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TITLE: **TOWARDS THE ADOPTION OF
THE EXTRACTIVE INDUSTRIES
TRANSPARENCY CODE AND THE
IMPLICATIONS FOR
TRANSPARENCY IN MALAWI'S
MINING SECTOR**

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DECLARATION

I, CYNTHIA CHAWANI, hereby declare that this mini-dissertation is my original work, and other works cited or used are clearly acknowledged in accordance with University requirements. This work has never been submitted to any university, college or other institution for any academic or other award.

Signed:.....

Date:.....

This dissertation has been submitted for examination with my approval as University supervisor.

Signed:.....

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Date.....

DEDICATION

To my late father Dr Brenner Chawani who instilled in me the importance of Education

and

To my mother Mrs Felesia Chawani for being my daily inspiration.

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LIST OF ABBREVIATIONS

ACPC	African Union Convention on Preventing and Combating Corruption
CCJ	Catholic Commission for Justice
COM	Constitution of Malawi
EITI	Extractive Industries Transparency Initiative
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GMMA	Globe Metals and Mining Africa
IFC	International Finance Corporation
IMF	International Monetary Fund
LEITI	Liberia Extractive Industries Transparency Initiative
MMA	Mines and Minerals Act of 1981
MMP	Mines and Minerals Policy (2013)
NEITI	Nigerian Extractive Industries Transparency Initiative
NGO	Non-Governmental Organisations
OSA	Official Secrets Act
PWYP	Publish What You Pay
SADC	Sothorn African Development Community
SPOC	SADC Protocol against Corruption
TA	Taxation Act
UNCAC	United Nations Convention against Corruption

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SUMMARY OF THESIS

Since time immemorial extractive industries have been shrouded in secrecy worldwide. This stemmed countries with high levels of corruption and weak administrative systems and vulnerable regulatory frameworks to seldom develop or economically grow from extractive industries revenues. This has led to the identification of transparency as being the evasive factor worldwide to help attract more investments, avoid the resource curse and curb corruption. Malawi is no exception to this trend and has one of the lowly performing and very obscure mining sectors. That though Transparency is a fundamental principle of the Constitution of Malawi; it is not reflected in the Mining laws of Malawi which were enacted before the Constitution.

The secrecy that hovers over the activities of the mining sector has provoked various stakeholders to demand their inclusion in the processes of concluding contracts due to lack of visible benefits from existing investments. To avoid difficult forums of stakeholders gathering to make a decision on intended investments to be made, there has been a call to make the mining industry more transparent. This entails the introduction of public scrutiny post-contract making which remains the discretion of the Minister.

Attempts to introduce transparency have led to the introduction of Transparency initiatives whose main objective is to ensure transparency is evident in extractive industries such as mining. Malawi is currently deciding whether to adopt one such initiative called the Extractive Industries Transparency Initiative. It is a strong advocate for transparency in extractive sector which is voluntary in nature and mandates the disclosure of revenues collected by government and the companies to report the amounts paid to government. Adoption of EITI is pegged to immensely improve the mining sector through increased FDI inflow.

This dissertation argued for Malawi to adopt EITI because it found that the Malawian mining sector is governed by ancient laws which are silent on transparency principles. This thesis found that EITI though is a stepping stone for Malawi, it lacks several crucial factors in its scope and the thesis highlights several shortfalls of the initiative. EITI implores revenue transparency over other forms of transparency. And this research found that Malawi needs contract transparency more than revenue transparency because Malawi's mining sector is contract-based rather than legislative-based thereby recommending Malawi include contract transparency to the standard EITI scope. It was further concluded that Malawi emulates

Liberia by extending their scope to include other extractive sectors like agriculture besides the classified Oil, Gas and Mining.

This thesis spurred a debate as to enforcement and compliance of EITI. It was discovered that Malawi is already a member to various international instruments that advocate the transparent means of administering the extractive sector but sadly these are not fully implemented in the mining sector. This is attributable to the fact that Malawi's laws stipulate that newly adopted international laws or standards do not have binding force until converted into domestic legislation. Consequently, since EITI is termed 'soft law' because it lacks enforcement, this study concluded that Malawi needs to enact a domestic law to ensure enforcement. This was drawn from the comparable analysis of Nigeria and Liberia who have enacted EITI legislation to ensure effective implementation.

It was drawn from this analysis the need to enact legislation codifying EITI in order to ensure compliance and as a form of enforcement. With the idea of introducing a new EITI law, this thesis found that EITI if adopted will be aligned to Malawi's international obligations but its principles contrary to domestic laws. This study, nevertheless, concluded these inconsistencies can be ironed by explicitly stating in the EITI code that it is an exception to the general laws such as tax laws which prohibit disclosure of taxes paid to third parties.

Based on these findings, this dissertation recommends the improvement of transparency in the mining sector through the adoption of EITI. That Malawi should codify it into domestic legislation to convert its voluntary element into mandatory. That this new law should expressly state EITI as an exception to existing laws which it is inconsistent with. It further recommends Malawi includes agriculture to the standard EITI scope as the administration of which could also help boost the economy of which it heavily contributes to. It also recommends the amendment of the mining laws to reflect transparency principles stipulated in the superior law of the land the constitution, international instruments and core principle of EITI. It points out the importance of government to involve existing extractive companies as the adoption of EITI directly impacts them and therefore consultation is vital.

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

Malawi is one of Africa's most densely populated countries. Over 85 percent of the population depends on subsistence agriculture, and the agricultural sector accounts for over 35 and 80 percent of Gross Domestic Product (GDP) and exports respectively.¹ Malawi has traditionally been considered as an agro-based rather than mineral-based economy because of the policies that Government pursued since attaining independence in 1964.² Malawi is not generally linked to mining unlike its neighbours, Zambia and Mozambique.³ Inspired by the economic boost its neighbours have had from the mining sector and in order to diversify its source of economic growth, Malawi decided to maximise its efforts in the mining sector. So far, mining contribution to the country's GDP is estimated to have grown from 1 percent by 2001, 3 percent by 2004 and 10.8 percent by 2010 and that a well-managed mining sector could contribute between 20 and 30 percent of Malawi's GDP in the next five years.⁴

Although little is known about the existence of minerals in the country, Malawi is said to be 'Africa's largest source of rare earth minerals' because it holds more than 30 million tons of rare earths.⁵ Malawi is said to bear significant resources like nobium, pyrite, graphite, bauxite and limestones.⁶ In terms of laws, several statutes regulate the mining sector in Malawi including the Mines and Minerals Act of 1981, the Petroleum (Exploration and Production) Act of 1983 and the Explosives Act of 1968.⁷ Additionally, in March 2013, the government introduced a new Mines and Minerals policy (MMP) in order to promote investments in the mining sector. Though it is still in its early stages, Malawi has attracted few investments and

¹ 'Index of economic freedom' (2013) http://www.interfima.org/upload/articles/index_2013.pdf (accessed 11 November 2013) 305

² Malawi Mines and Mineral's policy (2013), <http://www.eisourcebook.org/cms/Malawi%20Mines%20&%20Minerals%20Policy%202013.pdf> (accessed 27 May 2014) 1

³ 'Mineral Sector Review Source of Economic Growth and Development' Oil, Gas and Mining Policy Division, Oil, Gas, Mining and Chemicals Department Africa Region' (2009), Report by the World Bank, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/11/11/000333038_20091111234920/Rendered/INDEX/501600ESW0P108101Official0Use0Only1.txt (accessed 27 May 2014) 15

⁴ 'Political economy analysis of mining in Malawi' (2013) Final report prepared by Tilitonse, http://tilitonsfund.org/wp-content/uploads/2013/05/Final-report_mining_Tilitonse-2.pdf (accessed 25 September 2013) 3

⁵ <http://www.mining.com/web/energy-minister-malawi-holds-over-30-million-tons-of-rare-earth-minerals/> (accessed 25 September 2013) 1

⁶ As above

⁷ Mines and Mineral's policy (n 2 above) 16

has granted several licenses to various foreign companies like Lancaster exploration Limited, Globe Metals and Mining Africa (GMMA)⁸, and Paladin Limited, which runs the main mine called Kayelekera⁹ to mention a few.

The Kayelekera mine was projected to be the one that would revamp the mining sector in Malawi and boost the economy. But the company has stated it is making losses owing to the fall of uranium price worldwide.¹⁰ However, reports indicate that Malawi is projected to make a loss of 92 billion kwacha (US\$281million) during the 13 year tenure of the company due to tax incentives given to this particular company.¹¹ Currently, government is in negotiations with several other companies who want licenses. There is concern that government has made raw deals in the past and the country has not benefitted as it should have in the mining contracts they had made previously.

In order to have an efficiently regulated and investment attracting mining sector, there have been several suggestions. One of the suggestions relates to revising the current Mines and Minerals Act of 1981 (MMA) which provides a weak legislative framework and is outdated. The MMA is labelled ‘one of the oldest mining codes in Sub-Saharan Africa’.¹² There have been numerous developments and updated standards that have emerged in the mining industry in the world and some of them need to be reflected in the MMA. For instance, countries have now made their mining industries’ administration to be more transparent. On a national level, Malawi has also endeavoured to have transparency as part of their legal and administrative system. The concept of transparency is reflected in the Constitution of Malawi (COM) which is the supreme law of the land. In section 12(1) (c) of the COM, one of the constitution’s fundamental principles is that the government should be open, accountable and transparent.

⁸ GMMA is only interested in mining niobium and tantalum, since it deems the quantities of uranium to be economically insignificant. See: Tilitonse (n 4 above) 5

⁹ This mine is owned jointly by the government and Paladin. Government has 15% and paladin has 85% stake in the mine.

¹⁰ Uranium price has been falling for over a decade. With the Fukushima disaster making it even worse. Some have even written off the chances of uranium prices increasing again. See: <http://www.nirs.org/uranium/radvenues.pdf> (accessed on 25 September 2013)

¹¹ M Curtis ‘Malawi’s mining opportunity: increasing revenues, improving legislation’ (2013), Report prepared by Norwegian Church aid/Catholic commission for justice and peace, <http://www.curtisresearch.org/Malawi%20Mining%20Revenue%20Study%20Report.pdf> (accessed 16 May 2014) 3

¹² World Bank report (n 3 above) 33

Transparency has been enshrined in the COM as a fundamental principle for the benefit of the citizens and this is emphasized further in s. 35 which stipulates the right to access information by citizens.¹³ The MMA is silent on transparency and this has led to stakeholders getting weary of the administration. To rectify and implement changes, government has declared its intention to review the MMA in line with international best practices. Furthermore, the government declared its intention to review the MMA as one of the commitments made to settle a dispute brought by NGOs opposing the Kayelekera mine project.¹⁴ It is not disputed that having a weak legislation is detrimental; however, significance should be attached to the lack of transparency of the administration of the mining industry. And this difficulty is broad because the Malawi minerals' industry is largely contract-based rather than legislative-based.¹⁵ While citizens have access to laws like the MMA, the same cannot be said of the contracts and this reduces the transparency since all vital information is contained in the contract.

In other words, Malawi's mining industry is largely governed by the agreements made between the government and investors. This has proven problematic because the majority, if not all the mining contracts have confidential clauses. The merit of including confidential clauses in the agreements has been challenged by various stakeholders in instances where they want government to be accountable with regards to the benefits from these contracts. Various stakeholders have voiced out that the investments are not visibly benefitting the country and they have told government to renegotiate the mining contracts. And this has been the case especially for the Kayelekera mine and stakeholders are wary of government's inactive steps to renegotiate. The only confirmation as to the existence of the renegotiation clause was through the company's report where they stated that:-

Clause 40 is not a mandate for the parties to renegotiate the Kayelekera development agreement. It provides a limited basis for review on strictly defined and restricted grounds.¹⁶

¹³ The COM was passed in 1994 which is years after the MMA hence the need for the MMA to reflect the intentions stipulated in the Constitution which is the main and most superior law in Malawi

¹⁴ World bank report (n 3 above) 89

¹⁵ This connotes instances where most of the crucial terms of the mining sector are left to be decided in the contract with the legislation being silent on the same.

¹⁶ 'Response to the Norwegian church aid/Catholic Commission for Justice report titled Malawi's mining opportunity: increasing revenues, improving legislation' (2013), Report by Paladin energy limited, <http://www.paladinenergy.com.au/default.aspx?MenuID=247#265> (accessed 16 May 2014)8

Unbeknown to the various stakeholders is what scope are these limited grounds covering, consequently, incapacitating them to contribute to the administration of the mining industry.

It is the president that is vested with control over the minerals on behalf of the people.¹⁷ Having non-disclosure clauses leads to lack of transparency. Transparency as to what is contained in these contracts will promote accountability to maintain checks and balances. The negotiation process is still the mandate of government and the team it constitutes. However, clarity as to the contents of the contract will ensure efficiency as to the administration of the mining industry.

In order to ensure transparency in extractive industries like mining, there has occurred a surge of Transparency Initiatives. Malawi is now considering whether or not to adopt a Transparency Initiative called Extractive Industries Transparency Initiative (EITI).¹⁸ EITI was initiated in 2002 due to the fact that some resource rich countries that ought to contribute to economic development were faced with the ‘resource curse’ and EITI was launched as a response to the absence of revenue transparency in the extractive industry in most of these countries.¹⁹ Basically, EITI makes it mandatory for government to report all the revenues collected from companies and that companies should report all the taxes paid to government. Malawi was recommended to adopt the EITI, but this has not been done yet. Malawi has instituted an EITI task force to look into the country’s adoption of the initiative and the implementation procedure.

1.2 Problem statement

This study aims to analyse two interconnected problems which are namely: the drawback of an opaque legal regime in the mining sector and the prescribed solution of adopting the EITI which also has some legal implications. Firstly in terms of transparency, it has been pointed out that while international agreements such as treaties, laws, and regulations which define the relationship between governments and private companies are public documents, oil, gas and mining contracts between governments and the extractive industries are shrouded in secrecy.²⁰ This attribute is extant in mining contracts in Malawi since there is no knowledge of what legal regime is being applied to the mining contracts. Little is known on what exactly

¹⁷ S. 2 of MMA

¹⁸ <http://eiti.org/files/2011-EITI-evaluation-report.pdf> (accessed 27 May 2014) 1

¹⁹ <http://www.eiti.org.mw/Initiative.html> -(accessed 12 November 2013)

²⁰ <http://apperi.org/category/in-the-media/natural-resources-in-the-media/page/3/> (accessed 27 May 2014) 1

transpires in terms of how contracts are awarded, terms of the award, mining operations including their profits and tax obligations, etc. This is due to the fact that there is no statutory obligation to publicise concessions, environmental management plans and other aspects of the industry for public scrutiny. Incidentally it means Malawians and other potential investors are unaware of the ambit of the mining sector because it is locked away in confidential contracts. This gap facilitates the exploitation of mineral wealth without the necessary checks and balances.

Secondly, since the current legal regime does not provide for a mandatory transparency requirement of mining contracts, the adoption of the EITI initiative is a feasible option considering that its core objective is accentuating transparency of governments and companies in the extractive industries to ensure accountability.²¹ However, the adoption of this initiative will bring in the complication of its application on already existing mining contracts and its consistency with existing legislation. There is need to be aware of the possible violations due to the government's contractual obligations in the existing contracts and also check for consistency with those laws that prohibit disclosure of information such as taxes.

1.3 Thesis statement

This study argues that the absence of a proper legal framework geared towards ensuring transparent mining contracts has resulted in Malawi's mining sector contributing sub-optimally to economic growth and barely attracting lucrative investments. It further argues that Malawi should adopt EITI and that the economical and developmental benefits should be envisaged with the legal implications.

1.4 Research Questions

The main issues to be addressed are the detrimental effects of confidential contracts on the growth of the mining industry and the legal implications of Malawi enacting an EITI code on existing mining contracts and laws. This will be done by addressing the following questions:

- What is the current mining regime in Malawi and how transparent is the country's mining industry?

²¹ [http://www.pactnigeria.org/Partners/CIVIL SOCIETY & THE EITI VOL. 1.pdf](http://www.pactnigeria.org/Partners/CIVIL_SOCIETY_%20&%20THE_EITI_VOL._1.pdf) (accessed 27 May 2014)

- What is EITI and should Malawi adopt it?
- What are the legal implications of adopting EITI?
- Whether Malawi adopting transparency principles in the mining industry is harmonious with the constitution and other applicable international laws?
- What can Malawi learn from other African countries that have adopted it?

1.5 Significance of the study

This investigation is relevant to the Malawian government, other African nations who are contemplating adopting this initiative and academics.

For the Government of Malawi, there is need for them to be aware of the coverage of this initiative as to what to expect once Malawi becomes EITI compliant since the initiative requires revealing certain contents of the confidential contracts such as revenues. This study will also highlight how the adoption of the initiative will have certain legal implications which government needs to be aware of.

For academics, the study presents an opportunity to look at how this surge of confidential contracts has been a primary cause of lack of sustainable development and economic growth in the mining sector. It will also provide a demonstration of the interplay between existing legislative framework and newly adopted initiatives such as the EITI

This study is of particular interest to African countries who for a long time have complained of being plagued by ‘resource curse’ due to not maximizing the benefits of being natural resource rich. It provides an overview of how this curse can be broken by taking some steps such as adoption of the initiative which provides for transparency not currently provided for in most legislative frameworks.

1.6 Preliminary literature review

Some scholarly works exist on transparency and its impact on mining and on transparency initiatives such as the EITI. However it should be noted that this is mostly from articles, journals and rarely any books have covered the topic in detail. There is also literature on contractual obligations of a state and investor rights in mining contracts.

