

Preliminary Inquiry into Indigenous Peoples' Participation in EITI Multi-Stakeholder Groups: What are the Present Experiences, Potential Benefits, and Challenges?

Sarah Daitch and Patrick Field
Consensus Building Institute
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Summary of Report

Across mineral rich and developing regions of the world, substantial natural resource wealth rests with Indigenous and tribal communities. And yet, throughout the world, Indigenous Peoples have historically suffered disproportionately from negative impacts of extractive activities in their territories.

The global transparency movement has the potential to play a part in changing that past for the better by supporting Indigenous Peoples' greater participation in resource decision-making on their territories and in their countries.

To better understand how increasing transparency globally might affect Indigenous Peoples, we undertook a preliminary research project. We wanted to learn more about the challenges and successes for Indigenous Peoples seeking good governance of natural resources through engaging with EITI, the Extractives Industries Transparency Initiative. This initial and preliminary inquiry was meant to provide a snapshot of what growing natural resource transparency means for Indigenous Peoples in three distinct regions: Philippines, Guatemala and the USA.

In conclusion, in spite of legal, cultural and historical differences in our three study countries, we identified five key commonalities.

1. Legal contexts shape how Indigenous Peoples (IP) can utilize EITI
2. Support is needed for Multi-Stakeholder Groups to target outreach strategies to Indigenous Peoples
3. There is a need for consistent and 'legitimate' IP representation in EITI Multi-Stakeholder Groups
4. There is a case for building an Indigenous Peoples' EITI Network and Caucus
5. There is potential power of subnational EITI IP Multi-Stakeholder Groups

Introduction

The purpose of this inquiry is to begin to build a better understanding of current Indigenous Peoples participation in the Extractive Industry Transparency Initiative's (EITI) multi-stakeholder groups (MSGs). This preliminary inquiry also aims to highlight the challenges and successes for Indigenous Peoples seeking good governance of natural resources as well as access to decision-making about natural resources on Indigenous lands.

To produce this preliminary report, the authors conducted a document scan and seven key informant interviews with past or present participants from the EITI MSGs in three selected countries. As this report examines only three out of 49 EITI implementing countries, its findings are, of course, hardly exhaustive. Additional actions from this report could include further research into other countries' experiences, more comprehensive research into a specific country's experience, examining the effects of EITI participation nationally, as well as the effects of participation for Indigenous Peoples' self-governance, and creating a network of Indigenous participants across EITI-implementing countries.

This report provides background on the status of natural resource extraction on Indigenous lands as it links to the growing transparency movement – focusing on the EITI. The report includes three case studies highlighting both the challenges of Indigenous participation in EITI MSGs and the good practices and successes identified. The report highlights overarching findings across the three cases and recommendations for future work.

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Background – Natural Resources on Indigenous Lands, and the Growing Transparency Movement

It is estimated that as much as 60% of the mineral resources worldwide are on Indigenous Peoples' lands.¹ But, throughout the world, Indigenous Peoples have often historically suffered disproportionately from negative impacts of extractive activities in their territories due to: lack of control, lack of recognition, lack of benefit flows, mismanagement of trust resources, and outright theft and violence. Historically, in many cases, industries have exploited resources in Indigenous territories without Indigenous Peoples' consent – threatening some tribes' physical and cultural survival² – with the full knowledge and permission of national governments.

In response to these issues, Indigenous communities have sought to gain influence and control over decision-making regarding resources within their territories. Indigenous Peoples have worked to establish the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) as a means to protect rights and access decision-making. UNDRIP contains an article on 'Free, prior, and informed consent' (FPIC), the principle that an Indigenous or tribal community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy, or otherwise use. As an important piece of aiding Indigenous Peoples' in implementing FPIC or more generally gaining more influence over their resources, transparency of existing extractives value, revenue, and production is important. The international effort to increase transparency generally could be a powerful tool for Indigenous Peoples in particular. Thus, this research focuses on Indigenous Peoples' participation in three country's EITI's Multi-stakeholder group platforms. If used robustly, improved transparency could empower Indigenous Peoples to help hold governments and companies accountable for the payments made and received for resources on their territories.³ This can better position Indigenous Peoples to harness the development of their lands for their peoples' own needs and wants.

The Global Transparency Movement and EITI

While many Indigenous Peoples do not yet have adequate access to decision-making over their lands and resources, greater transparency in the extractive industries is becoming more of a global norm. Efforts have been led by the EITI (<http://www.eiti.org>) to mobilize governments, industry, and civil society to advance this agenda. The EITI, which almost 50 countries are now trying to implement, aims to ensure that citizens have access to reliable and useful information regarding how much their governments are getting from the extraction of their nation's finite oil, gas, and mineral resources. To do this, EITI implementation has two core components.

First, transparency – oil, gas, and mining companies disclose their payments to governments, and government discloses its receipts. The payments are audited by an independent third party and published in a publicly available annual EITI report with contextual information about the extractive sector. The second component is accountability – a MSG with representatives from government, companies, and civil society is established to oversee the process and communicate the findings of the EITI report, promoting reform efforts in the country. The purpose of greater transparency is to improve accountability and better manage these finite resources for the benefit of citizens in the country where the resources are found. Poorly designed and non-transparent governance over natural resources will not create wider-spread prosperity for citizens and can lead to conflict.

¹ "Indigenous People and Natural Resources," Jodi Liss, 2 October 2009, Foreign Policy Association Network blogs.

² Doyle c. (ed.) *Business and Human Rights: Indigenous Peoples' Experiences with Access to Remedy. Case studies from Africa, Asia and Latin America*. Chaing Mai, Copenhagen: AIPP, Almaciga, IWGIA 2015: <http://www.enip.eu/web/wp-content/uploads/2015/03/Business-and-Human-Rights-Indigenous-Peoples-Experience-with-Access-to-Remedy.pdf>

³ Pelosi, N. (2014). *The Extractive Industries Transparency Initiative: An Opportunity for Indigenous Resource Rights* First Peoples Worldwide: firstpeoples.org/wp/the-extractive-industries-transparency-initiative-an-opportunity-for-Indigenous-resource-rights/

Extractive Industries, Transparency and Indigenous Peoples

Across mineral rich and developing regions of the world, substantial natural resource wealth rests with Indigenous and tribal communities. For example, in the United States, Native American reservations, which are tribal sovereign lands within the federal U.S. system, contain 30% of the coal reserves west of the Mississippi, 50% of potential uranium reserves, and 20% of known oil and gas reserves. The estimated value of these resources is nearly \$1.5 trillion.⁴ And yet, although a number of tribes are embracing resource extraction as a path towards economic prosperity, Native Americans and Alaska Natives remain the most impoverished demographic in the country.

Similarly, Indigenous Peoples are among the poorest and most marginalized in the Philippines in spite of legal protections of their Indigenous land rights. There is increasing extractive activity in a number of Indigenous Peoples' ancestral lands in the Philippines: out of the 39 large-scale metallic mining operations covered by the 2012 PH-EITI Report, 28 are within the ancestral lands of Indigenous Peoples.⁵ In spite of the extractive industry's presence, many Indigenous Peoples are still living in serious poverty. The country's 2008 budget showed that regions with highest concentrations of Indigenous Peoples were allocated the smallest amounts from the national government. Social service provision in Indigenous territories is below that of the rest of the country.⁶

Although Indigenous Peoples had higher levels of poverty in all three case study countries examined for this report, Guatemala stood out in terms of the stark inequality and poverty experienced by its Indigenous Peoples. 73% of Indigenous groups in Guatemala are living below the poverty line while extractive industry activity has intensified in the country. The Guatemalan government seeks to improve economic conditions through promoting increased investments in economic activities, including extractives, while the country continues to be dogged by corruption.⁷ The extractive industries are not seen as having contributed widely to narrowing the wealth gap⁸ for Indigenous Peoples in Guatemala.⁹

Challenges – Lack of Indigenous Representation in Extractive Industries Transparency Initiative

In spite of the potential benefits of transparency (reduced corruption, improved management, increased revenue flows to Indigenous Peoples, improved investment environment, and increased trust in resource revenue governance), some remain skeptical about EITI. For example, while Indigenous participation in EITI is supported by some tribal leaders in the Philippines, many are opposed to it. Some tribal leaders in the U.S., an EITI implementing country, have expressed concern that data collected on natural resource revenues could be used against their communities and, furthermore, numerous laws protect disclosure of revenues the U.S. federal government collects on their behalf. Some First Nations and aboriginal peoples in Canada have expressed concern about new federally-required transparency requirements. These Indigenous Peoples worry that the data will give critics of general revenue flows to First Nations further ammunition to attack treaty responsibilities manifested as revenue flows for housing, medical care, social services, and many other functions.

Cross Cutting Themes and Recommendations

Although legal, cultural, and historical contexts for Indigenous Peoples in EITI implementing countries differed among the three case studies examined for this report, analysis of key findings contained several

⁴ Ibid

⁵ <http://www.ph-eiti.org/app/EITI-Report/#/First-Country-Report/Volume-1-Contextual-Information>

⁶ IFAD Country Technical Note: Philippines <http://www.ifad.org/english/Indigenous/pub/documents/tnotes/philippines.pdf>

⁷ Corruption index 2014 from Transparency International: <https://www.transparency.org/country/#GTM>

⁸ "Falling Extractive Revenues in Guatemala amidst political turmoil." EITI blog: <https://eiti.org/news/falling-extractives-revenues-guatemala-amidst-political-turmoil>

⁹ Sustainable Development Strategies group (2013). *Validation of The Extractive Industries Transparency Initiative Guatemala*. https://eiti.org/files/EITI-Gua_SDSG_Final%20Validation%20Report.pdf

common themes. Based on these findings, EITI MSGs and implementing countries may find it helpful to consider:

1. Legal contexts shape how Indigenous Peoples can utilize EITI

The legal structures which govern Indigenous land rights, title, royalty payments, rents, and benefit sharing differ vastly between and within EITI implementing countries, shaping and constraining how EITI can be implemented in a given country. For example, in the United States, the Department of the Interior does not, and legally cannot, release data regarding revenue generated for specific tribes or individual Native Americans without the express permission of the tribes or individuals in question nor can the federal government compel a tribal government or an individual to agree to release of this data.

