



Mesa de la Sociedad Civil
para la Transparencia en las
Industrias Extractivas



March 19, 2020

Vanessa A. Countryman

Secretary, Securities and Exchange Commission
100 F Street NE
Washington, DC
20549-1090.

Re: Colombian civil society organizations' interest in fully public, project-level, company-specific disclosures under Section 1504 of the Dodd-Frank Act

Dear all,

The Civil Society Roundtable for Transparency in the Extractive Sector in Colombia (Mesa de la Sociedad Civil para la Transparencia en las Industrias Extractivas) is an alliance that promotes greater transparency and access to public information in the extractive sector, oil, mining and gas. The Roundtable includes nonprofits, universities, foundations, social organizations, and experts from different regions of Colombia to advocate for transparency in the extractive sector, guarantee effective participation in the Extractive Industry Transparency Initiative (EITI) process in Colombia, and promote open spaces for public policy discussion in the extractive industry.

We thank the SEC for the opportunity to express our views on the development of the implementing rules for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act and commend you on your commitment to pursuing greater transparency. A rule requiring project-by-project and company-by-company disclosure with no provision for exemptions would help Colombia tremendously in our own efforts towards transparent and accountable governance. In fact, a company can have several projects or several companies can be associated in the same project, so that local communities cannot know clearly which are the payments of the project with which they are directly related in their territories.

There are many US-listed companies operating in Colombia, and so the Dodd-Frank 1504 legislation could have a strong impact on our country. In this letter, we aim to make clear through our country's example why anonymous or aggregated reporting would not offer us the data that we need in order to promote transparent governance in our country. We strongly request that you introduce a rule that requires company-specific, project-based disclosures.

As is the case for many countries who are rich in natural resources, Colombia's extractive industries have contributed to the economic development of the nation, but have also provoked unfortunate social and environmental impacts. Project-level, company-specific data would allow us to see the payments our government authorities receive from extractive companies and inform citizen oversight of the sector, thus helping us ensure that we receive the maximum benefits from extractive activities.

Colombia joined the EITI in 2014 and has made progress in improving transparency levels in the years since then. However, Colombian authorities are struggling to provide appropriate and timely information. The most recent year for which we have an EITI report is **2018**. Timely company disclosures could help us receive data more quickly and be able to track government payments while they are still relevant and more easily traceable.

1. U.S.-Listed Companies Operating in Colombia

It is important to note that coal mining and oil and gas exploration/production are the main areas of U.S. investment in Colombia. In the extractive sector, gold and emeralds are also privileged investment destinations. In this context, several U.S.-listed companies currently operate in the country and many of them have different exploration and/or exploitation projects underway. Apart from their individual projects, several companies can also be associated in the same project. A brief list of some of these companies includes¹:

- **Chevron** is one of the largest producers of natural gas in Colombia. Through its subsidiary Chevron Petroleum Company, it produces fuel and lubricants. Chevron also operates a network of Texaco service stations and are a major supplier at the Bogotá and San Andrés airports.
- **Drummond Ltd.** Colombia is an important thermal coal producer in Colombia. It has today nearly 2 billion tons of reserves in the projects. Parallel to mining development is the exploration and development of methane gas projects associated with unconventional sources (coal and shale gas). It has two contracts for the development of this hydrocarbon, one in the department of Cesar and the other in La Guajira, in association with Ecopetrol.
- **Occidental Petroleum Corporation** has operations in the Llanos Norte Basin in the Department of Arauca and in the Middle Magdalena Basin in the Department Santander. In the Llanos Norte Basin it operates the Caño Limón Field, where more than 1.42 billion barrels of oil have been produced since its discovery in 1983. It has worked in partnership with Ecopetrol (e.g. for an enhanced oil recovery -EOR project in Magdalena)
- **Minería Texas Colombia (MTC)** is an emerald mining company operating in the country (Muzo mine in the Boyacá department) since 2009 and with 100% American capital.
- **ExxonMobil** has a variety of exploration activities under way through its affiliate ExxonMobil Exploration Colombia Ltd. It participates in the fuels and lubricants markets with the Esso and Mobil brands.

