The E15 Initiative

STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM FOR SUSTAINABLE DEVELOPMENT

ICTSD
International Centre for Trade and Sustainable Development

WORLD ECONOMIC FORUM
COMMITTED TO IMPROVING THE STATE OF THE WORLD

SYNTHESIS OF THE POLICY OPTIONS

No. 6

TRADE AND INVESTMENT FRAMEWORKS IN EXTRACTIVE INDUSTRIES: CHALLENGES AND OPTIONS

E15 Expert Group on
Trade and Investment in Extractive Industries

Trade and Investment Frameworks in Extractive Industries: Challenges and Options

Synthesis of the Policy Options*

January 2016

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NOTE

The policy options presented in this synthesis are the result of a collective process involving all members of the E15 Expert Group on Trade and Investment in Extractive Industries. It draws on the active engagement of these eminent experts in discussions over multiple meetings and think pieces commissioned by the E15Initiative and authored by group members. Rafael Tiago Juk Benke was the Theme Leader. Christophe Bellmann was the author of the report. Thomas Cottier and Ilaria Espa contributed significantly to the final paper. While a serious attempt has been made on the part of the author to take the perspectives of all group members into account, it has not been possible to do justice to the variety of views. The policy recommendations should therefore not be considered to represent full consensus. The list of group members and E15 papers are referenced.

The full volume of policy options papers covering all topics examined by the E15Initiative, jointly published by ICTSD and the World Economic Forum, and launched at the Forum's Annual Meeting at Davos-Klosters in 2016, is complemented with a monograph that consolidates the options into overarching recommendations for the international trade and investment system for the next decade.

E15 INITIATIVE

Jointly implemented by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum, the E15Initiative was established to convene world-class experts and institutions to generate a credible and comprehensive set of policy options for the evolution of the global trade and investment system to 2025. In collaboration with 16 knowledge partners, the E15Initiative brought together more than 375 leading international experts in over 80 interactive dialogues grouped into 18 themes between 2012–2015. Over 130 overview papers and think pieces were commissioned and published in the process. In a fast-changing international environment in which the ability of the global trade and investment system to respond to new dynamics and emerging challenges is being tested, the E15Initiative was designed to stimulate a fresh and strategic look at the opportunities to improve its effectiveness and advance sustainable development. The second phase of the E15Initiative in 2016–17 will see direct engagement with policy-makers and other stakeholders to consider the implementation of E15 policy recommendations.

For more information on the E15Initiative:
www.e15initiative.org

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OBJECTIVES AND OUTPUT

The E15 Expert Group on Trade and Investment in Extractive Industries had three objectives

- Identify major sustainable development challenges and opportunities in natural resources/extractive industries that can be effectively addressed through trade and investment frameworks and policies.
- Assess the adequacy of the global trading system to respond to these emerging challenges and opportunities.
- Propose policy options for the global trade and investment system to better respond to these emerging challenges and opportunities.

Overarching questions and issues the Expert Group was tasked to consider

- How can trade and investment policy tools and measures contribute to effective and efficient management of minerals, metals, and fossil fuels, ensuring:
  - Social and environmental sustainability (minimal environmental and social impact of extraction, use, and disposal);
  - Distribution of benefits and contribution to economic transformation of host economies; and
  - Access and availability on global markets.
- What is the role of international investment law in achieving these objectives?
- What is the role of international trade policy instruments such as export restrictions, subsidies, public procurement, trade-related investment measures, local content requirements, standards, and non-tariff barriers (including private standards, corporate social responsibility guidelines, labelling, and processes and production methods)?
- Will the evolution of trade and investment policy rules through multilateral, regional, and bilateral trade and investment agreements affect the achievement of these objectives?
- Examine how trade and investment in natural resources may be impacted by evolving trends in the global economy such as efforts to mitigate climate change; manage scarce resources; changes in innovation and technology; and levels and patterns of consumption.

Expert Group analysis and policy proposals were submitted in two forms

1. Critical issues studied through think pieces commissioned for the E15Initiative. These papers are referenced on page 12 and can be accessed at http://e15initiative.org/publications/.

2. Policy options presented in this synthesis and compiled in the summary table. The options are grouped under three categories:
   - Towards sustainable extraction
   - Ensuring fair distribution of benefits and promoting economic transformation
   - Securing access and availability of natural resources on global markets

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FOREWORD

Non-renewable mineral resources are dominant for the economies of over half of the world's countries which collectively account for a quarter of global GDP. Africa alone is home to 30% of the world's mineral reserves, 10% of the world's oil, and 8% of the world's natural gas. If managed properly, this natural resource endowment has significant potential for contributing to sustainable development goals on the continent. The recently adopted Addis Ababa Action Agenda on Financing for Development highlights natural resource exports as one of the main sources of domestic resource mobilization, and encourages countries to enhance transparency in the management of these resources and derived financial flows.

