

FIGHTING CORRUPTION IN A GLOBAL ECONOMY: TRANSPARENCY INITIATIVES IN THE OIL AND GAS INDUSTRY

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I. INTRODUCTION

It is a privilege to be able to speak to you today. I want to start by expressing my thanks to Professor Steven Zamora for inviting me to this exciting event. The timing is superb: I just returned from a meeting on oil and gas in Baku (Azerbaijan) last week and will share with you some new information—hot from the press.

I can well recall visiting Houston for the first time for a conference on the Oil and Gas Industry twenty five years ago when, as Division Chief at the World Bank, I tried to promote an investment in a miniscule petroleum project in Chad. At that time I was not successful. The known deposit was considered too small, the political situation too unstable, and the global appetite for energy resources still too moderate—the time was not yet ripe for my program.

Then I visited Houston again in 1995, as founder of Transparency International. My objective was to convince the

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top management of Enron that there were dangers of corruption, and to obtain some funding for our embryonic NGO in Berlin. This time I was mildly successful but only with the second half of my objective.

II. GROWTH OF THE ANTICORRUPTION MOVEMENT

Today I want to talk again about the oil and gas sector, and more specifically about an initiative to increase the transparency surrounding revenues flowing into countries blessed with valuable natural resources. Since its inception, Transparency International has been the leading member of a growing and accelerating movement against corruption, and has been actively engaged in improving fiscal oversight and tackling the supply side of bribery all over the world.¹ Transparency International has been heavily involved with others in civil society organizations, governments, and industries in the development of the Extractive Industries Transparency Initiative (EITI).²

Last year, I was asked by the British government to chair an International Advisory Group to help design EITI's future. EITI does, of course, cover solid minerals as well as hydrocarbons, but, being in Houston today, I shall focus primarily on oil and gas.

Before proceeding to the discussion of EITI, however, I would like to paint the background picture. Different constituencies see EITI in different lights, but it is principally an exercise aimed at better governance and improved fiscal management at the national level in resource-rich states.

A. *OECD and Other Conventions*

Today, it is hardly conceivable that until about six years ago, governments in most industrialized countries allowed their citizens—in particular their exporters—to bribe foreign

1. See Extractive Industries Transparency Initiative, About EITI, <http://www.eitransparency.org/section/abouteiti> (last visited Feb. 5, 2007) [hereinafter About EITI].

2. See Extractive Industries Transparency Initiative, Supporters, <http://www.eitransparency.org/section/supporters> (last visited Feb. 4, 2007).

officials.³ In fact, through generous tax deductions of bribes, these governments even subsidized and promoted corrupt behavior of their corporate sector in global markets.⁴

A major exception to this scandalous reality was the Foreign Corrupt Practices Act of 1977 passed by the United States under the leadership of President Jimmy Carter.⁵ The other industrialized countries did not follow the American example.⁶ Today it is necessary to recognize that a system of widespread grand corruption has evolved in the globalized economy; this corruption is one of the main causes of poverty, conflict, violence, and even terrorism—particularly in the developing world. This fact is especially true in the valuable extractive industries sector where corruption and mismanagement have frequently turned the blessing of natural resources into a curse.⁷ It is important to acknowledge that this sad state of affairs is the joint responsibility of the North and the South, of the private sector and the state sector alike.

Accepting this joint challenge is the first step in finding a joint solution. It was with this philosophy that Transparency International managed to build awareness of the all-pervasiveness of corruption, its deadly impact, and the need to act against it. On this basis, it managed to build the political and practical coalitions for change. The coalition included all responsible stakeholders in business and government, in the industrialized world, and in poor countries.⁸

The good news is that this has succeeded. The Organisation for Economic Co-operation and Development (OECD) was persuaded to pick up the baton. After many and often

3. Martine Milliet-Einbinder, *Writing off Tax Deductibility: The Tax Deductibility of Bribes is a Practice which the Convention has made Easier to Abolish*, OECD OBSERVER, May 2000, available at http://www.oecdobserver.org/news/printpage.php/aid/245/Writing_off_tax_deductibility_.html.