¹ Non-exhaustive list, preference was given to American companies and those listed only in the United States

- **Murray Energy Corporation** is a coal mining company with operations in two surface mining operations and three undeveloped thermal coal reserves near Cesar Department in Colombia.
- **Ecopetrol** is a Colombia's state-owned oil company and the largest company in the country. It is a comprehensive oil chain company and one of the top four companies in Latin America. In addition to Colombia, where it generates more than 60% of domestic production, it has exploration and production activities in Brazil, Peru and the United States (Gulf of Mexico). Ecopetrol owns the largest refinery in Colombia, most of the country's oil and pipeline network and is significantly increasing its participation in the biofuel sector.

Ecopetrol is listed in the US and not in any of the other jurisdictions that already require mandatory reporting². Therefore, project-specific disclosure commitments as part of their listing in the US would be of benefit so that its payments will not remain secret. In addition, since Ecopetrol is the largest company in the country, it has a strong effect on other companies operating in the Country.

Of the above-mentioned companies operating in Colombia, only Ecopetrol, Occidental Petroleum Corporation, Drummond and MTC have joined the Extractive Industries Transparency Initiative (EITI). In this sense, it would be relevant and beneficial for Colombian social actors if companies listed in the United States had stronger disclosure commitments in order to have complete information on companies, including on those that are not members of the EITI.

2. Background on the Extractive Industries in Colombia

The extractive industries share of Colombia's economy has grown exponentially over the last two decades. The US is Colombia's main commercial partner—in 2018, US foreign direct investment in Colombia reached \$11 billion.³ Colombia is Latin America's top thermal and metallurgical coal producer and the region's fourth-largest oil producer. Colombia has proven coal reserves of 5,38 billion metric tons, with an average annual production of 99,77 tons and a consumption rate of 11,3 million (2016), meaning that we have 473 years of coal left (at current consumption levels and excluding unproven reserves), and that we are likely to be engaged in extraction for many years to come⁴. Colombia became an oil exporter in the 1980s and we export half of our oil production, mostly to the United States. We also have significant quantities of gold, silver, platinum, iron, and emeralds.

² However, as a state own company, Ecopetrol is also subject to a number of controls over their operations both from supreme audit institutions in Colombia and access to information legislation.

³ Colombia Foreign Investment, Santander, accessed February 20, 2020, <https://santandertrade.com/en/portal/establish-overseas/colombia/investing>.

⁴ Colombia coal consumption and production. Worldometer, accessed March 10, 2020.



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Our mineral wealth was once thought to be the key to peace and stability in our country: after years of violent unrest, in 2016, our country signed a peace deal with the FARC. The peace deal included development promises for FARC-controlled areas that amounted to \$45 billion over the course of 15 years. At that time the peace deal was devised, the government enjoyed oil revenue of \$100 per barrel.⁵ Now, prices are a third lower, and fighting has recommenced.

Our natural resource revenues have failed to bring peace and have also led to disappointment in other areas, especially in regions where resources are extracted. A study found that in mining regions, health, education, and access to social services were lower than in other parts of the country.⁶

Through our work, we have learned from extraction-affected communities that they are concerned about the impacts that royalties and other resource rents have on their quality of life, as well as about other environmental and social impacts of the extraction activities. Community members are operating with scarce information or ability to formally examine whether the extraction activity taking place in their communities is translating into tangible benefits for their community, or is just causing disruption, environmental harm, or leading to corruption. Timely project-level, company-specific reporting could allow communities to better understand the impacts and potential benefits of extraction.

3. Fiscal administration of extractive revenues in Colombia

Fourteen different government agencies and offices are responsible for revenue collection, management and public reporting for Colombia's extractive sector. Under the Colombian Constitution, the state is considered to be the owner of all natural resources, and so companies pay the national government a royalty that is then distributed to local governments following General System of Royalties (SGR) rules. In 2011, the royalty distribution system was restructured, with the intention of providing more equitable distribution of benefits and reducing the misuse of funds.⁷ This decision was based on the premise that the pre-2011 system disproportionately favored locations that produce natural resources, and that those locations were unable to use the amounts of royalties that they received to improve people's lives because of corruption, inefficiency, and lack of institutional capacity.