This reflects the fact that international debate and action on extractives has mainly focused on increasing transparency and reducing illicit financial flows stemming from extractive industries, *inter alia* through initiatives such as the Extractive Industries Transparency Initiative. However, despite the fact that open markets and international trade are indispensable for the economic viability of natural resource mining, there has been limited research and analysis on these linkages—mostly concentrating on oil as well as export restrictions (taxes and quantitative limits). In contrast, foreign direct investment (FDI) finds its origins in extractives. Since its infancy, international investment law and policy have been concerned about protecting foreign investors in resource-rich countries. This is in the process of changing, with calls for a more balanced approach, allowing host countries to pursue public policy objectives.

It is also evolving because FDI is vital for resource-rich countries. The International Council on Mining and Metals estimates that FDI in the mining sector, on average, accounts for 60–90% of total FDI in low- and middle-income resource-rich countries, however the sector only contributes between 3–20% of government revenue, 3–10% of national income, and 1–2% of employment in these economies.

The sense that richness below ground is insufficiently translating into value for society, and more importantly sustainable development outcomes, has led governments to implement a wide variety of policy interventions, including industrial policies, export restrictions, local content requirements, and the establishment of state-owned enterprises. The results have been mixed. Now that the commodity price boom of recent years has receded, and FDI in extractives has correspondingly contracted, resource-rich countries are even more concerned about building upstream and downstream linkages to reduce their vulnerability to price volatility by ensuring that mining industries are integrated in the economy.

At the same time, sustainable development, at its core, is about promoting development for present generations without comprising opportunities for future generations. This is particularly important in the context of extractive industries from an economic, social, and environmental perspective.

The E15 Expert Group on Trade and Investment in Extractives Industries, led by Rafael Benke and composed of experts drawn from a wide variety of backgrounds, focused on three overarching objectives that international trade and investment frameworks should contribute to achieve: sustainable extraction of natural resources; distribution of benefits and contribution to the economic transformation of host countries; and access and availability on global markets.

Within the overarching goal of enhancing the global trade and investment system for sustainable development, the Expert Group put forward policy options under each of these headings. A number of recommendations address several objectives simultaneously, such as increased transparency. Others seem critically useful but mostly lie outside the realm of trade and investment frameworks, such as enhanced regional collaboration around mineral infrastructure development and its potential for contributing to regional economic integration.

During the Expert Group deliberations, it became apparent that many of these issues and ideas are still very much in their infancy. While the Group was able to produce a cogent set of policy options, more research and analysis will be needed to elevate some of them to fully-fledged proposals that policy-makers and influencers can take forward.

As co-conveners of the E15 Expert Group, we are convinced of the need to provide organized and structured input into the policy and governance debates on trade and investment in extractive industries. The policy options that have resulted from this thought and dialogue process are offered to policy-makers and stakeholders alike, in the hope that they provide paths to effectively respond to policy imperatives of societies the world over. In a second phase of the E15Initiative, we intend to engage policy-makers in advancing these options.

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TRADE AND INVESTMENT FRAMEWORKS IN EXTRACTIVE INDUSTRIES: CHALLENGES AND OPTIONS

INTERNATIONAL TRADE IN EXTRACTIVE PRODUCTS HAS INCREASED SIGNIFICANTLY IN RECENT DECADES, WITH THE SHARE OF FUELS AND MINING PRODUCTS IN TOTAL MERCHANDISE EXPORTS REACHING 23% IN 2011. WITH STEADILY GROWING WORLD DEMAND FOR ENERGY AND RAW MATERIALS, COUNTRIES WILL INCREASINGLY COMPETE FOR SCARCE NATURAL RESOURCES OF CRITICAL IMPORTANCE TO THEIR ECONOMIC ACTIVITIES.

At the domestic level, if managed properly, the revenues from extractive industries can have a substantial impact on income and prosperity while respecting community needs and the environment. To achieve this, host countries often need to strike a delicate balance between offering attractive terms and guarantees for foreign investment, and concurrently creating domestic employment, generating revenues, and protecting the interests of local communities

International trade and investment frameworks thus have a central role to play in ensuring that trade in natural resources effectively results in transformative development and inclusive growth, while simultaneously providing fair and predictable access on global markets for countries that rely on such resources.

As a contribution to this debate on the international governance of extractive industries, the E15 Expert Group on Trade and Investment in Extractive Industries, jointly convened by ICTSD, the World Economic Forum, and the International Institute for Sustainable Development (IISD), started by identifying major sustainable development challenges and opportunities in the sector that could be effectively addressed through trade and investment frameworks. It then assessed the adequacy of the global trade and investment system to respond to both longstanding and emerging challenges, and suggested policy options and possible reforms to address them more effectively. In doing so, the Expert Group focused its attention more specifically on fuels and minerals.