Firstly transparency and its impact on mining will be discussed. Transparency has been classically defined as when ‘much is known by many’.²² The World Trade Organization states the three core requirements of transparency are namely: the availability of information on relevant laws, regulations and other policies, notification to interested parties of laws and regulations and any amendments and lastly administration of laws and regulations in a uniform, impartial and reasonable manner.²³

As illustrated, definition of transparency varies depending on the area it is being utilised. However there are several elements of openness and accountability which are commonly used to define it. Irrespective of the way it is defined, its value and impact on industries like mining has been widely debated. The existing literature clearly shows lack of consensus in scholarly opinions and countries on the effectiveness of transparency on mining industry. For the purpose of this study, these schools of thought are classified into two groups. One line of thought²⁴ states that:

transparency makes it more difficult for these government and corporate actors to disserve the wider public. Through increased transparency, corruption and mismanagement would reduce, and increased accountability would engender the more development-oriented conduct of industry operations.²⁵

In contrast, the second school of thought²⁶ argues that:

transparency hinders competitiveness and would be very costly to implement.²⁷ They also point out the fact that some countries such as Angola and China have laws which

²² See: <http://www.investopedia.com/terms/t/transparency.asp> (accessed 10 November 2013)

²³ A Bellver & D Kaufmann ‘Transparenting Transparency—Initial Empirics and Policy Applications’ (2005), Preliminary draft discussion paper presented at the IMF conference on transparency and integrity June 6–7 2005, Washington, DC: World Bank, http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Transparenting_Transparency171005.pdf (accessed 27 May 2014) 4

²⁴ A Gillies (2008), A Furnas (2014)

²⁵ A Gillies, ‘The World Bank, Reputational Concerns and the Emergence of Oil Sector Transparency as an International Norm’ (2008), A paper presented at the Doctoral Workshop on Development & International Organizations, ABCDE, Cape Town, <http://siteresources.worldbank.org/INTRAD/Resources/AGillies.pdf> (accessed 26 May 2014) 1

²⁶ A Etzioni (2014),

²⁷ <http://www.miningfacts.org/Blog/Mining-News/Federal,-provincial-and-territorial-governments-agree-to-greater-mining-industry-transparency-but-challenges-remain/> (accessed 26 May 2014)

mandate the exact opposite, for instance, resource extraction companies may not disclose payments.²⁸

Generally the first school of thought comprises of those who advocate for the efficiency of transparency as a developmental tool and the second school of thought comprises of those who argue against it.

There has been a vigorous debate as to the scope of transparency and its impact on mining. However, literature has focused on the impact of revenue transparency and not other forms of transparency because the mining industry has campaigned for mandatory disclosure of payments to government.²⁹ This factor has contributed to most schools of thoughts emphasizing the need for revenue transparency and ignoring other forms. There has emerged a new school of thought advocating for contract transparency.³⁰ It argues that:

contract transparency is critical to addressing better resource management and bringing contract stability to an industry that sees its contracts renegotiated more than any other.³¹ Furthermore that with contracts publicly available, government officials will have a strong incentive to stop negotiating bad deals due to corruption, incompetence, or otherwise.³²

Breaking the Curse report concludes that secret deals lead to corruption and this can be undermined by making mining regimes more transparent in order to assure citizens and investors that the rents from mining are being shared justly.³³ This study aligns itself with this argument and acknowledges that Malawi was one of the countries under review in the report under reference. However, opponents of contract transparency argue that contracts should stay private because they contain commercially sensitive details.³⁴

²⁸ As above

²⁹ As above

³⁰ The difference and meaning of contract and revenue transparency will be discussed in detail in chapter two.

³¹ T Moran 'Harnessing Foreign Direct Investment: Policies for Developed and Developing countries' (2006), Paper by Centre for development, http://siteresources.worldbank.org/INTRANETTRADE/Resources/Internal-Training/Ted_Moran_Paper.pdf (accessed 26 May 2014) 76

³² P Rosenblum & S Maples 'Contracts confidential: Ending secret deals in the extractive industries' (2009) Report by Revenue watch Institute, <http://www.revenuwatch.org/sites/default/files/RWI-Contracts-Confidential.pdf> (accessed 16 May 2014) 10

³³ 'Breaking the Curse: How Transparent Taxation and Fair Taxes can Turn Africa's Mineral Wealth into Development' (2009) Reported by Open society institute of Southern Africa, <http://elaw.org/system/files/breaking-the-curse-march2009.pdf> (accessed 26 May 2014) 1

³⁴ http://www.revenuwatch.org/training/resource_center/backgrounders/contract-transparency (accessed 26 May 2014)

As pointed out this paper argues for contract transparency. It further points out that transparency can be fully implemented by adoption of transparency initiatives. This study will go further to demonstrate how elimination of secret tax deals can be done with adoption of EITI as it will enable Malawi to account openly for their taxations in these mining contracts and show all interested parties the benefits of this initiative. This study will consequently underline the need to analyse closely those who have implemented EITI and see how their mining sector has been impacted. It is only through the close review of the challenges and benefits one can conclude. This research seeks to highlight that there is no evidence provided as to which countries have been negatively impacted by disclosing contracts or have had had companies impacted due to disclosure of information termed commercially sensitive. This study argues that until such evidence is provided for, this is merely an illusion to deter countries from making their industries more transparent by disclosing their contracts. It disagrees with the assertion that the negotiations of contracts are the most important factors in the mining industry³⁵ because it is knowing what has been agreed that is vital. This study highlights the conundrum in the light of Malawi government's preference for confidential contracts. Knowledge of what the agreement contains and inputs by stakeholders contribute to efficiency.

Secondly, this study will highlight further the literature with regard to transparency initiatives. Some have argued that transparency is not always a guarantee that the mining industry will blossom. And the lack of impact has been linked to transparency initiatives not being of use. For instance some have even gone further to argue that signing up to EITI will not automatically bear success for the industry.³⁶ This study concurs to the extent that being an EITI signatory is no surety of full transparency bearing in mind the initiative only requires transparency of the revenues. It contends that transparency may not be an instant source of success to the mining industry but the lack thereof is impeding any progress that should be made. The mere adoption of the EITI is not enough to guarantee transparency or its effectiveness; it also requires its implementation and political will of all parties involved.

From the literature, it is evident that the focus has been the economical and developmental impact of adopting the initiative. Most of the literature addresses the benefits of adopting the

³⁵ <http://pubs.iied.org/pdfs/12554IIED.pdf> (accessed 26 May 2014)

³⁶ A Keita 'Legal tools for citizen empowerment: Increasing local participation and benefit in Mali's mining sector' (2008), Report by IIED, <http://pubs.iied.org/pdfs/12554IIED.pdf> (accessed 16 May 2014)10

initiative or making the mining sector more transparent; while there is little to non-existent literature on the legal implications of adopting this initiative on existing mining contracts and laws. This study seeks to highlight the legal obligations Malawi must consider alongside the economical and developmental benefits. This can be done by analysing the existing national and international laws alongside the principles of this initiative which will form part of legislation as a form of implementation.

Sornarajah points out that there is a view that distinguishes between the violation of a contract through a commercial act by the state and a violation through the use of its sovereign powers. On this view, the conclusion is drawn that a violation through the use of sovereign power would amount to a breach of international norms³⁷. He analyses the imbalance that exists since the host has authority to change the rules contrary to the expectation of the investor.³⁸ This study will seek to discuss the violation Malawi could possibly make on existing contracts since adopting this initiative could be the state exercising its sovereign power and this being a breach of international norms could lead to international dispute settlement. This study will also seek to highlight all the legal aspects that could be brought up including what possible outcomes if disputes arise.

To conclude, the gaps underlined in the literature are that:

- i) Legal implications of adopting transparency initiatives have not been discussed.
- ii) The benefits of contract transparency as opposed to revenue transparency have not been highlighted contrary to the EITI standard.
- iii) There is no literature to provide evidence of countries and extractive countries being negatively impacted by the disclosure of contracts.

1.7 Proposed methodology

This study will be descriptive, analytical and prescriptive. The descriptive part will be on the current mining regime and the ambit of the EITI initiative. The analytical part will be the implications of adopting it on the existing mining contracts and laws. And lastly the prescriptive part would be on how best to implement and what else Malawi needs to ensure full transparency in the mining sector beyond the contract. This research utilised library sources and internet; it has primary and secondary sources of information. The primary

³⁷ M Sornarajah *'The law of foreign Investment'* (2010) 14

³⁸ M Sornarajah *"The Settlement of Investment Disputes"* (2000) 14

sources include Acts of Parliament such as the MMA and will confer other comparable legislation in other jurisdictions.

The secondary sources of information include relevant journal articles, papers, articles written by academicians and researchers on issues relevant to the study. The study relies also heavily on internet public sources. Speeches and daily newspapers containing information relevant to the issues under discussion will also be considered.

1.8 Scope and limitation of study

The study will focus specifically on the lack of transparency of mining contracts themselves. It will deal with the lack of knowledge on general agreements made in the contract specifically on revenue and tax concessions and their impact on the mining industry. It will not deal with any other areas transparency is lacking such as the negotiation process. And the study is limited to the current period when the contracts are still confidential; if changes are made later on they should not be considered in the light of this study. This study focuses on existing investors in the mining sector and the impact of the initiative. It does not focus on how the initiative will impact future investments.

The main limitation of the study is that the contracts are confidential and therefore rendering it impossible to critically analyse the contents which were thought to need to be kept confidential. Therefore, this study will rely on reports rather than the actual text of the contracts.

1.9 Structure of Chapters

a) Chapter 1

Chapter 1 is the introduction of the research. It shapes the nature and significance of the study and gives preliminary the literature review.

b) Chapter 2

In Chapter 2, there is an in depth examination of the concept of transparency in mining sector particularly as it relates to mining contracts. It further discusses the current mining regime of Malawi focusing on its role in Malawi's economy. It will further discuss how lack of transparency has impeded the growth of the mining industry.

c) **Chapter 3**

In Chapter 3, there is a discourse pertaining to the scope of the EITI and the proposed adoption of which will have an impact on the existing mining industry. It will further discuss the reasons for Malawi and benefits of Malawi joining.

d) **Chapter 4**

In chapter 4, the study seeks to demonstrate the legal implications of Malawi adopting in terms of what Malawi should anticipate with regard to their legal obligations to existing investors and domestic laws. Furthermore, this chapter explores EITI systems in Nigeria and Liberia who are the exemplary countries that have adopted the initiative and implemented it well.

e) **Chapter 5**

Chapter 5 makes some concluding remarks for the study and makes some recommendations

CHAPTER TWO

CONCEPT OF TRANSPARENCY IN THE MINING INDUSTRY

2.1 Introduction

This chapter examines the concept of transparency in the mining sector particularly the ideology of contract transparency. It further discusses the current mining regime in Malawi in relation to transparency and the need to avoid the resource curse suffered by most developing countries with abundant mineral resources. It will further discuss how lack of transparency has impeded the growth of the mining industry.

2.2 Nature of transparency

Transparency has been defined as public access to information or timely and reliable economic, social and political information that is accessible to all relevant stakeholders.³⁹ Transparency is equated to openness, it purports the idea that any social entity should be prepared to subject its activities to public scrutiny and consideration.⁴⁰

Transparency has been dealt with in some treaties or international instruments like the WTO.

Some focus on not so much particular information which should be disclosed but methods of disclosure.⁴¹ Metaphorically, transparency can be termed as the stipulation in which knowledge of public interest is exposed to ensure accountability.⁴²

Transparency has been described and alluded to by different authors depending on the particular subject being discussed. This study focuses on transparency in terms of disclosure of vital information that could impact the levels a mining sector could flourish. It discusses the openness to access the regulations that are being applied to existing contracts which are not openly provided for in the laws and occasionally supersede those prescribed by the laws. Transparency will focus on the hitch of keeping confidential vital information that makes the difference to potential investors.

³⁹I Kolstad & A Wiig 'Is Transparency key to reducing corruption in resource rich countries' World Development Vol. 37, No. 3, (2009) 522

⁴⁰ 'Transparency' (2004) Report by UNCTAD on Issues in International Investment Agreements, http://unctad.org/en/docs/iteiit20034_en.pdf (accessed 16 May 2014) 7

⁴¹ UNCTAD (n 40 above)10

⁴²P Sturges 'What is this absence called Transparency' (2007) Paper presented at ICIE Conference, Pretoria, <http://www.ifla.org/files/assets/faife/publications/sturges/icie-paper.pdf> (accessed 16 May 2014) 5

2.3 Scope of transparency

Conceptually, Transparency encompasses the obtainability of a variety of information to enable public scrutiny.⁴³ The areas in which transparency is required vary and the extent to which information should be provided does too. These areas include:

consultation and information exchange, making information publicly available, answering requests for information, and notification requirements of specific measures that need to be notified to the other party or to a body set up for the purpose under the agreement.⁴⁴

Malawi as a country can decide which levels of transparency it wants for its mining sector. It could be producing information when valid investors are interested if they do not want to make it completely open to the public. They could limit it to several stakeholders instead.

2.4 Purpose of transparency

The underlying principle for transparency is the existence of a genuine need to know which is generally articulated as the public interest.⁴⁵ Transparency serves several purposes.

2.4.1 Transparency and investment

Foreign direct investment (FDI) in natural resources can have a substantial impact on the economic prospects of a developing country.⁴⁶ Transparency in terms of investment involves the foreign investors' aspiration to have utmost access to a range of information in a host country that may influence the terms and conditions of the agreement under which they operate.⁴⁷ The analogous situation is that countries that maintain and promote transparent policies and structures will attract more investment.⁴⁸ Additionally, transparency promotes investment through the dissemination of information on investment conditions and opportunities in host countries, support measures available from home states, and creates an ambiance of good governance which includes curbing the prospects of illicit payments during the process.⁴⁹

⁴³ M Genasci and S Pray 'Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice' *11 Yale Human Rights & Development Law Journal* 37 50

⁴⁴ UNCTAD (n 40 above) 10

⁴⁵ P Sturges (n 42 above) 2

⁴⁶ T Moran (n 31 above) 75

⁴⁷ UNCTAD (n 40 above) 8

⁴⁸ Z Drabek & W Payne 'The Impact of Transparency on Foreign Direct Investment' *Journal of Economic Integration*, Vol. 17, No. 4 (2002) 792

⁴⁹ UNCTAD (n 40 above) 8

Transparency is key to attracting investments and of particular interest in this study are investments in the mining division. In order for the mining sector to expand and be more lucrative, it needs investors. These could be local or foreign investors. In order for there to be investments, this study argues that this can be done mostly through having a transparent sector. Theoretically firms are wary of non-transparent countries because of uncertainty, increased risks and costs of doing business.⁵⁰ But this is also evident in practice. Investors should be aware of what incentives a country is willing to give without having to go through a rigorous consultation. This is a factor that could put-off investors. For instance, if an investor wants to operate a mine in the same country similar to one in operation, information as to what has already been agreed will enable investors to determine whether or not to invest which is better than having to make full enquiries from authorities to get all information.

Lack of transparency in policy decision-making and unsystematic disclosure of information relevant to the formation of rational expectations obliges private agents to review their expectations raising the variability of asset prices, consumption and investment, increasing the risk of investments.⁵¹

Therefore, transparency in terms of investment is the availability of information for investors to be able to make a sound decision. There are many determinants of attracting FDI which at times graded more valuable, nevertheless, foreign investors do expect a certain level degree of transparency from host countries.⁵²

2.4.2 Curbing corruption

The abuse of public office for private gain is termed Corruption.⁵³ Corruption is prevalent in many developing countries with natural resources.⁵⁴ More so in countries where information on the size of oil or mineral wealth endowments is protected through confidentiality clauses in contracts and the terms of agreements for the monetization of these endowments is withheld from public scrutiny.⁵⁵ Transparency is key to reducing corruption within a country,

⁵⁰ Z Drabek & W Payne (n 53 above) 792

⁵¹ A Bellver & D Kaufmann (n 23 above) 7

⁵² UNCTAD (n 40 above) 71

⁵³ I Kolstad & A Wiig (n 39 above) 522

⁵⁴ I Kolstad & A Wiig (n 39 above) 521

⁵⁵ M Genasci & S Pray (n 43 above) 45

a sector or any business or financial transaction. Whereas transparency normally exists in more indirect forms within government administration, corruption exhibits itself in various forms.⁵⁶ Aside from enforcement measures and relevant practical changes in modes of governance, transparent governance is pegged worldwide as the key factor to elimination of corruption.⁵⁷

The evident message in most scholarly works is that investors tend to elude states which lack reliable information and have high levels of corruption.⁵⁸ Corruption affects FDI; the higher the corruption level, the lower the FDI in-flow.⁵⁹ Malawi as of 2013 was ranked number 99 out of 177 countries in terms of corruption perception index.⁶⁰ Investors are put off by countries which have high levels of corruption; making a system more transparent could redeem the country's image.⁶¹ Non-transparency of natural resource revenue flows enables corruption on a massive scale. The endurance of blatant corruption could prove impossible in an environment of disclosure and public scrutiny.⁶²

Therefore, the major purpose for transparency is to reduce corruption levels by disclosing information of public official acts for public scrutiny. Transparency correlates with corruption since the lack of transparency leads to corruption. However, some have argued that transparency is essential but not sufficient to reduce corruption. That, besides access to information, you need the ability to process the information plus the ability and incentives to act on the processed information.⁶³

2.4.3 Ensure accountability

Transparency aims to generate accountability in systems of public and corporate governance.⁶⁴ Transparency is commonly deemed a major component of good governance

⁵⁶ J Hongxin ; H Seung & J Du 'The Impact of Corruption and Transparency on Foreign Direct Investment: An Empirical Analysis' (2003) *MIR: Management International Review*, Vol. 43, No. 1 42

⁵⁷ P Sturges (n 42 above) 2

⁵⁸ A Bellver & D Kaufmann (n 23 above)

⁵⁹ J Hongxin; H Seung & J Du (n 56 above) 46

⁶⁰ <http://www.transparency.org/country#MWI> (accessed 3 March 2014)

⁶¹ UNCTAD (n 40 above) 8

⁶² M Genasci & S Pray (n 43 above) 50

⁶³ I Kolstad & A Wiig (n 39 above) 524

⁶⁴ P Sturges (n 42 above) 2

and an essential prerequisite for accountability between states and citizens.⁶⁵ Transparency permits examination of the stewardship that is expected of those who own or have the care of resources that are matters of public interest.⁶⁶ Transparency is demanded to grant citizens, markets or governments to hold institutions responsible for their policies and performance.⁶⁷

Accountability is in various forms. O' Donnell states that:

there are distinctions between 'vertical' and 'horizontal' forms of accountability, the vertical referring to that between citizens and the state and the horizontal to internal checks and balances between various branches or organs of the state.⁶⁸

Whereas Goetz and Jenkins (2005) also stress:

the important distinction between *de jure* and *de facto* accountability. This review's focus on effectiveness and impact points us towards *de facto* accountability – what occurs in practice, as opposed to what is set out in law or intent.⁶⁹

In terms of a mining sector, there is need for both horizontal and vertical accountability. Vertical because citizens should be aware how natural resources are being used for their developmental benefit and be given an opportunity to voice their concerns and contribute optimally; and horizontal so that those entrusted with power should have peer review from other state organs whose evaluation could work towards improving the administration of mining sector.