Because of the disparity in legal requirements and protections for Indigenous Peoples in EITI implementing countries, ideas on how to make EITI useful for Indigenous Peoples must be tailored to that country's legal context. For example, in the Philippines, the Indigenous Peoples' Rights Act – stipulating legal rights on ancestral domains – has a requirement in it that extractive companies must pay IPs a minimum royalty of 1%. However, due to a weak government agency tracking the payments and a lack of monitored and reported information about total production value, the royalty share cannot be calculated. Work has begun to develop and institutionalize a mechanism to properly monitor the management and expenditure of IP shares of royalties. Similarly, other solutions explored in other EITI implementing countries would need to be customized for that country's IP legal environment.

2. Support is needed for Multi-Stakeholder Groups to target outreach strategies for Indigenous Peoples

In each of the case studies examined, both information about the EITI process and the data from the reports themselves are not reaching enough Indigenous communities and tribal peoples. It is difficult for IPs to mobilize the potential benefits stemming from transparency without first overcoming obstacles to engaging with both typical EITI MSG members and the information their processes generate. Implementing countries and MSGs can examine ways to support tailored outreach to IPs, which, if carried out, could serve four purposes: first, increase IP awareness of how EITI works and how it can be a channel for putting IP perspectives and concerns onto the table; second, building relationships among IP and established MSG sectors and representatives; third, increase understanding of the findings of EITI reports themselves, and fourth, use the targeted outreach as a tool to recruit potential EITI MSG Indigenous participants.

Based on the strength of this finding across case studies, the authors recommend that EITI implementing countries' MSGs take a closer look at how to best implement tailored outreach to IPs. This can include mobilizing the findings of the EITI reports themselves in appropriate IP forums and making clear arguments for the value of EITI for tribal peoples. A compelling example of this targeted IP outreach was completed for the first time by the Philippines EITI MSG during fall 2015.^{10 11}

3. There is a need for consistent and 'legitimate' IP representation in EITI Multi-Stakeholder Groups

Across the three case studies examined, a need was identified for IP representation on MSGs to be formalized and more consistent. The United States provides a strong example of how to formalize IP representation through its approach to IP participation on the MSG since its inception. In August 2012, the

¹⁰ <http://bantaykita.ph/bk-pwyp-philippines-hosts-its-first-national-ip-seminar-workshop-on-mining-and-community-development/>

¹¹ In the fall of 2015, Philippines civil society organization Bantay Kita together with PH EITI put on a series of extractive transparency outreach workshops for Indigenous communities in the Compostela Valley, Agusan del Sur, and South Cotabato, as well as a Mindanao wide Indigenous People's conference on extractives. While each workshop was tailored to local priorities in extractive transparency and monitoring of extractive revenues, these workshops also mobilized the findings of the PH EITI report itself. (Please see Bantay Kita reports in bibliography for references to each workshop report).

Secretary of Interior chartered the U.S. MSG. The charter provided for two members representing Tribal governments and individual Native American mineral owners to participate as part of the government sector (along with states and federal government agencies). The Indigenous representation is provided in two ways: two members representing broader U.S. Indigenous issues are seated under the Civil Society sector, and one IP currently sits as a representative of a tribal government under the Government sector. Two other tribes will be seated on the MSG in 2016. Similarly, the Philippines EITI is currently looking to formalize one Civil Society sector position on the MSG for an IP.

Two of the case studies emphasized a potential solution to address the lack of broad based support for EITI amongst IPs. Participants suggested that an IP representative can be most effective as part of the MSG when ancestral decision-making procedures and traditional decision-making authorities are engaged in the selection process. Given the wide range of tribal decision-making structures within an EITI implementing country and among countries, this approach could be more viable in specific geographic areas or sub-national MSGs. However, participants strongly emphasized that engaging ancestral leadership would help legitimize and empower the IPs on the MSG. A strong example was provided in Mindanao, Philippines in the Compostela Valley, a region where disputes over royalties have resulted in conflict. Work has begun on a series of workshops with IPs intended to explore and link transparency and accountability to traditional ancestral decision-making practices.¹²

In addition, participants felt it was important that an IP MSG representative come from a region directly affected by the extractive industry to be effective in bringing an Indigenous community perspective to the table – currently, this occurs in some MSGs but not others.

4. The case for building an Indigenous Peoples' EITI Network and Caucus

All case studies examined highlight the need to set up a network for IPs in EITI implementing countries to exchange information, share good practices, discuss challenges, and explore solutions. EITI IP network building could take several forms: one possibility is forming a “caucus” within a country’s MSG for IP representatives and those companies who have direct experience with extraction on tribal lands or ancestral domains. These interested parties could form a working group to share experiences, reach out to other Indigenous Peoples, advocate for key interests on behalf of Indigenous Peoples, and grow the understanding for the importance of revenue transparency and the role of EITI nationally. For instance, the Philippines case study highlights how a network for sharing information amongst Indigenous Peoples within the country from different ancestral domains could help to narrow power imbalances when negotiating with extractive industries.¹³

Case studies also highlight interest not only in networks or caucuses nationally, but also for an international Indigenous-Indigenous EITI MSG network. Technology could be harnessed through webinars, online platforms, and news bulletins for IPs in MSGs to share useful information on how EITI can be put to work to further the interests of IPs.

Both national IP EITI caucuses and an international network would better enable Indigenous EITI MSG participants to share successes, challenges, and good practices that meaningfully shape decision-making about natural resources as well as build larger networks for advocacy and change. This has the potential to position Indigenous communities to share equitably in both the decision-making process and the potential benefits from the exploitation of natural resources on ancestral lands. Indigenous Peoples have several existing

¹² bantaykita.ph/bk-partners-with-comval-in-workshop-aimed-at-drafting-ancestral-domain-revenue-code/

¹³ For example, in November 2015, the first ever Mindanao-wide Indigenous Peoples’ conference on the extractive industry was held. This was an opportunity for many Mindanao IPs to collaborate towards meaningful participation in the Philippine EITI, and resulted in exchanging common concerns about and strategies to protect IP rights in their ancestral domains. One outcome of the gathering was that a proposal to organize a Mindanao IP coalition on extractive industry was agreed to by the participants (see Bantay Kita Mindanao Conference Report, bibliography).

mechanisms for connecting leaders from different regions, any of which could be the appropriate forum for aiding or hosting such a network. As an example, there is the UN Permanent Forum on Indigenous Issues, the world's largest global gathering of IPs. The Permanent Forum could provide an important space for cultivating a global network for enhanced IPs involvement EITI.

5. The potential power of subnational EITI Multi-Stakeholder Groups

Based on the preliminary research, the authors see sub-national MSGs as worthy of further exploration. Can sub-national MSGs provide a pathway for Indigenous Peoples to become more empowered with information on influencing how extraction will proceed in each area and how royalties from each area can contribute to local development? Even if Indigenous Peoples' representatives participate actively and effectively on national MSGs, it is not clear, in the context of broader extractives issues in that country, that the impact on Indigenous Peoples will be direct and substantial. Thus, a single Indigenous Peoples community could seek to implement EITI commensurate with the scale of their population and extractives revenue and/or numerous or all Indigenous Peoples across an entire region or nation could seek to create a sub-national, Indigenous-specific EITI process. Such subnational approaches, while time and resource intensive, would bring the complex historical and present issues into greater relief; allow greater participation by both Indigenous Peoples, their leaders, and their governments (should they exist within the implementing country); and allow greater focus on the specific context, revenues, arrangements, and means of transparency.

Conclusion: Indigenous Participation in EITI Multi-Stakeholder Groups has Great Potential but Needs Extensive Commitment and Work for that Potential Work to be Fulfilled

If employed effectively, improved transparency could position Indigenous Peoples to ensure governments and companies: 1) provide them greater clarity and transparency on revenue flows; 2) increase all Indigenous Peoples' understanding of and access to these transactions, not just some members or leaders; and, ideally, 3) help provide IPs their fair share of the revenues from extraction on Indigenous lands. EITI's MSGs make contributions to fostering stability and good governance through enabling dialogue. More space is provided for civil society to voice their concerns and, together with governments and companies, relationships improve and trust is built between parties. The EITI goals of increasing development and preventing conflict align with the aims of many Indigenous governments and organizations and have potential to foster well-being and help close the wealth gap in resource rich countries. However, there is significant work to do to ensure Indigenous Peoples are realizing lasting transparency about and benefits from extraction on their ancestral lands. There is much work to do to include Indigenous Peoples in national MSGs and the overall international EITI governance, as well as utilize EITI's process and products to engage and inform Indigenous Peoples. With greater engagement, IPs can use EITI processes to shape the laws, rules, and processes that affect revenue flows to them.

