TWELFTH PLENARY MEETING OF THE POLICY DIALOGUE ON NATURAL RESOURCE-BASED DEVELOPMENT

20-21 June 2019

Summary Report

The meeting was conducted under Chatham House Rule: "When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed."

I. Meeting objectives and structure

Under the co-chairmanship of Guinea, Liberia, Norway, and the United Kingdom, 20 government delegations from Africa, Asia, Europe and the Caribbean, as well as representatives from 11 partner international organisations and institutions, and 32 major firms, industry associations, civil society organisations, academia, law firms and think tanks, convened at the OECD on 20-21 June 2019 for the Twelfth Plenary Meeting of the Policy Dialogue on Natural Resource-based Development. International organisations and institutions represented included the African Legal Support Facility (ALSF), the Commonwealth Secretariat, the European Commission, the Extractive Industries Transparency Initiative (EITI), the International Finance Corporation (IFC), the Inter-American Development Bank (IADB), the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), the Holy See, the United Nations and the World Bank.

The OECD Development Centre, acting as a neutral knowledge broker, contributed to framing the broad thematic areas and specific issues for discussion, as outlined in the background documents distributed to all participants in advance of the meeting. Besides the OECD Development Centre, the OECD Centre for Tax Policy and Administration, the Directorate for Financial and Enterprise Affairs, and the Development Co-operation Directorate were also represented.

The first day (20 June 2019) began with two sessions to advance the outputs under the Thematic Dialogue on Commodity Trading Transparency. The afternoon featured a session to share the finalised version on the Guiding Principles of Durable Extractive Contracts, followed by a session to discuss their potential use and uptake.

The second day (21 June 2019) began with a thematic discussion under Work Stream 1 on the shared-use of transport infrastructure providing mutual benefits for governments and industry beyond the extractive sector, followed by a session to advance work under the IGF/OECD joint project on BEPS in mining.

II. Summary of the Discussion and Conclusions

Under *Work Stream 1 – Shared value creation and local development*, participants recognised how the shared use of transport infrastructure for mining projects, if done in the right way, can be a win-win and value-creating proposition, which can generate shared benefits for governments, investors and communities. The shared use of infrastructure can create economies of scale that can significantly reduce costs for infrastructure development and use, while also acting as a catalyst for other sectors of the economy. Participants acknowledged that the shared use of transport infrastructure is not a mere extension of the mine, but involves investments that are larger than mining operations. For this reason, in order to be financially sustainable, the infrastructure projects should reflect the competiveness of the mine, in terms of its value, volumes and costs. The inclusion of obligations for public access should also reflect the existence of actual excess capacity to avoid disruptions in mining operations. The shared use of the North-West Corridor in the Boké region, Republic of Guinea, was validated for inclusion in the online *Compendium of Practices*. The success of this shared railway infrastructure project was attributed to an alignment of the interests of all the stakeholders involved (the government, the concessionaire and operator of the infrastructure, and the new mining companies operating in the region), a well-designed governance structure though contractual arrangements, and the government's ownership and political will to support the shared use infrastructure agreement. In addition, the quality of the technical studies that underpinned the initial investment, supported by the World Bank added to the robust business case for the project. Participants recognised that there is no single way to realise the shared use of transport infrastructure as each project must be considered on a case-by-case basis. Participants discussed emerging challenges, such as the impact of climate change on the risk profile and design of shared transport infrastructure projects, the appetite for risk across different categories of lenders depending on commercially as opposed to politically driven investments. Finally, they highlighted the need for future work on regulatory *vs*. contractual approaches as well as cross-border infrastructure development to explore ways to build trust amongst governments for the realisation of regional corridors.

Under Work Stream 3 – Getting Better Deals, Participants strongly welcomed and endorsed the finalised version of the Guiding Principles for Durable Extractive Contracts, following four-year multi-stakeholder consultation process. The Guiding Principles reflects the outcomes of an open, intense, enriching and inclusive drafting process that has resulted in the creation of a robust, legitimate and credible document that addresses the heart of the problem of how to negotiate a fair deal. The Guiding Principles set out eight principles and supporting commentary that host governments and investors can use as a common reference for future negotiations of enduring, sustainable and mutually beneficial extractive contracts and they were developed in response to the mandate received from the member countries of the Governing Board of the OECD Development Centre at its Fourth High Level Meeting on 3 October 2017. The Guiding Principles provide guidance on how resource projects can be developed to reflect the balance of risks and rewards that underpins durable contracts, while also taking into due account community interests and concerns from the very beginning. The Guiding Principles also provide a blueprint for explaining the content of the contract to the public that can reduce the drivers of renegotiation, by providing adaptive and flexible provisions that, for example, can automatically adjust to prevailing market conditions. They also aim to assist host governments and investors in explaining the content of the contract to the public, thereby helping to overcome tensions between stakeholders. Participants emphasised the great value-added and the timeliness of the finalisation of the Guiding Principles to support the implementation of the new EITI requirement for contractual disclosure and to reduce instances of investor-state disputes. Negotiations support providers, such as CONNEX, the African Legal Support Facility and the Commonwealth Secretariat, pledged to utilise the Guiding Principles in their ongoing support and programmes in developing countries, and recognised how these principles can reduce the asymmetry of information and can build the capacity of governments in negotiating contracts. The OECD Development Centre will also leverage the existing collaboration with regional organisations to foster uptake and ownership at the country level. The OECD Development Centre will submit the Guiding Principles for consideration and possible endorsement by the Governing Board of the OECD Development Centre in the fall of 2019.