However, in 2019 a new reform of the SGR was introduced (Legislative Act 005 of 26 December). It modifies the percentages of royalty distribution, increasing direct allocations to departments and municipalities where non-renewable natural resources are exploited, in a similar logic to

⁵ Nicholas Casey, "Colombia's Peace Deal Promised a New Era. So Why Are These Rebels Rearming?" *New York Times*, May 17, 2019, <https://www.nytimes.com/2019/05/17/world/americas/colombia-farc-peace-deal.html>

⁶ Rudas, Guillermo y Espitia, Jorge. La paradoja de la minería y el desarrollo. Análisis departamental y municipal para el caso de Colombia. Luis Jorge Garay. [ed.] Minería en Colombia: institucionalidad y territorio, paradojas y conflictos. Bogotá: Imprenta Nacional, 2013, pp. 27-83.

⁷ La Silla Vacía, "La reforma de regalías: la recentralización del poder más drástica en décadas". (Bogotá:2011).



how the pre-2011 system worked. A bill that regulates this reform and specifies how the processes of project approval will work will be filed in congress in March 2020. In general, the implementation of this reform will probably pose new risks in terms of transparency and corruption that require a strengthening of citizen oversight of the use of these royalties in order that the communities can hold their local governments accountable for them.

Besides royalties, there are other payments made by extractive companies—taxes, rights, and other fees—that are not disaggregated and made available to citizens. Some of these payments are set by law on an equal basis for all companies, while others are negotiated on a contract-by-contract basis. Some companies have been required by contract to fund specific social programs at the local level. At the sub national level, companies are also liable for local taxes and establish ad-hoc agreements with local governments within the framework of their social responsibility programs. Companies pay environmental fees, pay for use of resources such as water, and implement reclamation and reforestation programs in accordance with their contracts.

4. Transparency under the current regime

In recent years, Colombia has made efforts to increase transparency in the extractive sector, but consistent, complete reporting is still not happening. Different agencies use different criteria to collect different information, and so it is nearly impossible to analyze a project holistically.

While the SGR discloses information on projects financed by royalty revenues at a fairly granular level,⁸ neither it nor the mining and oil agencies (ANM, ANH) publish data on payments collected at the local level or disaggregated information about the social payments/investments that each company have been required by contract to undertake.⁹

The ANH publishes project-level payment data, but does not identify which company made the payments.¹⁰ Economic rights are disclosed only on an aggregated basis, which makes it impossible to identify how much each company has contributed. This of course makes it impossible for a community to tell whether a contract is worthwhile or if a company is paying its fair share.

Ecopetrol, the state-owned oil company, publishes information on its production costs, taxes, and dividends in its annual report. However, income taxes from other companies are aggregated and published at the national level by the Ministry of Finance and there is no systematic publication of other taxes or fees paid. The situation is more complex for other payments/revenues at the local level.

⁸Colombia, Departamento Nacional de Planeación, “Sistema de Monitoreo, Seguimiento, Control y Evaluación: Informe Primer Trimestre 2015.” (Bogotá: 2015) 22.

⁹Colombia, Agencia Nacional Minera, “Informe de Rendición de Cuentas”. (Bogotá: 2015) 44-45.

¹⁰Colombia, Agencia Nacional de Hidrocarburos, “Estadísticas y Informes”. 5 Nov. 2015.

In implementing the EITI Standard, the National Government made it known that national authorities do not gather or report on mandatory payments made at the local level. Though payment amounts are owned to local communities, local communities have very limited access to information on environmental payments and compulsory investments.¹¹ There is also little to no information available on compensation payments to indigenous people or contributions to specific social programs or national- or local-level sectoral programs.

In 2014, Colombia passed an Access to Public Information Law, but it has not yet yielded any systematic way to obtain data on project-level deals made by national or local authorities. And so, the most straightforward way for citizens to receive this information would be for companies to report it at the project level.

5. The case for project-level, company-specific disclosure

Project-level, company-specific payment information is simply not available at a systematic basis in Colombia. For the following reasons, it would be a tremendous benefit to Colombian society:

A. Empowering communities to weigh the impacts of projects against the benefits they receive.

In workshops hosted by our organization throughout Colombia, citizens have voiced their strong desire to understand the direct benefits and costs of resource extraction in their communities. While the SGR has created a web platform for monitoring projects financed specifically by the royalties system, communities require localized, company-specific payment information in order to accurately assess project value. Depending on the stage of a project, this information can help communities push to receive a better deal, demand more direct investment from a company or the state, or insist on stronger environmental mitigation measures.