TRADE AND INVESTMENT POLICY CHALLENGES IN EXTRACTIVE INDUSTRIES

MAIN FEATURES OF EXTRACTIVE INDUSTRIES

A number of characteristics are particular to the extractive industries. These characteristics are often at the root of the various tensions arising between investors, the host country, local communities, and the home state of the investing company or other importing countries. Given the heavily traded nature of fuels and minerals, such tensions tend to crystallize around the trade and investment policy nexus.

- *Natural resources are unevenly distributed* across different regions and countries, making access—and by extension trade and investment—particularly important for nations that depend on imports. Production tends to be heavily concentrated geographically. Moreover, the industry is capital-intensive, with a long development lead time (from exploration to engineering, development, and ramp-up), and a prolonged extraction life cycle. Capital requirements may further entail massive integrated investments in infrastructure and logistics beyond mining itself. However, extractive infrastructures are often self-standing operations, disconnected from the broader development agenda of the countries and regions concerned.

- ***The principle of permanent sovereignty*** over natural resources grants host states exclusive jurisdiction over the extractive resources located in their territory. Yet most developing countries are unable to mobilize domestically the significant long-term investments required to exploit their resources, and often rely on foreign direct investment (FDI) or other sources of financing. In turn, such investments bring technology, capital, and domestic economic opportunities. In practice, however, many resource-rich developing economies feel that they have not benefited satisfactorily from the wealth created by their extractive resources. Concerns have also been raised about illicit financial flows (IFFs) mostly originating from corruption, illegal resource exploitation, and tax evasion, including through transfer pricing or mis-invoicing.
- ***Natural resources are exhaustible***, and the notion of sustainability in the extractives sector primarily refers to the need to balance economic, social, and environmental concerns arising from prospection to extraction and post-extraction. Such activities may come at the expense of those individuals and communities who live in the vicinity of a project, revolving around issues such as land, human, or cultural rights, as well as environmental and health considerations. Ignoring these concerns has induced the so-called "resource curse," when the prosperity of a population deteriorates in spite of increased revenues generated through the extractive activity.

TRADE AND INVESTMENT POLICY CHALLENGES

EXTRACTIVE INDUSTRIES AND INVESTMENT POLICIES

Access, through FDI, and any other activity conducted in connection with natural resources located within the jurisdiction of a country, is subject to the sovereignty and regulatory powers of the host state. Foreign companies usually operate under concessions or a licensing agreement, defining the terms of exploitation, often referring to international law. The design of contractual and fiscal regimes and the allocation of licenses have to meet different objectives: one is to capture rent for the host state; and another is to provide incentives for efficient extraction and investment in the exploration of new concessions. Two issues merit special consideration in this debate, namely the use of local content requirements (LCRs) and investor-state dispute mechanisms under international investment agreements (IIAs).

- ***Local content requirements:*** In an effort to foster employment creation, value addition, or technology transfer, host states often seek to promote forward, backward, and horizontal linkages between the extractive industries and the local economy. To achieve this, the vast majority of resource-rich countries have used investment-related measures such as LCRs to combine the use of locally extracted raw materials with domestically available factors of production. The focus of local content measures is usually on ownership, maximization of local procurement, local transformation, domestic employment, and technology transfer. However, from an investor or importing country perspective, the use of such instruments can constitute significant trade barriers.
- ***IIAs and investor-state disputes:*** While the conditions for sustainable extraction should be settled in the first place through state contract, at the international level, the legal relations within the triangle of home states, host states, and companies concerned is governed by international investment law, including IIAs and investment chapters in free trade agreements. These agreements define certain standards of treatment that governments agree to accord to foreign investors and, in the case of disputes, often give the investor the possibility of bringing a claim against the host state before an international arbitration tribunal. According to Viñuales (2015), international investment law, in its mainstream understanding, has largely focused on protecting the rights of investors, and this emphasis has sometimes come to the detriment of the authority of the host state and the public interest; particularly in cases against developing countries, where a large part of extractive industry activities occur.

TRADE-RELATED MEASURES IN EXTRACTIVE INDUSTRIES

Several trade-related measures are commonly applied in the extractive sector, ranging from government procurement through trade-related investment measures to state-owned enterprise policies. Subsidies are particularly prevalent in fossil fuels. The Expert Group focused on two critical areas, namely export restrictions and sustainability standards.

