



IDeIAS

Informação sobre Desenvolvimento, Instituições e Análise Social

MEITI – Analysis of the Legal Obstacles, Transparency of the Fiscal Regime and Full Accession to EITI

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As part of the implementation of the Extractive Industry Transparency Initiative in Mozambique (MEITI), the second MEITI report was recently officially launched. This report was produced by Ernst & Young Mozambique at the request of the MEITI Coordinating Committee (CC). In response to the international requirements of the Initiative, the report contains information on the payments made by companies in the mining and hydrocarbon sectors reconciled (verified) against the information on revenue received by the government. In addition to this information, the CC-MEITI decided to include as part of the second report an analysis of the legal obstacles to the implementation of the Initiative and research on the transparency of the fiscal regime.

After the report was finished, it followed the dissemination and vital analysis by civil society organizations (CSOs). This work is also one of the criteria for the full accession of the country to the Initiative. This edition (no. 43) and the previous edition (no. 42) of IDeIAS are contributions to disseminating and debating the information provided by the report, by assessing its main components. After IDeIAS 42 dealt with the exercise of reconciling the payments made by, and the revenue received from, the extractive sector, the present text will deal with the analysis of the legal obstacles to the implementation of MEITI, the research on the transparency of the fiscal regime and the recommendations. This article also undertakes a brief analysis on the following steps towards complete accession to EITI.

Transparency of the fiscal regime

The data from the reconciliation exercise in the second report clearly show the feeble contribution of the extractive sector to state revenue, largely because of the excessive fiscal benefits granted to some companies (see IDeIAS no. 42). Hence the transparency of the fiscal regime of all the companies that operate in the sector is very important for good governance along the entire

chain of the extractive sector and hence for translating the riches of the subsoil into economic and social gains for the country.

The report includes research into the companies selected for the reconciliation exercise as to whether they are willing to make their fiscal regime public. The results were that six companies responded favourably, seven negatively, and ten gave no answer. We should congratulate the companies which, in answering positively, show that they are indeed committed to the principles of transparency and good management of natural resources for the development of the country.

The attitude of the companies who chose to keep this information hidden from citizens is lamentable and a matter of concern. It is sad to note that companies that try to give an image of commitment to principles of transparency and good management at international level show, when they are asked to implement good practices of transparency, that they do not go much beyond speeches. But even more lamentable is the attitude of the government on the CC-MEITI, which was straightaway more concerned to find obstacles than solutions to holding this research on the fiscal regime. The attitude of the government may not only have influenced both negative answers and the silence from the companies, but also led to the holding of poor quality research.

As soon as some CSOs presented CC-MEITI with the proposal to include the fiscal regime of the companies in the report, opposition arose under various arguments: that it was not the time to make additions to the basic EITI (restricted to reconciliation and publication of payments made and revenue received from the extractive sector), or that the research would hold up the process, among others. In the discussions held, it was clear that carrying out the research was possible without imposing constraints of time or of any other kind on the production of the report¹.

Unfortunately, even after the decision of the CC-MEITI to hold the research was reaffirmed, new

obstacles were put in its path (it should be noted that decisions on the CC-MEITI are not always consensual). In fact, the questionnaire initially proposed by two members of the CC-MEITI, the Institute of Social and Economic Studies (IESE) and the Centre for Public Integrity (CIP), was rejected on the grounds that it was too long. In this questionnaire, if the company enjoyed a special fiscal regime, it would have had to answer five questions (four of which were in a yes or no format). The proponents of the questionnaire agreed to eliminate one of the questions, thus reducing it to four questions (three of them in the yes/no format).

In the end the questionnaire contained just one question: "If the company has signed a contract with the Mozambican state which envisaged a special fiscal regime, or has any document which guaranteed it a special fiscal regime, namely the terms of authorisation of the project, would you be willing to reveal this special fiscal regime in the next reconciliation report?"

There are several problems with the way in which the research was undertaken and how the question is posed. First, although the decision to carry out the research was communicated to the reconciler in December 2011, only on 27.02.2012 was the questionnaire sent to the companies. Secondly, the question is aimed only at the companies which enjoy a special regime. Hence, in the case of the companies which did not reply to the questionnaire, it is not possible to know whether they failed to do so because they did not want to, or because their fiscal regime is not special. Thirdly, the question does not ask the reasons for companies' intention to keep the regime secret, which does not make it possible to analyse options for overcoming the problem².

Finally, after the research was concluded, the government blocked the publication of the information disaggregated by company, preventing the revelation of which companies replied positively (which would make it possible to request

1. More details on the obstacles thrown up to carrying out this research can be found in the letter which the CSOs who are members of the G20 and of the Civil Society Platform on Natural Resources sent to the CC-MEITI, protesting against the way in which the matter was being handled. Consult also no. 13 of the CIP Newsletter.

2. The report shows that 8 companies declared they did not have a special regime. However, the questionnaire did not ask for this information, and so there is no guarantee that the companies which did not reply failed to answer because they do not enjoy a special regime.

the government to publish their fiscal regime), which negatively and which did not reply (which would make it possible to carry out awareness work with these companies). If the research poses the question "...would you be prepared to reveal your special fiscal regime in the next reconciliation report?", but does not reveal which companies are prepared to do so, how would it then be possible for this information to be published?