Under Work Stream 4 – Domestic Resource Mobilisation (tackling BEPS, corruption and commodity trading transparency), participants welcomed the recognition by the EITI that two different reporting templates for the disclosure of information on commodity trading are needed – one for SOEs and one for buyers – in order to reflect the different environments that these entities operate in. At the same time, participants noted the importance of expanding the reach beyond EITI countries – since 90% of commodity transactions take place in non-EITI countries – with the objective of creating a level playing field across all countries, including trading hubs. They also provided feedback on the full set of information recommended for disclosure by the EITI on transactional elements and the OECD on additional aspects, including conflicts of interest, the use of corporate vehicles and the use of intermediaries, highlighting areas where further work is required by the EITI Commodity Trading Working Group to address commercial confidentiality concerns and practical challenges, including for the future operationalisation of information disclosures and data usage. Participants welcomed the progress made by the OECD toward the development of guidance to support SOEs in selecting buyers of their publicly-owned commodities and acknowledged that the OECD Development Centre's discussion paper on Key Risks in the Buyer Selection Process and Emerging Good Practices used by State-Owned Enterprises provides a useful framing of the key corruption challenges and emerging good practices across the buyer selection process. Participants emphasised the differences in the sales processes for oil, for gas and for minerals, and the corresponding need for guidance to address the different characteristics of these different commodity sales processes.

The IGF and the OECD Centre for Tax Policy and Administration provided an update on the on-going BEPS in Mining Program. With respect to the international tax treaty work, they noted the review of 90 international tax treaties against the different segments of the mining value chain, which seeks to identify the treaty provisions that are most critical for resource-rich countries in order to protect their right to tax mineral income, determine a proper allocation of taxation rights, and consider any possible modifications to the United Nations Double Taxation Convention between Developed and Developing Countries and/or OECD Model Tax Convention on Income and on Capital. The modelling on tax incentives begun last year is also being complemented by empirical research in 11 more countries (for a total of 21) to better assess the impact of tax incentives on attracting investment and the associated costs in terms of foregone revenues. As an offshoot of the work on modelling of tax incentives, participants welcomed the " *Modelling for Sustainable Development: New Decisions for a New Age*", as a tool that will contribute to changing how decisions are made by enabling a more holistic modelling process from a sustainable development perspective, taking into consideration both financial and non-financial dimensions. Robust modelling can have an impact on future resource allocation and use, choices of energy projects, and major infrastructure or natural resource projects. Participants welcomed the long-term IGF/OECD deep-dive technical assistance programme that already started in Zambia and Mongolia. Beyond engagement with revenue authorities and ministries of mines, participants encouraged the IGF and the OECD to also involve in capacity building and deep-dive processes the judiciary and civil society to hold governments to account and address political economy issues.

Work Stream 1 - Shared Value Creation and Local Development (Sessions 5, part 1 and 2)

Sessions 5 was chaired by Hon. Emmanuel O. Sherman, Deputy Minister for Operations, Ministry of Lands, Mines and Energy, Republic of Liberia and Prof. Petter Nore, Senior Consultant at the Norwegian Agency for Development Cooperation, Kingdom of Norway. Session 5 focused on mutually beneficial arrangements for the shared use of mining transport infrastructure. The first part provided the opportunity to review the different models and types of arrangement for multi-purpose and multi-user transport infrastructure. It explored the potential risks and benefits of various types of arrangements for developing countries. In the second part, a new example on the shared use of railway infrastructure in Guinea's Boké region was presented and validated for inclusion in the Compendium of Practices.

Participants first discussed the different contractual models for the shared use of infrastructure, also with a view to improve understanding around bankability and de-risking issues from the perspective of financial institutions.

Participants recognised the mutual benefits of the shared use of infrastructure leading to cost reduction and contributing to broad-based development. At the same time, the challenge of agreeing on a workable framework agreement for a multi-user and multi-purpose arrangement has been highlighted. One contractual approach is to enable open access to privately owned infrastructure through open access regulation. In this context, participants discussed the example of South Africa. Given the competitive dynamics between mining companies, the emphasis of the operational model should lie on guaranteeing that the infrastructure is built to accommodate additional capacity and that tariffs are non-discriminatory. To guarantee the latter, the most effective mechanism available to government is to separate the ownership of the infrastructure from the mining companies. In South Africa, the railway line to Richards Bay is open access and owned by the government, but the coal terminal is company-owned. The Richard's Bay coal line is the country's dedicated railway line which handles South Africa's coal exports by connecting the mines in Mpumalanga with the Richards Bay Coal Terminal (RBCT) at the port of Richards Bay. The line also moves domestic commodities such as chrome, coke, chemicals and timber.

Another contractual arrangement is the private negotiation model for third party access. In this context, participants discussed the case of the Nacala Corridor in Mozambique as well as the Transgabonais in Gabon. In the Nacala Corridor the rail concessionaires own the rail. The rail operator is Vale through its subsidiary as well as the port owner. The infrastructure is 100% financed by Vale and its subsidiaries to handle heavy coal traffic. Some rail capacity is reserved for general freight and passenger service.