Inside a transparent system, emphasis switches from a presumption that the holders of information can decide whether there is a genuine public interest in the disclosure of information, to a presumption that it can be revealed. The exception to this principle is when it can be shown that it is not in the public interest to do so.⁷⁰ Therefore, where the governments want to keep mining contracts confidential, there is need to demonstrate how this is for public interest to keep such information private. To ensure government accounts to

⁶⁵ R McGee & J Gaventa 'Review of impact and effectiveness of transparency and accountability initiatives' (2010), Synthesis report by Institute of development studies, <http://www.ids.ac.uk/files/dmfile/IETASynthesisReportMcGeeGaventaFinal28Oct2010.pdf> (accessed 16 May 2014) 13

⁶⁶ P Sturges (n 42 above) 2

⁶⁷ A Bellver & D Kaufmann (n 23 above) 4

⁶⁸ R McGee & J Gaventa (n 65 above) 5

⁶⁹ As above

⁷⁰ P Sturges (n 42 above) 2

its citizens, there is need for transparency to illuminate how the mining sector is performing towards the development goals. Transparency has been regarded as another dimension of governance; that poor governance has substantial, adverse effects on economic growth and indicators of development⁷¹

2.5 Forms of transparency

Transparency is not straightforward; its meaning varies according to different people in distinctive contexts.⁷² There are many areas which require transparency and transparency varies in forms. However, this study will mainly discuss revenue and contract transparency but briefly suggest new forms of process and substance based transparency as well. It will illustrate that though revenue transparency is important, there is also need for contract transparency.

2.5.1 Revenue transparency

Developing countries should utilise their extractive industries revenues to invigorate economic growth and social development.⁷³ Oil and gas are a source of coffers to host governments in varying forms of license fees, taxes, royalties, dividends, and local community support.⁷⁴ Recently, there has been a colossal demand for revenue transparency specifically in oil, gas and mining sectors of developing countries. This advocacy for revenue transparency is upon realisation of corruption and poor economic conditions, notwithstanding, the huge revenue flow into government's coffers from the resources.⁷⁵ Mineral and petroleum wealth can fuel large-scale corruption, poverty and cause conflict if revenues from the extractive sector are not managed with transparency and accountability.⁷⁶

⁷¹ A Bellver & Kaufmann (n 23 above) 9

⁷² A Mabel; C Hernandez, A Landivar A & M Mendez 'Examining oil extraction and transparency in Bolivia, Ecuador and Nicaragua' Publish what You Pay (PWYP) trace briefings (2010-2011), http://www.publishwhatyoupay.no/sites/all/files/1004a-PWYPNorway_TRACEBriefings_ENGLISH_DOWNLOAD_0.pdf (accessed 16 May 2014) 6

⁷³ S Bryan & B Hofmann (eds) 'Transparency and Accountability In Africa's Extractive Industries: the Role of legislature' (2007) Report by National Democratic Institute for International Affairs (NDI), https://www.ndi.org/files/2191_extractive_080807.pdf (accessed 16 May 2014) 14

⁷⁴ B Kowalczyk-Hoyer 'Promoting revenue transparency: 2011 report on oil and gas companies' (2011), Report by Transparency International (TI) and Revenue Watch Institute (RWI), http://www.revenuewatch.org/sites/default/files/PRT_report_24_02.pdf (accessed 16 May 2014) 4

⁷⁵ B Nwete 'Revenue Transparency, National Sovereignty and Authoritative government: any way out of dilemma?' *18th World Petroleum Congress*. World Petroleum Congress (2005) 1

⁷⁶ B Kowalczyk-Hoyer (n 74 above) 4

There have been several attempts to ensure there is revenue transparency. First there is the Publish What You Pay (PWYP) which is campaign calling for extractive companies to publish what they paid to governments⁷⁷. PWYP campaigns for transparency and accountability in the extractive process preceding payments, so that the decision to extract is made in a transparent and accountable manner, to the benefit of all citizens rather than to the entrenched interests of the few.⁷⁸ There is also EITI which the writer has already alluded to and will be discussed in detail in chapter three. And the US went further and actually introduced The Energy Security through Transparency Act of 2009 (ESTT). The ESTT Act requires those gas, oil and mineral companies registered with the U.S. Securities and Exchange disclose payments to foreign governments for the commercial extraction within the US.⁷⁹ The flaw with this in the writer's view is that it targets only companies who are registered with the US stock exchange and excludes the rest. With history of focus being on financial transparency, this exclusion is intentional; however, it should be expanded to include those not registered.

Briefly, revenue transparency entails disclosing all payments made to government by mineral, oil and gas companies to ensure accountability. Unfortunately, there is still no initiative propelling the need to disclose how this money is spent but this could be problematic for countries like Malawi who have 'account number one' which is a combination of all collected revenues regardless of what sector.

2.5.2 Contract transparency

Many contracts are involved in the mining sector and other natural resource sectors. This study is focused on the main or primary contract which may be the contract between the host state and the mining companies and no other contracts surrounding the process. The primary contract is the contract concerned with exploration or exploitation of the resource.⁸⁰ Primary contracts generally are in four basic forms and some combined forms of concession agreements, production sharing agreements, license agreements and service agreements. Exceptionally governments that have an equity stake in a project, the shareholders' agreement between the government and the company would be the 'primary contract'.⁸¹

⁷⁷ <http://www.publishwhatyoupay.org/about/objectives> (accessed 11 March 2014)

⁷⁸ As above

⁷⁹ <http://omiusajpic.org/2010/03/01/support-the-estt-act-of-2009> (accessed 11 March 14)

⁸⁰ P Rosenblum & S Maples (n 32 above) 18

⁸¹ P Rosenblum & S Maples (n 32 above) 19

The primary contract is usually kept confidential and this is common in most countries. Countries that heavily depend on non-renewable resources do not disclose these vitally important contracts to citizens. Generally they are not available to citizens as a result of confidentiality clauses that overtly limit access for public opinion.⁸² It is doubtful any government has embarked on full contract transparency. They either disclose existing contracts, carry out public voice and participation in contract awarding or implement a post-contract award monitoring mechanism but not all three at once.⁸³ Three main reasons have been given for keeping contracts confidential namely: to protect commercially sensitive information; to avoid matching concessionary deals, or competing in a ‘race to the bottom; and to avoid antagonizing constituents thereby exposing incompetence or corruption.⁸⁴

Governments and companies argue that contracts contain delicate commercial information that would jeopardize their ability to be competitive if publicized. Sensitive information comprises financial conditions, labour obligations and environmental mitigation and protection measures to be taken.⁸⁵ Expectedly States and companies have a blame game as to the blanket clandestineness that covers agreements; neither conspicuously supports specific claims about trade secrets or commercially sensitive information and coincidentally neither dispels the notions of rampant corruption, power dynamics or raw incompetence which they fear exposure of.⁸⁶

However, it has been pointed out that contracts are necessary to give precise detail and legal specificity to the obligations of a state and the company or group of companies involved in an extractive project.⁸⁷ There is an evident crusade for contract transparency supported by assorted distinctive establishments.⁸⁸ Fiscal institutions like the World Bank, the International Monetary Fund (IMF) and the International Finance Corporation (IFC) are beginning to encourage contract transparency. The most laudable is the IMF which endorses contract transparency as key to the good governance of extractive sectors.⁸⁹ The book ‘**Confidential**

⁸² A Mabel; C Hernandez, A Landivar A & M Mendez (n 72 above) 7

⁸³ A Mabel; C Hernandez, A Landivar A & M Mendez (n 72 above) 10

⁸⁴ P Rosenblum & S Maples (n 32 above) 17

⁸⁵ A Mabel; C Hernandez, A Landivar A & M Mendez (n 72 above) 8

⁸⁶ P Rosenblum & S Maples (n 32 above) 12

⁸⁷ As above

⁸⁸ P Rosenblum & S Maples (n 32 above) 15

⁸⁹ ‘International Monetary Fund Guide on resource revenue transparency’ (2007), <http://www.imf.org/external/np/pp/2007/eng/101907g.pdf> (accessed 16 May 2014) 37

contracts: Ending Secret Deals in the Extractive Industries' summarises the benefits of contract transparency as follows:

Contract transparency is essential for the responsible management of natural resources and the potential for growth and economic development that those resources can provide. That's several parties gain from contract transparency. Governments will be able to negotiate better contracts if they have access to contracts other than their own, as industry certainly does. Coordination among government agencies in enforcing and managing the contracts will be made easier. Citizens' suspicions of the hidden horrors will decrease, creating a more stable contract that is less likely to be subject to calls for renegotiation.⁹⁰

Briefly contract transparency entails the availability of the contract for public scrutiny to decipher everything that is agreed in terms of exploration and production of the mineral resources. Internationally, there is rising demand to make contracts with the extractive companies available to the public and to establish new standards to define what information is revealed.⁹¹

2.5.3 Process and Substance based transparency

In this study, Process transparency refers to the process of approving mining licences and substance transparency to the mining activity itself including post-mining activities like revenue reporting and acquitting tax obligations which should be based on equitable legislation enacted in democratic legislative process. These two areas involve how mining licences are awarded and the scrutiny is whether same procedure is followed in awarding all licences. In Malawi, they set out in sections 37-48 of the MMA the procedure to be followed to apply for a licence. However section 11 of the same provides the Minister as the person with discretion to grant or deny the granting of the licence. Transparency as to the process of application and the reasons for granting or denying are what this study regards as process transparency. Whereas substance is what mining companies are expected to openly report in terms of how they fulfilled their tax and environmental obligations after they are done conducting. This enables the possibility of rectifying discrepancies or negative environmental impacts.

⁹⁰P Rosenblum & S Maples (n 32 above) 15

⁹¹ A Mabel; C Hernandez, A Landivar A & M Mendez (n 72 above) 7

These two forms are important because they could shed light on whether the processes preceding the mining activities and after are scrutinised democratically and fairly to all companies involved. This ensures the proper administration inspections are in place and are being followed to the core. However, this study will focus on two forms namely revenue transparency and contract transparency. Revenue transparency being the one most schools advocate for but this paper wishes to highlight the value of contract transparency as opposed to the former.

2.5.4 Revenue transparency versus contract transparency

There seems to be misinformed consensus that revenue transparency is more vital than contract transparency. Though this study is in agreement of the significance of revenue transparency, it also seeks to substantiate the inestimable value of contract transparency which has been overlooked.

Revenue transparency involves the payments made by companies to government and disclosure by government of what they have received. Revenues are reflected in the contracts by stating how companies will be taxed, what royalties are to be given. The contract is the umbrella of the whole transaction whereas revenues are only a single facet of the whole agreement. Revenue transparency has been pegged as a paramount deterrence for corruption in the mining sector. This study seeks to emphasize that Contract transparency should be foremost to help curb corruption. It is pointed out that Contract transparency will set in motion governments getting a better deal for their resources, make them aware of the incentive to make more durable deals, and deter corruption.⁹² Therefore contract transparency enables accountability of governments and the extra carefulness to make lucrative long-lasting deals and circumvent corruption in the process. It makes government answerable to people who entrusted them with a duty to contract for the benefits of the masses.

This study points out the fact that the value of having mining operations reflected by revenues is important, however, the availability of the actual contract is invaluable. A contract reflects how calculations of revenues will be made and additional information is also provided for. Contract transparency will ensure citizens are aware of how legally they can

⁹² P Rosenblum & S Maples (n 32 above) 16

hold their government accountable. Revenues could be disclosed but without seeing the contracts citizens are unaware of how to proceed to ensure accountability.

2.6 The resource curse

Countries with large endowments of natural resources perform worse in terms of economic development and good governance than do countries with fewer resources. Paradoxically, the discovery and extraction of oil and other natural resources which inspire prospects of wealth and opportunities has usually and inexplicably hampered balanced and sustainable development.⁹³ There's literature on the puzzling inverted relationship between natural resource wealth and development in poor countries.⁹⁴

Initially, effects of commodity price volatility and the Dutch disease were marked as the contributing factors to the curse.⁹⁵ It was intimated that exporters of natural resources were victimized by declining terms of trade, volatile export earnings and the so-called 'Dutch disease'.⁹⁶ Currently in Malawi, the lack of success of the mining sector has largely been attributed to the fall of commodity prices, as reiterated, the main mine Kayelekera mines uranium which currently is experiencing the dive. However, the possibility of the 'Dutch disease' occurring in Malawi are minimal because currently the agriculture sector is sustaining the whole economy on its own, mining will not negatively impact the agricultural sector but rather relieve it from enormous pressure.

There has been debate as to whether the resource curse really exists. Jeffrey Sachs has this to say:

First, casual observation suggests that there is virtually no overlap in the set of countries that have large natural resource endowments – and the set of countries that have high levels of GDP. Many resource-rich countries have been resource rich for a long time. If natural resources really do help development, why do not we see a positive correlation today between natural wealth and other kinds of economic

⁹³ M Humphreys; JD Sachs & JE Stiglitz 'What is the problem with the Natural Resource Wealth' in Humphreys, M; Sachs, JD, & Stiglitz, JE (eds) (2007) *Escaping the curse* Columbia University Press: Columbia 1

⁹⁴ M Genasci & S Pray (n 43 above) 42

⁹⁵ M Genasci & S Pray (n 43 above) 42. In the 1970s, the Netherlands discovered one of these problems. Following the discovery of natural gas in the North Sea, the Dutch found that their manufacturing sector suddenly started performing more poorly than anticipated. Resource-rich countries that similarly experience a decline in pre-existing domestic sectors of the economy are now said to have caught the "Dutch disease": M Humphreys; JD Sachs & JE Stiglitz (n 93 above) 5

⁹⁶ A Rosser 'Escaping the Resource curse' (2006) *New Political Economy*, Vol. 11, No. 4 558

wealth? Second, casual observation also confirms that extremely resource-abundant countries such as the Oil States in the Gulf, or Nigeria, or Mexico and Venezuela, have not experienced sustained rapid economic growth.⁹⁷

Some have gone further and pointed out that a number of resource-abundant developing countries like Botswana have done well in development terms, high levels of economic growth and poverty reduction.⁹⁸ There are various theories as to the existence and non-existence of the resources curse. Some have suggested having abundant resources is no warranty for growth; debatable as to what is ‘abundant’ resources.

While there has been considerable debate about the causes of the resource curse, scholars have given relatively little attention to understanding the conditions under which resource-abundant countries escape the curse; **Andrew Rosser** emphasized the importance of understanding how to escape the curse and gives two reasons why:

First, it can give us a better sense of the developmental prospects of these countries. If overcoming the resource curse hinges on changing socio-economic structures, international geo-political or geo-economic conditions or some other variable that is very difficult to change, then the developmental prospects of resource-abundant countries in the foreseeable future are unlikely to be good. Second, understanding the conditions under which resource abundant countries escape the resource curse can help us to develop more sophisticated strategies for addressing the resource curse. Many studies provide little ideas as to when and how governments in these countries might be persuaded to make these changes.⁹⁹

This study argues that Malawi as a country needs to make policy and institutional changes immediately if it will avoid the resource curse. It advocates that the resource curse can be escaped if all institutions and stakeholders involved in the administration or exploitation of minerals are transparent. This ensures accountability and optimal usage of available resources with public scrutiny ensuring checks and balances. Lack of governmental culpability is the nucleus of the resource curse which is facilitated by the absent information flow between the

⁹⁷ J Sachs & A Warner ‘The curse of natural resources’ (2001) *European Economic Review* 45 827

⁹⁸ A Rosser (n 96 above) 558

⁹⁹ A Rosser (n 96 above)558-559

government and people.¹⁰⁰ This research focuses on the standpoint of some scholars who have concluded that institutions should play an analytical role in determining the economic performance of resource-rich economies.¹⁰¹ This is so because the allowance to involve institutions to evaluate the performance of mineral-rich countries involves transparency.

As stated earlier, this investigation focuses on Malawi. In order to illustrate how Malawi is bound to fall for the spell of the resource curse and therefore the need for transparency; there is need to evaluate Malawi's mining sector regime. But the resource curse is not inevitable and can be avoided as proven by nations with prudent and transparent management like Chile as it benefited from its resource wealth.¹⁰² Therefore, Malawi like these countries can escape the curse by availing to transparent management practices.

2.7 Mining regime in Malawi

Malawi's mining sector is capable of surpassing the contribution of the agricultural sector to the economy. So far, the growth has been gradual. It is reported that the mining sector is now contributing 10 % of the GDP. It is pointed that percentage could increase if the mining sector is well managed¹⁰³. Currently mining licences are granted by the Minister of Mines working in tandem with the Commissioner of Mines. The MMA stipulates the procedure to be followed and the requirements to have a mining licence granted. So far, Malawi has granted several mining licences but there are now discussions as to the concession agreements.

Government in the MMP identified the need to attract investors locally and foreign for the exploration and production of minerals¹⁰⁴. In order to do so, there is need to have the administration of the mining sector to be more transparent. As alluded to, the procedure to get a licence is very open to everyone as it is provided for in the MMA. But the agreements made are confidential, being kept away from public scrutiny. To magnetise investors, there is need for them to be aware of what the country is willing to offer and the citizens to be fully aware as to what is being gained from the existing contracts. Additionally transparency will ensure

¹⁰⁰ M Genasci & S Pray (n 43 above) 49

¹⁰¹ CN Brunnschweiler 'Cursing the Blessings? Natural Resource Abundance, Institutions, and Economic Growth' (2008) *World Development Vol. 36, No. 3* 400

¹⁰² International Monetary Fund Guide on resource revenue transparency' (n 89 above) 1

¹⁰³ Tilitonse Report (n 4 above) 5

¹⁰⁴ Mines and Mineral's policy (n 2 above) 3

that investors are getting the same fair deals as others and not raw deals. It is the view of this research that the current mining regime is not transparent and this is contributing to the country not getting maximum investments and having various stakeholders query the viability of existing contracts.

As stated, Malawi has laws and regulations which are administered to the mining sector. In the MMA there is annexed to it the Mines and Minerals (Royalties) regulations. These are to be followed subject to the agreements made. It stipulates that the minimum royalty rate is 5% for different kinds of minerals subject to the agreement. However, the main mine Kayelekera had its royalty rate slated for 1.5% for first three years, then it will be three for remainder of contract.¹⁰⁵ The freedom to reduce the royalty rate was given when the MMA made the prescribed rates subject to what is agreed. However, if these contracts are kept confidential, what assurance do future investors have that they will also be treated in a uniform, impartial and reasonable manner. Transparency is the key to having such doubts erased. If development agreements were not opaque and available for public scrutiny, the mining sector would be more attractive for investments.