In Colombia, our constitution states that before mining or oil exploration can be approved by the government on indigenous territory, there must be a good-faith consultation with the affected communities. In order to do so, enough information must be provided to allow for a meaningful decision-making process.¹² Indigenous communities can also ask for environmental groups to be consulted about possible project impacts and benefits. These communities would use project-level data to consider the fiscal and environmental impacts of the project. In doing so, it would be helpful for them to be able to access project-based, company specific data from throughout the country—a company's past behavior in one community would be highly relevant information to evaluating whether another community should also do business with the same company.

¹¹Mesa de Sociedad Civil para la Transparencia en las Industrias Extractivas, "Identificación de Buenas Prácticas en el Acceso y Divulgación de Información Pública Ambiental en el Sector Extractivo." (Bogotá: 2015).

¹²Corte Constitucional [C.C.] [Constitutional Court], octubre 22, 2002, Sentencia C-891/02, (Colom.); Corte Constitucional [C.C.] [Constitutional Court], octubre 26, 2006, Sentencia T-880/06, (Colom.).

B. Allowing citizens to ensure that revenues are being redistributed to local governments according to the law.

Departmental and local governments in extraction-affected areas have a constitutional right to a fraction of the resource revenues from their area. However, without project-level, company-specific payment data, they have no way of verifying that they are receiving what they are owed. This ambiguity has caused much controversy, and has eroded trust in government.¹³ If citizens know what they amounts they are meant to receive, they can make sure that their local government is receiving them and give informed input on how they should be spent. If citizens can clearly see what funds their community is receiving and have a say in how those funds improve their community, this will also benefit extraction companies because citizens will be more content with their presence.¹⁴

C. Giving citizens the tools to hold their local authorities accountable for the responsible use of natural resource revenues.

Local taxes, fees, and ad-hoc arrangements constitute an increasingly important component of the budgets of local governments in extraction-affected communities. Without project-level, company-specific disclosure that specifies the level of national or sub-national government that received a payment, local communities have very limited ability of knowing if they are actually receiving revenue in return for their resources. Without this information, people living in these areas have little way of knowing what their local governments are actually receiving, and consequently what they should be able to expect in terms of social services.

It is also important that communities have the information they need to perform an oversight role for the social programs that are directly funded by companies as agreed to in their contracts. Without proper disclosure, these social programs are often confused for being voluntary rather than mandatory, and are therefore not appropriately evaluated. If companies disclose this information, they will arm community members with the most basic tools of democracy: the ability to vote irresponsible leaders out of office, prevail upon law enforcement to crackdown on embezzlement and corruption, and organize to demand that the government spend resource revenues on citizen priorities.

D. Giving a boost to the EITI implementation process in Colombia.

We had great hope that by when joining the EITI in 2014, Colombia would have rationalized and systematized its revenue management and reporting system. However, this has not been the

¹³See <http://www.ampetdecolombia.com/quienesomos.html> or <http://www.vanguardia.com/historico/22655-ampet-de-colombiapeleara-por-la-inversion-de-regalias>

¹⁴Law 393 of 1997, art. 8, July 29, 1997 (Colom.)



case and serious problems of law, efficiency, and administrative culture continue to hinder the proper implementation of useful and transparent reporting mechanisms. In this challenging environment, Dodd-Frank 1504 could give Colombia the boost that it needs to properly implement the EITI. Because the majority of companies operating in Colombia are U.S.-listed, a robust rule would provide a veritable disclosure windfall and could drastically change the Colombian citizens' relationship with our government.

E. Building trust between companies and communities.

Extractive enterprises have rapidly expanded over the last decade, and without transparent mechanisms to prove compliance, mistrust between communities and extractive companies is extended. Disclosure of company-specific, project-level data would help dispel doubts and rumors about whether a specific company is complying with its contractual responsibilities at the local and national level.