In the case of Gabon, Société d'Exploitation du Transgabonais (Setrag) is the concessionaire of the Transgabonais rail line since 2005 and is subsidiary of the Compagnie minière de l'Ogooué (COMILOG). Two other mining companies (CITIC and NGM) and Eramet use the railway. Eramet has a 63% stake in COMILOG. Setrag has been facing low level of productivity since the start of the concession, in particular due to the poor state of the infrastructure. The railway is the only important public transport route in Gabon with a capacity of carrying more than 3 million tonnes of freight (timber, water, sugar, minerals, oil) and 190.000 passengers. To increase capacity and reliability, the government provided a subsidy to finance the rehabilitation of rail platforms and bridges, while the railway operator Setrag has applied for a loan from the IFC to help fund infrastructure upgrades. The IFC financing and government support helped in reaching the aim of doubling the railway's capacity and reducing delays. In an effort to cover the costs of needed upgrades and ensure financial sustainability of the railway, a revised pricing structure was considered, which led to cost sharing between the concessionaire, mining companies and the state.

Participants questioned the future of the global energy market vis-à-vis the energy transition, and considered the potential effect on the risk and financing profile of infrastructure projects. The financing challenges of a shared use railway is defined by the existing link between bankability and investment intensity. Lenders look at several elements before accepting to grant a loan for a project: the nature of the railway operation (single or multi-usage), the infrastructure management, the financial strength, rolling stock operations, on what basis the railway capacity would be allocated (first come first serve or reserved capacity), and what kind of recourse is possible in case this capacity is not used. Another critical aspect for financial institutions is if governments impose Passengers Service Obligations (PSO) on the operator. While the social and economic rationale behind such requirements is understandable, it may pose operational challenges if there are capacity constraints, as passenger trains have always the right of way over any other train.

During the second part of session 2, participants discussed and validated an additional example on shared use of transport mining infrastructure in the Boké region, Republic of Guinea for inclusion in the Compendium of Practices.

Guinea understood already in the 60s the importance of ensuring adequate logistics and infrastructure to develop mining projects, as the country's mineral resources deposits, be they bauxite or iron, are located far inside the country. As a result of two successive crises in the 70s and 80s, all bauxite development projects were abandoned, and the country could not benefit from or carry out further investments for a period of about 20 years. In the 80s, however, following the rise in the cost of aluminium, Guinea quickly sought to relaunch its projects building on the infrastructure already developed, and taking advantage of the fact that the infrastructure concession contract which had been awarded to the incumbent railway and port operator CBG had expired. The government seized the opportunity to effectively begin to implement the concept of shared infrastructure, making CBG aware of the need to move quickly to the implementation of the clause in the concession convention, which allowed the access to third parties for the use of the railway and other infrastructure facilities. Guinea also benefited from the World Bank's new commitment to the country through a project called Support Project for the Governance of the Mining Sector to create the conditions for the use of shared infrastructure. It is therefore in this context that, with the support of the World Bank, negotiations began with the incumbent operator CBG and with the new projects that were under development. The two most advanced projects are in the Boké region. An agreement was reached in 2015, which allowed the launch not only of the CBG extension programs, but also for newcomers (GAC), which was granted access to a reliable infrastructure at very competitive conditions. With the support of the World Bank, Guinea developed a policy for the shared use of mining infrastructure, which was the object of a declaration on mining policy in 2018.

As a first-of-a-kind project, both CBG and all incumbent users were aware from the beginning that the arrangements to ensure a smooth functioning of the railway for all parties would need to be refined. CBG underlined that the agreement allows users to increase capacity, but it is necessary to make the request to the concessionaire, and get the agreement of the committee of the users, and to finance the studies for increasing this capacity. Moreover, it was noted that bringing the decision to the level of the technical committee and the users' committee ensures coordination.

With regard to the development of an enabling regulatory framework, it was noted that it was the practice that informed the adoption of regulations at a later stage. The regulatory framework would ideally have been in place in advance to frame the discussions. However, the government wanted to seize the economic opportunity to relaunch two major projects for the development of the North-West area. For this reason, it preferred to move forward first on this and then, on the basis of the experience acquired, to elaborate not only a plan for the development of infrastructure projects for the whole country, but also to put in place the regulatory framework on shared use of mining infrastructure.

Participants noted that successful factors for successful shared railway infrastructure projects: an alignment of interests amongst all the stakeholders involved (the government, the concessionaire, the operator of the infrastructure, and the new mining companies operating in the region), a well-designed governance structure through contractual arrangements, and the government's ownership and political will to support the shared use infrastructure agreement. In addition, the quality of the technical studies that underpin the initial investment adds to the project business plan. Participants recognised that there is no single way to realise the shared use of transport infrastructure as each project must be considered on a case-by-case basis.

Work Stream 3 – Getting Better Deals (Sessions 3 and 4)

Sessions 3 and 4 of the Twelfth Plenary Meeting were chaired by Mr. Nava Touré, Principal Counsellor, Ministry of Mines and Geology, Guinea, and provided an opportunity to consider the finalised text of the *Guiding Principles for Durable Extractive Contracts* following a multi-year multi-stakeholder consultation process. These principles were developed in response to the mandate received by the OECD Development Centre's member countries in October 2017 to provide host governments and investors with a common reference to shape durable, equitable and mutually beneficial relationships.

The *Guiding Principles for Durable Extractive Contracts* reflects the outcomes of an open, intense, enriching multi-stakeholder consultation process, and sets out eight principles and supporting commentary that host governments and investors can use as a common reference for future negotiations of enduring, sustainable and mutually beneficial extractive contracts.