2.7.1 Transparency in Malawi's mining regime

Section 10 of the MMA gives the Minister the power to enter into an agreement not inconsistent with the MMA with any person with respect to granting mineral rights and conditions attached to it.

The Minister is given power to make agreements with people on conditions decided by him and he is to ensure that these agreements are not inconsistent with the MMA. The conundrum is how the public ensures that this agreement has been made consistent with the MMA. There is no guarantee for this. Citizens are unable to hold their governments or transnational corporations accountable for this abuse of power because they lack information about their country's revenues and expenditures, and the deals it has made with those extracting the resources from their territories.¹⁰⁶

¹⁰⁵ A Rosser (n 96 above) 558

¹⁰⁶ <http://acetforafrica.org/whats-new/post/reversing-the-resource-curse-promoting-transparent-effective-and-accountable-governance/> (accessed 20 February 2013)

This discretion by the minister is contrary to other standards in different countries. For instance in Zambia, section 9 (2) (d) of the Mines and Minerals Act¹⁰⁷, the Minister of Mines is meant to consult and decide together with Minister responsible for finance and other Ministers responsible for any relevant portfolios before making stability commitments in relation to Development Agreements. This shows the standard is not for one minister to decide, other relevant Ministers help to decide. Unlike in Malawi, it is merely one individual mandated to decide.

As reiterated, a non-transparent mining sector is contrary to the intention of the Constitution which in sections 11 and 35 mandates transparency and accountability of all governmental officials to the citizens of Malawi. Due to the lack of transparency, Malawi is now being urged to join several transparency initiatives in order to benefit more from mining and ensure there is accountability.¹⁰⁸

2.7.2 Necessity of contract transparency

As alluded earlier, transparency entails the public knowing the regulations being applied by public officials. Mining or oil codes specify procedures and parameters for the granting of concessions and other rights of access specific to the extractive industries.¹⁰⁹ The mining regime in Malawi is set that only procedures to be followed to obtain the mining licence are stipulated in the MMA. Though some areas are prescribed such as the royalties, section 86 of the MMA states that whatever royalty is agreed in the agreement has precedence over the prescribed rates. The actual regulations and explanations as to the exploration of the minerals are spelt out in the contract. This is why there is a need to have the contract accessible and available for the public.

Malawi ranks high on the corruption index and this is one of the factors that could deter investors from investing in the mining sector. One principal challenge faced by accountable governments in determining the policy framework for the exploitation of oil and minerals is the creation of a business climate that attracts private investment, a necessary precondition to the development of the extractive industries.¹¹⁰ This means Malawi at its early stages is meant to attract investments and this can be achieved by making the sector more transparent

¹⁰⁷ Cap 213, laws of Zambia

¹⁰⁸ See: <http://mwnation.com/ti-dares-malawi-on-mining-deals/> (accessed 11 March 14)

¹⁰⁹ S Bryan & B Hofmann (n 73 above)19

¹¹⁰ As above

to indicate the objective to eliminate corruption and negotiate mining deals which are beneficial to both the state and the investors.

Contract transparency ensures all stakeholders have sufficient information as to the administration of the mineral sector. Transparency can only work well if the targets of the calls for transparency are able and willing to provide the requisite information; and the recipients of the information are able to use it to evaluate the provider of the information according to some accepted standard of behaviour.¹¹¹ In a country where the degree of transparency is high, the government must be open to the public, be transparent in their decisions and actions and not withhold information that is in the public interest.¹¹² The public interest is to have a mining sector that benefits everyone and the evaluation of the performance of the sector is through inspection of the contracts to see the agreed standards and measure them against to what has been achieved.

The fact is that standards are set worldwide as to what should be expected from mining agreements. The investors need to have information as to what a host state is willing to offer and the best and fastest way to determine this is the existing contracts. Others argue that this will lead to a host failing to rectify its mistakes by showing potential investors a flawed existing contract. However, this study argues that the act of showing the information could be a bargaining point whereby you set the minimum a country willing to go in any agreement. This provides investors with an idea of what at the minimum is expected of them and the host can develop by working towards improving. Being transparent with contracts could entice other investors which could lead to competitiveness and therefore give an edge to the mining sector in Malawi.

There exist at present no systematic studies of the relative impact of transparency compared to other types of feasible policies in resource rich countries.¹¹³ This research argues that Malawi's mining sector is at its earliest stages and can benefit and grow more by being more transparent as to the administration of the sector.

¹¹¹ A Florini 'Does the Invisible Hand Need a Transparent Glove? The Politics of Transparency' (1999), Paper prepared for the Annual World Bank Conference on Development Economics, http://rendiciondecuentas.org.mx/data/arch_docu/pdf0042.pdf (accessed 16 May 2014) 6

¹¹² J Hongxin et al (n 56 above) 46

¹¹³ I Kolstad & A Wiig (n 39 above) 526

2.8 Conclusion

This chapter has unveiled that transparency is key to establishing a robust mining sector by providing information for public scrutiny; that it ensures accountability, curbs corruption and helps attract more lucrative investments. Transparency is the necessary evil to avoid the resource curse. It should be noted that transparency is no guarantee that the mining sector will grow and achieve developmental goals. However, the lack of transparency will lead to minimal investments which are not beneficial to a country. This chapter has demonstrated the importance of transparency specifically contract transparency. The next chapter will discuss one of the transparency initiatives called EITI that though it only focuses on revenue transparency, it provides a stepping stone to introduce transparency in the mining sector.

CHAPTER THREE

MALAWI AND EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE

3.1 Introduction

This chapter discusses the nature and scope of EITI, the extent of practice and the effectiveness of the initiative for those who have adopted it. It then makes case for Malawi to adopt it and evaluates the benefits of doing so. This chapter continues to discover methods in which Malawi can improve transparency in its mining sector. It exhibits this particular initiative as a stepping stone to greater transparency while demonstrating the lack of mandatory contract transparency which was concluded in the previous chapter as key to Malawi's transparency and researches how Malawi can overcome this shortfall while implementing the initiative still.

3.2 Background and nature of EITI

The first effort requiring disclosure of payments to governments is called the Extractive Industries Transparency Initiative (EITI) which is a set of reporting standards published by a coalition of companies, governments and non-governmental organizations (NGOs).¹¹⁴ EITI is projected to bring a connection between the government and its citizens providing them with access to information in order to curb corruption.¹¹⁵ EITI is a follow-up or model of the work being carried out by Transparency International.¹¹⁶

EITI is a brainchild of efforts by various groups of people. Some have said it was commenced in 2002 by a partnership of NGOs; it came as a reaction of the international community to the disclosure of mismanagement and embezzlement of oil and mining revenues in several African states and the degree of corruption and bribing of international companies pinpointed by reports from Global Witness (GW) such as "A crude

¹¹⁴ 'Disclosing Government payments: implications for oil and gas industries' (2013), Report by Ernst and Young, [http://www.ey.com/Publication/vwLUAssets/EY_-_Disclosing_government_payments_extraction/\\$FILE/EY-Disclosing-government-payments.pdf](http://www.ey.com/Publication/vwLUAssets/EY_-_Disclosing_government_payments_extraction/$FILE/EY-Disclosing-government-payments.pdf) (accessed 16 May 2014) 1

¹¹⁵ S Aaronson 'Limited partnership: Business, government, civil society, and the public in the Extractive Industries Transparency Initiative (EITI)' (2011) *Public Administration and Development* 31.1 51

¹¹⁶ S Bracking 'Hiding Conflict over Industry Returns: A Stakeholder Analysis of the Extractive Industries Transparency Initiative' (2009) BWPI Working Paper 91, <http://www.bwpi.manchester.ac.uk/resources/Working-Papers/bwpi-wp-9109.pdf> (accessed 20 December 2013)

awakening”.¹¹⁷ Others have stated that EITI was spearheaded by Prime Minister Tony Blair who launched EITI as the future global transparency standard.¹¹⁸ Regardless of who officially launched it, the EITI is a creation of scholarly research, policymaker initiative related to resolving the resource-curse and global civil society activism.¹¹⁹

As pointed out this idea was introduced as a solution to the resource curse being experienced in African nations rich in various natural resources¹²⁰ The EITI aims to join together various stakeholders in the extractive sector to attempt to defeat the ‘resource curse’ and bring benefits to the public in economic growth and poverty reduction.¹²¹ Under the EITI, the basic idea is that companies report payments they made to government which in turn reports revenues received from the companies;¹²² and these reports are compared to each other regardless of whether they are private, state-owned, domestic or foreign.¹²³ This initiative was founded with the expectation of improving governance and accountability to spur economic growth and reduce poverty.¹²⁴

The World Bank views EITI as sending an indication to all stakeholders and investors of a nation’s commitment to be transparent.¹²⁵ The World Bank is also involved by monitoring country behaviour and researches how countries can fully implement EITI.¹²⁶

By 2007 only 14 of the countries that had adopted EITI required firms to publish what they paid, published what they received, and had set up a diversified multi-stakeholder group to evaluate such accounting.¹²⁷ Same year the EITI divided countries into candidate and compliant countries. A candidate country only has to get four nominal sign-up

¹¹⁷ S Anayati ‘The “resource curse” and the Extractive Industries Transparency Initiative (EITI)” unpublished undergraduate dissertation, King’s College London, (2012) 17

¹¹⁸ D Ölcer ‘Extracting the Maximum from the EITI’ (2009) OECD Development Centre Working Paper No. 276, <http://www.oecd.org/development/pgd/42342311.pdf> (accessed 28 May 2014) 8

¹¹⁹ S Aaronson (n 115 above) 52

¹²⁰ ‘Malawi Extractive Industries Transparency Initiative (EITI): Processes and work done in the EITI debate in Malawi’ (2011) Report by the Ministry of finance and development cooperation, <http://eiti.org/files/processess-and-work-done-in-the-EITI-debate-in-malawi.pdf> (accessed 16 May 2014) 8

¹²¹ S Bracking (n 116 above) 1

¹²² <http://www.revenuewatch.org/news/indonesia-expected-announce-eiti-plans> (accessed 18 March 2014)

¹²³ D Ölcer (n 118 above) 13

¹²⁴ D Ölcer (n 118 above) 8

¹²⁵ A Ravat ‘Improving EI: emerging lessons and results from EITI implementation in the “GAC” context’ (2008) Presentation for PREM Week, World Bank, http://siteresources.worldbank.org/INTEXTINDTRAINI/Events/21865999/prem_week_2008_eiti_session_4-22-08.pdf (accessed 16 May 2014) 14

¹²⁶ S Aaronson (n 115 above) 53

¹²⁷ As above

requirements¹²⁸ and submit a proposal to the EITI International Board who certify them if satisfied¹²⁹ and these countries undergo validation process in two years and get awarded with compliant status if successful.¹³⁰ Though EITI has made significant progress, it is still limited if you consider that only 11 out of the 35 implementing countries are EITI compliant.¹³¹

Originally EITI had rules which were to be complied with. However, in May 2013, the EITI approved a revised standard that broadens the scope of the reporting obligations for EITI reporters known as the EITI standard. Going forward, in addition to disclosing revenue information, EITI reporters will also need to disclose information about production volumes, the names of companies holding licenses, and additional information about state-owned oil and gas companies.¹³²

The EITI has been strongly promoted in international development discourses as the instrument that will finally enable resource-rich countries to reap the benefits from their endowments and has thereby created excessive expectations about the impact it could have.¹³³ The objective of the EITI, as stated in its Association article number 2, emphasises the importance of transparency to improve the extractives sector based on an internationally accepted standard.¹³⁴

Basically, government discloses what they received and companies disclose what they paid independently to an independent auditor who reconciles both reports and produces a report. The EITI involves several steps and these are summarised in the diagram below:

¹²⁸ Requirements and validation will be discussed in detail later on in the chapter.

¹²⁹ http://www.renewwatch.org/training/resource_center/backgrounders/extractive-industries-transparency-initiative-eiti (accessed 24 March 2014)

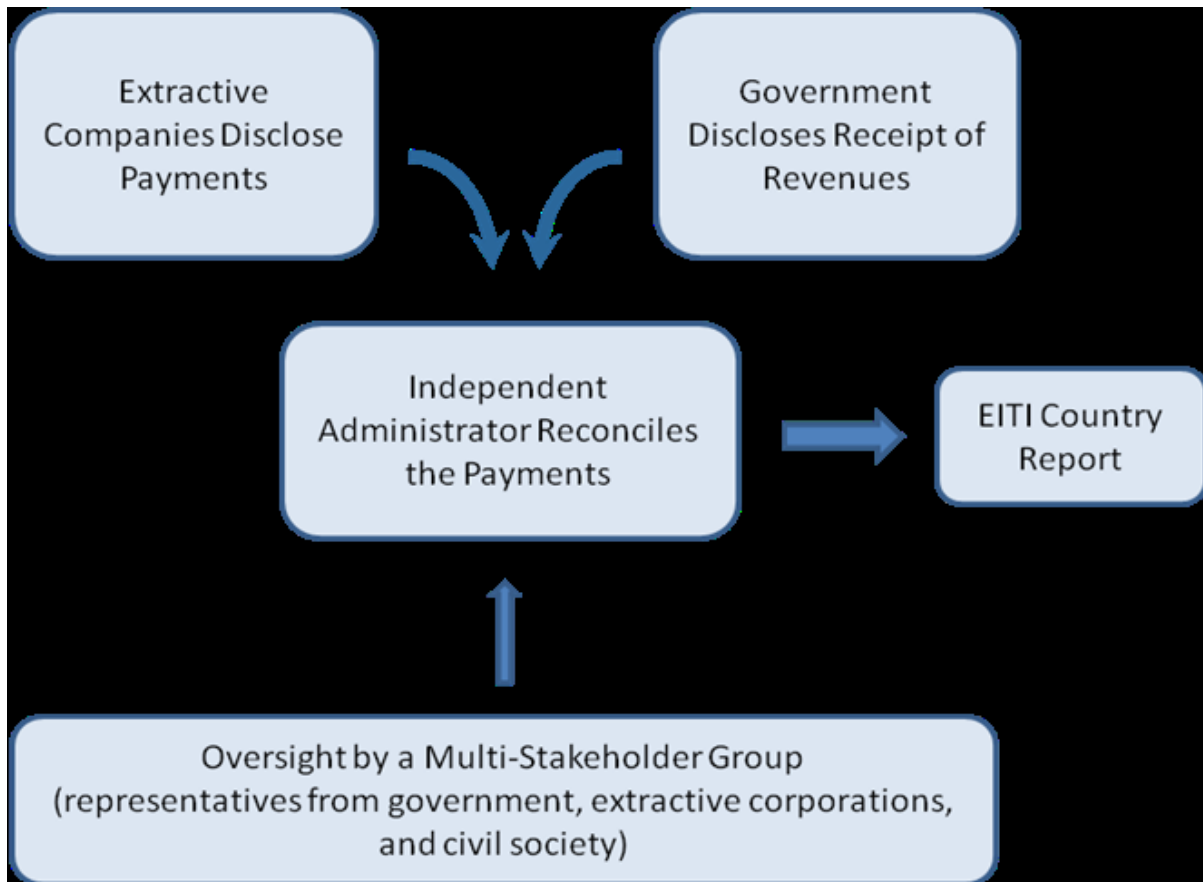
¹³⁰ http://www.renewwatch.org/training/resource_center/backgrounders/extractive-industries-transparency-initiative-eiti (accessed 24 March 2014)

¹³¹ 'Learning from the EITI: Lessons for Effective Country-By-Country Data Disclosure Requirements' <http://www.cidse.org/content/publications/business-a-human-rights/country-by-country-reporting/catholic-briefing-eiti.html> (accessed 27 March 2014) 2

¹³² Ernst and Young (n 114 above) 1

¹³³ D Olcer (n 118 above) 10

¹³⁴ S Anayati (n 117 above) 17



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3.3 Stakeholders of EITI

The EITI comprises of various stakeholders ranging from governments, companies, investors, civil society organisations, and partner organisations.¹³⁶

3.3.1 Government

From the outset, it should be pointed out that Government plays a central role in the implementation of EITI and not the civil society.¹³⁷ EITI accomplishes several goals economically and developmentally because the adoption of the EITI by country governments improves investment environment for companies and associated rises in fiscal revenue.¹³⁸ Government's involvement in EITI is in different forms. There are those governments of countries who have joined the initiative and are either candidate or compliant countries. Then there are those governments who are supporters of the initiative but they have not joined;

¹³⁵ D Olcer (n 118 above) 14

¹³⁶ <http://eiti.org/supporters/countries> (accessed 18 March 2014)

¹³⁷ Ministry of finance and development cooperation report (n 120 above) 10

¹³⁸ S Bracking (n 116 above) 12

they provide support varying from political, technical and financial support.¹³⁹ Normally, this is done by merely endorsing the initiative publicly. However, EITI has suggested or provided for other means for governments to be supporters.¹⁴⁰ Therefore, governments play a vital role either as members of the initiative or by merely supporting it in various ways.

3.3.2 Companies

EITI involves two sets of companies. The first category is those companies which are operating in countries who are implementing EITI. Extractive companies operating in countries implementing the EITI gain the opportunity to enhance their image and to interact more with the local community who they mostly affect by discussing how to manage risks associated with their businesses.¹⁴¹ These are companies obligated to report by mere existence in an implementing country. Then there are companies known as supporting countries. A Supporting Company publicly supports the EITI and helps to promote the Standard internationally and in countries where it operates and they are not obliged to report or disclose anything.¹⁴² To become an EITI supporting company, they are to publicly declare support for the EITI Principles as key requirement besides procedural filling in of application form and make an annual financial contribution to EITI management. Therefore extractive companies can form part of EITI either by being supporters or by operating in a country that implements EITI.