Case Study #1 - Guatemala

Guatemala ranks 133rd out of 187 countries on the UNDP Human Development Index; the top 1% of the population owns 65% of the country's wealth. Guatemala lags the region in terms of the human development index.¹⁴ Indigenous groups are most severely affected, with 73% identified as living below the poverty line. One of the ways in which the Guatemalan government seeks to improve economic conditions is through promoting increased investments in economic activities, including development in the extractive sector. Can EITI implementation play a role in helping the government put its oil and mining revenues to work narrowing the wealth gap?¹⁵ This is a particular challenge considering that Guatemala ranks 115th out of 176 countries on Transparency International's 2014 corruption perceptions index.¹⁶ As recently as July 2015, Guatemalans protested as corruption scandals became public.¹⁷

Type, Magnitude, and Value of Natural Resource Extraction

Guatemala is the most populous country in Central America with 14.7m people. It is also the region's biggest oil producer at 14,000 barrels per day. The government wants to push production to 80,000 barrels per day by 2022. Currently, the mining sector produces mainly gold and silver, but the country has deposits of nickel, coal, cobalt, copper, iron ore, limestone, sand and gravel, and uranium.¹⁸

Major Laws or Statutes Defining Indigenous People's Rights Regarding Natural Resources

Government mining revenues increased significantly from \$9 million in 2004 to \$522 million in 2010. The expansion of extractive industries brings with it a range of issues with economic benefits and community engagement being leading concerns. The extractive industries as a whole contribute 2% to 3% of Guatemala's \$47 billion GDP.¹⁹

Guatemala's fiscal regime, outlined in the 1997 mining law, provides a tiny share of revenue for the government (1% royalties) and a corporate income tax scheme that fails to address the needs of large scale mining investors.²⁰ In January 2012, portions of the 1997 mining law were declared unconstitutional by a ruling of the constitutional court in 2008.²¹

Considering these continuing issues over public benefits from extraction, President Molina introduced proposed reforms to the Constitution in 2012, including an amendment to Article 125 to include equity participation or ownership by the government of up to 40% in new mining and oil and gas concessions. He also signed an agreement with the extractive industries business association, Gremiex, through which companies would voluntarily pay a 5% royalty on gold, 4% on silver, and 3% on nickel. These proposals were later withdrawn.^{22 23}

¹⁴ UN Human Development Report: Guatemala Section. (2013). <http://hdr.undp.org/sites/default/files/Country-Profiles/GTM.pdf>

¹⁵ Sustainable Development Strategies group (2013). *Validation of The Extractive Industries Transparency Initiative Guatemala*. https://eiti.org/files/EITI-Gua_SDSG_Final%20Validation%20Report.pdf

¹⁶ Corruption index 2014 from Transparency International: <https://www.transparency.org/country/#GTM>

¹⁷ "Falling Extractive Revenues in Guatemala amidst political turmoil." EITI blog: <https://eiti.org/news/falling-extractives-revenues-guatemala-amidst-political-turmoil>

¹⁸ Cordaid Briefing Note: Extractives Guatemala (2013).

https://www.cordaid.org/media/publications/Briefing_Note_Extractives_Guatemala.pdf

¹⁹ Ibid

²⁰ Ibid

²¹ Sustainable Development Strategies Group (2013). *Validation of The Extractive Industries Transparency Initiative Guatemala*. https://eiti.org/files/EITI-Gua_SDSG_Final%20Validation%20Report.pdf

²² Ibid

²³ Cordaid Briefing Note: Extractives Guatemala (2013).

https://www.cordaid.org/media/publications/Briefing_Note_Extractives_Guatemala.pdf

In July 2013, President Molina proposed a two-year moratorium on the granting of new mining licenses for the stated purpose of allowing the government to pass reforms to the mining law. Proposed reforms include attempts to address social, economic, and environmental issues. These reforms include mandating, what are now voluntary, higher royalty rates, establishing a mining fund to distribute royalties to local governments, requiring community consultation, and addressing environmental concerns and mine closure issues.²⁴ The moratorium has resulted in falling revenues from the extractive industry. According to EITI Guatemala MSG industry representative Mario Marroquín Rivera, Executive Director at Goldcorp, the EITI “reports show that the industry’s contribution is falling, and the moratorium on new licenses suggests that the situation will continue. The time has come for a serious debate about the future that Guatemalans see for the development of the sector.”²⁵

The sector’s limited contribution to the country’s GDP is affected by social conflict around mining operations. A study by the Institute Centroamericano de Estudios Fiscales (ICEFI)²⁶ found a strong correlation between mining and conflict in Guatemala. Otto Haroldo Cu, a civil society representative in the MSG, felt that “the fact that extractives count for less than 2% of the country’s GDP should make us stop and think. According to a report by ICEFI, 78% of municipalities with active mining licenses registered were engaged in some kind of conflict in 2010. Is this an adequate trade-off? Is this the kind of development that we want for our country?”²⁷

Effects of Extractive Industries on Indigenous Peoples

The Guatemalan population is 60% mixed descent (Amerindian-Spanish and European), while almost 40% are Indigenous Peoples, including K’iche, Kaqchikel, Mam, Q’eqchi’, and Mayans.²⁸ Millions of Guatemalans, the majority Indigenous and rural, were displaced as a result of a 36 year conflict which ended in 1996. Guatemala has a long history of land disputes. Land tenure claims are complicated by the fact that many Indigenous ancestral lands were seized during the military dictatorship in the 1960s and 70s and sold to foreign entities which have since sold them off again – often to resource companies. Multiple schemes to relocate Indigenous Peoples have resulted in violence and conflict. Displacement related to conflict, land disputes, drug-related violence, crime, corruption, human rights issues, poverty, and access to basic services continue to be serious challenges for the Guatemalan people and government.²⁹

More than half the 118 metallic mining licenses granted since the 1990s are located in Indigenous areas. The process followed to grant these licenses has involved very little official consultation with local people. According to Americas Quarterly, Indigenous groups have organized 74 referenda to gauge whether communities want extractives activity on their land. In all of them, a majority has voted ‘No.’ For example, a 2011 referendum in a community near the Escobal silver mine showed 99% voting against its development, but the government later approved the exploitation license for Canadian miner Tahoe regardless.³⁰

Canadian companies own the biggest mines in Guatemala: Goldcorp owns the Marlin gold mine as well as 40% of Tahoe Resources, which controls the Escobal silver mine. The Canadian companies’ presence has

²⁴ Sustainable Development Strategies Group (2013). *Validation of The Extractive Industries Transparency Initiative Guatemala*. https://eiti.org/files/EITI-Gua_SDSG_Final%20Validation%20Report.pdf

²⁵ *Falling Extractive Revenues in Guatemala amidst political turmoil*. EITI blog: <https://eiti.org/news/falling-extractives-revenues-guatemala-amidst-political-turmoil>

²⁶ <http://icefi.org/wp-content/uploads/2014/03/mineria-impresion.pdf>

²⁷ *Falling Extractive Revenues in Guatemala amidst political turmoil*. EITI blog: <https://eiti.org/news/falling-extractives-revenues-guatemala-amidst-political-turmoil>

²⁸ Sustainable Development Strategies Group (2013). *Validation of The Extractive Industries Transparency Initiative Guatemala*. https://eiti.org/files/EITI-Gua_SDSG_Final%20Validation%20Report.pdf

²⁹ Ibid

³⁰ Cordaid Briefing Note: Extractives Guatemala (2013). https://www.cordaid.org/media/publications/Briefing_Note_Extractives_Guatemala.pdf

been controversial.³¹ In July 2013, an Ontario Superior Court ruled that lawsuits against Hudbay Minerals regarding alleged crimes at its former mine in El Estor, Guatemala, could proceed to trial in Canada. The case is currently ongoing.³²

The 1997 mining law makes no reference to the rights of Indigenous Peoples having the right to be consulted. Environmental regulations in the 1997 mining law are vague and government oversight over the environmental impact of mining is weak. As outlined, Guatemala has a long history of land disputes.

EITI Implementation Background

In February 2011, Guatemala began its candidacy for EITI implementation. Guatemala EITI was declared compliant in 2014, but was suspended temporarily in February 2015 after failing to publish the EITI 2013 requirements by the December 2014 deadline. The suspension was lifted following the publication of the EITI report in June 2015, which covered the period up to 2013.³³

Present Status of Indigenous People's Participation in EITI Multi-Stakeholder Group

Presently, Indigenous Peoples are represented on the EITI MSG in Guatemala through organizations that are part of a national assembly. From amongst the general assembly, leaders are selected to participate in the EITI Guatemala's National Working Group. According to an Indigenous Guatemalan civil society representative on the MSG:

The organizations that are part of the national assembly work independently and unite when there is a common objective...there is not a specific role for [Indigenous representatives], there are only people who are self-identified representatives of Indigenous People, but in reality there is not representation [of the Indigenous People themselves].

There are currently at least two civil society representatives on Guatemala's EITI MSG who identify as Indigenous, both Mayan and Garifuna. In spite of the lack of systemic and broad representation of Guatemala's Indigenous People's on the EITI MSG, interview informants acknowledged that it was an important step to include Indigenous People and civil society because "historically, it has been very hard to have dialogue with the state and private companies. Now [the state and private companies] hear the opinions of the people; this has been fundamental."

Challenges to Meaningful Indigenous Participation in EITI Multi-Stakeholder Group

Interview participants identified some key concerns preventing full and meaningful participation for Indigenous Peoples in the EITI MSG. These include divisions within the MSG; problems with ongoing and consistent communication and outreach to Indigenous communities and organizations; and the fact that key civil society organizations, some Indigenous organizations, and some companies are not represented on the MSG.

1. Divisions within the Multi-Stakeholder Group

One barrier to effective participation of Indigenous Peoples in the EITI MSG is divisions due to the conflicting interests and priorities of MSG members. In fact, one of the biggest challenges can be disagreement among Indigenous groups. These disagreements also occur between different sectors, including state and civil society. As an interview informant put it, "There are some Indigenous groups that are not in agreement about anything...this lack of coordination and agreement is a big challenge. Some groups do not want to participate in EITI because they do not agree with the extractive industry."

³¹ Ibid

³² Business and Human Rights Resource Centre <http://business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0>

³³ World Bank. 2015. *Guatemala - Extractive Industries Transparency Initiative (EITI) : First Post-Compliance Project*. Washington, DC ; World Bank Group. <http://documents.worldbank.org/curated/en/2015/03/24223625/guatemala-extractive-industries-transparency-initiative-eiti-first-post-compliance-project>

The informant further explained:

I have seen good coordination between the state representatives, civil society, and the private businesses that participated. But, there are divides between some participants. Generally, participants want communities to participate and to see communities benefit from the projects. But, there are participants who prefer that it is they themselves who benefit, and they don't care about participation of anyone else. This makes it more difficult because civil society has to coordinate even more.

2. Problems with communication and outreach

According to an interview informant, “there is infrequent communication and flow of information between the leaders and the representatives of the national working group at this point. Earlier, there were workshops and good information, but now it seems to have diminished.”

