosures is well received and appreciated in several countries. The big question for this report is- why South Africa continues to resist implementing transparency reforms in the extractive sector like mandatory disclosure. The most obvious answer to that question is political and the fear to unsettle investors in the extractive sector in South Africa. If anything, the Panama Papers and WikiLeaks revealed to us is the extent of opacity in the extractive sector.

Transparency in South Africa has never been a well-accepted phenomenon either in government or politics. For decades, civil society in South Africa has battled with the government on transparency issues. The apparent battle is PAIA, which civil society has also argued is unconstitutional and does not encourage the spirit of transparency. Also famous is the battle on disclosure of political party funding, which has brought the first glimmer of hope to a possible review of PAIA. In *My Vote Counts NPC v Minister of Justice and Correctional Services*, the Constitutional Court[9] found PAIA unconstitutional because it does not disclose information pertaining to the private funding that political parties receive.

The last decade has seen a deterioration of governance indicators for South Africa and dysfunctions that are impacting the country's commitment to good governance. The 2016 Ibrahim Index of African Governance ranks South Africa amongst the ten most deteriorated countries since 2006, highlighting a decline in accountability (the fourth

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[9] See My Vote Counts NPC v Minister of Justice and Correctional Services and Another http://www.saflii.org/za/cases/ZACC/2018/17.html

largest on the continent), safety, and the rule of law. South Africa was the only country out of the ten largest economies and most populous countries in Africa to register a decline in participation and human rights.[10] President Jacob Zuma's government registered issues that contributed to the deterioration of the country's governance standing. The country experienced several protests because of poor service delivery, corruption, university fees and the famous state capture project- which dominated political discussions in South Africa.

The coming in of President Cyril Ramaphosa in February 2018 brought a 'new dispensation. President Ramaphosa committed to democracy, integrity, ethical leadership, transparency, and corruption in his first state of the nation.[11] His presidency is seen as a chance to usher in reforms to deal with challenges that have faced South Africa, transform politics, and restore the country's governance position. Transparency in the extractive sector should be seen in this light and context. President Ramaphosa's administration provides an opportunity to reignite the extractive transparency discourse once again; ride along with his commitment to transparency and anti-corruption.

Other Transparency Initiatives in South Africa

Generally, global transparency initiatives have struggled to take off in South Africa, with just a few managing to make a mark of success. The government of South Africa has often seen itself as a big brother to many African countries because of its impressive constitution. This pride has often seen South Africa hesitate to join global initiatives on governance and transparency, including EITI. This next section will look at three global transparency initiatives South Africa has joined and assess why these initiatives have been accepted and received the government's political support. Critical to highlight is the influence of reformers like former Minister of Finance and later

[10] Mo Ibrahim Foundation, *A Decade of African Governance 2006 – 2015* (2016) p276

[11] State of the Nation Address 2018 http://www.thepresidency.gov.za/speeches/state-nation-address-president-republic-south-africa%2C-mr-cyril-ramaphosa

Minister of Planning Trevor Manuel, who championed transparency initiatives.

Fiscal Transparency

The Open Budget Survey 2017 scored South Africa 89 out of 100. This means South Africa provides sufficient budget information to enable the public to engage in budget discussions in an informed manner.[12] The journey for South Africa to become a global champion in fiscal transparency began in 1996.

During the apartheid regime, public finances were very opaque and fragmented, making it difficult to have a clear idea about what public resources were being spent on. This led to lots of waste and misuse and kept citizens in the dark. In 1996, under the leadership of Trevor Manuel, the Ministry of Finance immediately set about drafting a new Public Finance Management Act and introduced a series of other reforms to improve fiscal transparency and accountability. South Africa's OBI score has always been the highest in Africa and has received government attention and support.

The success of fiscal transparency reforms in South Africa can be attributed to several factors, which are as follows:

- The political and socio-economic environment in South Africa after the end of apartheid drove the need for more open, transparent and accountable governance. The government needed to change the image of South Africa to citizens, investors and financial institutions.[13]
- Reformers like Trevor Manuel, then Minister of Finance, played a crucial role in driving the vision for transparency in budget discussions and processes to enable sound policy and governance.[14]

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[12] https://www.internationalbudget.org/open-budget-survey/results-by-country/country-info/?country=za

[13] Building Budget Democracy: Fiscal Openness Reforms in South Africa http://www.fiscaltransparency.net/use/building-budget-democracy-fiscal-openness-reforms-in-south-africa/

[14] Building Budget Democracy: Fiscal Openness Reforms in South Africa http://www.fiscaltransparency.net/use/building-budget-democracy-fiscal-openness-reforms-in-south-africa/

- Parliament played an essential role as an audience of financial information and passing fiscal legislation.

