

## **EITI Global meeting in Lima, February 2016**

### **The EITI and Peru: Challenges and Opportunities**

*By Andrea Steel*

Against the background of a fresh scandal implicating the Peruvian President Ollanta Humala in corruption allegations, the Extractive Industries Transparency Initiative (EITI) Conference came to a close last week in Lima. Humala, who was expected to deliver the opening address only to be replaced by Prime Minister Pedro Cateriano at the last moment, is accused of receiving a \$3M kickback in exchange for the approval of \$157M lucrative public contracts awarded to Brazilian companies for major projects including Peru's Southern Gas Pipeline.<sup>1</sup>

The episode has cast yet another long shadow over the politics of the extractives sector in Latin America. Ironically, the EITI is a process conceived to achieve the very opposite; it aims to make information about government revenues received from the extractive industries and payments made by companies to governments more transparent.

To become EITI compliant, states must pass a set of rigorous measures to ensure they provide high-quality country-level data which is both accurate and reliable, and in line with international standards. One of the main EITI criteria and a condition for the success of the standard is to ensure there is effective and independent civil society participation throughout the EITI process. Civil society representatives are supposed to be given an equal role to play, alongside government and industry leaders, to ensure effective oversight and compliance with the EITI's own validation processes.

Members of the multi-stakeholder group are responsible for producing the EITI national reports and to implement their recommendations. The aim is to enable both citizens and civil society to determine how natural resource revenues are spent and to build trust in the quality and integrity of information provided.

The EITI Global Conference, which meets every three years bringing stakeholders together from all around the world, thus provides a platform for public debate on the progress of EITI implementation. Starting off as an initiative with seven countries in 2004, EITI has now grown to include 51 countries with another seven candidate countries including the UK and US lined up to become full participants.

As well as appointing a new Board, a key aim of the meeting this year was to elevate discussion focused narrowly on improving technical aspects of the EITI reporting system to a broader debate on change and policy reform.

The 2016 EITI Report 'From Reports to Results' and a new EITI Standard, both launched at the Conference, highlight the shift in emphasis and the intention to strengthen effectiveness.

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<sup>1</sup> <http://larepublica.pe/politica/743537-dinero-de-odebrecht-vinculado-humala-fue-consignado-durante-las-elecciones-del-2011>

More importantly, these two documents<sup>2</sup> have raised the bar in seeking to improve extractive sector governance in implementing countries in order to remain EITI compliant.

Perhaps one of the most surprising outcomes is how little coverage the conference received in the Peruvian press given the importance of the extractive industries to the Peruvian economy. The mining sector alone accounts for around half annual exports. The meeting was overshadowed in the press by coverage of national elections, now one month away.

At the international level, media attention was limited to the internal brouhaha caused by the civil society boycott of the EITI's highest governing body over its right to self-select its own representatives to the EITI International Board. This followed growing concern in the last year over effective civil society participation in EITI processes<sup>3</sup>.

On the face of it, much has been accomplished in Peru in a short space of time. Peru first achieved EITI compliance in 2012; and is viewed by many as one of the few resource-rich countries that seems to have successfully turned its 'resource curse' (the concept that countries with resource wealth experience stagnant or even negative growth) into a blessing. Since 2005 poverty levels have more than halved from 56% in 2005 to 23% in 2014 according to data from the Peruvian national statistics office (INEI)<sup>4</sup>. However, these figures mask regional inequalities, and under scrutiny the data show that 34% people of indigenous Quechua or Aymara origin and 65% of the Amazonian population are still living in poverty.

Troubling statistics from the Peruvian government show that the number of social conflicts tripled from 76 in late 2006 to 211 in January 2016.<sup>5</sup> Approximately half of these were violent and over 50% of reported conflicts were attributed to "socio-environmental" disputes.<sup>6</sup> Since 2011, 44 lives have been lost and of these, 43 were from the indigenous population.<sup>7</sup>

Mechanisms like the *canon minero* devolve revenues from extractive industries to the regions and municipalities where extraction takes place. Under current legislation 50% of corporate taxes received by the state are transferred to regional and local governments. The two pilot EITI reports from Piura and Moquegua that were showcased at the EITI Conference sought to show how improved transparency is helping to ensure that local communities enjoy the benefits of these revenue-sharing arrangements.

However, other research shows that, unless regulated by an exigent civil society, the canon

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<sup>2</sup> See: <https://eiti.org/lima2016>

<sup>3</sup> See <http://www.resourcegovernance.org/blog/what-you-didnt-hear-about-eiti-last-week-six-new-elements-2016-standard-and-their-potential>

<sup>4</sup> <https://www.inei.gob.pe/estadisticas/indice-tematico/sociales/>

<sup>5</sup> Peru, society and conflict: Social conflict at: <http://www.perusupportgroup.org.uk/peru-social-conflict.html> (accessed 5 March, 2016).