3.3.3 Investors

Investors contribute by explicitly stating their support for the EITI and assisting with the implementation while encouraging other companies to support it financially or through technical support.¹⁴³ Ultimately EITI is enabling the smooth operating of investments universally. This has led to some institutional investors to support it. David Diamond states that confidentiality in governance of extractive industries threatens investments since these are long term projects with a lot of capital involved and therefore requiring openness. That EITI has contributed to improving the investment climate by guaranteeing stability thereby providing opportunity for higher returns.¹⁴⁴

¹³⁹ <http://eiti.org/supporters/countries> (accessed 24 March 2014)

¹⁴⁰ <http://eiti.org/supporters/countries> (accessed 24 March 2014)

¹⁴¹ <http://eiti.org/supporters/companies/howto> (accessed 24 March 2014)

¹⁴² <http://eiti.org/supporters/companies/howto> (accessed 24 March 2014)

¹⁴³ <http://eiti.org/document/supporting-investor> (accessed 24 March 2014)

¹⁴⁴ <http://eiti.org/files/institutional-investors-fact-sheet-dec-2013.pdf> (accessed 24 March 2014)

Therefore, institutional investors support EITI because they benefit by ensuring companies they invest in are EITI compliant which enables the optimal usage of their investment in a transparent manner.

3.3.4 Civil society organisations/non-governmental organisations/Communities

These three are grouped together because the literature seems to use them interchangeably. EITI partners include: governments, extractive firms, NGOs (international and local), and more indirectly, the public. In general, citizens participate in discussions of EITI governance through the intermediation of NGOs.¹⁴⁵ This complexity is partly as a result of the EITI formulation, since within EITI, there is a broad definition of communities as a stakeholder, which also includes civil society organisations which seem to be critically sponsored by donors for the purposes of fulfilling this oversight function, on behalf of a more imagined ‘community’.¹⁴⁶

The World Bank recommended that governments view NGOs as collaborators rather than “watchdogs,” that can facilitate accurate timely information to stakeholders.¹⁴⁷ There are several constraints to NGO effectiveness in fulfilling this role. Policymakers must provide access to information which NGOs must effectively communicate to the citizens who in turn must be able to comprehend what the multi-stakeholder group reports.¹⁴⁸

Anayati emphasises the need for civil society to be involved and independent and government must ensure civil society and companies are able to adequately prepare for full and active participation and that it must address potential capacity constraints affecting civil society participation relating to the EITI, whether undertaken by government, civil society or companies.¹⁴⁹ Therefore EITI fuses together the community that is affected due to the extractive industries operations whose concerns are expressed by NGOs and civil societies who are entrusted with the duty to monitor governments as independent auditors and spectators.

¹⁴⁵ S Aaronson (n 115 above) 53

¹⁴⁶ S Bracking (n 116 above) 10

¹⁴⁷ S Aaronson (n 115 above) 56

¹⁴⁸ S Aaronson (n 115 above) 53

¹⁴⁹ S Anayati (n 117 above) 19

Therefore, EITI has various parties who play a dynamic role to ensure realization of the initiative. One unifying element and their common purpose is the rhetoric of resource transparency.¹⁵⁰

3.4 Scope of EITI

In terms of scope of EITI, it is limited in several ways. First, it is limited in that it was launched to only apply to extractive industries such as oil, gas and mining. In countries participating in EITI, companies exploring the three required extractives are required to publish what they pay to governments and governments are required to publish what they receive from companies.¹⁵¹ Though the EITI does not expressly state the limitation, this is implied in that these are the only extractive areas referred to throughout the EITI rules and regulations. While extractive industries are referenced generally, the EITI criteria repeatedly refer to oil, gas and mining.¹⁵²

However it should be noted that this is not a restrictive limitation and this has led to some countries extending the scope. Implementing countries decide what to include within the extractive industries scope, which companies to include or exclude from the EITI reports, define a materiality threshold.¹⁵³ For instance, when Liberia joined the EITI, it decided to include forestry.¹⁵⁴

Secondly, it is limited in that it only applies to voluntary members hence being termed a voluntary initiative.¹⁵⁵ Meaning only countries that willingly express their interest to join can become compliant and each country bears the responsibility of implementation.¹⁵⁶ Therefore, this factor makes the EITI voluntary. Its voluntary nature has raised concerns that some governments can ignore, abandon, or implement EITI selectively.¹⁵⁷ The voluntary nature is

¹⁵⁰S Aaronson (n 115 above) 56

¹⁵¹<http://www.revenuewatch.org/issues/eiti> (accessed 24 March 2014)

¹⁵² Ernst and Young (n 114 above) 2

¹⁵³ Learning from the EITI: Lessons for Effective Country-By-Country Data Disclosure Requirements' <http://www.cidse.org/content/publications/business-a-human-rights/country-by-country-reporting/catholic-briefing-eiti.html> (accessed 27 March 2014)

¹⁵⁴ <http://eiti.org/files/LEITI-forestry-report.pdf> (accessed 24 March 2014)

¹⁵⁵ <http://eiti.org/blog/voluntary-dimension-eiti#> (accessed 24 March 2014)

¹⁵⁶ Ernst and Young (n 114 above) 1

¹⁵⁷ S Aaronson (n 115 above) 57

what attracts governments and extractive firms whereas NGOs and some donors would like to see the EITI process become mandatory.¹⁵⁸

However, the conundrum of the voluntary description arises when with regards to companies that are in existence prior to the EITI implementation and are obliged to comply. These companies have no choice but to report when in EITI implementing countries.¹⁵⁹ Inadvertently, it is contended that the EITI is a voluntary process since governments and extractive corporations need to agree to adopt the initiative in order for publication of data to be allowed and the lack of enforceability.¹⁶⁰

Lastly, it is limited in that it is only about revenues. The EITI is an international standard for transparency in extractive industry payments and receipts;¹⁶¹ meaning it only covers revenue transparency. However, the new EITI standard has stretched its coverage to the value chain.¹⁶² Other transactions of extractive industries are not within the fixed scope of the EITI.

3.5 Requirements

A government intending to implement the EITI Standard is required to undertake certain steps before applying to the international EITI Board for EITI Candidate status. These include announcing a clear statement of the government's commitment, developing a work plan setting objectives of what it wants to gain from EITI and the method and procedures to be followed to obtain EITI Compliant status, and the establishment of the MSG.¹⁶³

There are 21 requirements for a country to be EITI compliant. And these are grouped into sign-up, preparation, disclosure, dissemination, review and validation and retaining compliance requirements.

¹⁵⁸ S Aaronson (n 115 above) 57

¹⁵⁹ <http://eiti.org/blog/voluntary-dimension-eiti#> (accessed 24 March 2014)

¹⁶⁰ D Olcer (n 118 above) 21

¹⁶¹ http://www.renewwatch.org/training/resource_center/backgrounders/extractive-industries-transparency-initiative-eiti (accessed 24 March 2014)

¹⁶² <http://www.publishwhatyoupay.org/activities/advocacy/extractive-industries-transparency-initiative> (accessed 24 March 2014)

¹⁶³ 'Beyond Transparency' (2013), EITI progress report, <http://eiti.org/files/EITI-progress-report-2013.pdf> (accessed 16 May 2014) 13. Also see: <http://eiti.org/files/EITI-fact-sheet-English.pdf> (accessed 28 May 2014)

3.5.1 Sign-up requirements

The first step for any interested country is of course, a sovereign decision by the government to express willingness to join and to fulfil EITI.¹⁶⁴ In order for a country to become EITI compliant, the government must issue an unequivocal public statement of its intention to implement the EITI and then meet a series of sign-up requirements that establish its dedication to implement the EITI process in the candidate country.¹⁶⁵ Summarily, the rest of the sign-up requirements are that government express their commitment to work with civil society and companies to implement EITI; they are to appoint a senior officer to lead the implementation of EITI, they are to set up a multi-stakeholder group to oversee the implementation who lay out the schedule for the implementation.¹⁶⁶

3.5.2 Preparation requirements

There are numerous preparation requirements which include government ensuring the independence of civil society and companies and their participation to remove all hindrances to implementation, the MSG to define materiality of reports and provide templates. Government is to ensure all companies and government entities report resembling the internationally accepted report standards.¹⁶⁷ There is need to ensure they address potential capacity constraints affecting civil society participation relating to the EITI, whether undertaken by government, civil society or companies.¹⁶⁸

3.5.3 Disclosure requirements

As reiterated, companies disclose their payments and conversely governments report revenues received. The MSG is to ensure the agency entrusted to reconcile the figures does it satisfactorily who in turn are expected to give a report of the reconciled figures by highlighting any discrepancies. These discrepancies are to be explained and where necessary make recommendations for remedies.¹⁶⁹

¹⁶⁴ Ministry of finance and development cooperation report (n 120 above) 9

¹⁶⁵ Ernst and Young (n 114 above) 1

¹⁶⁶ Requirements of EITI rules (2011) see: <http://eiti.org/requirements-2011-eiti-rules> (accessed 25 march 2014)

¹⁶⁷ Requirements of EITI rules (2011)(n 177 above)

¹⁶⁸ S Anayati (n 117 above) 19.also see: http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf (accessed 28 May 2014)

¹⁶⁹ Requirements of EITI rules (2011(see note 59 above)

3.5.4 Dissemination requirements

This entails that government and MSG ensure the report is comprehensible and publicly accessible for debate.¹⁷⁰

3.5.5 Review and validation requirements

Oil, gas and mining companies must support EITI implementation and the government and multi-stakeholder group must take steps to show they have learnt, address inconsistencies and ensure that EITI implementation is maintainable. Implementing countries are required to submit Validation reports in accordance with the deadlines established by the Board.¹⁷¹

3.5.6 Retaining compliance requirements

Basically membership depends on compliance of each country to the requirements to continue holding the compliant status.¹⁷² Candidates have committed to EITI, committed to work with NGOs and the private sector, selected an official to lead EITI implementation, and published a work plan. Implementing countries must become compliant within two years or they will be asked to leave. Compliant countries not only disclose and engage with the multi-stakeholder group, they also have validated the required stakeholder consultation process.¹⁷³

Candidate countries have 18 months to publish a first EITI Report that discloses all of the figures and information required by the MSG and in line with the EITI Standard. To become EITI Compliant, the country has to complete Validation, a quality assurance of their EITI, and submit the final Validation report within 2.5 years from the date that the country was designated as Candidate. Being Compliant means that the country has a working process for ensuring the required levels of transparency in their natural resource sector, and a platform for discussing how transparency and accountability in the sector should be further improved.¹⁷⁴

Aaronson argues that though EITI is voluntary it places three mandatory duties on government. First, she points out that it is imperative for government to require extractive companies to publish what they are paying as consideration for the right of extraction and exploration of minerals. Secondly that government should delegate an independent

¹⁷⁰ Requirements of EITI rules (2011)(n 177 above)

¹⁷¹ Requirements of EITI rules (2011)(n 177 above)

¹⁷² Requirements of EITI rules (2011)(n 177 above)

¹⁷³ S Aaronson (n 115 above) 53

¹⁷⁴ EITI progress report (2013) (n 163 above) 13

administrator to comparatively analyse the sales and revenues reported by government. And lastly they should create a MSG responsible of evaluation and review of government and companies reports¹⁷⁵

3.6 Principles

EITI has 12 principles and they are that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts; that management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development. They also highlight the importance of following revenue streams from resource extractions which should benefit all citizens.¹⁷⁶ However, the rest of the principles hinge on transparency and accountability which will now be discussed in detail as this study focusses on this area.

3.6.1 EITI in relation to transparency and accountability

In a survey carried out by Revenue Watch Institute (in Dykstra 2011), it emerges that the two main reasons why participants joined EITI are to increase transparency through publication of company payments and government revenues and to increase accountability of the government for extractive revenues.¹⁷⁷ Principles 4 to 9 of EITI speak of transparency and accountability underlining the importance of transparency to ensure accountability and efficient management of public finances and that this can be done by upholding the rule of law and contracts made. They state that through transparency of revenues and government expenditure to citizens and potential investors there is an increased FDI flow.¹⁷⁸

The EITI was commenced with the goal of enhancing good governance of natural resource development through improving transparency and accountability in the extractive industries.¹⁷⁹ Promoting transparency in resource-rich countries is the fundamental purpose of EITI.¹⁸⁰ S Anayati suggests that EITI, despite contributing to transparency in the extractive

¹⁷⁵ S Aaronson (n 115 above) 51

¹⁷⁶ <http://eiti.org/eiti/principles> (accessed 27 March 2014). Also see D Olcer (n 124 above) 10

¹⁷⁷ S Anayati (n 117 above) 22

¹⁷⁸ <http://eiti.org/eiti/principles> (accessed 27 March 2014)

¹⁷⁹ Ernst and Young (n 114 above) 2

¹⁸⁰ S Anayati (n 117 above) 18

industries, should revise its objectives, focusing on more realistic goals, particularly the enhancement of transparency, which is the reason why EITI was created to begin with.¹⁸¹

The importance of transparency and accountability is emphasised by making it core requirements of remaining EITI compliant. Compliance hinges on two components: revenue receipt disclosure and the creation of a multi-stakeholder body to oversee implementation.¹⁸² This means there is need to be transparent in the revenue receipt which involves full disclosure and to be accountable to the MSG which oversees the whole implementation of EITI.

EITI was established to ensure all citizens benefit from their natural resources. The principal mechanism which serves to bring these benefits is the transparent reporting of what companies pay and what governments receive in terms of mineral-related profits and rents.¹⁸³ Therefore, the existence of EITI and its core principles are centred primarily on the increasing of transparency and ensuring accountability

3.7 Benefits in relation to effectiveness of EITI

There are several benefits which are linked to EITI. First in terms of investment, EITI has shown a spur of investments in countries that have adopted EITI. The World Bank and the EITI argue that the results of EITI will be a stronger governance platform, improved trust, a better investment climate, and more foreign investment.¹⁸⁴ EITI reflects dedication of a country to be transparent and fair with all investors. It enables investors to know they will not be subjected to unknown costs during the time of investment. The Deputy Oil Minister of Indonesia determined that EITI enhances the investment climate by lowering information and transaction costs for firms by more clearly defining what revenues they are supposed to pay and why.¹⁸⁵

EITI reflects government's commitment to have a fair playing ground for all investors. It shows there is good governance in a country which is a concern for investors especially in countries in Africa which are known for many hindrances in their governance. Corruption is a major deterrent for both domestic and foreign investors and therefore a major barrier to investment. By taking voluntary steps towards the implementation of the EITI, countries send

¹⁸¹ S Anayati (n 117 above) 26

¹⁸² A Gillies (n 25 above) 16

¹⁸³ S Bracking (n 116 above) 1

¹⁸⁴ S Aaronson (n 115 above) 54

¹⁸⁵ S Aaronson (n 115 above) 54

signals about their intention to reform and create a sound business environment, which further attracts investors.¹⁸⁶ It is a clear signal to all stakeholders and investors on national commitment to transparency.¹⁸⁷ Therefore, EITI is effective because it shows the investors the willingness to be transparent and fair which is an important criteria for investors

Another benefit of EITI is that it implements a standardised, internationally recognized procedure for transparency in natural resource management.¹⁸⁸ There is need to measure the standard of an area at the same wave length. Transparency could mean different things for different countries depending on circumstances within the country. EITI provides a unified standard which every member is to abide by without favour to any members' circumstances. The levels of transparency reached are measured against an equal yardstick which is internationally recognized.

Additionally, EITI helps curb corruption and rent-seeking. Corruption is one of the symptoms of the resource curse. Improved transparency in the transactions between governments and extractive corporations means that there should be less room for hidden or opaque behaviour since illicit activity should be easily detected which in turn should lead to more revenue being paid into the government budget.¹⁸⁹ The EITI report, stating the revenues, payments and the discrepancies found, is then made publicly available and is expected to generate a debate and allow in-country civil society organisations to hold their governments accountable for any discrepancies.¹⁹⁰ However, this needs government to fully commit to curbing corruption. Because, according to the World Bank Worldwide Governance Indicators, control of corruption in EITI countries is actually worse than in non-EITI resource-rich countries.¹⁹¹ Therefore as much as EITI helps bring the subject of corruption to the fore to be dealt with, there is need for governments to commit to curbing it because merely being an EITI member will not curb it. There is need for political will on their part. This is a significant policy challenge that needs to be addressed, as corruption doesn't take place merely during

¹⁸⁶ D Olcer (n 118 above) 14

¹⁸⁷ A Ravat (n 125 above) 16

¹⁸⁸ Ministry of finance and development cooperation report (n 120 above) 12

¹⁸⁹ D Olcer (n 118 above) 14

¹⁹⁰ D Olcer (n 118 above) 13

¹⁹¹ D Olcer (n 118 above) 10

transactions between companies and government, but also during the allocation of revenues to different governmental agencies.¹⁹²

It also helps improve a country's access to capital. EITI-implementing countries benefit from better access to capital since several donor institutions require disclosure of payments. Rating agencies also give countries credit for endorsing the EITI, which helps the country in question to attract more capital. Given the capital intensity and technological sophistication needed in the extractive industries, in combination with long-term stability, to generate return, this aspect is of great importance.¹⁹³

Furthermore, it helps building capacity and empowers civil society. The citizens of many resource-rich countries are poorly informed about their government's revenues from the extractive industries and the actual value of the resources. Since access to this type of data has been very limited in the past, the citizens of these countries have not been able to question or monitor government activities. The EITI could therefore be a first step towards building.¹⁹⁴ EITI will help enable citizens and civil society hold government accountable and ensure the revenues from their resources are protected from being squandered by a few elite. Benefits to civil society come from increasing the amount of information in the public domain about those revenues that governments manage on behalf of citizens, thereby making governments more accountable.¹⁹⁵

However this study argues that EITI has several benefits but the effectiveness of EITI depends on what particular shortfalls in the sector you are trying to rectify and in order to benefit satisfactorily; there is need for political will on various stakeholders.

3.8 Challenges and shortfalls

Though EITI has some vivid benefits which are proven with data on impacts on various countries, on its own there are several shortfalls which can be rectified or improved on.