Open Government Partnership

South Africa was a founding member of the Open Government Partnership when it was launched in 2011 when then-President Jacob Zuma declared his country's intention to participate in the initiative.[15] The Open Government Partnership (OGP) is a voluntary international initiative that aims to secure commitments from governments in partnership with civil society to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. In 2014, under the leadership of former President Jacob Zuma, South Africa co-chaired OGP taking over from Mexico. In his acceptance speech, President Jacob Zuma highlighted South Africa's commitment to transparency, accountability, and citizens' responsiveness.[16]

In South Africa, OGP is led by the Department of Public Service and Administration (DPSA). Participating governments develop OGP action plans that elaborate concrete commitment to change practice beyond the status quo over two years. South Africa has developed three action plans that have commitments on fiscal transparency, citizen participation, beneficial ownership, open data and environmental management. South Africa will be developing the fourth national action plan by August 30, 2019. It is an opportunity for stakeholders to encourage the government to commit to mandatory disclosure of payments.

South Africa's joining OGP can be attributed to the following factors:

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[15] Statement by President Jacob Zuma at the Heads of State launch of the Open Government Partnership", African National Congress, http://www.anc.org.za/content/statement-president-jacob-zuma-heads-state-launch-%20open-government-partnership

[16] Acceptance Remarks by President Jacob Zuma, on being Co-Chair of the Open Government Partnership http://www.thepresidency.gov.za/speeches/acceptance-remarks-president-jacob-zuma%2C-being-co-chair-open-government-partnership%2C-ogp?page=11#!slider

- South Africa's global leadership and reforms in fiscal transparency identified them with the principles of open government. This saw global leaders like President Obama reaching out to reforms in South Africa to join this global initiative.
- The second factor that led South Africa to join OGP was reformers like Trevor Manuel and Ayanda Dlodlo, who saw the value of implementing open government reforms. These reformers took it upon themselves to convince the rest of the government to join the OGP initiative.
- Finally, the political environment in South Africa in 2011 made it easy to convince then-President Jacob Zuma. South Africa's image had started to sore, and the government needed something to show the world their commitment to good governance.

Money Laundering/ Illicit financial flows

The last five years have seen a concerted effort from the government of South Africa to put in place policies and legislative frameworks that try to deal with money laundering and illicit financial flows. To this effect, the government has put forward critical legislative amendment frameworks, including the Tax Administrative Amendment Act and the Financial Intelligence Centre Amendment Act. These legislative frameworks were meant to introduce, among other things, international tax standards, country-by-country reporting, exchange of tax information and beneficial ownership disclosure. South Africa's push for these reforms has been critical in complying with international standards on tax administration.

The successful push for reforms in addressing money laundering can be attributed to:

- The OECD and G20 developed frameworks that participating countries needed to implement and develop national action plans. The endorsement of Action 13 of the BEPS Action Plan by G20 Leaders in September 2013 proposed the development of "rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance

costs for business. [17]

- Since its appointment in 2013, the Davis tax committee has played a pivotal role in helping frame tax administration in South Africa to align with international standards. The committee encouraged the government to address issues like base erosion and profit shifting (BEPS) in its advisory capacity.
- The role of parliament has been crucial in amending legislative frameworks. Parliamentarians had gained knowledge and understood the adverse effects of illicit financial flows and money laundering. This enabled better consultative processes and uncontested legislative frameworks. This also speaks to the political climate to deal with corruption in South Africa

In conclusion, South Africa has taken steps to implement transparency reforms, as noted above. The success of these initiatives can be attributed to different factors, but a few similarities can be found in all three chosen initiatives. For instance, all three initiatives gained traction because of the political and economic climate in South Africa at the time. Secondly, the existence of reformers, both individuals and institutions like the Davis Tax Committee. Finally, the role of external partners in encouraging the political institutions in South Africa to advance transparency reforms. There are lessons to be taken by the mandatory disclosure of payment movement in South Africa to achieve success.

Conclusion: Way Forward for Mandatory Disclosure of Payment Advocacy in South Africa

South Africa's extractive sector remains opaque and protected by the current legislative framework. Yet, the South African government continues with its policy of not proactively disclosing payment information, claiming it has a sufficient framework to oversee the extractive sector. South Africa's transparency policy on the extractive sector is guided by the Minerals and Mining Policy for South Africa (White Paper,

[17] SARS External Business Requirements specification: Country- by- country and financial data reporting 2017.

1998);

"To ensure the transparent and efficient regulation of the development of South Africa's mineral resources and mineral industry to meet national objectives and bring optimum benefit to the nation."