- ***Export restrictions:*** One of the instruments most used by governments to support the downstream industry in extractives is export restrictions. These tend to be applied broadly across all raw material sectors, and their increased use in recent years has caused concern and friction, including two legal challenges at the WTO. Resource-rich economies and commodity-dependent developing countries have defended the right to use such measures as a means to promote economic diversification and industrial growth, in accordance with the principle of sovereignty over natural resources. However, export restrictions have been firmly contested by affected countries as beggar-thy-neighbour policies, distorting trade and fuelling international price volatility.

- ***Standards, certification, and corporate social responsibility:*** Some of the greatest challenges associated with extractive activities are the lack of transparency in revenue streams, controls to prevent corruption, and measures to establish and enforce effective social and environmental standards. Over 80 different private production standards are in place, supplemented by voluntary principles and guidelines. There is a lack of full understanding of the coverage and effectiveness of these initiatives, and their voluntary nature and proliferation also pose challenges. Beyond such schemes, the responsibility and authority to regulate extractive industries essentially lies with the host state. Evidence suggests that many countries are not in a position to sufficiently control extractive operations and implement existing regulations and contracts. In view of these structural weaknesses in host countries, the question arises whether import regimes in intermediary or consumer markets could assist in the implementation of fair and equitable industry standards (Cottier 2015). In this respect, some experts have insisted on the need for the home state of investing companies to assume more responsibility in guaranteeing sustainable extractive processes. This essentially relates to the extent to which processes and production methods (PPMs) could be used as a regulatory device to differentiate among imported goods based on social or environmental standards.

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POLICY OPTIONS FOR ENHANCED SUSTAINABILITY, FAIR DISTRIBUTION, AND RESOURCE AVAILABILITY

The options developed by the Expert Group are organized around three clusters of broad policy objectives. The first relates to the need to promote social and environmental sustainability in the extraction, use, and disposal of natural resources. The second responds to the imperative of ensuring a fair distribution of benefits arising from the exploitation of domestic resources and promoting economic transformation. The third cluster addresses the issue of security of access and availability of natural resources on global markets.

TOWARDS SUSTAINABLE EXTRACTION

The proposals included under this heading aim at encouraging more sustainable extractive processes by addressing social, human right, health, and environmental considerations. They cover actions to be undertaken not only by private investors and the host country, but also by the home state of the extractive company or other importing countries concerned with moral or reputational risks associated with extractive activities.

SUSTAINABILITY STANDARDS

POLICY OPTIONS 1 & 2 – **Expanding the use of international voluntary/private standards for sustainably sourced products**

Sustainable production initiatives in the extractive industry are largely led by the private sector. Trade rules under the WTO do not restrict companies from adopting such standards. However, many of these initiatives are recent and there is insufficient understanding of existing standards and potential shortcomings. (i) A first step would consist in mapping the current landscape of standards, their scope, coverage, and effectiveness. (ii) Based on this mapping, a next step would be to carry out a multi-stakeholder gap analysis to identify lacunae in the field.

POLICY OPTIONS 2 TO 6 – **Promoting differentiation based on sustainability standards in trade rules**

International trade regulations increasingly allow government policies to differentiate among like and substitutable products on the basis of PPMs. These distinctions mainly relate to concerns over environmental protection, public morals, human rights, and labour standards. The implementation of PPMs can occur through measures such as quantitative restrictions, differential tariffs, labelling requirements, certificates of origin, or even intellectual property rights. In practice, the operation of PPMs faces particular challenges in extractive industries, as they deal with bulk products, the origin of which is often difficult to trace. A key issue thus consists in developing effective mechanisms for tracing origin and ensuring compliance with standards. (i) Efforts should focus on improving techniques applied to the traceability of materials, taking recourse, *inter alia*, to available technologies. (ii) Another avenue could consist in establishing an international certification of smelters and mines. (iii) An index or reference list of responsible miners, traders, investors, shippers, and insurers could be developed to further support this endeavour. (iv) Such effort should also identify how technical cooperation and technology transfer can support host states and companies in complying with standards.

POLICY OPTIONS 7 TO 9 – Promoting internationally coordinated action

Given existing fragmentation and regional differences, universal standards are difficult to achieve. Unilateral measures will continue to play an important role in creating appropriate incentives to comply with international standards. Large markets such as the EU, US, and Canada already regulate imports of conflict minerals. While important, such unilateral approaches remain suboptimal, partly because their coverage is limited to a few import markets, but also because they result in a multiplicity of standards and import measures. (i) A first step might consist in promoting enhanced coordination of existing unilateral measures in their design and implementation, possibly starting in the field of conflict diamonds where several initiatives are already in place. If harmonization cannot be reached, emphasis should be laid on mutual recognition and equivalence. (ii) A slightly more ambitious approach would be to pursue differentiation on the basis of international sustainability standards in the context of regional trade agreements. Integrating such considerations in ongoing negotiations, notably under the so-called mega-regional agreements, would go a long way towards coordinating unilateral actions. (iii) A third and more ambitious approach would consist in developing and enforcing sustainability standards in the context of an international agreement on trade in extractives that would deal comprehensively with all relevant trade and investment issues related to the sector. Such an agreement could be developed step by step, starting with a group of interested countries and focusing on one or a limited set of extractive products.