First, EITI just focusses on revenue transparency and no other areas of natural resources administration. For instance, the allocation of licences and contracts to companies is excluded. The UK recommended that EITI needs to decide how to apply its principles to this

¹⁹² S Anayati (n 117 above) 22

¹⁹³ D Olcer (n 118 above) 14

¹⁹⁴ D Olcer (n 118 above) 14

¹⁹⁵ <http://eiti.org/eiti/benefits> (accessed 27 March 2014)

area by requiring contracts and other key information be made public, and/or by giving the national EITI the right to review bidding and contracting processes which would emulate the Liberian implementation.¹⁹⁶ EITI merely states that governments should report what they receive; there is no requirement to disclose what was agreed in terms of the contract or how these revenues have been utilized to further development within the country which ultimately benefits all citizens. Furthermore though EITI focusses on revenue transparency, this is not obligatory transparency in terms of the citizenry. Aaronson concludes that EITI's effectiveness depends on the government's willingness to give information to citizens who can hold them accountable. She argues that EITI provides a platform for various stakeholders to ensure there is solid governance of revenues and empowers a variety of opinions to decide the fate of extraction activities in the country. She notes with dismay that EITI is hampered by lack of consensus of stakeholders' objectives and the reluctance of government to involve citizens in EITI implementation.¹⁹⁷ The writer concurs that the effectiveness of implementation heavily depends on the government. Assessment of governance of revenue is impossible if government does not release information to be held accountable. This is problematic because it relies on the willingness of government to play their role as the driving force of implementation.

Secondly, the partners have different visions of EITI. Aaronson has described EITI as a limited partnership because some implementing governments have not allowed full-participation of civil society in the process or provided information to them to enable them to hold government accountable. She also highlights the problem of lack of EITI awareness in most countries on the part of law makers and citizens; she notes with concern the unlikelihood of positive impact if these two partners remain silent as corruption will remain rampant and limitless.¹⁹⁸ Additionally, Gillies argues that leniency on non-compliant participating countries will attenuate the effectiveness of its principles.¹⁹⁹ Whereas, Olcer criticises the quality of information published of which currently EITI only requires that material payments made by companies and the revenues received by the government are reconciled and that the results are published and doubts its helpfulness.²⁰⁰

¹⁹⁶ <http://www.publishwhatyoupay.org/sites/publishwhatyoupay.org/files/SWG%20EITI%20-%20PWYP%20United%20Kingdom.pdf> (accessed 24 March 2014)

¹⁹⁷ S Aaronson (n 115 above) 56

¹⁹⁸ S Aaronson (115 above) 54

¹⁹⁹ A Gillies (n 25 above) 17

²⁰⁰ D Olcer (n 118 above) 17

Anayati concludes that EITI achieves its best performance with regard to the implementation of transparency and disclosure of revenues in resource-rich countries but that the mechanisms that allow greater transparency fail to thoroughly address the issues of accountability and good governance, which are not even clearly pursued by EITI requirements; EITI needs to improve the enforceability and compulsory character of its disclosure mechanism and broaden its target and promote training and capacity-building of the domestic legislators.²⁰¹ This writer agrees that the key role of the lawmakers cannot be overlooked because it is their enactment of laws to implement EITI that will ensure compliance and enforcement by all stakeholders in the country. Legislation is required to stipulate what mechanisms are in place to mandate the implementation of EITI principles

3.9 Making a case for Malawi

Malawi was initially approached to adopt EITI in 2009.²⁰² Since 2002, 35 countries have joined the initiative out of which 22 are from Africa including Malawi's neighbours, Tanzania, Mozambique and Zambia.²⁰³ A taskforce was instituted to carry out investigation as to whether Malawi should adopt EITI. The first national stakeholders meeting was carried out in 2010 where majority opposed the adoption of EITI; the main argument being that Malawi's extractive industry was still in its infancy stages with a feeble framework and needing time before adoption of initiatives like EITI.²⁰⁴

They questioned if Malawi even qualifies as a 'resource-rich' country.²⁰⁵ They also argued that since EITI is about revenue transparency and not on granting on contract and environmental impact assessment, EITI is not vital to Malawi since revenues are already disclosed by government.²⁰⁶

This study argues that EITI does not require the country to be resource rich to join EITI, it merely requires a country to have resources such as minerals, oil and gas which they receive revenue from to be subjected to EITI standard. Though countries who have implemented it are mostly resource-rich, it does not exclude those who are not 'resource-rich' in tandem with

²⁰¹ S Anayati (n 115 above) 25

²⁰² Ministry of finance and development cooperation report (n 120 above) 7

²⁰³ Ministry of finance and development cooperation report (n 120 above) 8

²⁰⁴ Ministry of finance and development cooperation report (n 120 above) 14

²⁰⁵ 'Does Malawi need EITI' (2012) Paper presented by the revenue division of the Ministry of Finance, Malawi, (accessed 16 May 2014) 2

²⁰⁶ Ministry of finance paper (n 205 above) 3

the IMF definition of having GDP exceeding 25%²⁰⁷. Furthermore though government discloses the revenues, there is no disclosure from companies as to their payments to ensure if there are no discrepancies.

Citizens for Justice (“CJP”) organised a symposium in 2012 for Legislators to discuss EITI.²⁰⁸ This was done to educate legislators about their role on implementation of EITI and to understand their duties with regards to the same. So far it is reported that there is a current draft cabinet paper seeking cabinet approval of EITI and implementation of activities spearheaded by the EITI Taskforce.²⁰⁹

3.8.1 Reasons for joining

This study argues that Malawi’s extractive industry sectors are shrouded in secrecy particularly the Mining Sector. Very little is known of the administration of minerals in Malawi. It has been pointed out that the while government may wish to keep contents of Agreements with mining companies confidential, withholding such information may be construed as a way of hiding either corrupt practices or poor decisions. The existing information gap²¹⁰ should be plugged because resources like oil and minerals belong to a country’s citizens and their extraction and monetization can lead to economic growth and social development.²¹¹

Due to the many disagreements between civil society, citizens and government, this study argues that this has impeded the achievements of the mining sector and that this can be improved by joining the EITI. A company called Ernest and Young reports that greater transparency in the extractive industries will support proper development.²¹²

Eads et al point out the complexity of the mining sector owing to different tax systems, mineral diversity and numerous companies with anecdotal size and the presidential impact on the local community which presents challenges when working to improve transparency in the

²⁰⁷ As above

²⁰⁸ http://www.cfjmalawi.org/Press_Releases/EITI_Legislators_Symposium.html (accessed 27 March 2014)

²⁰⁹ <http://www.cfjmalawi.org/Projects/EITI.html> (accessed 27 March 2014)

²¹⁰ Ministry of finance paper (n 205 above) 9

²¹¹ ‘History of EITI implementation by Trinidad and Tobago’ (2013), Report by the steering committee of Trinidad and Tobago Extractive Industries Transparency Initiative (TTEITI), <http://www.tteiti.org.tt/wp-content/uploads/downloads/2013/09/TTEITI-History-of-Implementation-2010-July-2013-13.8.2013.pdf> (accessed 16 May 2014) 3

²¹² Ernst and Young (n 114 above) 1

revenue flows that the sector generates unlike in oil and gas sectors.²¹³ They argue that the mining sector has mysterious revenues since their method of realisation is confidential which is unfortunate since the non-renewable minerals exploited have public owners.²¹⁴ The writer concurs to the extent that government owes explanation to the people whose resources they have been entrusted to control as to how this administration is being conducted. There is need to assure the administration is successful because the lifespan of these minerals is finite.

Malawi needs to utilise the existing resources optimally before they become a story of the past. One of the ways to attract more lucrative investments and to give confidence to investors is by adopting the EITI. Malawi, as mentioned earlier, is not faring well on the corruption index. The effects are in two-fold. Malawi either attracts investors who take advantage of the corrupt means existing in the nation or it deters investors who could contribute to the country's development massively. The Kayelekera mine agreement has been cause for current debate as to whether Malawi is really benefitting. Questions as to what is being realised have been brought up. It has been argued that transparency will not 'solve all problems' but is part of wider reforms and this writer contends Malawi needs to introduce transparency in its mining sector to reform it.²¹⁵

Anayati points out that data is not always disclosed by government and extractive companies; that there is no modelled form of reporting being followed to enable government to track source of particular revenue which renders it difficult to investigate the discrepancies in reports.²¹⁶ This study contends that since Malawi only has a few mines it should not be hard to track all the data needed and this will enable it to design a model form of reporting before other mines are established.

Developing country policymakers seem to like EITI because it is voluntary and relatively cheap to implement; they view the positive investment spillovers from EITI as outweighing the costs of compliance.²¹⁷ Malawi will lose more from not joining than the cost of joining. Joining will be a way for Malawi to communicate to potential investors its commitment to transparency and good governance.

²¹³ C Eads; P Mitchell & F Paris(eds) 'Advancing the EITI in the mining sector: a consultation with stakeholders' (2009) EITI report, <http://eiti.org/files/MINING%20Compressed.pdf> (accessed 16 May 2014) 5

²¹⁴ C Eads; P Mitchell & F Paris(eds) (n 213 above) 8

²¹⁵ <http://www.mineweb.com/mineweb/content/en/mineweb-fast-news?oid=209205&sn=Detail> (accessed 19 March 2014)

²¹⁶ S Anayati (n 117 above) 19

²¹⁷ S Aaronson (n 115 above) 57

3.8.2 Additions to standard EITI

Ernest and Young point out that ideally the EITI framework and disclosure requirements should be into individual country's law which consequently impacts operational extractive industry companies in the country.²¹⁸ This study argues that Malawi should indeed adopt EITI but states that it should go a step further than what is required by the mandatory EITI standard.

Primarily, Malawi should not just enforce revenue transparency but contract transparency as well. As pointed out before, the success of the mining sector heavily depends on the contract which regulates the administration of the sector. Disclosure of revenues received should be strengthened by providing accessibility of contracts for stakeholders and independent auditors to decipher what was theoretically promised in the agreement and what in practice has been received. This is important because it will curtail corruption which is uncontrolled during the awarding of contracts which is not monitored or rarely accounted for thereby exposing companies that have taken advantage and made raw deals.

Additionally the importance of widening the scope of EITI can be supported by Cambodia which refused to join EITI because it does not include the foundation of choosing the company to invest until the final phase of the services quality monitoring.²¹⁹ Therefore Malawi could still join but widen the scope to cover contract transparency which is vital to the fruition of the mining sector.

Malawi could do so by also incorporating PWYP. PWYP is not a standard, but an international campaign carried out by NGOs in their domestic countries. It supports EITI and relies on its structured mechanism of disclosure. They differ in terms that PWYP stresses the importance of disclosure of government expenditures and encourages more control through the public disclosure of licensing procedures and contracts.²²⁰ Therefore this study recommends that in addition to EITI, Malawi should adopt PWYP policies which encourage disclosure of contracts and already works alongside EITI

²¹⁸ Ernst and Young (n 114 above) 1

²¹⁹

<http://www.publishwhatyoupay.org/sites/publishwhatyoupay.org/files/CRRT%20Letter%20of%20Support%20to%20shaping%20the%20future%20of%20the%20EITI.pdf> (accessed 27 March 2014)

²²⁰ S Anayati (n 117 above) 17

3.9 Malawi's existing frameworks aligned with EITI

As pointed out Malawi is not a member of EITI yet. However it has international obligations already which are analogous with the principles of EITI.

Malawi is one of the members of Southern Africa Development Community (SADC). As a SADC member it has adopted several international agreements and one of which is the SADC Protocol against Corruption (SPOC). Article 4 of the SPOC lists preventive measures of corruption. And one of the preventive measures in Article 4(1) (d) is that members should put in place mechanisms to promote access to information to facilitate eradication and eliminate opportunities for corruption. This means Malawi adopting EITI would be a form of implementing this preventative measure because EITI enforces access of information which in turn will reduce levels of corruption in Malawi.

There is also the African Union Convention on Preventing and Combating Corruption (ACPC) and the United Nations Convention against Corruption (UNCAC) which Malawi is also a member of. Malawi is legally obliged in terms of these conventions besides to open up its system including mining to public scrutiny as a method to fight corruption and increase public confidence in government and mining.

3.9 Conclusion

EITI has contributed to the improvements and success of various extractive industries around the world. Malawi should adopt EITI if it will ensure the optimal usage of her resources to develop and economically grow. It should go a step further and include in its EITI scope contract transparency and not merely revenue transparency. EITI is a voluntary process unlike other international laws Malawi is bound by. And this chapter has demonstrated that EITI is already aligned with Malawi's existing international obligations. The benefits of joining are not disputable and its implementation will enforce principles already in practice. However the next chapter will now discuss the interplay of specific EITI principles in line with existing domestic laws such as tax laws and its application to existing mining contracts. The importance of discussing EITI's alignment with domestic laws despite consistency with international obligations rests on the inapplicability of international laws until domesticated into national legislation thereby highlighting the legitimacy to comparatively analyse EITI in light of domestic laws.

CHAPTER FOUR

LEGAL IMPLICATIONS FOR ADOPTION OF EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE

4.1 Introduction

This study argues that it is necessary for Malawi to adopt EITI. However, in order for effective implementation, there is need to codify the initiative's objectives and principles into a domestic legislation. This has legal implications on existing contracts which is the agenda for discussion in this chapter. Furthermore, this chapter will examine as case studies Nigeria and Liberia which have implemented EITI to elicit lessons Malawi can learn from them.

4.2 EITI as a 'soft law'

Once Malawi has become EITI compliant there is a need to ensure there is optimal benefit from joining the initiative. And the most important step towards achieving that is to codify the objectives and principles of the initiative into legislation. This is so because EITI is considered soft law and not enforceable²²¹. This notion of it being soft law has been underscored by attempts by several countries to make it into hard law. For instance its revenue transparency principles reflected in section 15.04 of the US Dodd Frank legislation which stipulates energy and mining companies registered in the country to disclose payments to governments²²². Whereas some have gone a step further and made a whole legislation on EITI like Liberia to ensure enforceability²²³. This study argues EITI as an international standard will also be regarded as soft law in Malawi because section 211 of the COM designates international law, standards or agreements entered after the enactment of the COM to not be binding unless it is enacted into domestic legislation. The only way to ensure enforceability in Malawi is through enactment into domestic law.

As reiterated, EITI is a voluntary initiative and non-compliance of it does not entitle hard penalties on the country. The only form of punishment is the suspension of the member as witnessed when the EITI Board suspended Yemen due to failure to publish 2011 report by end 2013²²⁴. However besides a negative image attached with suspension for lack of

²²¹ A Budeanu 'The Extractive Industries Transparency Initiative (EITI)' (2013) Romania energy centre research paper, http://www.roec.ro/wp-content/uploads/2013/02/Budeanu_EITI_Jan_2013.pdf (accessed 16 May 2014)

²²² <http://www.iied.org/extractive-industries-transparency-initiative-no-more-hanky-panky> (accessed 8 April 2014)

²²³ This will be discussed in detail further in the chapter as it is one of the case studies.

²²⁴ <http://eiti.org/Yemen> (accessed 8 April 2014)

compliance; the damage is not massive unlike if it was a penal act done with the backing of domestic law.

Therefore this research argues that Malawi should enact legislation on EITI to ensure compliance by clearly stating the consequences of non-compliance which will incur penalties and punishments in the form of imprisonment of the officials responsible for the non-compliance. This will ensure effectiveness as there will be enforcement; and implementation is inoperable if there is no mechanism for enforcement.

4.3 Domestic Laws affected by proposed EITI legislation

Malawi currently has laws which will be affected by the proposed EITI legislation. These laws will be analysed in turn to see if there are inconsistencies which Malawi needs to look into. From the outset, it should be pointed out that the constitution is the supreme law in Malawi according to sections 5 and 199 of the COM. After the COM the second main source of law are Statutes. Section 48 (2) of the COM stipulates that statutes are superior to other sources of law apart from the COM. Therefore there is need for this study to evaluate the proposed EITI legislation in line with the COM and other statutes which are superior or equal in ranking respectively. Identification of inconsistencies will assist with pinpointing solutions.

4.3.1 The Constitution

Laws with time are bound to be inconsistent especially when new laws are enacted in response to new developments which are contrary to past realities. The supremacy of the COM over new laws and all other forms of law is stipulated in sections 5 and 199 of the COM and it further declares the invalidity of laws inconsistent with the COM. And section 10 (2) states law makers should be cautious of the principles of the COM when enacting new statutes and other laws. This principle was reiterated in the case of **State v Ex parte Muluzi and Another**²²⁵ where judge held that the Constitution is supreme and sets the standard against which all acts and actions of the Government must be tested and judged

This proves the imperative for this study to evaluate if the EITI legislation on its own would be in line with the COM. This study asserts that the COM has principles which support the implementation of EITI.

²²⁵ Constitutional civil cause number 2 of 2009

First, EITI encourages transparency during the administration of the extractives. The principle of transparency is fundamental in the COM. Section 12 (1) (c) provides the fundamental duty government has to be accountable, open and transparent as a condition of the power entrusted on them. One form of entrustment is stipulated in Section 2 of the MMA which provides that the president has been given control over the minerals on behalf of the people. EITI as echoed seeks to ensure that the extractive sector is administered in a transparent manner to ensure citizens whose resources are extracted for their benefit are given opportunity to scrutinize this transaction. Therefore the principle of transparency is already reflected in the COM.

Additionally, Section 37 of the COM stipulates citizens have a right to access information held by the State and its institutions if this information will enable them to exercise their rights. This section entitles citizens to have access to any information held by the government but this is supposed to be information required to exercise their rights. The debate is whether information on how the extractive industry is performing or how much companies are paying is in accordance with exercise of their rights. This research argues that it is because citizens want this information in order to exercise their rights to opinion and expression which are also provided for in the same constitution.²²⁶ However these are not absolute rights; these right can be limited. Section 44 of the COM provides that these limitations or restrictions may be placed on the exercise of any rights and freedoms provided for in the COM other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

Many countries also limit the right to confidential information such as Mining contracts. However, this right cannot be limited if this is prescribed by law. Therefore if section 37 can be supported by another Act then it will be an exception to the limitation and this is achievable with enactment of the proposed EITI legislation. The EITI will enforce the rights provided for under section 37 by allowing citizens to have access to confidential information of the extractive industry especially on revenues collected.

The value of interpreting other legislation in accordance with the spirit of the constitution was summarised in the case of **Matiso v Commanding Officer, Port Elizabeth Prison**²²⁷ as the

²²⁶ S.34 and s.35 respectively.

²²⁷ (1995) 4 SA 631 (CC)

yardstick for interpreting all other legislation because there is a comparative analysis of whether its core values are reflected in the legislation.

Therefore the interpretation of the EITI Act needs to show the fundamental principles stipulated in the COM which this research agrees is evident. Essentially this means that even though the EITI law may be inconsistent with the other legislations, it is vital to evaluate its consistency with the constitution which has primacy over it. And this study has revealed the two work along the same principles and are consistent.