One of the most emblematic cases that illustrates the distrust of communities and companies is that of Cerromatoso, a Nickel mine in the department of Córdoba that has been in operation since 1982 and has been managed by BHP until 2015 and then by South 32. The ethnic communities living in the region filed an action for protection (*tutela*) of their fundamental rights against the Company. Although the initial ruling of the Constitutional Court in response to the action (Ruling T-733 of 2017) imposed a payment of compensation to those affected and the creation of a special fund for reparation and compensation (USD \$400 million), a partial annulment of this ruling was declared. The last ruling keeps the obligation of holding a previous informed consultation (FPIC) with the communities to establish measures of prevention, mitigation and environmental compensation and the duty of the company to process a new environmental license and include the instruments to correct environmental and health impacts of the operations¹⁵. The communities have taken their case to the Inter-American Court of Human Rights in view of the disagreement with the partial annulment decision in the initial ruling. It is important to note that the National Comptroller's Office has just opened a process against Cerro Matoso in February 2020 for lack of royalty payments for nickel exploitation for 30 years, which will most likely worsen the mistrust of the communities¹⁶.

F. Improving transparency at Ecopetrol.

¹⁵RevistaSemana “Tumban indemnización que superaríalos USD \$400 millones en caso de Cerro Matoso” (September 2018) <https://www.semana.com/nacion/articulo/corte-anula-parcialmente-sentencia-de-cerromatoso-y-tumba-reparacion/583791>

¹⁶RevistaDinero, “Por pagos de regalías, Contraloría abre proceso en contra de Cerro Matoso” (February 2020) <https://www.dinero.com/pais/articulo/por-que-la-contraloria-esta-investigando-a-cerro-matoso/281937>



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Ecopetrol, Colombia's state-owned oil company, provides more information about its payments to the Colombian government than other entities. Since both Ecopetrol and most of its subsidiaries would be covered under Section 1504, mandatory project-level, company-specific disclosure of natural resource payments could help to dispel any doubt about the accuracy of Ecopetrol's numbers by allowing regulators and civil society groups to compare the amounts that international oil companies pay for oil transport with the net revenues that Ecopetrol declares.

F. Shedding light on controversial payments to the military.

In Colombia, companies often establish agreements with the Ministry of Defense to use direct payments or in-kind transfers in exchange for using military units for security at their operational sites.¹⁷ Beyond the letter of these agreements, however, there have been cases of documented collusion between foreign companies (including extraction companies and private security providers) and illegal armed groups, which has led to the murder of trade unionists, community organizers, and defenders of indigenous territory.¹⁸ These events have contributed to an environment of mistrust and citizens' strong desire to understand the flow of revenue to local military units, especially in zones where they are used to manage community opposition to extraction projects. Only company-specific, project-level disclosure will provide the data needed to evaluate these controversial payments.

G. Strengthening citizens capacities to work with the government to collect full payment of taxes, royalties and financial fees.

Our government is limited in its ability to track and verify resource extraction payments and the production volumes on which they are based. For example, royalties are paid based on good-faith declarations on production volumes and Colombia's public institutions' oversight and auditing capacity is very limited. With company-specific, project-level information, citizens may be able to assist government in identifying discrepancies in companies' payments to government. In Colombia, our regulatory capacity is greatly outstripped by our extractive activity, and so the ability to crowd-source oversight from civil society can help the government claim revenues that are due to it.

6. The opportunity

Because there are so many US-listed companies operating in Colombia, in considering a Dodd-Frank 1504 rule, you have the ability to impact the future of our country. Project-based, company-specific reporting could have a transformational affect on Colombia. It would allow us to make sure our revenue isn't lost to corruption and have a say in the development of our

¹⁷Resource Consulting Services (2012) 34.

¹⁸RevistaSemana, "Informerelaciona a Prodeco y a Drummond con 'paras'(2014); ABColombia, "Caught in the crossfire: Colombia's indigenous peoples" (2010).



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communities. It could engender a culture of transparency that helps bring greater peace and stability to our country.

Our case clearly illustrates that anonymous or aggregated reporting will be wholly insufficient and will just leave us with more confusing data that holds no practical use for our communities. We urge you to pass a version of this rule that mandates project-based, company-specific reporting so that Colombia can enter a new era of transparency.

We thank you for your consideration. Please do not hesitate to contact us if you require additional information.

Sincerely,

Gerardo Andrés Hernández Montes

Executive Director, Transparencia por Colombia

Secretaría Técnica, Mesa de la Sociedad Civil para la Transparencia de la Industria Extractiva

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