RECALIBRATING INTERNATIONAL INVESTMENT LAW

POLICY OPTIONS 10 TO 12 – Shifting from investor protection to investment regulation

Three avenues for reform in the area of international investment law can be considered—moving from an approach focusing on investment protection to one based on investment governance conducive to fulfilling additional goals. (i) The first suggested avenue is the introduction and/or reinforcement of requirements on the exhaustion of local remedies in IIAs—investment claims should only be considered admissible after having exhausted national remedies. (ii) The second avenue would see the establishment of an appeals mechanism for investment arbitration awards. Such a mechanism could provide coherence and help address the variability in jurisprudence and application of investment treaty standards. (iii) Finally, specific mechanisms might be envisaged to ensure that investor duties, whether arising from domestic laws, contracts, or international law, are integrated in the interpretation of investment treaties. Alternatively, the establishment of standing commissions consisting of representatives of state parties with the mandate to issue authoritative interpretations of IIA provisions could be considered. The commissions could also address referrals by investment tribunals on points of law.

ENSURING FAIR DISTRIBUTION OF BENEFITS AND PROMOTING ECONOMIC TRANSFORMATION

The policy options in this cluster aim at ensuring that international trade and investment rules contribute to achieving a balance between the interests of governments, which need to foster job creation and industrial development, and the interests of investors, which need to be able to operate efficiently and competitively in a stable environment.

TOWARDS BETTER LOCAL CONTENT REQUIREMENT REGULATIONS

POLICY OPTIONS 13 TO 15 – Enhancing transparency

It is important to consolidate the role the WTO can play in promoting a more coherent approach to LCRs given the multiple bilateral trade and investment agreements signed by its members, many of which seek to regulate the extent to which signatory countries can use local content measures. Transparency mechanisms in the WTO such as (i) notification obligations and (ii) the Trade Policy Review Mechanism (TPRM) are powerful information tools to monitor the evolution of trade and investment frameworks. (iii) Transparency can also be increased by complementing the WTO trade monitoring database with an online forum accessible to both members and industry. The forum would serve to centralize the information regarding policy instruments and measures that require LCRs, as well as information related to arbitral rulings and proceedings on disputes arising in the extractive sector under IIAs and free trade agreements.

POLICY OPTIONS 16 – Clarifying when LCRs can (legally) be used

There is no agreed definition of LCRs, and the fact that their scope is very broad makes such measures subject to a wide range of WTO disciplines. This creates uncertainties for members as to whether a measure could be considered unlawful under relevant LCR disciplines. There is also a perceived inconsistency when it comes to the interpretation of IIA provisions across agreements during arbitration procedures in investment treaties. In the absence of a multilateral framework, these procedures are likely to impact on the predictability of the system. A first step in this area might be to define the contours of the concept for the purposes of trade regulation. This could take the form of an annex to the Agreement on Trade-Related Investment Measures (TRIMs).

POLICY OPTIONS 17 TO 19 – EXPLORING ALTERNATIVE POLICIES

The proliferation of LCRs applied in different combinations calls for a better understanding of the conditions required for LCRs to be successful in fostering development as well as possible alternative means to achieve the same objectives. (i) Extractive sector LCRs need to be mapped systematically, and case studies should be developed on the use of such measures and on alternatives such as regional sourcing. (ii) Regional economic communities (RECs) could serve as privileged forums for sharing experience and findings from this analysis. Due to their localized mandate, RECs may also provide a platform to engage on improving LCR rules, and encouraging the creation of national and regional value chains with strong local clusters in and around the extractive sector. (iii) At the national level, there is a strong case for supporting robust collaborative partnerships among business, governments, and research institutions to strengthen the productive capabilities of local firms as well as the design of effective horizontal polices.

The proliferation of local content measures applied in different combinations calls for a better understanding of the conditions required for LCRs to be successful in fostering development as well as possible alternative means to achieve the same objectives.