4. *Id.*

5. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd (2000); see Justin Serafin, *Foreign Corrupt Practices Act*, 41 AM. CRIM. L. REV. 721 (2004) (discussing the history and development of the Act).

6. Serafin, *supra* note 5, at 721–22.

7. About EITI, *supra* note 2.

8. See Transparency International, About Transparency International, http://transparency.org/about_us (last visited Feb. 4, 2007).

contentious discussions in Paris, in 1997, the OECD's Convention on Combating Bribery of Foreign Public Officials was signed by thirty-five exporting countries and entered into force in 1999.⁹

This was a watershed. Since that time, practically all institutions, governments, and international organizations, along with much of the private sector, have joined the fight against corruption.

Of course it will take years for the ugly system, which has been allowed for decades to become too deeply ingrained in the global economy, to be brought under control. Therefore, it is important that arrangements be made for a peer-review process to determine whether a country has implemented the Convention on paper by incorporating its provisions into anticorruption legislation and whether those laws are being enforced effectively.

In the meantime, many other international conventions have come into existence; most prominently, the United Nations Convention Against Corruption of 2004 that entered into force last month and has particular importance because of its global reach.¹⁰ On a regional basis, some international conventions broke new ground, including the Inter-American Convention against Corruption of 1996,¹¹ the Convention of the Council of Europe of 1998,¹² and the African Union Convention of 2005.¹³

All of these conventions and their enforcement resulted from effective cooperation of government institutions, the private sector, and civil society organizations (CSOs). This is particularly reflected in the U.N. Global Compact, where more

9. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (1999).

10. United Nations Convention against Corruption, G.A. Res. 58/4, U.N. GAOR, 58th Sess., 50th & 51st plen. Mtgs., Annex, Agenda Item 108, U.N. Doc. A/58/422 (Oct. 21, 2003).

11. Inter-American Convention against Corruption, Mar. 29, 1996, 35 I.L.M. 724 (1997).

12. Criminal Law Convention on Corruption, Nov. 4, 1998, T.S. No. 173, *available at* <http://www.usdoj.gov/criminal/fraud/fcpa/ets173or.htm>.

13. African Union Convention on Preventing and Combating Corruption, opened for signature July 11, 2003, *available at* <http://www.africa-union.org/root/au/Documents/Treaties/Text/ConventiononCombatingCorruption.pdf>.

than 2,400 major companies have pledged to live up to the basic principles of corporate responsibility, including the tenth principle against corruption.¹⁴ The cooperation between civil society and the private and public sectors makes it possible to promote a greater contribution of the private sector for a better world.

B. Civil Society Growth

This high level of activity at the official level has been largely facilitated by a remarkable growth in civil society movements against corruption. As in other areas of ineffective global governance, the CSOs play an increasingly constructive role supporting traditional actors of governance in finding solutions that may elude the government because of limited reach or mandate.

In the area of fighting corruption, Transparency International has grown beyond our wildest dreams; it now has independent National Chapters in almost 100 countries.¹⁵ Other NGOs, made up of very brave people, have emerged, often at local levels and with little protection against authoritarian and often violent authorities, in countries ravaged and impoverished by the scourge of corruption. Also, other highly focused groups have grown to address specific types of corrupt behavior.

One such organization is Global Witness, a small organization based in the United Kingdom that concentrates its attention on the relationships between corruption and natural resources, often involving civil conflict.¹⁶

14. See United Nations Global Compact, The Global Compact Network, <http://unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last visited Feb. 4, 2007); see also United Nations Global Compact, Principle 10, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle10.html> (last visited Feb. 4, 2007) (“Businesses should work against corruption in all its forms, including extortion and bribery.”)