While recognising that renegotiation may be warranted in some instances to avoid issues escalating into a dispute as contracts cannot anticipate all possible outcomes and consequences at the time they are negotiated, the Guiding Principles and supporting commentary aim to provide guidance for the content and negotiation of mutually beneficial, sustainable and therefore enduring extractive contracts and thus reduce the risk of disputes and demands for contract renegotiation by either party over time.

They aim to reduce the drivers of renegotiation; provide adaptive and flexible provisions that can accommodate and respond in a predictable manner to potentially significant changes in circumstances, including prevailing market conditions; build trust to strengthen mutual confidence and reduce risk for both parties; optimise full value from resource development; and ensure a fair share for all parties to the contract through equitable, sustainable and mutually beneficial contracts and operations.

- The key take-away for Principle I is that a long-term perspective should prevail over short-term gains.
- The key take-away for Principle II is that the negotiations of extractive contracts is just the beginning of a long-term operational partnerships involving governments, investors and communities, which should be grounded on the understanding and alignment of realistic expectations.
- The key take-away for Principle III is that durable contracts maintain an alignment of interests throughout the life-cycle of the project, reflecting a balance of risks and rewards shared by governments, investors and communities.
- The key take-away for Principle IV is that externalities need to be internalised. This means that the economic value should also reflect any adverse environmental or social impacts.
- The key take-away for Principle V is that (1) during negotiations the final financial outcome is not known by any party, because there is both risk and uncertainty on the presence, size and quality of the resources, as well as their potential production levels, extraction, development, closure/decommissioning costs, and future market prices; (2) asymmetries of information need to be bridged through the continued sharing, in good faith, of qualified estimates of possible outcomes.
- The key take-away for Principle VI is that a sound investment and business climate, a reliable legal framework and institutions upholding the rule of law are all critical factors for successful investment in the extractive industry, given the significant upfront investment, the long lead times, high risk and uncertainty that characterise extractive projects.
- The key take-away for Principle VII is the recognition that regulatory regimes evolve over time, and so do the expectations and requirements that extractive projects must meet for the protection of public health, safety, security, the environment and communities, and that an alternative approach to the use of stabilisation clauses to deal with non-fiscal changes in law is recommended.
- The key take-way for Principle VIII is that durable extractive contracts are underpinned by a responsive fiscal regime that provides for the fair sharing of value through all stages of the project life-cycle and across a range of outcomes and ongoing market conditions.

Participants strongly welcomed and endorsed the finalised version of the *Guiding Principles for Durable Extractive Contracts*. Participants acknowledged how the Guiding Principles are a product of multidisciplinary efforts from governments, private sector, civil society and international organisations and how this collaborative effort enhanced and strengthened the final product. It was noted that during the multi-year multi-stakeholder consultation process, different members of the working group made an effort to understand the motivations and positions of each other and this had resulted in a general increased understanding amongst the participants in the working group.

Participants welcomed the explicit recognition of the interests and needs of local communities in the Guiding Principles and its related commentary as extractive projects can often have a significant impact on the communities that live in the area where extraction is taking place

When extractive projects do proceed, this can create risks related to the unrealistic expectations of communities about the perceived and real benefits of the project. This is a significant risk for all stakeholders: government, investors and communities. In this regard, participants welcomed the text of Guiding Principle II that makes an explicit mention of the risk of unrealistic expectations, and provides the framework to explain how contract negotiation can help to alleviate these risks.

Participants noted the strategic timing of the finalisation of the Guiding Principles, especially with the EITI requirement for extractive contract disclosure. It was noted that the Guiding Principles provides a broader context for the new EITI Standard. For example, EITI Multi-Stakeholder Groups will have to have discussions about contract disclosure and the Guiding Principles can be useful here to put this discussion into context and provide an overview of what the benefits of contract disclosure are. In general, contract transparency can make people nervous, therefore the Guiding Principles can be used as a reference point to clearly set out the benefits of disclosure.

Alongside the EITI, it was noted that the Guiding Principles can also complement other extractive transparency initiatives: such as the industries support policies for contract disclosure and the IMF's 2019 Natural Resource Fiscal Transparency Code. Furthermore, participants identified a trend in the increasing number of investor-state arbitration cases in recent years and noted how the Guiding Principles can play a role in helping to reduce those instances of investor-state arbitration through the development of durable extractive contracts.

It was noted that during a macroeconomic crisis, the countries that are most dependent on extractive revenues have the most incentive to break the contract. The Guiding Principles seeks to avoid this instability by recommending the governments maintain the credibility of the fiscal regime over time. Participants also acknowledged the original work that the working group had done to address the impact of non-fiscal changes in law – which can include costs associated with new requirements in respect of climate change, and how to share those costs between governments and investors.

In session 4, participants discussed opportunities for dissemination of the Guiding Principles and shared ideas on how to foster their wider use and uptake, including by regularly reporting on their implementation.

Participants welcomed the pledges from several negotiation support providers (such as the African Legal Support Facility, the Commonwealth Secretariat, CONNEX, and the International Senior Lawyers Project) to utilise the Guiding Principles in their ongoing support and programmes in developing countries, and their recognition of how these principles can reduce the asymmetry of information and can build the capacity of governments in negotiating contracts. Participants acknowledged that this commitment from support providers is the most effective way to introduce the Guiding Principles into negotiations.