Interview participants acknowledged previous trainings put on by the World Bank had been effective but noted the lack of consistency with training following the initial trainings offered at the inception of the Guatemala MSG. However, project reports and plans submitted by the World Bank indicate that further capacity building for MSG members and outreach to Indigenous areas affected by production in Mayan languages are in the planning stages.³⁴

3. Inadequate representation

Preliminary analysis of the MSG composition in Guatemala reveals that several key civil society organizations and companies are not currently represented. Originally, when civil society representatives were being selected for the MSG in 2011, a number of organizations primarily focused on supervising and monitoring social conditions were invited to participate. An interview participant explained,

Several decided not to participate because it appeared to be more ‘political’ than anything. Many companies also did not want to participate because there was a lack of confidence in the government institutions due to corruption. Eventually, a conglomerate of organizations that believed in the process and in transparency and in the potential to distribute the benefits generated by companies in the extractive industry. And then, we...developed the first report about payments being made/not made...

Another informant supported the view that Indigenous representation on the EITI MSG in Guatemala currently is not legitimate:

The ancestral authorities are key to decision making in the Indigenous communities of Guatemala. Having partnerships with the elders, both men and women, would almost cover Indigenous participation. What is actually happening though is that they call some leaders the representatives of the Indigenous People, but these people [the so called leaders/representatives] have only benefited from representation, which isn't legitimate. It isn't legitimate because it lacks the legitimacy and validation of the ancestral authorities.

Another issue identified is that Indigenous participants and representatives involved in the national EITI working group are not from the locations where significant extractive industry projects are occurring. Interview participants felt those regions most affected should be represented to ensure oversight of industry activities from the locations where those activities take place. As an informant explained, “To increase transparency and have better oversight, Indigenous Peoples who are neighbors to the extractive projects should participate in the national work group so that we know how they perceive the projects, what they are observing, and what they are experiencing from the project.”

³⁴ Ibid

One obstacle to participation in the EITI MSG conveyed by some civil society representatives interviewed, and confirmed by reports reviewed, is the lack of financial capacity. These representatives have to attend meetings in Guatemala City. The time and expense to participate, together with lost income, are significant costs. Unlike company and government representatives, the costs of participation for civil society representatives are typically not covered by their organizations.³⁵ In spite of this challenge, participants from civil society have been active; informants acknowledged that this barrier does stop some groups from participating.

4. Limited outcomes in changing economic conditions in Indigenous and rural areas

Interview informants did not see significant improvement in the poverty experienced by Indigenous Peoples in Guatemala since the inception of EITI. In their view, one reason for this is that many Indigenous Peoples still know very little about EITI:

The National Work Group of EITI-GUA needs to make a greater effort to promote EITI in the country, otherwise it will continue to remain an unknown topic for many Guatemalans.... In economic terms, the advances are few; one cannot talk about economic development in the areas of influence of the extractives projects because the central and local governments have not invested well the money they receive. Industries have assumed a subsidiary role because the governments haven't been able to articulate/design a spending plan that benefits the population.

In spite of the promise of poverty eradication through natural resource extraction not being realized, an interview informant did note some advances in communities where extractive projects are happening. For example, "the economy in El Estor is more stable. There are better schools and better streets.... There are mayors who will give benefits back to the community.... In Izabal, you can see the benefits in some municipalities – they receive money and they invest it in streets and in things that will assist the community."

Pathways Forward Based on Successes and Good Practices Identified

Ongoing information workshops in all regions

Informants agreed that previous information workshops carried out had been valuable. These included a series of trainings in 2010 delivered by the World Bank, which included trainers from Peru with experience in the MSG process. However, according to interview informants, these type of trainings are not currently being continued with the same consistency. A participant explained:

It would be very interesting if the national working group would develop and deliver a round of informational workshops focusing on what is happening with EITI. The representatives need to be more involved, to receive more information about the process, and to be engaged in the development and review of the reports. The lack of information has limited the general understanding of how EITI is functioning in Guatemala. Increasing the communication and ensuring that each sector reports back to their appropriate constituency would help to develop more equal participation and understanding of EITI.

Targeted outreach to Indigenous communities near significant extractive projects

Informants and the reports reviewed agreed that more and sustained outreach on EITI is needed in Guatemala, particularly to reach all sectors of Indigenous Peoples. As one informant explained:

I think this should be a next step; to convene Indigenous participants to a work group meeting held close to one of the areas where an attractive extractives project is to occur. It would be interesting to

³⁵ Sustainable Development Strategies group (2013). *Validation of The Extractive Industries Transparency Initiative Guatemala*. https://eiti.org/files/EITI-Gua_SDSG_Final%20Validation%20Report.pdf

take the information to them in one of these areas because I think it would motivate the leaders of those communities to participate much more. I think it would also help to reduce conflicts because much of the conflict is due to lack of information.... In terms of governance, there continue to be many conflicts in the extractive industry. The reason for the conflict is, on one hand, due to the lack of information on the extractive processes that the people do not understand. On the other hand, it is because of the external financing that social organizations that oppose mining projects have received.

Although interview informants agreed EITI MSG in Guatemala was far from reaching its potential in enabling Indigenous Peoples to participate in decision-making about natural resources, one informant acknowledged, “I have seen Indigenous participation impact the decisions, more in economic terms – not much but some.”

Broader, inclusive and legitimate participation of all Indigenous Peoples in Guatemala

Another interview participant explained:

We need to invite other Indigenous groups to participate, then inform them about EITI so they can participate effectively. There are various groups that are not participating right now. There are about 50 different Indigenous groups in Guatemala, and only about 30 of them participate in the EITI.... The majority just isn’t informed and need to learn about EITI to get involved.

Another informant felt that an important next step for the participation of Indigenous Peoples in the MSG is to convert EITI GUA “into a space of public participation that allows people to understand the issues related to the extractive industry. The National Working Group needs to convene all sectors in general.”

Supporting an Indigenous People’s network

Discussing whether it would be useful to share lessons with other Indigenous Peoples in EITI implementing countries, informants had clear views that information networks would be beneficial. One informant felt:

It would be beneficial to identify the things we have in common and to discuss how to strengthen those commonalities and any challenges we may be facing. Creating networks between these groups using technology...it could be webinars, Skype, etc. An electronic news bulletin would even be helpful.

Another interview participant agreed with the potential value in an Indigenous- Indigenous EITI network:

It would be interesting if the companies that are interested in expanding the EITI, including the Secretary General of EITI, should make efforts to ensure that Indigenous peoples know about and understand the initiative to reduce the negative impacts left by the extractives industry and, at the same time, to end the myths that have surfaced, particularly those in the areas where there are extractive projects.

Regarding a strategy to fund such a network, an informant suggested, “searching for a business who is serious about this work and willing to finance it and have them make the invitation to the Indigenous participants to begin to create the network. But, they have to be willing to do it for the long-term, not just a one time, short term effort.”

Case Study #2 - Philippines

On the UN's Human Development Index, the Philippines score for 2013 is 0.660, placing the country at 117 out of 187 countries and territories - the medium human development category. Between 1980 and 2013, the Philippines HDI value increased from 0.566 to 0.660, 16.5%.³⁶ Transparency International's 2014 corruption perceptions index rates the country 85th out of 175.³⁷

The Indigenous Peoples in the Philippines are officially recognized by the Philippine Constitution and the 'Peoples' Rights' Act (IPRA). There are no accurate figures on the population of Indigenous Peoples because of the lack of formal census. The most recent figures based on an unofficial survey conducted by the National Commission on Indigenous Peoples (NCIP) estimates the population of Indigenous Peoples in the Philippines to be between 12–15 million, but the actual population may be higher. Indigenous Peoples make up roughly between 10–15 per cent of the total population of the Philippines and are present in 65 of the country's 78 provinces.

One report on Philippines Indigenous Peoples describes the economy and relationship to the land of several tribes in the country:

Communities are found in the forests, mountains, lowlands, and coastal areas of the country and are in varied levels of socio-economic development. They engage in a mix of production systems including farming, settled agriculture, hunting and gathering, livestock raising, fishing, and production and trade in local handicrafts. A common characteristic of Indigenous Peoples is their close attachment to ancestral land, territory, and resources. The world-view that 'land is life' is deeply embedded in their existence.³⁸

Indigenous Peoples are among the poorest and most marginalized peoples in Philippine society. They experience neglect and discrimination in the provision of social services by the government. The country's 2008 budget showed that regions with highest concentrations of Indigenous Peoples were allocated the smallest amounts from the national government. Social service provision in Indigenous territories is below that of the rest of the country.³⁹

Type, Magnitude, and Value of Natural Resource Extraction

According to the Mines and Geosciences Bureau (MGB), mining production accounted for 0.7% of GDP, and mineral exports have averaged 6.3% of total exports in 2013. The main minerals mined in the Philippines are gold, copper, nickel, and silver, with nickel about 30% of total value of the mining industry's production in 2013. The Philippines is developing a sizeable natural gas reserve at Malampaya, which, in 2012, represented USD 1.1 billion in government revenue. Currently, petroleum production is still modest.⁴⁰

However, nickel production is significant: the Philippines produced 11% of the world's nickel in 2010. Currently, with low royalty rates and a less than optimal fiscal system, the government receives only a small share of this resource wealth. In July 2012, the government announced it would stop issuing mining licenses while it revised the sector's legal framework.⁴¹

Major Laws or Statutes Defining Indigenous People's Rights Regarding Natural Resources

IPRA grants IPs in the Philippines the right to Free, Prior, and Informed Consent (FPIC) with regard to

³⁶ UNDP Human Development Report 2014: http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/PHL.pdf

³⁷ Transparency International: <https://www.transparency.org/country/#PHL>

³⁸ IFAD Country Technical Note: Philippines <http://www.ifad.org/english/Indigenous/pub/documents/tnotes/philippines.pdf>

³⁹ *ibid*

⁴⁰ EITI International site: <https://eiti.org/Philippines>

⁴¹ Natural Resource Governance Institute: <http://www.resourcegovernance.org/countries/asia-pacific/philippines/overview>

development projects undertaken on their ancestral lands. Many areas covered by existing contracts for the exploration, development, and utilization of natural resources in the Philippines are on the ancestral lands and domains of Indigenous peoples. The rights of IPs to their ancestral lands and domains are recognized as a state policy. As outlined in the Philippines’ *Extractive Industries Transparency Initiative Report for 2014*, in the report’s volume on contextual information,⁴² state policies and regulations stipulate that the extractives sector is to properly secure the FPIC of IPs before pursuing any activities that may affect them. The FPIC process is intended to lead to the signing of a Memorandum of Agreement (MOA) by the parties. Regulations for the MOA require payment of royalties to the affected IP concerned of at least 1% of the gross output of the extractive operations. This royalty is to be managed to promote the socio-economic well-being of the IPs.⁴³