4.3.2 Taxation Act and Official Secrets Act

First, discussion of the Taxation Act²²⁸ which is the legislation that determines the administration of taxes in Malawi. The need to evaluate the consistency of EITI legislation with Taxation Act (TA) arises due to the fact that EITI is about disclosure of revenues which essentially are taxes. EITI entails government to disclose the revenues received from extractive companies operating in their country which are in the form of taxes, royalties and so forth. However, this is inconsistent with section 6 of the TA which prohibits tax officers to disclose private tax information of an individual or company to a third party. The core to implementation of EITI is disclosure of taxes of extractive companies to a third party in the form of the MSG or the EITI board through reports. This is problematic because EITI necessitates the unwavering requirement of disclosing taxes to third parties. This is clearly inconsistent with what is stated in the TA.

Secondly, there is the Official Secrets Act²²⁹ which prohibits the release of confidential data or knowledge obtained during the course of employment in government to other parties. Section 4 of the Official Secrets Act (OSA) prohibits government employees disclosing confidential information obtained during their course of employment to any person other than those he is authorized to disclose in the interest of the state.

This section also applies to secret and confidential information given to government by companies in the extractive sector. Government has inclined to group information in their possession into public and State information of which mining contracts are classified as State information rendering information contained therein inaccessible.²³⁰ Besides classification of mining contracts as state information, their basis of non-disclosure is based on these contracts

²²⁸ Chapter 41:01, laws of Malawi

²²⁹ Chapter 14:01, Laws of Malawi

²³⁰ Ministry of finance and development cooperation report (n 120 above) 13

containing confidential clauses. The information contained within includes taxes paid or to be paid which is not supposed to be disseminated elsewhere. This is not in line with objectives of EITI which will be included in the EITI legislation if Malawi were to domesticate it. However this study notes the exception in section 4 (1) (a) of OSA of disclosing such information if authorized to do so in the interest of the state. It concludes that information needed to implement EITI should be authorized for release because this is in the interest of the state as this will help improve the faltering mining industry in Malawi.

4.4 Solutions to inconsistencies

In this section, this study will seek to proffer solutions to the possible inconsistencies if and when Malawi adopts the EITI principles and decides to legally domesticate the principles. There is a need to consider what solutions Malawi can implement to avoid inconsistencies.

4.4.1 Intention of legislation

Since EITI legislation will be at par with other statutes such as the Taxation Act which it is inconsistent with; there will be need to look at the intention of each legislation to resolve whether they can be implemented side by side.

The TA was drafted to protect taxpayers from having their tax information disclosed to third parties; this was done as a form of privacy. However this Act did not have in mind taxpayers who are investors in a particular sector which produces revenue of particular interest to citizens. Public investments are always public knowledge and citizens' demand knowing how their non-renewable resources are being utilised to benefit them. The debate is whether the Taxation or Official Secrets Act envisaged disclosure of extractive industries information and whether the intention of the framers was for these Acts to prohibit disclosure when public interest stipulates otherwise. This study argues that the existing acts and the proposed EITI have colliding intentions but they can still work alongside with the latter being exception to the former. And to rectify this instance of colliding intentions, there are two options for Malawi

4.4.1.1 Amendment of Acts

First option would be the amendment of the two Acts to stipulate that there will be an exception in line with the new EITI Act with regards to provisions that are inconsistent. It should be borne in mind that the EITI Act will only be applicable to the extractive industry

otherwise the laws will remain in place for all other tax payers. And ultimately, the framers intention will be to protect all other citizens not necessarily those who have invested in a particular sector and made contracts with government of national interest. However this writer argues that amendments of all generally applicable Acts inconsistent with the EITI would be cumbersome, costly and time consuming. As reiterated, many have called on government to amend the MMA but this has not been done. It should be borne in mind that amendment of legislation cannot just focus on one provision; they will have to look at the whole statute which is time consuming. The writer though acknowledging amendment as a possible solution, it urges they do not amend but rather enact an EITI Act which will explicitly state its exception status.

4.4.1.2 EITI Act exception

As proposed throughout the study, government should enact an EITI Act codifying all the principle of EITI. In order to rectify the problematic collusion of intentions of this statute with the rest, the EITI should expressly state its intention of being the exception to generally applied laws such as the tax laws. Meaning, the EITI could specifically stipulate that where there are inconsistencies with the provisions of existing acts, it will supersede them, as this is in public interest. By specifying its intention to disclose taxes which though not in line with other Acts, this allows it to supersede since it is only applicable to certain individuals and companies and not necessarily a general rule. This research argues for the intention of the EITI to be expressly spelt out to exempt government officials handling revenues arising from the extractive industries from their duty.

And to ensure that all stakeholders involved are agreeable to this development, there is need for an agreement of all parties involved that the EITI Act will be superior to all other inconsistent provisions with the EITI Act. Taxes can be disclosed by a third party only if the tax payer willingly discloses their tax or authorizes disclosure of the taxes.²³¹ Therefore, this study argues that parties can voluntarily agree to be exception to laws that prohibit disclosure of taxes and other confidential information hence the need to ensure all stakeholders agree on this arrangement. And this study concludes the better solution is to enact an EITI Act which specifically stipulates its intention of being an exception to existing laws and not to amend the laws.

²³¹ Ministry of finance and development cooperation report (n 120 above) 13

4.5 Application of the legislation

As pointed out, Malawi should domesticate the initiative by enacting legislation to enforce the objectives and principles. And if Malawi enacts this legislation, there is need to consider whether this legislation can apply retroactively or will apply only to new contracts. Meaning, it applies to all contracts except the existing contracts at the date of enactment.

4.5.1 Retroactive application

As pointed out earlier, Malawi already has investors in the mining sector operating based on existing laws. When the EITI Act is passed there is need to evaluate whether it can apply to these contracts or only future or potential investors. So, the debate is: should Malawi apply the EITI Act retroactively.

Principle 11 of EITI stipulates that EITI should apply to all operational extractive companies in a country that has adopted it.²³² It does not classify existing and future contracts; it merely stipulates those who are and will operate in an EITI implementing country.

To implement EITI, Malawi having an Act means the provisions of the Act will apply to all existing contracts unless explicitly stating some companies are exempted. Generally new Acts do not have retrospective application especially already formed contracts since these contracts were made based on existing laws. And this principle is reflected even in international agreements such as the US BIT model which in Article 1 stipulates investments covered by the agreement will only be those made after the conclusion of the BIT and not before.

Reference is made to two international cases whose decisions are persuasive on the Malawian case-law. **Carson vs. Carson**²³³ judge held the general rule opposing retrospectivity of statutes is not a rigid or inflexible and that it must be applied while considering the language and subject matter of the statute. The reason for prohibiting retrospective application is to avoid new liabilities and costs. In the case of **Director of Public Prosecutions vs. Lamb et al**²³⁴ it was stated that if a statute will change the rights of people or create new liabilities or obligations then it should not be applied retroactively unless the language clearly states it will apply retroactively.

²³² <http://eiti.org/eiti/principles> (accessed 27 March 2014)

²³³ 1964 1 ALL ER 68, <http://www.malawilii.org/mw/judgment/high-court/2007/18> (accessed 28 May 2014)

²³⁴ 1941 2 ALL ER 499, <http://www.malawilii.org/mw/judgment/high-court/2007/18> (accessed 28 May 2014)

And these sentiments influenced and were held in the Malawian case **Mwalwanda v Stanbic Bank Limited** where judge concluded that there will be instances when statutes will apply retroactively; that a statute can be an exception to non-retroactive application general rule. That this must be clearly reflected in the statute and it must be necessary to have retroactive application.²³⁵

Therefore EITI legislation may have retroactive application but this must be explicitly stated in the Act. And this research argues that the Act should have retroactive application because long-term contracts are already made which are vital to development and should be scrutinised to sync international standards such as EITI. The reality is extractive industries involve non-renewable resources that should be closely administered in order to benefit before their extinction. The EITI legislation should have concise language stipulating it will apply to existing contracts as well as it is necessary.

4.5.2 Consequences of retroactive application

Malawi already has contracts with companies which were made based on existing laws in place at the time contracts were concluded. EITI will introduce a new law which this study argues should apply to the existing contracts retrospectively. Ideally existing investors will not have a problem with introduction of a new Act and its application to their contracts. In a previous stakeholder's conference, three mining companies operating in Malawi were invited to express their views. Three of the companies present stated they would not have a problem with EITI implementation in Malawi and would support it; however, they uttered reservations, concerning the cost of implementing EITI in terms of the adjustments of taxes to be paid by them and highlighted the need to evaluate the scope of EITI.²³⁶ Therefore, the assumption is that companies would be willing as long as cost effectiveness is factored into it without them incurring unnecessary liabilities; thereby proving the need to consult them.

This investigation however wishes to discuss briefly what would occur if some companies refused to comply with the new Act using the existing stabilisation clauses in the contract as their defence

²³⁵ civil cause number 3256 of 2005 , <http://www.malawilii.org/mw/judgment/high-court/2007/18> (accessed 28 May 2014)

²³⁶ Ministry of finance and development cooperation report (n 120 above) 18

4.5.2.1 Stabilisation clauses

A stabilisation clause is a contractual mechanism aimed at ensuring that domestic laws in the host country which impact the performance of investments financially and economically remain unchanged during the investment venture or such other period as may be agreed between the host state and the investor.²³⁷ Stabilisation clauses exist in various forms. There are two categories namely freezing clauses and economic equilibrium clauses.

Freezing stabilisation clauses are designed to literally “freeze” the laws that exist at the time the investment is made. Essentially this means laws remain as they are during the whole time an investment exists; no amendments or additions. And this also means any new laws enacted do not apply to these contracts. Whereas economic equilibrium clauses give room for new laws to apply to existing contracts as long as the investor gets compensated if he incurs other costs in order to fulfil what is stipulated in the new laws.²³⁸ Economic equilibrium clauses ensure that if there is a change to the agreement there is automatic right to renegotiation of all parties involved alternatively be compensated if there is no renegotiation.²³⁹ Stabilisation clauses are predominant in natural resource investment projects for the simple reason that these are long lasting investments which carry a lot of risks including political and economic risks.²⁴⁰

Stabilization clauses have the objective to maintain agreed terms and conditions of an investment thereby managing non-commercial risks.²⁴¹ For Malawi to have the Act applying there is a need to evaluate the existing contracts and their stabilisation clauses. Presumably there is an economic equilibrium clause whereby investors are assured whatever changes in law will not negatively impact them economically in terms of costs and commercial interests. Economic equilibrium clauses are preferable to freezing clauses because they do not prohibit the state from regulating as long as economically the investors are not negatively impacted.²⁴²

²³⁷ T W Walde and G Ndi Walde ‘Stabilizing International investment commitments: international law versus contract interpretation (1996) 31 *Texas International Law journal* 215 220-221

²³⁸ A Shemberg ‘Stabilisation clauses and Human Rights’ (2008) Report by international Finance corporation, <http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES> (accessed 16 May 2014) 4-9

²³⁹ L Cotula ‘Regulatory takings, stabilization clauses and sustainable development’ (2008), Paper prepared for the OECD Global Forum on International Investment VII, <http://www.oecd.org/investment/globalforum/40311122.pdf> (accessed 16 May 2014)

²⁴⁰ T W Walde and G Ndi (n 237 above) 317-318

²⁴¹ L Cotula (n 239 above) 6

²⁴² L Cotula (n 239 above) 7-8

Some economic equilibrium clauses state what levels the equilibrium can be deemed to have been distressed. There is material impact when there is a materially adverse effect or negative impact on the economic benefits. Whereas in some contracts this is referred to as the regulatory change which impacts implementation adversely even if not materially adverse.²⁴³

In terms of Malawi, there will be need to evaluate what kind of economic equilibrium clause exists. Because if it is one that deciphers any change adversely affecting the economic costs, then introduction of EITI which will entail costs to prepare reports etc. by companies may be discerned to be adverse. However, if it is materially adverse, this study argues that it does not materially adversely affect the investors. The disclosure and implementation costs are not that monumental to affect them that adversely.

4.6 Case Studies

This investigation will now look at two countries namely Liberia and Nigeria as case studies to see what lessons Malawi can learn from them. These case studies will be analysed to identify what commendable aspects of EITI implementation Malawi should emulate while also highlighting their weaknesses which Malawi should take heed of.

4.6.1 Nigeria

The government holds all mineral rights which are stipulated in the Petroleum Act of 1969 and the Minerals and Mining Act of 2007 which includes the right of government to control and decide on the exploration activity in the mineral sector.²⁴⁴ Nigeria in 2004 became the first country to willingly and formally assent to the EITI principles.²⁴⁵ One of the reasons for implementing was that the oil industry is regarded as non-transparent leading to projects in Nigeria costing more than similar projects worldwide.²⁴⁶ Nigeria is termed the “poster child” due to their early adoption of EITI hence the rationale of this study to consider it as a case study as the Nigerian process can help establish whether delegates the implementation of EITI is accomplishing its goals.²⁴⁷ Therefore this study found it necessary to look at Nigeria and their laudable implementation of EITI.

²⁴³ L Cotula (n 239 above) 8

²⁴⁴ <http://eiti.org/Nigeria> (accessed 23 April 2014)

²⁴⁵ http://www.ng.total.com/03_total_nigeria_commitments/030405_eiti.htm 9 (accessed 28 May 2014)

²⁴⁶ As above

²⁴⁷ M Keblusek ‘Is EITI really helping improve global good governance? Examining the Resource Curse, corruption, and Nigeria’s EITI Implementation Experience’ (2010), Paper by Niger delta professionals for development, <http://nidprodev.org/EITI%20-%20Nigeria%20Analysis.pdf> (accessed 16 May 2014) 9

The responsible organisation for EITI implementation is called Nigerian Extractive Industries Transparency Initiative (NEITI) which was inaugurated in 2004.²⁴⁸

The first step was the creation of the National Stakeholders Working Group (NSWG) to implement EITI.²⁴⁹ The NSWG was set up to oversee NEITI's activities and it is comprised delegates of government, extractive companies and civil society.²⁵⁰ It further established Five operational teams namely: a Technical, legislative, civil society media and focal team each responsible to carry out specific duties. For instance the legislative team has mandate to translate EITI principles into legislation.²⁵¹

NEITI has the mandate legally to promote transparency and accountability in the management of Nigeria's extractive sector's revenues.²⁵² To ensure enforcement, they submitted a bill in 2004 which led to the enactment of the NEITI Act in 2007.²⁵³ And this made them the first EITI implementing country with EITI legislation to support its operations.²⁵⁴ The enactment of NEITI Act of 2007 has changed the implementation of the EITI principles from voluntary to obligatory or mandatory.²⁵⁵ And Nigeria has continued to ensure their EITI principles are reflected in other legislation in the country. For instance Nigeria has included a mandatory contract disclosure provision in its pending Petroleum Industry Bill.²⁵⁶ NEITI Act mandated NEITI to extend the scope to include audits of financial, production and process.²⁵⁷

Nigerian adoption of EITI has led to greater transparency in their extractives industry particularly oil which is their main contributant to the economy.²⁵⁸ The Act empowers various stakeholders to have access to information to enable them to hold government and companies accountable and this is sustained through the creation of a formal government

²⁴⁸ B Okeke & ET Aniche 'A Critique of the Enforcement of Nigeria Extractive Industries Transparency Initiative (Neiti) Act 2007 in Nigerian Oil and Gas Sector' (2013) *British Journal of Arts and Social Sciences Vol.14 No II* 100

²⁴⁹ M Keblusek (n 247 above) 9

²⁵⁰ http://www.ng.total.com/03_total_nigeria_commitments/030405_eiti.htm (accessed 28 May 2014)

²⁵¹ M Keblusek (n 247 above) 10

²⁵² http://www.ng.total.com/03_total_nigeria_commitments/030405_eiti.htm (accessed 28 May 2014)

²⁵³ B Okeke & ET Aniche (n 248 above) 100

²⁵⁴ As above

²⁵⁵ As above

²⁵⁶ 'Contract Disclosure in the Extractive Industries Transparency Initiative' (2012), Position Paper BY EITI International Board, <http://www.publishwhatyoupay.org/sites/publishwhatyoupay.org/files/EITI%20-%20CSO%20Briefing%20on%20Contract%20Transparency%20Consultation%20Dec2012.pdf> (accessed 16 May 2014) 4

²⁵⁷ <http://www.worldbank.org/en/results/2013/04/15/extractive-industries-transparency-initiative-results-profile> (accessed 16 April 2014)

²⁵⁸ S Bryan & B Hofman (n 73 above) 74

agency under the President.²⁵⁹ Unlike some countries, the great discrepancies found by the reconciler between payments and revenues have been made up for in Nigeria, whose 2005 report identified a discrepancy of approximately \$560 million owed by companies. By ‘closing the loopholes’ highlighted by the report, the country now saves \$1 billion a year.²⁶⁰ The efficiency of NEITI was also illustrated when a Tribunal ordered Mobil Nigeria to pay US \$83.4 million to the Government as unremitted education tax after a NEITI audit.²⁶¹

The NEITI Act of 2007 gives the NEITI the necessary legal backing of additionally giving the mandate to promote due process and transparency in the application of extractive revenues. This increase in transparency has contributed to the on-going anti-corruption reform in Nigeria.²⁶² Regrettably, the enactment of NEITI Act in 2007 has not been able to ensure annual audit and publication of oil receipts and expenditures account of oil multinationals; nor has NEITI been able to insist on complying by international best practices in the audit and publication of oil revenues. The NEITI Act of 2007 has only been able to transform NEITI into a barking dog or a toothless bulldog that cannot bite.²⁶³ Thus, the culture of impunity and corruption continued unabated resulting to insignificant improvement in Nigeria’s corruption perception index, and little or no effects on the quality of living of Nigeria citizens.²⁶⁴

Some have also challenged the inclusion of some provisions in the Act. For instance sections 3(d) and 3(e) of the NEITI Act was crafted to accommodate the issue of confidentially clauses or provisos like which prohibit utilising information is contrary to the contractual obligation or proprietary interests of the extractive industry company’.²⁶⁵ Some have argued that the retention of these clauses in the NEITI Act makes NEITI a toothless bull dog as some of these oil and gas companies would hide under the protection or umbrella of these clauses to fail to comply in declaring or disclosing their activities such as disclosing production volumes, payments to the government.²⁶⁶ The concern has been that the Act gives extractive

²⁵⁹ Case-study of Nigeria (2012), Study by EITI, <http://eiti.org/document/case-study-nigeria> (accessed 24 April 2014) (accessed 16 May 2014)

²⁶⁰ S Anayati (n 117 above) 19

²⁶¹ <http://eiti.org/Nigeria> (accessed 23 April 2014)

²⁶² B Okeke & ET Aniche (n 248 above) 101

²⁶³ B Okeke & ET Aniche (n 248 above) 99

²⁶⁴ B Okeke & ET Aniche (n 248 above) 100

²⁶⁵ B Okeke & ET Aniche (n 248 above) 102; also see:

<http://www.chathamhouse.org/sites/default/files/public/Research/Africa/1109neiti.pdf> (accessed 28 May 2014)

²⁶⁶ B Okeke & ET Aniche (n 248 above) 102

countries superiority over the application of the Act however this study argues that this is done to avoid legal disputes with the companies considering if such information could affect their commercial interests, they would have a right to have it legally addressed.