Participants noted the value of the Guiding Principles as a reference document that can lend credibility to advice in the context of extractive contract negotiations, especially as the Guiding Principles are a product of a collaborative multi-stakeholder process. In this regard, participants welcomed the example of one support provider who had recently used the text of Guiding Principle VIII to frame advice to a government on the draft fiscal terms of a contract that was under negotiation. In this case, it was acknowledged that one of the strengths of the Guiding Principles is that they have been designed at a level for a non-technical audience, and that this will contribute to their uptake and usability.

Participants discussed several proposals to circulate and disseminate the Guiding Principles. One government representative pledged to hold a series of inter-departmental workshops to introduce the Guiding Principles to representatives from across government and focus on the specific principle(s) that is relevant to each government department. An industry representative pledged to circulate and publicise the Guiding

Principles with its legal and negotiation teams in order to better prepare them for engaging in extractive contract negotiations.

Participants welcomed the opportunity to submit the Guiding Principles for consideration and possible formal endorsement by the Governing Board of the OECD Development Centre in the fall of 2019.

Participants also noted the importance of reaching out to other international and partner organisations. The OECD Development Centre could work with regional and sub-regional organisations, such as ECOWAS, to ensure that those organisations are aware of the Guiding Principles and that they take ownership of them. Then, through these regional organisations, a greater awareness of the Guiding Principles could be made at the country level. Law firms, bar associations, journalists, universities, and civil society organisations could also be called upon to help foster awareness and uptake of the Guiding Principles.

Participants also discussed how the Guiding Principles could be publicised further through the identification of good examples and case studies where the principles (or specific aspects of the principles) has been used successfully in extractive contract negotiations. This approach would give an opportunity to advertise government and industry champions on various aspects of the Guiding Principles. Toolkits and checklists could also be developed to supplement the principles and commentary and to provide practical guidance for how governments and investors can implement the Guiding Principles in extractive contract negotiations.

Participants noted that the reporting and implementation of the Guiding Principles will be a key factor in measuring impact. This reporting could help support providers design more targeted and relevant interventions. For example, through the provision of capacity building in a selected area. A database or reporting matrix of the Guiding Principles that governments, investors and consultants could complete after each project could provide useful data for use in future extractive contract negotiations.

Work Stream 4 – Domestic Resource Mobilisation (tackling BEPS, corruption and commodity trading transparency) (Sessions 1, 2 and 6)

BEPS in Mining

Thematic Dialogue on Commodity Trading Transparency

Sessions 1 and 2 of the Twelfth Plenary Meeting were chaired by Mr. Andrew Preston, Head of Joint Anti-Corruption Unit (JACU), Home Office, United Kingdom. The Thematic Dialogue on Commodity Trading Transparency was launched in June 2017, following commitments made at the London Anti-Corruption Summit to enhance transparency in commodity trading in order to fight corruption. In January 2018, the Thematic Dialogue made the case for action and identified three priority areas in which to make progress.

At the outset, participants reflected on the challenges that the Thematic Dialogue is seeking to address. Commodity trading provides a very significant amount of revenues for producer governments but remains a sector characterised by a lack of transparency that is not covered by the broader elements of the extractives transparency architecture. Commodity trading consists of complex transactions, underpinned by often opaque corporate structures with questionable wider governance architecture. This presents challenges for resource-rich developing countries as there are opportunities for corruption and rent seeking. Participants stressed the importance of coordinated action from home countries, trading hubs, producing countries to maximise impact, ensure consistency in reporting across jurisdictions. Participants identified an increasing global focus on commodity trading transparency from many different actors, and noted that Gunvor had recently published its first payments to governments report.

Participants noted the discrepancy between payment made for commodities in EITI and non-EITI countries. An NRGI study showed that in the year 2016, commodity trading companies purchase oil and gas to value of USD 1.5 trillion. However, only 10 percent of these sales took place in countries that implement the EITI Standard. The remaining 90 percent of sales took place outside of the jurisdiction of the EITI. Consequently, participants recommended that the EITI and the OECD work toward closing this transparency gap in these less-transparent jurisdictions.

Participants noted the importance of trading hubs playing a role in the regulation of commodity trading activities, particularly in requiring buyers to disclose their payment to government and SOEs. Participants were cautioned that any attempt at regulation should be in accordance with an internationally agreed framework in order to create a level playing field across jurisdictions. It was further noted that the adoption of an internationally agreed framework could assist buyers in their discussions on disclosure with SOEs in non-EITI countries by providing them the legal certainty to make disclosures and promote transparency.

Participants welcomed the adoption of the 2019 EITI Standard and noted the new wording in clause 4.2 that addresses disclosures in respect of commodity trading. In order to prepare for these new requirements, the EITI International Secretariat undertook consultations with several buyers during the first half of 2019, to understand the challenges they faced when making disclosures using the template developed by the EITI for disclosures by SOEs. No challenges were raised by buying companies in respect of the volume and invoice price, the date of sale and the contract type. During the consultation process, several buyers expressed concerns regarding the commercial sensitivity of some of the proposed elements for disclosure, specifically: the official selling price and the pricing options, as this may reveal a buyers' trading strategy. Buyers also identified competition law requirements that may affect any disclosure of these two elements. Some buyers also identified the grade of the crude, the incoterms, and the cargo-by-cargo nature of reporting as commercially sensitive. During the session, some participants noted that in order to achieve meaningful transparency in commodity trading transactions, the disclosure of the official selling price and the pricing options are necessary to determine the price.