The importance of the FPIC and MOA processes become more apparent when considering where minerals are concentrated in the Philippines. Out of the 39 large-scale metallic mining operations covered by the 2012 PH-EITI Report, 28 are within the ancestral lands of Indigenous Peoples. Based on 2013 data, the NCIP, (the government agency responsible for IPs in the Philippines) reports a total of 194 mining operations within IP ancestral domains.⁴⁴

Legal protections for IPs in the Philippines

The 1987 Constitution recognizes the importance of Indigenous Peoples and their rights over ancestral lands and domains. The state’s policy is to recognize and promote the rights of Indigenous Cultural Communities (ICCs) within the framework of national unity and development. Under the constitution, the state is required to protect the ancestral land rights of IPs and to ensure their economic, social, and cultural well-being.⁴⁵

The Philippine Mining Act of 1995 also recognizes the rights of ICCs over their ancestral land. Section 16 of the law compliments the 1987 constitution, in that it requires the prior consent of the ICC in order to pursue extractive development. In addition, IPRA specifies IP rights within the Philippines’ national legal system under the constitution. IPRA outlines priority rights in the exploration, development, and use of any natural resources within the ancestral domains. In addition, IPRA clarifies the need to obtain formal and written agreement with IPs, in accordance with their own decision making process, in order to develop natural resources. The law stipulates that the IPs will not allow any party to develop their ancestral domains for more than 25 years, which the IP may renew for another 25 years.⁴⁶

Claiming ancestral domains and lands

In order to be eligible for the considerable legal protections outlined in the previous section, IPs in the Philippines must go through a significant process in order to claim “ownership” of their ancestral domains. IPRA led the government to establish NCIP and begin to formally recognize the right of Indigenous Peoples to their domains by awarding IPs a Certificate of Ancestral Domain Claim (CADC) and a Certificate of Ancestral Domain Title (CADT). In 2004, NCIP updated its process to allow the IP to apply directly for title (CADT) through a process of survey, delineation, and certification.⁴⁷

The current process for IPs to claim ownership can now occur in three ways: by virtue of a native title,⁴⁸ by gaining formal recognition of ownership through acquiring a certificate of CADT or a certificate of

⁴² <http://www.ph-eiti.org/app/EITI-Report/#/First-Country-Report/Volume-1-Contextual-Information>

⁴³ *ibid*

⁴⁴ *ibid*

⁴⁵ *ibid*

⁴⁶ *ibid*

⁴⁷ Co, 2008: <https://dspace.mit.edu/handle/1721.1/44353>

⁴⁸ A native title, according to RA No. 8371, “refers to pre-conquest rights to land and domains, which, as far back as memory reaches, have been held under a claim of private ownership by ICCs/IPs, have never been public lands and are thus indisputably presumed to have been held that way since before the Spanish Conquest.” As cited in <http://www.ph-eiti.org/app/EITI-Report/#/First-Country-Report/Volume-1-Contextual-Information>

ancestral land title (CALT) from the NCIP's Ancestral Domains Office (ADO), and by securing a certificate of title by virtue of "Commonwealth Act 141, as amended, or the Land Registration Act 496."⁴⁹ Obtaining certificates of titles is seen as an arduous process. IPs whose lands were delineated prior to the enactment of the IPRA do not have to go through the process.⁵⁰

Problems with FPIC process and NCIP

In spite of seemingly robust legal protections of Indigenous Peoples in the Philippines, their ancestral domains, and the rights in those domains under Philippines law, Indigenous communities come under tremendous pressure to provide consent. In the midst of aggressive mineral development in the country, while the FPIC process unfolds in many ancestral areas, companies continue to operate as the FPIC process is carried out. In cases examined by MIT researcher Ronilda Co, the FPIC processes shows a lack of transparency and mining companies significantly control the process and outcome. As her dissertation outlines, "Instead of coming out as a neutral facilitator of the FPIC process, the NCIP's lack of skills and resources and the personal biases of officers involved in the process rendered them more supportive of the mining companies' interests."⁵¹

Effects of Extractive Industries on Indigenous Peoples

Mining projects must undergo an environmental impact review, but rules requiring community consultation and consent are not consistently followed. The Philippines has not passed a freedom of information law. According to information gathered by Bantay Kita (BK), at least PhP258 million worth of payments coming from mining revenues went to Indigenous Peoples in 2012, with most of it not accounted for by the government. The cited amount was disclosed by 11 large-scale mining companies who reported in 2012 as part of the EITI Philippines report.⁵²

As outlined in the previous section, mining companies operating on lands under ancestral domains are required by law to pay at least 1% of their gross outputs value as royalty payments. According to the latest EITI report, however, NCIP left PhP 52 million unaccounted for by the NCIP, even though NCIP is mandated by the government to monitor these royalty payments. In BK's assessment, the problem could either be companies overstating their payments or NCIP's inability to monitor the amounts accurately.

According to the Philippines (PH) EITI report, of the 28 large-scale mining companies operating in ancestral domains, 6 did not participate in PH EITI's reporting. Of the 22 participating companies under ancestral domain, 11 companies did not disclose any payments made to IP groups.⁵³ Without a higher level of transparency, the Philippines' extractive industries' impact on citizen wellbeing will be difficult to track. This is particularly true for the Indigenous Peoples of the Philippines because several laws entitle the IPs protection and rights over their lands, and they still remain among the most marginalized and impoverished groups in the Philippines.

⁴⁹ *ibid*

⁵⁰ This includes filing for delineation, delineation proper, submission of proof attesting to possession or occupation of the area, preparation of maps, preparation of report of investigation and other documents, notice and publication, endorsement of the ADO to the NCIP and the turnover of areas within ancestral domains managed by government agencies until the certificates are issued and registered As cited in <http://www.ph-eiti.org/app/EITI-Report/#/First-Country-Report/Volume-1-Contextual-Information>.

⁵¹ Co, 2008, p.18: <https://dspace.mit.edu/handle/1721.1/44353>

⁵² <http://bantaykita.ph/php-258-million-from-mining-revenues-went-to-ips-in-2012/>

⁵³ Philippines EITI site: <http://www.ph-eiti.org/app/EITI-Report/#/First-Country-Report>

EITI Implementation Background

The government took its first steps toward joining the EITI in 2012. By January 2013, the MSG was established, and, by May 2013, the EITI approved the Philippines as a candidate country.⁵⁴ Production data for 2012 and 2013 was reported, while a contextual information country report was submitted at the end of 2014. A second report was due by the end of 2015.⁵⁵

Civil society umbrella group, BK, translated to English as “We Guard,” is a national NGO working on increasing transparency and accountability in the extractive industries. BK coordinates the participation of civil society representatives on the EITI Philippines MSG. Established in 2009, it has built a strong network across the country and, now, has a number of initiatives aimed towards engagement and capacity building with Indigenous Peoples.⁵⁶

Present Status of Indigenous Peoples’ Participation in EITI Multi-Stakeholder Group

BK coordinates representation of civil society on the EITI MSG through a published selection process. Through consultation with civil society, it selects 5 regular members and 5 alternates to the EITI Philippines MSG.⁵⁷ There are 2 representatives from each geographic region as well as 4 from metro Manila who represent national organizations that are part of BK. According to an interview participant:

Bantay Kita... focuses on capacity building, and mandating representatives to participate on the MSG to be able to do the research and technical analysis needed. BK looks for technical capacity, gender balance, and regional representation.

For the last two years, BK had an IP representative on the MSG. An interview participant explained:

I was representing a civil society group and an Indigenous group that is not stipulated by the executive order of the president, but BK agreed I could represent. BK wanted IPs represented - it is BK policy to ensure there is IP representation.

At the time the interview was conducted, BK was actively searching for a new IPs to be part of the MSG as current representatives had terms coming to an end. BK was also advocating for a separate permanent IP seat on Philippines EITI MSG.⁵⁸

Challenges to Meaningful Indigenous Participation in EITI Multi-Stakeholder Group

While interview participants and documents reviewed indicate there is a strong legislative framework in the Philippines to protect the rights and interests of Indigenous Peoples (IPs) in mining regions, there are several obstacles in the way of IPs having a strong voice in decision-making about extraction on their ancestral lands. One participant noted:

EITI has no mechanism to strengthen IP rights because EITI focuses only in revenue streams. Our participation in EITI is just an opportunity for engagement. At least, our sentiments, issues, and concerns from the ground are laid down during meetings and well noted by respective government agencies.

Although participants pointed out that EITI MSG participation allows for another channel for advocacy and communication on IP issues, it was widely perceived that the government agency responsible for IP concerns is not effective in its current state.

⁵⁴ EITI International site: <https://eiti.org/Philippines/implementation>

⁵⁵ Philippines EITI site: <http://www.ph-eiti.org/app/EITI-Report/#/First-Country-Report>

⁵⁶ <http://blogs.ubc.ca/maapps/category/eiti-country-case-studies/page/4/>

⁵⁷ <http://bantaykita.ph/report-on-the-consultations-on-the-eiti-implementation-in-the-philippines/>

⁵⁸ <http://bantaykita.ph/bk-presents-experience-with-fpic-in-pre-ogp-cso-day-in-mexico/>

1. Weak government agency responsible for IP issues

Documents and interview participants cited serious concerns with the government agency responsible for IPs, NCIP. One participant noted how the lack of capacity and transparency in NCIP creates serious barriers for ensuring IPs benefit from extractive development on their ancestral lands:

For IPRA ancestral domains, Indigenous Peoples have to register and gain tenement title to be entitled to the FPIC process. There are many questions on how the FPIC process is carried out – the government agency responsible for conducting it is very weak. This agency is responsible for ensuring what should be paid to IPs in royalties – it’s at least 1% [under the law]. This contract must be disclosed. Some of the contracts have no signatories, some are not notarized, and some are not in Indigenous language but in Tagalog or English. And, the government agency is not disclosing if the royalties [for IPs] are received. Part of our [Bantay Kita’s] agenda is to organize IPs in ancestral domains to address these gaps.