<sup>6</sup> Social Conflict Report No.143, January 2016 by the Peruvian Human Rights Ombudsman (la Defensoría del Pueblo) at: <http://www.defensoria.gob.pe/conflictos-sociales/home.php> (accessed 27 February, 2016)

<sup>7</sup> For more information see *Informe Alternativo 2015 sobre el Cumplimiento del Convenio 169 de la OIT* at: <http://www.servindi.org/actualidad-noticias/29/01/2016/descargue-el-informe-alternativo-2015-presentado-la-oit>

flows can result in unequal distribution, wasteful spending, and localised corruption.<sup>8</sup>

### *Beyond transparency?*

The case of Peru shows that global initiatives like the EITI can help to level the playing field and enhance extractive industry transparency. Civil society, however, is increasingly demanding that improvements in accountability and good governance must go beyond the provision of information. Cases like the recent oil spills in the province of Bagua (in the Amazonas region) and in Loreto region<sup>9</sup> and the high incidence of indigenous deaths in anti-mining protests highlight the need to address the actual concerns expressed by populations most affected by extractive activities in national EITI reports.

While these are issues that may fall outside the remit of the EITI narrowly-defined, Global Witness and Oxfam America (see below) believe that reporting can be used as an instrument to promote respect for human rights by encouraging states to measure the use of extractive industry revenues against human rights standards. The United Nations Guiding Principles on Business and Human Rights also emphasise the role the EITI can play in helping states to protect individuals and groups against human rights abuses.

If the EITI process is to be truly recognised as a mechanism that can foster better accountability in resource-rich countries like Peru, then the voices of civil society and the space in which they are able to express their views must also be protected. As described by Anthony Bebbington during one of the EITI side events organised by Oxfam America, Publish What You Pay, Propuesta Ciudadana and the Peru Support Group, “the weight of extractive industries is so great that one simply cannot afford *not* to struggle for this transparency”.<sup>10</sup>

Companies themselves will also have to do more to improve their disclosure practices, particularly with regards to Free Prior and Informed Consent (FPIC). The results from the latest 2015 Community Consent Index (CCI)<sup>11</sup> that were presented from another EITI side event organised by Oxfam (see below) show that, in spite of numerous policies and guidelines, companies frequently fail to establish and maintain cooperative relations with affected communities.<sup>12</sup>

Building trust and credibility in mine affected regions present a number of additional institutional challenges for governments. Peru, in particular, needs to review how it can improve local governments’ capacity and performance while supporting and encouraging active citizenship. It also needs to enforce anti-corruption laws consistently. In spite of these

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<sup>8</sup> John Crabtree 'Funding Local Government: The Use (and Abuse) of Peru's Canon System', Bulletin of Latin American Research, Vol. 33, No. 4, 2014.

<sup>9</sup> Oil spill alarms Amazon populations at: <http://www.perusupportgroup.org.uk/news-article-1053.html#1053> (accessed 27 February, 2016)

<sup>10</sup> 'EITI and the problem of shrinking civic space' by Anthony Bebbington (see below)

<sup>11</sup> Community Consent Index 2015: Oil, gas, and mining company public positions on Free, Prior, and Informed Consent at: [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp207-community-consent-index-230715-en\\_o.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp207-community-consent-index-230715-en_o.pdf)

<sup>12</sup> 'Who has the Right to Decide? Trends in Prior Consultation and Community Consent in Petroleum and Mining'. Report on the side event by Maritza Paredes and Rosemary Thorp (see below).

shortcomings, the fact that so much high-quality data is now accessible through the EITI process shows a global commitment towards supporting responsible investment and activities in the extractives sector.

But perhaps the real value of the EITI process (and of the Lima conference in particular) lies in bringing stakeholders to the table.

The shift towards responsible mining or what is sometimes called '*la nueva minería*' in Peru suggests that transparency can be helpful in building trust in mining regions and thus promote more open and accountable government practices and ensure that local communities enjoy the benefits of revenue-sharing arrangements. But there is a long way to go before this is the norm in Peru and there are worrying signs about the lack of space offered to civil society in the formulation of policy.

In time, EITI may bring human rights benefits to Peru as well. While this might not be the "great transformation" promised by Humala when elected in 2011, it has arguably been something of an 'unspoken' or silent one.