Buyers participating in the consultation process also identified a number of elements where there are no issues of commercial sensitivity but where there may be practical challenges to overcome:

- The seller, rather than the buyer may be in a better position to disclose the payment received date;
- Destinations often change mid-shipment;
- The purchase order invoice number remains a concern due to the number of trades that are undertaken; and
- The forex rate remains a concern for buyers due to the number of trades that are undertaken.

It was noted that buyers and SOEs approach the transaction from different ways and therefore a specific disclosure template will be developed by the EITI for buyers rather than buyers having to make use of the existing SOE template. The new buyer template will be accompanied by an explanatory guidance note and this will include advice about how buyers can engage with governments and inform them of disclosure ahead of time. In respect of the time lag for disclosure, options include an early disclosure of limited data or a disclosure of more comprehensive data after a 12-24 month time lag.

Participants discussed the transactional elements for disclosure that are recommended by the EITI and noted the challenges that may arise in respect to some of these proposed elements:

- The date of sale and the bill of lading may not necessarily occur on the same day as these refer to different aspects of the transactions. Participants noted that the bill of lading may be easier to track from a systems perspective;
- Concerns around accuracy and systems were raised in respect of Incoterms and it was noted that this can be a sensitive factor for commodities other that crude oil. In some transactions, the parties will use a specific incoterm but agree to modify it in the contract – this would present a challenge to reflect accurately in the disclosure. Participants also discussed the extent to which incoterms can affect the sale price. The price should be clearly defined in the contract, and separate from insurance elements;
- There may be accuracy concerns about the disclosure of the load port, primarily where the storage facility is not located in the country where the sale took place;

- Participants highlighted the difference between the grade and the quality of the commodity and noted that the disclosure of the grade should be feasible but there may be some commercial sensitivity concerns around the disclosure of the quality – and this will depend on the nature of the specific commodity, particularly for minerals.
- In respect of the invoice amount, participants noted that the overall price may not be contained in one invoice. In addition, there may be some commercial sensitivity concerns around the disclosure of the invoice amount if the information is used to determine the unit price as the price (premium vs discount) is considered commercially sensitive by buyers. A time lag of 12-24 may alleviate some of these concerns but this will ultimately depend on the data and level of aggregation.
- Participants noted that many buyers and sellers will define fees, charges, and credits differently and this may lead to distorted results or false positives.

Participants also discussed the additional elements for disclosure that were recommended by the OECD Development Centre based on the common ground reached at the Eleventh Plenary Meeting on the key types of information that are critical for improved accountability and therefore should be considered for information disclosure by companies involved in commodity trading. The scope of disclosure should reflect the full spectrum of corruption risks in the commodity trading value chain in order for enhanced transparency to meaningfully serve the anti-corruption agenda. Participants discussed the proposal to disclose conflicts of interest in order to capture any additional red flags associated with the relationship between the buyer and seller. For example, are any employees of the buyer former employees of the seller, does the buyer have access to information in respect of the commodity sale that other buyers do not, is the buyer supplying other goods and services to the government that are unrelated to the commodity sale? Participants noted some concerns around the disclosure of conflicts of interest from a practical perspective, including tracking the past employees of staff from a systems perspective, and possible compliance issues with the EU General Data Protection Regulation (GDPR).

When discussing the proposed inclusion of the use of corporate vehicles in the global reporting template, participants acknowledged that in many cases, there are essential and legitimate reasons for buyers to utilise these vehicles in a commodity sales transaction. However, they can be misused for illicit purposes, including: money laundering, bribery and corruption, insider dealings, tax fraud, terrorist financing and other illegal activities. The OECD has an established standard on transparency for corporate vehicles which is found in recommendations 24 and 25 of the *Financial Action Task Force (FATF) Recommendations*. These recommendations require countries to have accurate, timely information on the beneficial ownership of corporate vehicles that is available and can be accessed by competent authorities. Corporate vehicles can be used to insert opacity into the commodity sale transaction in order to facilitate corruption schemes. They can provide legal distance between the beneficial owner and his/her asset by inserting layers of legal entities between the legal and beneficial owner. The disclosure of the beneficial ownership of the buyer is a key transparency element that is required to cope with increasingly complex patterns of corruption which often rely on layered structures operating across jurisdictions. Research undertaken by the NRGI and in the OECD in the *Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives*, found many cases of corruption that included companies with hidden beneficial owners.

Challenges with obtaining information on beneficial ownership was identified in Ghana's EITI commodity trading pilot. All buyers who participated in the EITI pilot programme identified the name of the entity of the buyer but not the beneficial ownership information in respect of that buyer. Any excessive complexity in a corporate vehicle structure can be regarded as a red flag. Therefore the disclosure of the use of corporate vehicles can help prevent the misuse of vehicle to facilitate corruption and public rent diversion.

On the subject of politically exposed persons (PEPs), it was recognised that having a PEP status does not necessarily mean that an individual is corrupt but it does raise a red flag that should require further scrutiny. For example, the FATF requires reporting institutions to treat every transaction with a foreign PEP as a high risk. Similarly, in respect of the use of intermediaries, participants also acknowledged that there are legitimate reason for buyers to engage intermediaries. For example, when exploring new business opportunities, buyers may be in unfamiliar environments with wide variety of cultural, financial, and legal complexities and may want to benefit from local knowledge that will also be available to local actors. Furthermore, in some jurisdictions, the use of intermediaries may be a mandatory requirement. However, the involvement of intermediaries in corruption practices worldwide has been largely documented. At least 71% of the 127 bribery cases reported by the signatory countries to the OECD Anti-Bribery Convention between 1999 and 2014 involved the use of an intermediary. Participants noted the importance of clearly defining what type of intermediaries should be within the scope of the disclosure requirement. For example, service providers, sales agents, and/or local companies (that are often allocated oil by the government) that simply buy and sell to international buyers. Participants noted that intermediaries themselves may be reluctant to participate in any proposed disclosure process.