The participant noted examples of NCIP not recognizing IP rights. In some cases, NCIP’s refusal to issue a tenement title, which would oblige proponents to complete an FPIC process, leads directly to conflict on the ground. Another interview participant noted:

The government wants information brought back to government agency’s concern. The government is then responsible to do something. The MSG can’t do anything [about concerns which IPs bring up]. The government must talk to tribal leaders [to address issues]. We bring issues to the government agencies concerned, but they are very slow in responding. The government wants minimum compliance EITI reporting and not to have to do anything about the issues.

Maximizing benefits from the extractive industry can be a potential driver of economic development in mining areas. Interview participants agreed that NCIP requires a stronger mechanism for monitoring royalty payments in order to ensure transparency and accountability for the IPs. Funds intended by the law for IPs must be open to the public and be accounted for, which is not currently the case. As explained by an interview participant:

The last report was presented in different forms to IPs. The weakness in governance is ammunition for the anti-mining coalition. EITI hasn’t had an impact yet in the IP mining areas. EITI report has not been translated into Indigenous languages.

2. Resistance of tribal leaders to EITI

As explained by an interview participant, the “EITI was introduced in 2005 by industry. The Philippines has a strong anti-mining movement. Environmental and human rights organizations were anti-mining as a number of mining operations had a poor track record.”

This resulted in distrust in EITI amongst IP leaders. As another interview participant explained:

IP leaders are not convinced of transparency and are not convinced about EITI. The traditional council of elders often don’t want development – it is a big no-no; do not join EITI. They see us as pro-extractive just because we sit on EITI. We explain it’s a way to express our sentiment and continue advocacy. The land is their life. It is sacred.

In the participant’s view, the sentiment of the tribal leaders is a key obstacle in participation of IPs in EITI:

The big barrier for IP Representation is the Tribal Leaders’ resistance to extractives. If we do not participate, the opportunity for engagement also will be lost. Then, we cannot express our concerns in the MSG.

3. Lack of understanding about relationship to the land

For IPs in the Philippines who have been willing to engage with extractive companies and participate in the MSG, differing world-views towards land make participation a difficult task:

It is not easy to be in the MSG. I always raise my voice during the meetings. Sometimes, I am emotional about relaying the IP sentiments. It is not the revenue that is the issue; it is the sacredness of the land. The land is life for them. Some regions, including my province, has been declared by Congress as “no go” areas by champion legislators due to the sacred lands and waters. I hope the next IP rep will translate what we on the ground want to bring to the government.

4. Key information missing from EITI report and lack of monitoring of royalty shares

One participant explained why civil society in the Philippines is not yet convinced of the value of EITI in helping people realize the benefits from extractives:

Civil society was not happy with the first report and almost did not sign it. It did not see the significant answers we’re seeking. From the beginning of the engagements, some requirements were submitted as addendums very late, many lacking documents, but had met the minimum compliance requirements. For the second report, we agreed that, if these documents are still missing, I’m afraid, we will not be able to sign. We are expecting the second report by fall [2015].

Another participant noted that these gaps in the first report were a type of success in that it became clear that IP royalty shares, defined by law, were not being properly monitored:

The first EITI report showed there wasn’t tracking of royalties to Indigenous peoples. For the last quarter of 2015, BK has planned capacity building of Indigenous organizations to work towards having an Indigenous rep on the MSG by 2016.

Another participant noted:

I expect that the IPs are not satisfied with the first report - not only after the disclosure of revenues but also interested in displacement from lands and human rights violations. [A problem] is IPs not knowing how to calculate royalties at 1% of gross revenue. If the total production value is not disclosed or known, how can we compute our share?

An interview participant reflected that, when local governments were consulted on these issues of not knowing total production value, local government and civil society agreed that there is “a need to monitor the sales and revenues of mining companies to provide an idea the share local governments should be receiving. They also stressed the need to develop and institutionalize a mechanism to properly monitor the management and expenditure of IP royalties.”

Both interview participants noted that work needed to be done for IPs to become more engaged with EITI. “There are two main constraints: first, organizing IPs, as they are not yet organized in a way to allow for participation in EITI; second, capacity building for other civil society organizations and for IP organizations - this is needed.”

Pathways Forward Based on Successes and Good Practices Identified

Ongoing information workshops in all regions and capacity building targeted to Indigenous Peoples

BK carries out quarterly sub-national consultations where the MSG members travel to the provinces. Interview participants explain this process as a good practice to be continued and how it has been expanded by a 2015 focus on Indigenous Peoples:

We [BK] always bring information back to my community - not only to IPs but to all regional organizations quarterly. Outputs are reported back, so they will be updated on how BK is participating in the MSG [on behalf of all CSOs in BK]. [This] reflects participation and commitment. We bring information to the community level. We have 1-day meetings for the key leaders of regional organizations quarterly. We ensure that the payments are disclosed and communicated with stakeholders... Consultations for IPs all over the country are coming on October 8th. This is capacity building to integrate what the issues are of the IPs into the second EITI report.

When the interviews were conducted, the IP workshop referred to had not been completed. According to a subsequent report on the IP workshop,⁵⁹ the participants identified a direction for moving forward: A national coalition of IP groups that can leverage its numbers to better negotiate with and seek demands from mining companies and the government. The overall purpose of one IP workshop aimed to dispel myths about the process of IPs signing agreements with extractive companies. The aim was to work towards leveling the playing field when it comes to IP demands at the negotiating table. One tool that BK sees as helping to level the playing field is a monitoring tool that could be used to check that all government documents that need to be disclosed to the IPs can be tracked. As an interview participant said, "This will help to measure effectiveness... It will also build public understanding of the documents being disclosed."

BK also aims to target further outreach and capacity building efforts towards Indigenous communities near significant extractive projects. As an interview participant explained:

Beyond the IP engagement in the MSG, BK plans to build capacity amongst Indigenous organizations to manage royalties. Are they getting their fair share? And, ensuring they are moving towards sustainability of their organizations. For example, in the Compostela Valley, royalties lead to conflicts. We are working on a program intended to link transparency and accountability to traditional practices. An MOU was signed with IPs that cultural practices are linking to transparency and accountability, with a series of workshops planned. In the long-run, we are trying to do these things where the government agencies have disclosure of MOUs with IPs. We hope to make this part of EITI implementation in the Philippines.

Since the interviews were conducted, BK has worked with the local government units in the Compostela Valley to organize a workshop for IPs designed to draft an Ancestral Domain Revenue Code. The purpose of the event is to ensure there is the necessary transparency and accountability in revenue collection by the local governments. This fills the identified gap that revenues owed to Indigenous Peoples are monitored and that the required funds are utilized for projects in ancestral domains.⁶⁰ In addition to the work being completed in the Compostela Valley, capacity building IP workshops addressing local transparency and extractive monitoring concerns were held in South Cotabato and Agusan del Sur in the fall of 2015.⁶¹

Sub-national work of EITI

An interview participant viewed EITI implementation at the sub-national level as the greatest potential influence of EITI in empowering IPs in the Philippines:

⁵⁹ <http://bantaykita.ph/bk-pwyp-philippines-hosts-its-first-national-ip-seminar-workshop-on-mining-and-community-development/>

⁶⁰ bantaykita.ph/bk-partners-with-comval-in-workshop-aimed-at-drafting-ancestral-domain-revenue-code/

⁶¹ See Bantay Kita report references in bibliography on IP workshops

The theory of change of civil society [in the Philippines] is – engage at the local level and empower local government to have a say on how mining will proceed in each area, directly based on companies active in each area. BK is working on sub-national pilots; the goal is to have sub-national MSGS. In 2009, a pilot began in Mindanao for the disclosure of information for companies, governments, communities, for Free Prior and Informed Consent – disclosing the royalties paid and received.

The southern island of Mindanao is the least developed of the Philippines’ three big islands. The Compostela Valley transparency initiative was the first sub-national organization in the country. With most of the mineral land falling under special protection due to its Ancestral Domain status, Compostela Valley is one of the regions where sub-national reporting was identified as a need. BK’s subnational MSG issued a 72-page handbook in 2013 containing detailed reporting templates for all relevant entities and assisting these institutions in disclosing their revenues, payments, and contracts.⁶²

Local governments and Indigenous leaders in Compostela decided to advance their own transparency initiative modeled on reporting requirements of EITI but extending beyond the EITI minimum requirements. The provincial government established a “provincial multi-stakeholder council for extractive industry transparency and accountability.” This was made up of small-scale and large-scale companies, local government officials, national government agencies, as well as four representatives from the provincial tribal council and five locally operating NGOs. The council is funded through revenues collected by the provincial government from mining operations. The council meets at least once every quarter and makes decisions by consensus.⁶³

In spite of these notable achievements of sub-national EITI in IP regions, an interview participant noted the resistance of companies and government to sub-national EITI initiatives. The participant explained:

Industry thinks that EITI should only be at the national level and don’t think local governments should have a say, for example, with the Glencore project in Mindanao. It is an ongoing debate. The [BK] approach of sub-national, multi-stakeholder engagement is challenged by industry. It’s a struggle between government, community, industry, and civil society.

Our goal for EITI is that in 2016 all regions hosting mining will have a sub-national EITI consultant to do a preliminary study or scope on the effects in that region. We don’t want to replicate the national level quarterly reports on how companies are complying with environmental legislation. But, the sub-national level can discuss compliance issues and discuss how to make local royalties align with a development agenda of how social spending from these royalties should contribute to local development.

EITI Multi-Stakeholder Group has improved the relationship between sectors

Even though interview participants did not credit EITI as having improved the rights and decision-making powers of IPs, it has so far, in their view, improved relationships and the level of dialogue between the parties. For example, one participant saw sitting on the MSG participation as a means to advocate more directly on IP issues to the government agencies concerned:

I, as an IP rep, together with fellow CSO Reps, we scrutinize the templates if it includes IPs shares, the inclusion of the Memorandum of Agreements, and other pertinent documents. We see to it that in the contextual information IP issues are included so that the gaps will be addressed by concerned government agencies.