This type of attitude is regrettable, because it damages all the efforts of the country to comply fully with EITI. What happened with this research will certainly have a negative impact on the quality of the report, as well as on the idea that CC-MEITI offers a space for constructive dialogue in favour of transparency in the extractive sector.

Legal obstacles to the implementation of MEITI

One of the criteria for complete accession to EITI is the analysis of possible legal obstacles to implementation of the initiative so that they can be removed.

In the report, the analysis of these obstacles has two main limitations. First, the reconciliation company had no access to the contracts of the companies to check whether they contain confidentiality clauses which protect the companies from divulging the information required by EITI. In addition, Article 75, paragraph 1, of the general tax law of 2 March 2006, requires secrecy of the personal tax situation of the taxpayer (of the company, in the case of EITI), except for the purposes of applying taxes (according to paragraph 2 of the same article). Paragraph 4 of the same article gives situations where the duty of secrecy ceases. Specifically, line a) of this paragraph gives the case in which the taxpayer authorises revelation of his tax situation.

It is commonly argued that the fact that the companies make information available voluntarily is a sign that there are no obstacles to the implementation of MEITI. But this argument is not satisfactory and does not meet the concerns about the sustainability of MEITI. That is, the fact that the companies have made information available voluntarily so far does not mean that they will always do so. It is thus necessary to give MEITI legal sustainability – that is, to amend the legislation and other norms in order to make it impossible that at any time a particular company (or government) might resort to the legislation in order to avoid providing the information.

Secondly, the report does not refer to the lack of a legal framework regulating conflicts of interest in the state. This is particularly relevant, if we bear in mind that, according to an article by Milton

Machel published in no. 13 of the CIP Newsletter, the MEITI Coordinator and many of the other MIREM senior staff have business interests in the extractive sector. It is thus not possible to guarantee that the representation of the government on CC-MEITI is guided by the principle of serving the public good, instead of by the individual business interests of each of the government representatives. This may undermine the entire sense of balance intended for the CC-MEITI, in being ideally composed of four elements from each of the parties (government, companies and civil society). This type of situation should be addressed; otherwise it may compromise the process of the complete accession of Mozambique to the initiative.

Recommendations

The discussion in this article (and in IDeIAS no. 42) supports, adds to and contradicts some of the recommendations of the report. The article supports the recommendations that (i) all the government institutions that report revenue received should provide supporting documents for the information contained in the report forms, (ii) a review should be undertaken of the legal and regulatory framework and other norms that provide legal support to MEITI. It adds as recommendations (i) separate payments deriving from extractive activities from those deriving from non-extractive activities, (ii) faced with divergences in the sums reported, give an opinion on which is closer to the correct figure, (iii) apply the level of significance of discrepancies to the total of the positive and negative sums separately, and by company, (iv) guarantee that all companies report their payments, and (v) divulge the information from the survey on the fiscal regime disaggregated by company.

Contrary to the report, this article considers that IRPS and retentions at source, which are not direct payments from the companies, should continue to form part of the reports. This information makes it possible to assess the total contributions of the extractive sector to the economy and the forms in which they are made. What is important is to maintain the correct procedure adopted in the present report of disaggregating the IRPC and identifying the indirect payments.

Steps for complete accession

The production of the second report is one of the necessary conditions for the country to be considered as complying fully with the rules of transparency of EITI. The decision will be taken by the International EITI Coordinating Committee, informed by an assessment to be undertaken by

the EITI international Secretariat or by an independent validation team. The CC-MEITI intends to submit a request to be assessed in advance and may become fully EITI-compliant before the February 2013 deadline granted to the country³. This intention of speeding up the assessment and the possibility of being declared fully EITI-compliant before the deadline possibly explains some of the procedures adopted in the report which are incorrect and thus endanger the objective of full accession.

The great constraint imposed by the rush to submit the report was the time available to the CSOs (and others) to make comments on the draft versions of the report – which is, in itself, an important indicator of the quality of the process. Secondly, it made that contributions that could have improved the report were not made in time to be included.

The first version of the report was submitted to the CC-MEITI just one clear day before its presentation and discussion at the CC-MEITI. Thus it was not possible for the CSOs representatives on the CC-MEITI to read the report carefully. Much less possible was it for members of the G20 and of the Civil Society Platform on Natural Resources (PSCRN) to present their contributions and doubts to be channelled to the CC-MEITI through their representatives. Although the G20 and the PSCRN warned about this in writing, the following draft of the report was submitted only three days before the meeting to discuss it at the CC-MEITI, thus repeating the same difficulties. In the end, the ceremony to launch the report was held on 30.03.2012 without sharing the final version of the report.

Unfortunately, these aspects raise fears about the true motivations of the government in adhering to the initiative. Was it in order to make the sector more transparent by a greater involvement of Civil Society in the monitoring and decisions about the management of the resources, or simply to obtain the stamp of approval as a transparent government? With the space for discussion and the quality of the report compromised, in the rush to obtain the statute of a fully EITI-compliant country, these fears are becoming more acute. We hope that the (perfectly avoidable) violations have not been enough to compromise the country's full accession to EITI. More important than being validated in advance is continuing to improve the quality of the reports, strengthening dialogue and effective, critical and constructive participation of all parties. These will certainly guarantee that Mozambique attains the status of a fully EITI-compliant country (whether in advance or in 2013 does not matter much).