HARNESSING MINERAL INFRASTRUCTURE FOR DEVELOPMENT

POLICY OPTIONS 20 & 21 – Strengthening synergies in infrastructure development

The extractive industry is one of the largest consumers, providers, and contractors of large-scale infrastructure. However, there is a need to optimize extractive infrastructure to the benefit of a broader range of stakeholders and to trigger investment opportunities in other economic sectors. The challenge consists in better coordination among national governments, the private sector, RECs, international financial institutions (IFIs), and development partners, as well as strategic planning in the early stages of infrastructure development to ensure alignment with national and regional priorities. (i) A first step could consist in setting up a coordination mechanism within RECs and IFIs to address the consistency of infrastructure with broader regional economic policies. (ii) A multi-stakeholder dialogue platform involving all relevant actors should complement these efforts at the institutional level. The inclusion of NGOs in monitoring such processes would contribute towards awareness and transparency.

REDUCING ILLICIT FINANCIAL FLOWS FROM EXTRACTIVE INDUSTRIES

POLICY OPTIONS 22 TO 25 – Redirecting IFFs to contribute to development financing

Illicit financial flows, mostly originating from corruption or tax evasion through transfer pricing and trade mis-invoicing, represent sizeable amounts of lost revenue for host countries. Such practices are especially prevalent in extractive industries. Several initiatives are in place, including the Extractive Industries Transparency Initiative (EITI), which aims for greater transparency in the allocation of tax revenues, and the G20 and OECD work on Base Erosion and Profit Shifting (BEPS) and Transfer Pricing Guidelines for Multinational Enterprises. (i) Options to reduce IFFs could start nationally by ensuring that all licenses and concessions are subject to transparent bidding processes, and improving tax systems. (ii) At the international level, resource-rich countries could use IIAs and contract to require detailed reports on production prices and volumes. In return, host countries would provide early notice and consultations on changes in applicable tax rules. (iii) In a similar vein, an online platform with data on international prices and volumes could be established. (iv) Expanding on the EITI, an index of responsible traders in extractive industries could be established.

SECURING ACCESS AND AVAILABILITY OF NATURAL RESOURCES ON GLOBAL MARKETS

Due to the geographical concentration of extractive resources, a relatively limited number of large suppliers detain substantial market shares and are in a position to exert pressure on world prices and supply through the use of export barriers. As demand for natural resources grows, the beggar-thy-neighbour effect of export restrictions is likely to generate tensions between resource-endowed countries and those that depend on reliable and predictable markets. The following options aim at easing these tensions and providing greater certainty.

IMPROVING INTERNATIONAL DISCIPLINES ON EXPORT RESTRICTIONS

POLICY OPTIONS 26 & 27 – Enhancing transparency and predictability

By and large, export restrictive measures remain an area where WTO disciplines are underdeveloped. In view of the proliferation of export restrictions in the extractive sector, the question arises as to how to ensure adequate levels of transparency and predictability in the use of these instruments. (i) On transparency, a centralized regime for the notification of all types of export restrictions could be established at the WTO and facilitated through close cooperation with institutions active in their monitoring (e.g. the OECD inventory). The centralization of information should be built on the model established by the 2012 revision of the Decision on Notification Procedures for Quantitative Restrictions. The notification regime could be strengthened through the introduction of consultation requirements administered by an *ad hoc* committee. (ii) On predictability, WTO members have generally lacked the incentive to undertake export duty commitments. By contrast, several recently acceded members (incl. China, Saudi Arabia, and Russia) have assumed specific obligations on the use of export duties. Depending on the legal technique used to assume these obligations, they may neither be subject to the GATT-specific adjustment procedures available to tariff concessions (e.g. Art. XXVIII), nor have access to the general GATT exceptions (e.g. Art. XX). To address these inconsistencies and lay the ground for future commitments on export restrictions, WTO members could adopt a harmonized procedure for assuming obligations in the area of export duties.

POLICY OPTIONS 28 & 29 – Working towards a level playing field in export taxes

(i) The launch of negotiations on export duty concessions on a product-by-product basis could represent a suitable option in the establishment of a level playing field. Recently acceded countries would gain the possibility to renegotiate their concessions in accordance with the review procedure established under GATT, Art. XXVIII, and/or use export taxes under legitimate circumstances as recognized by GATT general exceptions. New commitments could vary from member to member based on a request and offer approach. Alternatively, one could opt for a "sectoral approach," with product coverage limited to a specific list of raw materials. (ii) Flexibilities could be envisaged for least developed countries and/or small and vulnerable economies—e.g. maintaining their export taxes unbound for all or only certain tariff lines. A threshold could alternatively be set for special and differential treatment, such as whether the country in question is a significant exporter.

NEXT STEPS

The reform opportunities highlighted by the Expert Group may take place at various levels and over different time horizons. Some can be realized by altering practical patterns in investment, extraction, and trade; others require reforms of domestic legislations or amendments and changes to existing treaties that may take longer to acheive. The table below summarizes the main policy options and a possible timescale for implementation.