The policy is framed to address national objectives set out in the Mining Charter without necessarily aligning to international transparency standards. The alignment to global transparency standards requires a policy shift from the government of South Africa, as has been done with fiscal transparency and money laundering. For that to happen, stakeholders need to focus attention on the following:

1 There is a need to build capacity within government and parliament to fully comprehend the importance of mandatory disclosure of payment in the extractive sector. To make a clear business, economic and political case on the value proposition that resonates with the objectives of the Mining Charter.
2 The current political environment in South Africa creates an opportunity for mandatory disclosure of payment to gain traction. There is a need for stakeholders to build high-level political support that can champion mandatory disclosures.
3 Evidence-based advocacy and engagement are critical. Research and evidence developed by the Davis Tax Committee reports and the OECD BEPS report convinced both government and parliament to act on tax reforms and money laundering. Like OECD, there is a need for stakeholders in South Africa to invest in data and evidence.

While PAIA remains the standard for access to information in South Africa, the My Vote Count Case[18] has managed to show the need to update and amend the legislative framework to disclose information proactively. This will enable all other legislative

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[18] See My Vote Counts NPC v Minister of Justice and Correctional Services and Another http://www.saflii.org/za/cases/ZACC/2018/17.html

frameworks such as MPRDA, MPRRA and TAA to move towards mandatory disclosure. While that gets underway, mandatory disclosure of payment is possible without amending PAIA. The treasury department in fiscal transparency and contract disclosures has gone beyond PAIA to proactively disclose information. Therefore, recommendations on mandatory disclosure of payments are as follows:

1. The JSE provides a less complicated route to achieve mandatory disclosure of payment by extractive companies but requires a strong and convincing value proposition. It requires the buy-in of mandatory disclosure payment from the private sector. The JSE Listing Regulations already has an additional listing requirement for extractive companies because they understand it as a particular group. Secondly, amendments to the listing requirements only require the buy-in of the JSE, FSCA and the Reserve Bank.[19] Areas that need to be amended have been listed above.
2. The amendment of MPRDA requires a policy shift from the department of mineral resources on transparency in the extractive sector. There are three opportunities that stakeholders must explore,
    - ✓ Firstly, stakeholders need to influence the Mineral Resources Strategic Plan 2020- 2024 to ensure it prioritizes another review of the MPRDA and has language that advances mandatory disclosures. The 2014- 2019 strategic plan is concluding, and the Department of Mineral Resources is currently in the process of developing the 2020- 2024 strategy.
    - ✓ The finalisation of the Mining Charter remains a priority for the department of mineral resources and the rest of the government. Stakeholders need to participate in consultation processes and influence the charter to give direction on transparency and mandatory disclosure of payment to align with international standards. The consultation process ended on August 30, 2018. PWYP South Africa needs to capacitate mining communities to engage in the consultations and encourage the

[19] See JSE Listing Requirements https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE%20Listings%20Requirements.pdf

importance of mandatory disclosure of payment regime.

- ✓ It is essential to highlight that both MPRDA Amendment Bill and Mining Charter provide a window of opportunity quickly closing. Failure to influence these processes in 2018 might close any real opportunity to amend MPRDA and Mining Charter in the near future.

3. Opportunities to make amendments to MPRRA and TAA continue to exist as the treasury department and SARS continue to strengthen the tax regime in South Africa to align with international standards. Recommendations from the final Davis Tax Committee report are yet to be fully implemented, especially those related to the BEPS processes. Stakeholders advocating for mandatory disclosure of payments need to follow closely as the government begins the processes to review legislation to be in line with these recommendations and the Action 13 BEPS report.[20]
4. Stakeholders need to explore collaboration and partnership with mining companies that understand the values and principles of mandatory payment disclosures. The B20 have been instrumental in advancing and influencing transparency norms in G20 countries. South Africa is a member of the G20, and with private companies like Boniswa being part of the B20, stakeholders need to explore building partnerships to advance mandatory disclosure. Companies like Anglo-America have the potential to be good allies, as the company has highlighted its commitment to transparency, accountability and agree with the business case for these principles.[21]
5. As noted above, the Open Government Partnership provides strategic entry points to advance mandatory disclosure. In the past, the OGP action plan has provided entry points to encourage the government to make commitments on

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[20] Base Erosion and Profit Shifting (BEPS) Action 13 on Implementation of Country-by-Country Reporting: http://www.oecd.org/ctp/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.pdf

[21] See https://www.angloamerican.com/~/media/Files/A/Anglo-American-PLC-V2/investors/tax/anglo-tax-report-web.pdf

fiscal transparency, open data and beneficial ownership disclosure. South Africa will develop the fourth national action plan by August 30, 2019. Stakeholders need to engage with the OGP process to encourage the government to commit to advancing the mandatory disclosure regime.