However, in order to rectify these concerns, Nigeria is currently reviewing their NEITI Act. This has been done after it was noted that some of the very progressive provisions of the LEITI Act²⁶⁷ especially in the area of Contract Transparency, amongst others, would assist the Civil Society groups and other stakeholders in Nigeria when the review of the NEITI Act 2007 commences.²⁶⁸ The NEITI Act of 2007 gives NEITI the power to make regulations through which it could impose sanctions on erring companies covered in the NEITI oil, gas and solid minerals audit. The regulations will guide the organisation on how to impose sanctions.²⁶⁹ This shows Nigeria is seeking to ensure more enforcement and compliance by all stakeholders most especially companies in the oil sector.

Nevertheless, it is wrong to state that NEITI is completely useless and lacks enforcement. The NEITI with other government institutions ensures those who are non-compliant with regulations face disciplinary measures. For example Economic and Financial Crimes Commission (EFCC) are referred to investigate and prosecute those suspected of unreconciled financial flows.²⁷⁰

Nigeria still has a long way to go to ensure their extractive industry is transparent and government is held accountable. However EITI compliance is a critical step towards achieving the goal and objective of grander transparency and accountability and NEITI is assisting to achieve this.²⁷¹

4.6.1.1 Lessons from Nigeria

Several lessons can be learnt from Nigeria. First is the way Nigeria set up its NEITI organisation and how the law is implemented. The setting up of five practical teams is commendable because you have teams specialising in a particular aspect of implementation

²⁶⁷ LEITI Act will be discussed in detail when discussing Liberia as a case study

²⁶⁸ <http://www.neiti.org.ng/index.php?q=news/2013/12/03/neiti-commends-liberian-eiti-law-leiti-embarks-study-tour-nigeria> (accessed 15 April 2014)

²⁶⁹ <http://www.neiti.org.ng/index.php?q=news/2013/12/03/neiti-commends-liberian-eiti-law-leiti-embarks-study-tour-nigeria> (accessed 15 April 2014); http://www.neiti.org.ng/files-pdf/NEITI_Handbook4.pdf (accessed 28 May 2014)

²⁷⁰ Case-study of Nigeria (n 259 above) 2

²⁷¹ Case-study of Nigeria (n 259 above) 4

rather than doing everything together. This ensures efficiency of the whole implementation process.

Secondly, the enactment of the Act and reviewing it to accommodate new discoveries. Just having the Act gives NEITI legal backing which is necessary to ensure compliance by all stakeholders; and even more admirable is reviewing it to adjust and adapt to other standards that have proven useful in other countries. This ensures optimal performance of the process. And in terms of the Act, there is a lesson from what should be included bearing in mind the country already has existing contractual obligations. Nigeria added the proviso to avoid legal disputes which Malawi as a country has to be wary of. However, this should be done in a form that does not reduce the impact of the initiative by diluting the mandatory nature of the initiative with infinite exceptions.

Thirdly, the Nigerian government has shown the political will. As reiterated, it was discovered that there were discrepancies between the report of government and the extractive companies and government discovered that it was owed money by companies who agreed to pay the difference. The EITI process will be futile if once discrepancies are found, government treats them with leniency. There is need to actively rectify these mistakes such as paying the difference like it was done in Nigeria.

Additionally, in terms of enforcement, Nigeria relies on other existing organisations to help with enforcement. As much as NEITI is an independent body, it cooperates with other existing organisations like the EFCC to help with investigation and possible prosecution. This could be adopted in Malawi which has organisations such as Anti-Corruption Bureau which could help investigate if there is discovered corruption or abuse in the EITI process. This ensures that companies and other stakeholders are compliant with the standard set.

Furthermore, as pointed out some have criticised NEITI for lacking effective enforcement. They have pointed out that on the offences, sanctions and enforcement, although the NEITI Act stipulates certain sanctions for offences relating to violations of the EITI principles, the law is silent on the procedure to apprehend, prosecute and punish the culprits or violators.²⁷² Essentially the Act in section 16 stipulates that the offending company will be fined to pay N 30,000, 000 or N 5,000, 000 to the government officials. It does not explain what procedure will be followed, whether it will be through the usual judicial civil litigation or a separate

²⁷² B Okeke & ET Aniche (n 248 above) 103

tribunal will be set up specifically. Malawi has set up specialised courts like for labour disputes; however, all legal disputes are settled within the usual judicial system. Malawi should specify in the Act whether a specialised court will be set up for EITI disputes or it will use usual judicial system. This research argues that they EITI-related matters should be settled in the commercial courts whose procedure is expeditious unlike the other courts in the country.

4.6.2 Liberia

Liberia was in 2007 the 14th African country to join EITI²⁷³ and the first African state to be validated as EITI compliant in October 2009²⁷⁴ and the second country in the whole world.²⁷⁵ This helped government with their image and led to debt relief.²⁷⁶ Liberia discusses their EITI reports with their citizens to show it's accountable, curb corruption and demonstrate the benefits gained from revenues. The Liberian head of EITI stated since the resources once led to conflict, they can now be used and ably managed by involving citizens in their administration through EITI.²⁷⁷

The Liberian endorsement is special because they included forestry to the usual EITI scope.²⁷⁸ They adapted the scope of EITI taking into consideration their reality by including forestry and agriculture; its main industries²⁷⁹ Liberia is going to be an influencing factor when EITI standard is evaluated as to whether to extend its scope or not.²⁸⁰

Just like Nigeria they enacted an EITI law,²⁸¹ this was enacted in 2009 and is called Liberia EITI Act (LEITI) which converts voluntary principles into legal principles.²⁸² Liberia's EITI

²⁷³ <http://www.im-mining.com/2007/08/03/liberia-comes-in-from-the-cold/> (accessed 28 May 2014);

<http://www.afdb.org/en/news-and-events/article/liberia-joins-extractive-industries-transparency-initiative-eiti-1580/> (accessed 16 April 2014)

²⁷⁴ <http://www.publishwhatyoupay.org/resources/pwyp-commends-liberia-achieving-eiti-compliant-status> (accessed 14 April 2014)

²⁷⁵ D O'Sullivan 'What's the point of Transparency? The Extractive Industries Transparency Initiative and governance of natural resources in Liberia, Timor Leste and other countries' (2013, <http://globalwitness.co.uk/sites/default/files/library/What's%20the%20point%20of%20transparency%20April%202013.pdf>) (accessed 16 May 2014) 10

²⁷⁶ D O'Sullivan (n 275 above) 11

²⁷⁷ S Bryan & B Hofman (n 73 above) 55

²⁷⁸ <http://www.afdb.org/en/news-and-events/article/liberia-joins-extractive-industries-transparency-initiative-eiti-1580/> (accessed 16 April 2014)

²⁷⁹ <http://www.publishwhatyoupay.org/resources/pwyp-commends-liberia-achieving-eiti-compliant-status> (accessed 14 April 2014)

²⁸⁰ <http://www.afdb.org/en/news-and-events/article/liberia-joins-extractive-industries-transparency-initiative-eiti-1580/> (accessed 16 April 2014)

²⁸¹ Case-study of Nigeria (2012) (n 259 above) 2

implementation has been one of the most comprehensive amongst EITI-implementing countries.²⁸³ For instance Liberia's 2009 EITI Law requires the public disclosure of all contracts, which appear on the LEITI website.²⁸⁴ This does not always feature in most countries implementing EITI though more people are calling for contract transparency to be a standard.

The LEITI Act also requires reporting of payments on a disaggregated company-by-company basis, and by promoting disclosure and review of contracts and licensing arrangements to ensure the country is getting fair deals.²⁸⁵ In order to ensure enforcement, section 2.3 of the LEITI Act empowers LEITI to sue or be sued. This means people can hold LEITI accountable for any misconduct and they can conversely sue those who are not complying with the LEITI standards. Additionally, it includes in the report 'what ought to be paid' according to LEITI by extractive industries companies²⁸⁶ This is provided for in section 4.1(i) and this is achieved through a review of the concessions and licenses awarded by virtue of s.5.3 of the LEITI Act.

Liberia has been successful in EITI implementation but several discrepancies and challenges have been realised. Spanning the period July 2009 to December 2011, LEITI's Post Award Process Audit, released in May 2013, reviewed 68 contracts across the country's agriculture, mining, forestry and oil sectors. In 60 cases, the government was found to have failed to apply its own laws in the contracting process. Of worth pointing is that the irregularly awarded contracts total \$8bn in value, according to the Associated Press, in a country whose GDP for 2012 was \$1.7billion.²⁸⁷ Furthermore, it was discovered that despite various successes in the administration of LEITI both the state and private entities complied with legal and procedural obligations.²⁸⁸

²⁸² <http://www.publishwhatyoupay.org/resources/pwyp-commends-liberia-achieving-eiti-compliant-status> (accessed 14 April 2014)

²⁸³ <http://www.worldbank.org/en/results/2013/04/15/extractive-industries-transparency-initiative-results-profile> (accessed 16 April 2014)

²⁸⁴ EITI International Board Paper (2012) (n 256 above) 4

²⁸⁵ <http://www.publishwhatyoupay.org/resources/pwyp-commends-liberia-achieving-eiti-compliant-status> (accessed 14 April 2014). S 4.1 (a) speaks of requiring reporting of payments on a disaggregated basis whereas s 3.2 (f) states the requirement of contract disclosure.

²⁸⁶ <http://www.worldbank.org/en/results/2013/04/15/extractive-industries-transparency-initiative-results-profile> (accessed 16 April 2014)

²⁸⁷ <http://www.thisisafricaonline.com/Business/Legal-Bulletin/Liberia-EITI-exposes-corruption-in-resource-contracts> (accessed 16 April 2014)

²⁸⁸ <http://emansion.gov.lr/doc/President%20Sirleaf%20Statement%20%20at%20G8%20Summit.pdf> (accessed 28 May 2014)

4.6.2.1 Lessons from Liberia

There are several lessons from Liberia Malawi should emulate. First is the inclusion of other sectors besides the precedent three in EITI. Liberia included forestry and Agriculture because these are sectors that produce most of their export earnings and contribute heavily to their economy which involve extraction of resources. Malawi should include agriculture in their EITI standard. The Malawi Growth and Development Strategy acknowledges that agriculture as the backbone of Malawi's economy,²⁸⁹ to which this study concludes agriculture is a crucial sector that Malawi can benefit from if they include it as part of the EITI coverage.

Secondly, and most importantly, Malawi should domesticate EITI by enacting an Act to guide and ensure effective implementation. In order for EITI to not be viewed as a mere voluntary initiative, it should be backed by a legislation to make it binding. This will ensure compliance by all parties involved if the voluntariness element of EITI is removed. Liberia has the LEITI Act as pointed out which gave the country the necessary legal footing as reiterated.

Adding on to earlier point of legal backing, Malawi should follow Liberia's form of enforcement through legal procedures by stipulating the forms of enforcement. The Act provides for LEITI to sue or be sued. This ensures there is a legal backing for any misconduct within the operation and administration of EITI. Malawi should adhere to this form of enforcement to ensure compliance of all parties involved.

Lastly, it was discovered in Liberia that government had awarded contracts without following procedure in some instances. Malawi should ensure they also have a review board and that any contracts awarded without following the due process will either be declared void or some other form of punishment will be in place.

4.7 Conclusion

Malawi needs to back EITI with domestic legislation to ensure optimal implementation and enforcement. There are several Acts which are inconsistent with the principles of EITI to be legislated but these inconsistencies can be ironed out. Nigeria and Liberia are countries which Malawi should seek guidance from as they have legislation that back up the standard and principles in the country to make headway towards corruption-free extractive industry.

²⁸⁹ http://eeas.europa.eu/delegations/malawi/documents/about_us/agriculture_en.pdf (accessed 29 April 2014); http://www.osisa.org/sites/default/files/sup_files/chapter_2_-_malawi.pdf (accessed 28 May 2014)

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1 Summary of Findings

This research examined the impact of confidential contracts in the mining sector on economic growth and investments specifically in Malawi. It attempted to align the benefits of adopting transparency initiatives such as EITI to increase transparency in extractives with the legal implications of doing so on existing laws and contracts. It sought to enlighten African nations contemplating adopting transparency initiatives, law/policy makers in Malawian government, existing investors in Malawi and fellow academics. In so doing, it endeavoured to analyse existing scholarly opinions, legal systems and case-law on the application of newly introduced international soft law on existing domestic laws. It did so having in mind the current mining regime in Malawi and the laws that are regulating it.

Chapter one introduced the background to the study, problem statement, research questions, thesis statement, significance of the study, preliminary literature review, methodology, scope and limitation of study and the outline of chapters.

The second chapter introduced the concept of transparency and explained how transparency is critical to avoiding the resource curse which has implanted itself in most resource-rich developing nations particularly in Africa. This chapter discussed the various forms and understandings that currently underpin transparency. It highlighted the differences between revenue and contract transparency and advocated for the latter in order to ensure efficient transparency exists in the mining sector. It also examined two new forms of substance-based and process transparency that should be incorporated in extractive industries. It pinpointed how transparency forms the main principle in the country's constitution which unfortunately has failed to drive the Mining sector in Malawi. It argued in favour of the imperative of promoting the transparency principle by adopting transparency initiatives such as EITI which was discussed in the next chapter.

In Chapter three, EITI was analysed in terms of its nature, scope, rules, principles and requirements. It critiqued the initiative with the view of throwing up its benefits and challenges which nations should be aware of. Of importance is its voluntary nature which is contrary to what is obtainable in most international instruments. It was found that Malawi already has international obligations that consist of promoting principles similar to the ones

under the EITI framework, though the voluntary nature of EITI could influence compliance unlike most obligatory international laws. The chapter made the case for Malawi to join EITI bearing in mind the purposes of EITI which include attracting investment and curbing corruption which are critical to the development of Malawi. It also recommended the addition of contract transparency to the standardised EITI scope of revenue transparency to be implemented.

The fourth chapter commenced with a discourse of legal implications of adopting EITI. It was argued that if Malawi is to become EITI compliant, the best and most effective way of implementing it is through the enactment of a law to domesticate the principles of EITI. This will ensure enforcement and upgrade the voluntary 'soft law' to a mandatory 'hard' law in Malawi. The chapter also discussed the possibility of enacting an EITI law which would ahead, in primacy, of other statutes such as the Taxation Act which contain provisions that are inconsistent with principles of EITI. It was concluded that this could be achieved by making EITI an exception to these laws it is contrary to unlike amending the existing laws seeing as they apply to other sectors and not just mining. This exception should be expressly stated in the EITI legislation. This proposed legislation should retroactively apply to existing contracts because non-renewable resources exploited by these countries have to be administered with the best policies to enable optimal benefit. It was noted that the change in the law will not breach existing stabilisation clauses because the extra costs of complying with EITI will not materially adversely affect them.

Furthermore, for comparative reasons, the chapter investigated Nigeria and Liberia which have been applauded for their EITI implementation. It revealed how both enacted legislation that backed the EITI principles to ensure compliance and enforcement with proofs of positive impacts made on their extractive industry. This chapter also revealed how Liberia added forestry to the EITI scope. This Malawi can emulate by adding agriculture which is the pillar of the economy. And it also demonstrated the various steps and procedure Nigeria did before adopting EITI.

5.2 Conclusion

In conclusion, this study revealed that extractive industries are not performing optimally due to lack of transparency of which transparency initiatives are seeking to rectify; that the lack of transparency has led to corruption and reduced investment flow into the sector due to various concerns by investors and other stakeholders such as citizens. It was concluded that

joining the transparency initiative is an indication of a country's willingness to be transparent and this gives boost to the investors' confidence.

It was also found that for efficient application of EITI in Malawi, there is a need to legally domesticate the principles to enable compliance and enforcement. It was discovered that one of the legal implications of adoption in Malawi of the transparency initiative is that EITI principles are inconsistent with existing legislation therefore illustrating negative legal implications. However, this study has shown that the legal implications that may arise by introduction of legislation domestically of transparency initiatives such as EITI can be corrected using various means such as amending existing legislation or making the new legislation an exception. There is so far no evidence that some governments have had to pay compensation or have legal settlements with extractive companies that were in existence before EITI was adopted. Moreover, the possibility of introduction of this new law leading to litigation in Malawi is very slim if government uses safe methods to rectify the inconsistencies that arise from the change of law after due consultations and involvement of the affected extractive companies that are already in existence. This will ensure mutual understanding and decision to have new legislation apply to existing contracts thereby ensuring the participation of all parties concerned.

5.3 Recommendation

It is obvious that Malawi needs to adopt EITI in order to develop the country's extractive industry especially the mining sector. This will ensure more investments and reduce corruption. This study therefore recommends the adoption of EITI and the domestication of it through legislation.

As much as enactment of new laws in the light of existing contracts is controversial, Malawi's mining sector will develop if it continues on this path. This study therefore recommends that the government should engage the operational extractive companies in discussion about the change. It is also recommended that rather than amending existing laws, the new EITI law should expressly declare its status as exception to the existing laws which may be inconsistent with it. However, it also recommended the MMA should be amended to reflect transparency principles and to ensure the enforcement of EITI standards in the country.

To solidify transparency, it is recommended that the MMA reflects the principle of contract transparency and leaves the minister and other stakeholders to still have discretion in the negotiations and conclusion of investment agreements; however such negotiations and agreements should be made public for other stakeholders' scrutiny.

Finally, for the companies, this study recommends they do not impede the EITI adopting process as they stand to benefit image-wise, locally and internationally. However if some still are of the view they will be negatively impacted, starting point would be to prove that fact during their discussion with the government.

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