Advancing the proposals will require effective collaboration among the various actors involved in the industry. Beyond traditional diplomatic protection of their companies, *home state governments* are increasingly responsible for ensuring that these companies behave in accordance with domestic and international law in their foreign operations. They have an interest in promoting efforts such as compliance with internationally agreed standards or domestic standards applicable to their companies. In the area of investment law, they have a responsibility to ensure that IIAs do not overemphasize investment protection at the expense of the public interest. Similarly, *importing countries* are in the position to support sustainable modes of extraction by taking recourse to appropriate requirements for the production and processing of fuels and minerals. *Host countries* remain responsible for the supervision of mining sites and compliance with legal requirements. The main efforts need to relate to transparency in taxation and the allocation of revenues, sharing of benefits, and the enforcement of standards relevant to the industry. Finally, the *private sector* remains of key importance in realizing and implementing the goals set out by the Expert Group. The responsibility of companies (including state controlled operations) is not limited to extraction and profit making, but entails obligations—which should be included in licensing agreements between host states and companies—towards the regions and people concerned.

Advancing the proposals will require effective collaboration among the various actors involved in the industry: home state governments, importing nations, host countries, and the private sector.

Many of the policy issues raised by the Expert Group are not specific to extractive resources, even if they exhibit particular features when applied to fuels and minerals. A relevant question is whether these should be addressed horizontally or whether a sectoral approach might be more appropriate. Given the specificities of the extractive sector and the current impasse in multilateral trade negotiations, some group members have suggested that a sectoral approach might be more appropriate. Such an approach could start as a plurilateral initiative on trade in extractives, involving critical exporting and importing countries and covering a wide range of trade and investment issues such as standards and non-tariff measures, export restrictions, LCRs, investment-related measures, and state trading enterprises. Given the large differences that exist among the various extractive industries, one could proceed step by step by initially focusing on a small set of minerals.

TABLE SUMMARY OF MAIN POLICY OPTIONS

ISSUE	OBJECTIVES	STATUS	GAPS	POLICY OPTIONS	TIMEFRAME
Goal 1 — Social and environmental sustainability					
Limited differentiation between sustainably or unsustainably produced products in international trade.	Expanding the use of international voluntary/private standards for sustainability sourced products.	Over 80 known standards are relevant for the mining industry.	Limited understanding of effectiveness, coverage, overlap or gaps.	1. Undertake a mapping analysis. 2. Carry out a multi-stakeholder gap analysis to identify lacunae in the field.	Short term
	Promoting differentiation based on sustainability standards in trade rules.	Regional trade agreement (RTA) provisions on sustainable fish & timber.	Traceability of minerals poses difficulties; Responsible traders, shippers, insurers, and investors index.	3. Promote research on traceability of materials. 4. Establish certification of smelters. 5. Create an index of responsible miners, traders, investors, shippers, and insurers. 6. Support for new/existing standards incl. technical assistance to producers to comply.	Medium term
	Promoting internationally coordinated action.	EU, US, and Canada regulate imports of conflict minerals. Kimberley on diamonds.	Only a few importing markets regulate imports; No effective provisions on exhaustible natural resources in RTAs.	7. Coordination of unilateral schemes on conflict minerals (EU, US, Canada). 8. Use RTA provisions to encourage differentiation on the basis of sustainability standards. 9. Negotiate an international agreement on trade in extractives (could proceed step by step, starting with one extractive product).	Medium - long term
International Investment law unbalanced in favour of investors.	Recalibrating international investment law: from investors' protection to investment regulation.	Overemphasis on investment protection; Domestic law interpreted too narrowly.	Need to balance investment protection with interest of the host state and addressing FDI negative externalities.	10. Give full effect to provisions on the exhaustion of local remedies. 11. Consider an appeals mechanism and/or joint commissions for interpretation. 12. Integrate domestic and international law in the interpretation of existing IIAs.	Medium - long term