Participants expressed some concerns around data and systems. Systems are often built in a certain way for a specific purpose and it can be difficult to modify these systems in order to extract new or aggregated data. Industry would likely need to take time and resources in order for their systems to be able to meet any new disclosure requirements. It was also noted that once information is made available through disclosure requirements, data analytics can be used to analyse trading patterns, and this may create challenges for buyers. Participants further noted that the development of new disclosure requirements will result in a significant amount of data being generated, aggregated and recorded. Examples of previous mandatory disclosure regulations show that reports are compiled by companies in many different ways and that this reduces the ability for stakeholders to locate the information they require. In respect of mandatory disclosure of payments made by companies for extracting oil, gas and mining resources around the world, the NRGI has sought to compile all these reports into one website (resourceprojects.org). Consideration will have to be given to how this data production will be undertaken and which entity(ies) will play the role of aggregating and reporting on the data.

Session 2 provided an opportunity to continue the peer learning process on procedures and criteria used by SOEs to select buyers of publicly owned oil, gas and minerals where participants considered the corruption risks that may arise across the buyer selection process, and sought to identify emerging good practices that SOEs are currently undertaking to prevent or mitigate these corruption risks.

Participants recalled the OECD Development Centre's *Preliminary Stock-take of the Selection Procedures used by State-owned Enterprises to Select Buyers of Oil, Gas and Minerals*, that was discussed at the Eleventh Plenary Meeting and that sought to outline the key steps in the buyer selection process and to identify procedures that SOEs are currently undertaking. Participants noted that the purpose of this session was to build knowledge toward the development of guidance to support SOEs in selecting buyers of publicly owned oil, gas and minerals.

Five key risks in the buyer selection process were identified: ownership and governance structures of SOEs, discretion in the buyer selection process, risk of unbalanced contractual provisions, risk of undervaluation or mispricing and public rent diversion at point of revenue collection.

In terms of ownership and governance structures of SOEs, robust governance arrangements for SOEs are particularly important for mitigating the heightened corruption risk in the extractive sector. Risk factors related to the governance of SOEs include lack of or insufficient segregation of roles and responsibilities between administrative, regulatory and supervisory functions. In many instances, state-owned companies act as both as the administrator and regulator of the sector.

Emerging good practices have been identified that can reduce or mitigate the risks associated with the ownership and governance structures of SOEs. These can be identified where there is a clear definition and disclosure of the institutional arrangements and of practices governing the state's role with respect to SOEs, and where there are robust arrangements in respect of a well-resourced buyer selection team. Participants welcomed the publication of the new *OECD Recommendation on Anti-Corruption and Integrity in SOEs*, which was developed in response to a request from the OECD Working Party on State Ownership and Privatisation Practices for more guidance on how to counter corruption within SOEs.

The exercise of discretion in the buyer selection process is a major risk factor and can undermine the effective prevention of corruption and can result in significant public rent diversion. Emerging good practices have been identified to reduce discretionary power in the buyer selection process for example, the use of pre-defined criteria to select buyers. The assessment of a buyer against pre-defined criteria may occur at the pre-qualification stage, at the subsequent assessment stage (i.e. during a tender), or, as is often the case, during both stages. SOEs can use a weighting system when assessing a prospective buyer against the pre-defined criteria. This can help in situations where a prospective buyer may be able to demonstrate its ability to meet some of the criteria but may have difficulty in meeting other criteria.

In terms of the risk of unbalanced contractual provisions, these can result in significant public rent diversion at the expense of the SOE and ultimately the state. Red flags that may indicate unbalanced contractual provisions include: unusual long-term repayment periods, payments in open credit with no financial guarantee (i.e. where the SOE assumes substantial risks of default). Emerging good practices have been identified to reduce or mitigate the risk of unbalanced contractual provisions include: the disclosure of the terms of the sales contract, and the use of pre-defined commercial terms.

The risk of undervaluation and mispricing can result in significant public revenue losses. Mispricing in commodity trading usually consists of under-reporting volumes or under-invoicing the value of the resource sold, allowing its purchaser to resell it at an inflated margin. Emerging good practices have been identified to reduce or mitigate the risk of undervaluation and mispricing include: transparency of pricing information, the use of a commodity benchmark to set prices, and including pricing adjustment mechanisms in long-term sales agreements.

Public rent diversion at point of revenue collection can deprive governments of much needed revenues. Corruption risks can include the misreporting practices, mainly consisting of distortions in accounting and reporting of revenues. These include, for example, the underreporting of production volumes and the misreporting of applicable charges, fees or credits. To counter these corruption risks, governments and SOEs can provide avenues for whistleblowing, either within or outside the SOE and favour clarity and simplicity with respect to revenue collection processes. In addition, the practice of separating the entity that makes the sale from the entity that receives the payment can act to reduce the opportunities for corruption or public rent diversion.

Participants continued the peer learning and knowledge sharing process by discussing the specific buyer selection procedures used in Botswana to sell diamonds. Two entities in Botswana are engaged in the sale of diamonds and are responsible for buyer selection. The Debswana Diamond Company (Pty) Limited is a 50/50 joint venture between the Government of the Republic of Botswana and the De Beers Group of Companies, and the Okavango Diamond Company (ODC) is 100% owned by the government and acts as its selling arm. The independence of these two entities from the government was deliberate in order to minimise political interference in the buyer selection process.