15. *Id.*

16. See Global Witness, <http://www.globalwitness.org> (last visited Feb. 5, 2007).

III. EITI—DEVELOPMENT

A. *The Challenge*

The 1999 Global Witness report, “Crude Awakening,”¹⁷ brought the situation in Angola to widespread international attention and triggered the formation of a civil society alliance. Initially composed only of Global Witness and Transparency International-UK, the alliance has rapidly expanded to the “Publish What You Pay” campaign.¹⁸ It called for action, not only in Angola, but more widely, to ensure that revenues from natural resource extraction reached transparent official budgets and that governments could be held to account for their proper expenditure.¹⁹

For many years, multilateral agencies such as the World Bank, attempted to strengthen public financial management in client countries, and the IMF had been pressing for sound fiscal controls.²⁰ There was widespread recognition that natural resource extraction could be either a blessing or a curse. On the academic front, numerous studies analyzed the dangers of allowing the advent of extracted riches to lead to economic decline, administrative disorganization, and even state failure.²¹

With the all-too-common linkage between natural resource wealth and civil conflict, it became apparent that something had to be done. This is not merely a matter of economic theory. It is about the prosperity or poverty, health or sickness, indeed life or death of millions of suffering people currently deprived of any

17. GLOBAL WITNESS, CRUDE AWAKENING, THE ROLE OF THE OIL AND BANKING INDUSTRIES IN ANGOLA'S CIVIL WAR AND THE PLUNDER OF STATE ASSETS (1999), available at http://www.globalwitness.org/media_library_detail.php/93/en/a_crude_awakening.

18. Publish What You Pay, Background, <http://www.publishwhatyoupay.org/english/background.shtml> (last visited Feb. 5, 2007) [hereinafter Publish What You Pay].

19. *Id.*

20. See World Bank, Governance, <http://www.worldbank.org/wbi/governance> (last visited Feb. 4, 2007); International Monetary Fund, What the IMF Does, <http://www.imf.org/external/work.htm> (last visited Feb. 4, 2007).

21. See, e.g., TERRY LYNN KARL, THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES (Univ. of Cal. Press) (1997).

share in their national wealth, while the offshore bank accounts of their national elites bulge with dollars, euros, and pounds.

B. History

In early 2002, George Soros lent his support to the NGOs' launching of the "Publish What You Pay" campaign.²² The U.K. Prime Minister's attention was attracted, and in September 2002 at the Sustainable Development summit in Johannesburg, Tony Blair announced that he would be launching an initiative to promote the transparency of oil, gas, and mining revenues.²³ And so the EITI was born.

Early discussions of the EITI moved away from mandatory company disclosure in published accounts to the development of a program to encourage producing countries and companies to implement a set of transparency principles.²⁴ At a high level international conference at Lancaster House in June 2003, representatives of governments, industries, and civil societies endorsed this approach and agreed on a set of EITI Principles.²⁵ A number of countries (including Nigeria and Azerbaijan) volunteered to pilot the approach.²⁶ Since then, building on a general commitment to transparency in Evian, during 2004 and 2005, the G8 leaders collectively have specifically endorsed EITI at their annual summit meetings in the United States and Scotland.²⁷ Around twenty countries are now at some stage of endorsement and implementation; I will present a few examples shortly.

22. Publish What You Pay, *supra* note 18.

23. EITI, REPORT OF THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI) LONDON CONFERENCE (June 17, 2003), *available at* <http://www2.dfid.gov.uk/news/files/eitireportconference17june03.asp> [hereinafter Report of the EITI].

24. *Id.*

25. *Id.*; EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI), STATEMENT OF PRINCIPLES AND AGREED ACTIONS (June 17, 2003), *available at* <http://www.eitransparency.org/UserFiles/File/speeches/agreedactionsjune2003.pdf>.