ISSUE	OBJECTIVES	STATUS	GAPS	POLICY OPTIONS	TIMEFRAME
Goal 2 — Ensuring fair distribution of benefits and promoting economic transformation					
LCRs used but effectiveness and legal status is unclear.	Enhancing transparency.	WTO database, *ad hoc* review under WTO TPRM.	Transparency.	13. Notification of LCR use. 14. Regular review in TPRM. 15. Data in WTO trade monitoring database.	Short term
	Clarifying when LCRs can (legally) be used.	WTO disciplines (e.g. TRIMs, Agreement on Subsidies and Countervailing Measures, GATT); Disciplines under IIAs.	Rules are unclear and not enforced; Legal uncertainty.	16. Clarify rules on (non-TRIMs) LCRs bilaterally in IIAs and in the WTO through an annex to the TRIMS Agreement.	Medium term
	Exploring alternative policies.	Case studies are focused on oil and gas.	Understanding of beneficiation and value capture policies that can work effectively.	17. Map existing LCRs and generate case studies. 18. Use RECs as fora for experience sharing on the use of LCRs, exploring new disciplines or designing alternatives like regional sourcing. 19. Support collaborative partnerships among firms, governments, and research institutions in the design of effective horizontal policies.	Medium – long term
Mineral infrastructure should be better harnessed for broader development efforts.	Strengthen synergies among infrastructure projects and other development strategies, initiatives and projects.	Extractive industries are significant providers and consumers of infrastructure.	Insufficient alignment between infrastructure and regional development.	20. Set up a coordination mechanism within RECs and IFIs to address the coherence and consistency of infrastructure development with broader economic policies. 21. Launch multi-stakeholder dialogue platforms to complement institutional efforts.	Short term
Illicit financial flows could be tackled and redirected to contribute to development financing.	Ensuring tax on extractive activity is paid where value is created; Combatting the use of transfer pricing/ mis-invoicing.	BEPS (G20, OECD work) EITI; Large amounts escape developing countries through trade mis-invoicing.	Limited provisions under IIAs; No global official information system on prices.	22. Improve tax system. 23. Use IIAs and state contracts to require investors to report on production quantities and world prices. 24. Online platform with data on international prices and volumes. 25. Establish an index of responsible traders.	Medium term
Goal 3 — Securing access and availability of natural resources on global markets					
Export restrictions are unpredictable and not transparent.	Improve transparency and predictability.	OECD inventory of export restrictions.	Covers minerals, metals, and wood.	26. Establish a centralized regime for the notification of all types of export restrictions. 27. Adopt a harmonized procedure for assuming obligations in the area of export duties.	Short term
	Working towards a level playing field regarding commitments on export taxes.	Recently acceded WTO members (incl. China, Saudi Arabia, and Russia) and Australia have scheduled commitments.	No incentives for scheduling export restriction commitments.	28. New international agreement on export restrictions establishing a level playing field. 29. Provide special and differential treatment for developing countries.	Long term

EXPERT GROUP PAPERS AND THINK PIECES

The papers commissioned for the E15 Expert Group on Trade and Investment in Extractive Industries can be accessed at http://e15initiative.org/publications/.

Bellmann, Christophe. 2016. *Trade and Investment Frameworks in Extractive Industries: Challenges and Options*. E15 Expert Group on Trade and Investment in Extractive Industries – Policy Options Paper. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

Cottier, Thomas. 2016. *The Role of PPMs in Extracting Industries*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

Espa, Ilaria. 2015. *Export Restrictions in Relation to Extractive Industries*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

Ramdoo, Isabelle. 2015. *Synergising and Optimising Mineral Infrastructure in Regional Development Strategies*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

Ramdoo, Isabelle. 2015. *Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks? E15Initiative*. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

Viñuales, Jorge E. 2015. *International Investment Law and Natural Resource Governance*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

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The experts participated in their personal capacity. The analysis and policy recommendations are not attributable to any institution with which members of the E15 Expert Group are associated.

E15 INITIATIVE:
EXPERT GROUPS AND TASK FORCES

In the quest for effective responses to the challenges faced by the global economy at this time, foremost experts were invited to contribute to 15 thematic groups as well as three task forces addressing horizontal issues. The groups met regularly between 2012 and 2015 with the goal of delivering a set of policy options on the occasion of the WTO's 20th anniversary. These options are intended to animate discussions and feed the present and future international trade and investment policy agenda for sustainable development. The full volume of policy options papers, jointly published by ICTSD and the World Economic Forum, and launched at the Forum's Annual Meeting in Davos-Klosters in 2016, is complemented with a monograph that consolidates the options into overarching recommendations for the international trade and investment system for the next decade. The second phase of the E15Initiative in 2016–17 will see direct engagement with policy-makers and other stakeholders to consider the implementation of E15 policy recommendations.

E15 INITIATIVE THEMES

1 – Agriculture and Food Security
2 – Clean Energy Technologies
3 – Climate Change
4 – Competition Policy
5 – Digital Economy
6 – Extractive Industries
7 – Finance and Development
8 – Fisheries and Oceans
9 – Functioning of the WTO
10 – Global Trade and Investment Architecture*
11 – Global Value Chains
12 – Industrial Policy
13 – Innovation
14 – Investment Policy
15 – Regional Trade Agreements
16 – Regulatory Coherence
17 – Services
18 – Subsidies

* Policy options to be released in late 2016

The E15 Initiative

e15initiative.org

Implemented jointly by ICTSD and the World Economic Forum, the E15Initiative convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business and civil society geared towards strengthening the global trade and investment system for sustainable development.

ICTSD

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