Participants noted the specific circumstances that were relevant to the formation of ODC when it was established six years ago. ODC was set up to act in accordance with Botswana’s reputation as a transparency country that is open for business. Transparency was on the rise generally, especially in the diamond industry that was seeking to reform and improve its image. In addition, consumers were becoming more aware and more discerning about the products they were purchasing and were seeking to understand and take comfort in the entire value chain.

ODC has extensive governance procedures in place to ensure proper accountability of operations to its shareholder, the Government of Botswana. To ensure the ODC operates on a proper commercial basis, ODC was established as a private company. ODC is governed by an independent board that includes both public and private sector representation. This is to balance long term government strategy in the diamond sector but also to ensure the private sector practices are adopted. ODC buys and sells diamonds but only buys from one company, Debswana.

ODC sets out a robust pre-qualification process to register potential customers and has over 500 customers registered from around the world, primarily in the diamond trading hubs Antwerp, Mumbai, and Tel Aviv, but also several based in Dubai. The registration process is rigorous and transparent as ODC considers this in its commercial interest. Consequently, potential buyers have confidence that the buyer selection process cannot be manipulated. The entire registration process is done through an online portal. This is both for efficiency reasons and significantly, to limit human interface. If it is a system driven process, this can reduce or prevent any undue influence. The registration process is free and the registered status lasts for three years. It is a disclosure based registration process. ODC requires seven supporting documents for registration to determine where the company is from, who is involved, who are the PEPs. Potential customers need to provide information on trading activities as they need to demonstrate that they are a legitimate trading company, for example, they should have diamond trading licences from their home jurisdictions.

Once the requisite information has been provided by a potential customer, there are two gating stages. Firstly, an internal audit is undertaken to assess whether there are any issues that would bring ODC or Botswana into disrepute. This includes a background check on the company (parent and subsidiary). Secondly (if passed the internal audit), an independent verification check is undertaken. ODC will send the information to a third party agency that has access to relevant global databases to undertake a second check, including on compliance with anti-money laundering (AML) requirements and international sanctions. Only if this second check is passed, can a company register with ODC. Note that as a final stage, ODC will send the information to the government who have the ability to veto a potential customer. Intermediaries (referred to as brokers in the diamond industry) are allowed to participate in the sales process but must go through the same screening process and satisfy all the relevant requirements.

Participants noted that although most diamond sales are done via direct negotiation, ODC sells its diamonds exclusively by auction, ten times per year. In part because auctions promote transparency. The ODC auction process is fully auditable – each click of mouse by ODC customers can be audited. Within 24 hours of an auction taking place, the sales results and the prices paid are available on the ODC website. The winning bid is disclosed and within a 12 hour period invoices are sent out. Because ODC diamonds are sold via an auction process, all transactions take place at a specific point in time. Price of each lot is locked at point of auction – this promotes transparency.

Participants noted that collusion is one of the risks associated with running an auction process. When there are several buyers, you can have an efficient auction, but when there are few buyers, this may result in instances of collusion between bidders. ODC's buyer selection process was set up by a combination of system developers and economic theorists on the back of global data that suggests that if there is a minimum number of bidders the risk of collusion can be nullified. ODC normally get between 80-100 bidder per auction, but if the level of bidders falls below a certain threshold, and is so low that collusion could occur, this will trigger a response. In addition, the auction process is fully audited and this audit will try to identify any instances where collusion may have occurred.

Participants emphasised the differences in the sales processes for oil, for gas and for minerals, and the corresponding need for guidance to address the different characteristics of these different commodity sales processes. It was noted that that oil is a more homogenous product, and the way that it is transacted, transported and priced is different from gas and other minerals. Participants noted that there is no world market for sales of natural gas, and that in a typical sale of natural gas there may be three potential buyers, not 500, and one or more of those buyers may be domestic. For emerging producer of natural gas, such has Petrosen in Senegal, long-term sales contracts are key to enabling production and development due to the large volumes of gas and the significant expenditure needed to bring the gas to market. Potential buyers will be evaluated on technical, financial and economic criteria and in some cases, the SOE and the producer will undertake joint marketing of the natural gas.

Session 2 also provided an opportunity to update participants on the work-in-progress towards an *On-line Mapping Tool of State-Owned Enterprises and their Subsidiaries for use by trading companies* – an integral output of the Thematic Dialogue on Commodity Trading Transparency, and how it relates to the Natural Resource Governance Institute's (NRGI) *National Oil Company Database*. The NRGI NOC Database provides a platform for users to benchmark NOC performance and hold NOC leadership to account. Users are able to check NOC's payments to government, their operational efficiency and debt management. The NOC Database provides an in-depth analysis of the financial health of the NOC by consolidating relevant information on production data, revenue data, expenditure, balance sheets and tax payments. The rationale for the development of the OECD On-line Mapping Tool of SOEs to assist buyers in identifying if a seller is a SOE or a subsidiary of a SOE. Buying companies have indicated that it is often a challenge to determine the ownership of entities that sell oil, gas and minerals and participants acknowledged that the OECD On-line Mapping Tool could add value here. Participants noted other initiatives in this area, such as the UK Government's beneficial ownership register and noted the importance of joining up with other relevant work in this area.