## **Oxfam side-event highlights need for more progress on prior consultation**

### ***Maritza Paredes and Rosemary Thorp***

"Who has the Right to Decide? Trends in Prior Consultation and Community Consent in Petroleum and Mining". This was the title of the side event organised by Oxfam on Thursday 25th February to the EITI conference. It was significant in the context of the general concern expressed that civil society space is not effectively protected or respected in EITI procedures. Indeed at the conference itself, despite the formal goals and mission of the EITI, Oxfam chose to highlight an aspect particularly germane to civil society: Free Prior and Informed Consent (or FPIC).

FPIC is "the principle that indigenous peoples and local communities must be adequately informed about projects that affect their lands in a timely manner, free of coercion and manipulation, and should be given the opportunity to approve or reject a project prior to the commencement of all activity" to quote one of the two documents presented. This is the mandate contained in the ILO Convention 169, and accepted in theory by most of those countries in Latin America for which it is relevant (including Peru).

Daniel Cerqueira from the Due Process of Law Foundation presented the results of this organisation's review of six Latin American countries (Bolivia, Brazil, Chile, Colombia, Guatemala and Peru), documenting the legal status of FPIC in these. Peru was the first of the six to implement the legislation.<sup>13</sup>

Cerqueira stressed points of weakness in the process common to all the countries. These included an institutional problem of power, namely the power of the agency in charge of the

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<sup>13</sup> Derecho a la Consulta y al Consentimiento Previo, Libre e Informado en América Latina at: [http://www.dplf.org/sites/default/files/resumen\\_consulta\\_previa\\_2015\\_m7web-2.pdf](http://www.dplf.org/sites/default/files/resumen_consulta_previa_2015_m7web-2.pdf)

process of consultation vis-a-vis other parts of the state. There is also a problem of resources: consultation is essentially an intercultural process, taking place between the state and indigenous people. It therefore requires considerable intercultural skills; typically the public sector lacks teams with these skills while few or no indigenous people work within the bureaucracy.

Cerqueira said that it is not normal to find the active presence of an ombudsman in the process. And while the legal obligation to consult was important, it was only 'the tip of the iceberg' in policy terms; to be successful FPIC requires huge improvements in policy practice in areas such as land and water policy and in the handling of inter-cultural issues. Also, FPIC means little without a good Environmental Impact Assessment (EIA).

A second report 'Community Consent Index 2015' by Oxfam, and introduced by one of its authors Emily Greenspan, surveys 38 companies in the oil, gas and metal mining sectors to gauge their record on FPIC. Most of these have (or have had) operations in Peru. It found some progress in published positions since a previous survey in 2012, particularly in the mining sector. There appeared to be significantly more commitment to FPIC, with the number of extractive companies rating its importance increasing from 5 to 14 out of the 38 surveyed.<sup>14</sup>

FPIC is of course an obligation on governments (not companies) to consult, but the Oxfam report finds that companies are increasingly aware that without informed consent, projects are at high risk. Interestingly, the finance arm of the World Bank, the International Finance Corporation (IFC), now requires loan recipients to implement FPIC. Even though it is not something that companies can implement on their own, or even where FPIC as such is not applicable, companies have to demonstrate they have achieved 'broad community support'.

On the down side, there was much less commitment on the part of firms in the oil and gas sector to FPIC. This is a significant finding for Peru, since FPIC is only so far mandatory among Amazonian indigenous groups, not in the highlands. Oil and gas are derived mainly from this part of the country. The definition of 'indigenous' in Peruvian law so far virtually excludes the highlands where most mining projects are located.

There also remains an important gap between policy and practice. There is as yet little detail on to how FPIC can be implemented and then monitored. Companies were evasive on whether they would withdraw in the event of failure to achieve consent among local communities.

There followed comments and observations from Angela Acevedo (the director of Consulta Previa in the Ministry of Culture), Aidan Davy (deputy president and programme director of the ICMC (International Council on Mining and Metals)) and Vladimir Pinto from Oxfam. The points arising included the following:

- That the process of consultation inevitably raises many wider issues, beyond the scope of prior consultation.
- Important concepts such as 'direct impact' were not clearly defined or easy to work with.

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<sup>14</sup> Community Consent Index 2015: Oil, gas, and mining company public positions on Free, Prior, and Informed Consent at: [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp207-community-consent-index-230715-en\\_o.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp207-community-consent-index-230715-en_o.pdf)

- There was so far a lack of mechanisms to follow up on agreed measures, which were typically very general thus awakening expectations without practical follow through.
- The whole process was riven with conflict, between the government and communities over the ownership of resources, the rights and duties of the different levels of government, and over follow up on commitments made.
- The regulations governing the process needed to be more flexible, taking account of the reality of indigenous life and culture.