Another participant observed that EITI had built trust across sectors:

⁶² <http://blogs.ubc.ca/maapps/category/eiti-country-case-studies/page/4/>

⁶³ http://www.publishwhatyoupay.org/wp-content/uploads/2015/02/MSI_EITI-report_download-2c.pdf

EITI has changed the dynamic. Before there was a lot of mistrust. Now the MSG representatives are professors and professionals. This builds credibility, as sometimes the consultants of companies are also professors. The CSO rep and company rep can be colleagues at the University of the Philippines, so now, the technical capacity of the MSG can't be undermined, and there are better quality interactions between the companies and civil society.

Whether this greater level of trust and increased capacity for information exchange and dialogue leads to better results for Indigenous Peoples remains to be seen.

Supporting an Indigenous People's network to share information

Interview participants saw value in building networks and platforms for IPs to share information with each other. One participant explained how this would support IPs in negotiations with companies:

There is a Canadian firm interacting with an IP organization that is now part of Bantay Kita. No, the IP did not get what they thought they should. It would be good for them to share their experience with other IPs regarding their ancestral domains.

The interview participant emphasized the need for further IP training, particularly one focused on an ongoing FPIC process. The participant noted:

EITI hasn't empowered IPs yet. The last report was presented in different forms to IPs. The weakness in governance is ammunition for the anti-mining coalition. EITI hasn't had an impact yet in the IP mining areas. EITI report has not been translated into Indigenous languages.

Case Study #1 – United States⁶⁴

The United States ranks 8th out of 187 countries on the UNDP Human Development Index. Its approximately 320 million population has a gross national income per capita of \$52, 947.⁶⁵ Yet, the U.S. Gini coefficient, a measure of income inequality, is higher than all but one other country in the top 40 countries in ranking by the Human Development Index. U.S. Indigenous Peoples are comprised of some 566 federally recognized tribes (337 tribal entities in the continental U.S. or “48 states” and 229 in Alaska). Some 5.2 million people, 1.7% of the total U.S. population, identify as Native American or Alaska Native. Native Americans have a higher poverty and unemployment rate when compared with the national average rate. About one-in-four American Indians and Alaska Natives lived in poverty in 2012. Among those who identify as American Indian or Alaska Native as their only race, the poverty rate was 29.1% in 2012.⁶⁶

Type, Magnitude, and Value of Natural Resource Extraction

The U.S. is a large extractives producer. The U.S. on all of its land — public, Indian, and private — is the number one global producer of natural gas and oil, the second largest producer of coal and renewable energy, the third largest producer of gold and the fourth largest producer of copper. Within that large share of production, a much smaller portion is extracted from federal and Native American lands and waters. In the federal fiscal year 2013, 40.3% of coal, 23.1% of crude oil and lease condensate, and only 15.9% of natural gas were extracted from federal lands or waters, including tribal lands. The U.S. federal government collected some \$12.64 billion in extractives revenue in 2013 from rents, royalties, bonuses, and fees from federal and Native American lands and some \$11.8 billion in federal corporate income taxes⁶⁷.

Major Laws or Statutes Defining Indigenous People’s Rights Regarding Natural Resources

The relationship between the U.S. federal government and tribal governments is complex and has a long and, in many cases, tragic history. The U.S. Constitution establishes the power of the U.S. Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁶⁸ This provision confirms that tribes have a distinct status in the U.S. political fabric of the United States — a status limited only by the plenary power of the Congress. It also establishes that tribes are separate and distinct political entities from the 50 states, which generally do not have jurisdiction within the boundaries of Native American reservations. Today, the U.S. federal government has a “nation-to-nation” relationship with tribal governments, in which the government balances the tribes’ sovereignty and right to self-determination with the obligation to protect tribal and individual Native American assets. Considerable disagreement remains among tribes, individual Native Americans, and the federal government regarding the meaning, boundaries, and obligations of the trust responsibility.

Dozens of federal statutes, enacted over hundreds of years, regulate the process of leasing tribal or individual trust land for extractive purposes, operating those leases, and paying revenues to the tribal government or individual allottees. Different laws establish different processes for different commodities and, sometimes, for different reservations. Major laws governing this industry on trust land include: The Indian Mineral Leasing Act⁶⁹, The Indian Mineral Development Act⁷⁰, The Energy Policy Act,⁷¹ and the Act of March 3, 1909.⁷²

⁶⁴ This case study draws significantly from research conducted by Jerry Gidner, Tribal Liaison Officer, Department of the Interior Office of Policy, Management, and Budget, and USEITI advisor. The co-authors wish to acknowledge his significant contribution to this report.

⁶⁵ UNDP Human Development Report 2014: http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/PHL.pdf

⁶⁶ Jens Manuel Krogsta, 13 June 2014, Pew Research Center. <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/>

⁶⁷ Please note that U.S. corporate income taxes include tax on all income from extractive companies, including transportation, refining, retail and many other operations beyond extraction only.

⁶⁸ The Indian Commerce Clause, United States Constitution, Article I, Section 8

⁶⁹ 25 USC §396a 1938.

⁷⁰ 25 USC §§2101-2108, 1982.

⁷¹ 119 Stat §594, Title V, authorizing Tribal Energy Resource Agreements, 2005

⁷² 25 USC 396

Although the U.S. federal government collects most revenue generated by extractives on trust land, the federal government has no ownership rights to that revenue. The government disburses 100% of trust revenues to the tribes or individual allottees. The U.S. Department of the Interior (DOI) does report, on an annual basis, the aggregate national total of revenues that it collects from trust land. However, it does not, and legally cannot, release data regarding revenue generated for specific tribes or individual Native Americans without the express permission of the tribes or individual allottees in question nor can the federal government compel a tribal government or an individual allottee to agree to release of this data.

In Alaska, Native land ownership is treated quite differently than in the continental U.S. because of the land settlement in 1971 under the Alaska Native Claims Settlement Act (ANCSA).⁷³ That Act extinguished all aboriginal land claims in exchange for conveyance of 40 million acres of land in fee to corporations established under the Act and payment of \$962,500,000 to those corporations. There are four types of Alaska Native land ownership: lands conveyed to Alaska Native regional corporations and village corporations, lands held in fee by Federally Recognized Alaska Native Villages, Native allotments granted under the Act of 1906, which are owned by individual Alaskan Natives subject to a restriction against alienation, and restricted Native town site lots located in villages and towns.

Under ANCSA, both the regional and village corporations selected lands, which they hold in fee simple. Village corporations hold the surface estates to lands they selected. Regional corporations hold both surface and subsurface estates, including subsurface estate to most lands to which the village corporations hold the surface estate. The corporations are private entities and the DOI does not hold the corporation land in trust, so the department is not involved with the collection of revenue from any extractive activities carried out by a Native corporation on their land holdings. In Alaska, given this structure, Indigenous resource extraction is almost exclusively a Native corporation (i.e., private business, thereby governed as such) activity.

Effects of Extractive Industries on Indigenous Peoples

The U.S. collected on behalf of tribes some \$933 million in revenues from coal, oil, natural gas, and copper in federal fiscal year 2013.⁷⁴ In some cases, extraction has occurred on Native American lands for over a century. One of the earlier and largest oil fields in the U.S. was discovered in 1894 on lands held by the Osage Tribe in Oklahoma.

DOI's Office of Natural Resources Revenue (ONRR) collects revenues on behalf of tribes and/or receives information on extractives payments to tribes or individual Native American mineral rights holders from companies for some 40 tribes out of the some 566 tribes in the U.S. It also collects revenues for approximately 30,000 individual Native American mineral rights holders, sometimes referred to as "allottees." Many of these tribal rights are fractionated, which means a single right has been further subdivided or "fractionated" due to multiple generations within families passing down the right to all or many descendants.

In general terms, for oil and gas leases, the Bureau of Indian Affairs (BIA) completes and negotiates an agreement under the Indian Mineral Leasing Act or approves a tribally-negotiated agreement under the Indian Mineral Leasing Act or the Indian Mineral Development Act. The BIA also approves rights of ways, surface use agreements, communitization agreements, and similar documents ancillary to the lease. The BIA also tracks all tribal and allotted royalty ownership for each tract of land. The Bureau of Land Management (BLM) approves the Application for Permit to Drill (APD) and monitors production during the life of the well. The Office of Natural Resources Revenue ensures the proper royalty is paid for the amount of oil or gas that is produced and collects and disburses most of the revenue paid from oil and gas extraction on Native American lands.

⁷³ Public Law 92-203 (1971), as amended.

⁷⁴ 2015 US EITI Executive Summary and On-Line Report: <https://useiti.doi.gov/>

For coal leases, the BIA and ONRR roles and authorities are the same. Instead of an APD, however, the BLM approves the Exploration Plan and Mining Plan and monitors production.

EITI Implementation Background

The U.S. launched USEITI in 2011 with a commitment from the president to become a candidate country. In December 2012, the U.S. created its 22 member MSG under the auspices of the DOI. In December 2013, the U.S. submitted an application for candidacy to the International EITI Board. The U.S. was accepted as a candidate country in March 2014, and the first USEITI report was completed in December 2015.

Present Status of Indigenous Peoples' Participation in EITI Multi-Stakeholder Group

The U.S. has considered the role of tribes and Alaska Native corporations in the USEITI process from its inception. The USEITI process began with an extensive stakeholder assessment to identify the issues, ideas, and concerns of various sectors and constituencies with a potential interest in USEITI.⁷⁵ In the first years, USEITI outreach included informing and engaging tribal members, including sending “Dear Tribal Leader” letters from DOI to all tribes; MSG members attending conferences; sharing information in individual tribal meetings between the federal government and tribes; and sharing information with various existing advisory committees with tribal members.