In summary, while growing awareness by business of the importance of consultation was encouraging, the process as currently operating is deficient in many respects. Pressure needs to be maintained to ensure follow-through, flexibility and sensitivity and for the enactment of underpinning reforms. Consulta previa is therefore no magic bullet.

## **EITI and shrinking civic space**

*By Anthony Bebbington*

Alongside the formal meeting programme in Lima, civil society organisations, companies and government bodies also convened a series of side events. One of these was organized by Oxfam America, Publish What You Pay (PWYP), Propuesta Ciudadana and the Peru Support Group (PSG). It sought to address the problem of shrinking civic space in EITI countries.

Opening the event, Carlo Merla, the chair of the PWYP board, Ray Offenheiser, the president of Oxfam America, and Gustavo Valdivia of Propuesta Ciudadana expressed concern at the “growing and accelerating trend” of intimidation and criminalisation. They catalogued some of the ways in which journalists, community leaders, NGOs, human rights activists and others working on extractive industries are being persecuted or harassed in their respective countries.

Speakers from Peru, Guatemala, Equatorial Guinea and Azerbaijan then recounted the sorts of repression and harassment that they and other organisations working on extractive industry transparency have encountered. From Peru, Carmen Rosa Shuan spoke of the criminalisation of community leaders such as herself; Alfredo Okenve from Equatorial Guinea described the exclusion of NGOs from the EITI process in his country, and the recent government decision rendering his own NGO illegal; Zohrab Ismayil from Azerbaijan spoke of his harassment by authorities and his ultimate decision to take refuge in the United States. Marvin Flores, echoing the other speakers, described the chequered road of EITI implementation in Guatemala.

The message that emerged from the session was that without the protection and expansion of civic space, the EITI simply cannot deliver results on the ground. Indeed, by its own definition, EITI fails when public debate is being diminished. Yet in many countries the pattern appears to be that repression is getting worse, not better. “Let’s face it” commented Dani Kauffmann of the Natural Resources Governance Institute in a subsequent plenary, “we do not see improvement of civic space when countries join EITI”. As recounted by panelists, the repression they and their organisations faced was sometimes physical, but more often was regulatory or reputational, with persistent efforts to limit NGO freedoms and to question the legitimacy of civil society. If we accept that civic space is essential for the success of EITI (and

Kauffmann identified civic space as “the best measure of EITI’s impact”) then such repression constitutes nothing less than an existential crisis for the whole EITI enterprise.

At the same time as the PSG panel highlighted the reduction civic space in EITI member countries, other events at the meetings suggested threats to civil society participation in EITI at a global level. Conflicts between PWYP and the presidency of EITI over civil society nominations to the 2016 board culminated on 23 February in an EITI members’ meeting that proceeded to endorse a new board without civil society board members being present. This in turn led civil society organisations to issue a strong public statement<sup>15</sup> questioning the legitimacy or even legality of the process

That same day two iconic figures within the PWYP alliance used their participation in a conference plenary session to argue that the recent practices within EITI culminating in the 23 February board meeting had undermined the “central premise” of stakeholder independence and self-governance on which EITI is founded. Worse still, Kauffmann argued, the exclusion of civil society from the board meeting on 23 February risked conveying a signal to member states that “civil society can be weakened or eviscerated.” In short, the risk was that dynamics at the global level of EITI risked legitimising the sorts of national restriction of civic space that had been so powerfully expressed in the PSG-PWYP-Oxfam America panel.

Underlying these dynamics, argued one Peruvian NGO leader, is a desire on the part of some EITI members to push back against the increasingly stringent demands of the EITI reporting process, demands to include beneficial ownership and social and environmental standards in EITI reporting. Whatever the case, both the side event and board meeting showed that the EITI is still a vulnerable institution.

Yet what struck me more than anything was that, even in the face of direct threats to their personal security, activists on the PSG-PWYP-Oxfam-Propuesta panel insisted that the EITI is worth fighting for. Why? In part because increasing transparency in extractive industry governance is a means to a larger ends, namely one of greater accountability and respect for rights across society at large; and in part because in many EITI member countries, Peru included, the weight of extractive industries is so great that one simply cannot afford *not* to struggle for this transparency.

It was clear from the panel that different types of civil society organization will have different roles in this process, and while considerable risks are involved for all such organizations, this is especially the case for national activists. The role of international organisations in continuing to support these activists remains critical.

*Professor Anthony Bebbington travelled to Peru to chair the side meeting for the PSG. He is Higgins Professor of Environment and Society and director of the Graduate School of Geography at Clark University in Massachusetts. He is also professorial research fellow at the School of Environment and Development at the University of Manchester.*

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<sup>15</sup> <http://www.publishwhatyoupay.org/pwyp-news/statement-eiti-governance-failures-threaten-independent-civil-society/>