The U.S. DOI and the MSG reached out to groups such as the National Congress of American Indians, Energy Committee; the Oklahoma Indian Land and Minerals Association, an association of individual Native American mineral owners; the Council of Energy Resource Tribes; the Montana-Wyoming Tribal Leaders Council; and Alaska Native Claims Settlement Act regional and village corporations. They also reached out to some tribal-related, federally-established committees, such as the State and Tribal Royalty Audit Committee; the DOI-established Tribal Budget Interior Council; the Royalty Policy Committee and the Indian Oil Valuation Negotiated Rulemaking Committee, also established by DOI. The MSG also communicated with various federal agencies or groups involved in energy development affecting tribes including, but not limited to: the BIA; the Indian Energy and Minerals Steering Committee, established by DOI; the Office of Special Trustee; the Office of Indian Energy and Economic Development, the Assistant Secretary – Indian Affairs; and the Office of Indian Energy Policy and Programs in the U.S. Department of Energy.

In August 2012, the Secretary of the Interior chartered the US MSG. The charter provided for two members representing Tribal governments and individual Native American mineral owners to participate as part of the government sector (along with states and federal government agencies). Initially, the Indigenous representation was provided in two ways. First, two members representing broader U.S. Indigenous issues were seated under the Civil Society sector: Rebecca Adamson, First Peoples Worldwide, and Veronica Slajer, North Star Group. Second, the MSG welcomed its first tribal member under the Government Sector, Claire Ware of the Shoshone and Arapaho Tribes, in 2014. In 2016, the MSG will be adding two additional members from tribes in the U.S.

Challenges to Meaningful Indigenous Participation in U.S. EITI

There are a number of legal, practical, and political challenges to full participation for Native Americans and Alaska Natives in USEITI generally. These included the sheer number of individual extractives-producing tribes who could participate, the unclear value of participation to many tribes, legal restrictions on the U.S. federal government's right to share Native American data, the complex relationship between the U.S. federal government and Indigenous Peoples, and the internal complexities and politics of individual tribes.

1. Legal restrictions on the U.S. federal government's right to share data and other legal factors

⁷⁵ *Stakeholder Assessment for the United States Extractive Industries Transparency Initiative (USEITI) Implementation and Formation of a Multi-Stakeholder Group (MSG)*, July 9, 2012, by the Consensus Building Institute for the US Department of Interior.

As noted above, the U.S. federal government cannot legally release data regarding revenue generated for specific tribes or individual Native Americans without the express permission of the tribes or individual allottees in question. In Alaska, under ANCSA,⁷⁶ DOI is not involved with the collection of revenue from any extractive activities carried out by Native corporations on their land holdings.

In addition, the U.S. federal government has an obligation to engage in direct, one-on-one, government-to-government consultation, an activity further reinforced by an executive order on this manner issued by the current Obama administration. Thus, legally, one could argue — for any US EITI engagement where tribes would be directly involved with their resources, extraction, and revenues — the federal government would need to conduct individual and separate consultations. The MSG, as a multi-stakeholder body, could be seen as an infringement upon, or barrier in the way of, direct government-to-government relations.

2. Number of potential participants

Approximately 38 extractive-producing tribes are located in the lower 48 states, typically located in the central to western part of the country. And, there are 12 land-ownership Alaska Native regional corporations. The resources include the rich oil fields of the Bakkan formation in North Dakota, a resource made viable by hydraulic fracturing, the more traditional oil and gas fields of Oklahoma and Alaska, and the large coal reserves on the Navajo Nation. Each tribe in regards to extraction is sovereign and independent of one another. While DOI has the authority to collect revenues, royalties, and rents on behalf of tribes, tribes may also enter into their own arrangements with companies, have their own government structures and reporting requirements, and might wish to increase transparency or preserve privacy for their own revenue information. Given that more than 40 sovereign entities could participate, questions have been raised about how the U.S. could best include sovereign tribal nations and Alaska Native Corporations in EITI. Should they each have their own report? If they were to disclose data, should it simply be part of the US report? Does each participating tribe need its own MSG with cross-sectoral membership?

3. Unclear value to tribal governments and tribes

For tribal governments, many have expressed cautious skepticism about participation in U.S. EITI. Given many of these governments are quite small, with many having fewer than 10,000 members (the Navajo Nation is a major exception, with over 250,000 members)⁷⁷, the tribes have expressed concerns about the administrative burden of taking on additional reporting requirements beyond those already required by both tribal governments and the federal government.

In some tribes, record keeping and administrative challenges are already significant problems; additional administrative burdens, might only exacerbate their challenges. Second, tribes are protective of their sovereign rights, including their right to disclose or hold data, information, and potentially sensitive financial information. Third, for some tribal governments, it is not clear what additional benefit EITI participation would provide. Disclosure may not provide any additional investment incentive for companies who extract on tribal lands. Fourth, tribes are not certain what kind of participation would be best. The options include simply tracking progress, participating as a MSG member to ensure general tribal interests are taken into account, or actively providing data. Lastly, tribal resource extraction is often caught up in controversies regarding allocation, value, and environmental impacts. For example, the purchase of a coal mine by the Navajo has raised significant internal divisions. In North Dakota, the bounty of oil riches has led to numerous lawsuits among various tribal members and entities. Thus, tribal governments may not be incentivized to further share data and information given litigation, internal controversy, and alleged, though not proven, malfeasance.

⁷⁶ Public Law 92-203 (1971), as amended.

⁷⁷ <http://www.navajo-nsn.gov/history.htm>

4. The complex relationship between the U.S. federal government and Native peoples

Extraction on Native American lands has been rife with controversy at many points in its history, from specific illegalities of non-Natives using unethical to criminal actions to obtain the rights to traditionally Native allottee-held shares⁷⁸ to the Cobell court case filed in the 1990s that asserted the mismanagement of billions of dollars of trust resources by the U.S. federal government. The lawsuit charged that for over 100 years the government failed in its duties to accurately account for the income generated by extractive and other kinds of leases as well as pay the revenues to Native Americans.⁷⁹ The case was settled, without acknowledgement of wrongdoing by the Federal government, for \$3.4 billion in 2010. Because DOI is U.S. EITI's lead agency and oversees the BIA, tribes and tribal members may be skeptical of the initiative and concerned about an additional, voluntary initiative further complicating an important but complex relationship. Of course, at the same time, tribes may consider U.S. EITI to be a reinforcing and transparent mechanism to uphold the responsibilities of U.S. DOI for greater accountability.

5. Internal complexities and politics of individual tribes

Tribes are hardly monolithic entities. They have governments that come and go, tribal elections with heated campaigns, diverse members with varying interests, and complex land ownership that in some cases affects both additional tribal and non-tribal interests. For example, federally recognized tribal governments are not the sole Native American interest in extraction. The General Allotment Act of 1887 (aka The Dawes Act) authorized the president to allot portions of reservation land to individual Native Americans. The recipients of these allotments became known as allottees. ONRR uses the term "allotted leases" and "individual Indian mineral rights holders" because the status of the land has not changed, but the royalties are distributed to the heirs of these original allottees. In some cases, such as in the Osage Nation, while the mineral resource is held in trust by the tribe, various payments go to what is known as "headright holders," who may or may not be Native, and, furthermore, the surface is owned primarily by non-tribal members with their own concerns and interests. In the State of Alaska, while Native corporations may hold the rights to extractive revenues, they are not representing Native communities, and, in fact, may have very different interests. Thus, there are varying interests that create complicated politics for each individual tribe.

Pathways Forward Based on Successes and Good Practices Identified

Inclusion of a Tribal Case Study in the 2016 U.S. EITI Report

The current U.S. EITI 2015 report includes 11 case studies or narratives for 11 counties or cluster of counties affected by natural resource extraction. The narratives provide more fine-grained facts and numbers regarding resource extractions costs and benefits in more local jurisdictions and are considered one of the innovations of the first report. Therefore, it would be useful and imminently achievable for the 2016 US EITI report to include a case study from at least one tribe. Because there are tribal representatives on the MSG, it might be possible to engage those tribes. In any case, tribal lands and experience are unique and different than non-sovereign counties and could and should be highlighted in future reports.

Form a Sub-Caucus of Native Interests on the MSG

The U.S. MSG will have new tribal members to add to the existing tribal member, CSO tribal-affiliated interests, and those companies that have direct experience extracting on Native American lands. Thus, these interested parties could form a "caucus" to share experiences, reach out to other tribes and tribal interests, advocate for key interests on behalf of Indigenous Peoples, and help explicate the value and importance of revenue transparency and the role of EITI both nationally and for interested tribal governments and tribes. Since the U.S. government can appropriately really only engage tribal governments in a sovereign-to-sovereign relationship, a non-government caucus could engage tribal governments in more informal ways as well as reach out to broader tribal members, allottees, and others.

⁷⁸ *Bloodland: A Family Story of Oil, Greed and Murder on the Osage Reservation*, Dennis, Jr. McAuliffe (1994)

⁷⁹ <http://nativeamericanhistory.about.com/od/Law/a/The-History-Behind-The-Cobell-Case.htm>

Conduct targeted outreach with the 2015 Report in-hand

Because the U.S. now has a completed hard copy and on-line report, “product” exists to show and explain U.S. EITI to various tribes, groups of tribes, and tribally affiliated organizations and Alaska Native tribes and corporations. - whether that be the National Congress of American Indians, the Alaska Federation of Natives, the Native Nations Institute, or the Native Finance Officers Association - there are a number of forums where the report can be shared, the on-line interactive data portion explained, and more clear arguments made for the value of EITI for tribes and tribal interests. To this end, either the MSG, the suggested caucus named above, or others, would need to articulate a clear set of rationales for why participation of some kind in U.S. EITI is in the tribes’ interests and provide reasonable responses to skeptical questions and concerns raised by tribal governments and members. Probably more often than not, individuals who are trusted by the tribes—not necessarily federal representatives—should be deployed to spread the message and engage in dialogue.

Additionally, there needs to be more encouragement and facilitation of global indigenous-to-indigenous dialogue so that Indigenous groups worldwide can exchange ideas and learn about “best practices” from each other. Attendance at 2016 global EITI meetings provides the perfect opportunity to arrange and allow for this interaction to occur.

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