26. REPORT OF THE EITI, *supra* note 23.

27. *Id.*; *see* Extractive Industries Transparency Initiative, G8 Summit Endorses Extractive Industries Transparency Initiative (EITI), http://www.eitransparency.org/section/supporters/_g8endorsement (last visited Feb. 5, 2007) (endorsing EITI most recently in St. Petersburg).

At another high-level conference in London in 2005, it was decided to appoint an International Advisory Group²⁸ to examine the ways in which EITI should be developed for the future. It is my privilege to chair this group of sixteen people from governments, companies (including the investment community), and civil society. This group is supported by a Secretariat provided by the U.K. government as well as the World Bank and International Monetary Fund (IMF).

C. The EITI Framework

1. Basics

At its heart, the EITI is profoundly simple, although admittedly in application it can become more complex. In November 2003, President Obasanjo used his speech on the tenth anniversary of Transparency International in Berlin to announce his government's intention to implement EITI in Nigeria. In doing so, he said that at its center would be three requirements: (1) companies would be required to disclose everything they pay to the government; (2) institutions of the government would be required to disclose everything they receive from companies; and (3) an independent auditor would be appointed to ensure the two sets of figures agree and produce a published report.²⁹

This simple description explains the purpose of EITI. Different governments and companies may interpret the details differently, but the principle is clear. The people of a country are given confidence that the money paid for their natural resource is actually reaching the government accounts. Subsequently, outside of the EITI process itself, they can ask further questions about how this wealth is being used.

28. Extractive Industries Transparency Initiative, International Advisory Group, <http://eitransparency.myaiweb15.com/iag.htm> (last visited Feb. 4, 2007).

29. Extractive Industries Transparency Initiative, Nigeria, http://www.eitransparency.org/section/countries/_nigeria (last visited Feb. 4, 2007).

2. *Six Criteria*

As work proceeded during 2004, it became apparent that there was a need for an expanded set of criteria to use in determining whether or not a country's or a company's claim of implementing EITI was real or merely window-dressing. At meetings in Paris, hosted by the World Bank and the French government in early 2005, a set of six criteria was agreed upon and confirmed by a second high-level meeting in London in the spring of that year.³⁰

These "EITI-criteria" are now the test of reality for implementation at the national level. In outline form they are:

1. Regular publication revenues to a wide audience in a publicly accessible, comprehensive, and comprehensible manner.
2. Application of international audit standards to the data.
3. Appointment of a credible, independent administrator, and publication of the administrator's opinion regarding the reconciliation, including discrepancies, should any be identified.
4. All companies, including state-owned enterprises are to be included.
5. Civil society actively engaged as a participant in the design, monitoring, and evaluation of the process.
6. A public, financially sustainable work plan, including measurable targets, a timetable for

30. Extractive Industries Transparency Initiative, EITI Implementation Workshop, Feb. 2005, Paris, http://www.eitransparency.org/section/events/_eiti_implementation_workshop_february_2005_paris; Extractive Industries Transparency Initiative, EITI London Conference, Mar. 2005, http://www.eitransparency.org/section/events/_eiti_london_conference_march_2005; Extractive Industries Transparency Initiative, EITI Principles and Criteria, <http://www.eitransparency.org/section/abouteiti/principlescriteria> (last visited Feb. 5, 2007) [hereinafter EITI Principles and Criteria].

implementation, and an assessment of potential capacity constraints.³¹

3. *Misunderstanding on Terms: Voluntary Versus Mandatory*

Earlier I referred to the Publish What You Pay (PWYP) call for “mandatory” disclosure of payments to governments as opposed to “voluntary” cooperation. These two terms have often been set against one another. PWYP’s call is described as “mandatory,” whereas EITI is characterized as “voluntary.” Actually, as a careful reading of the criteria will reveal, this simplistic contrast is misleading.

The reality is more nuanced. Certainly, it is voluntary for the sovereign government of a country to adopt or not to adopt EITI. But if it chooses to do so, it must ensure that all companies active within its borders submit their data to the independent administrator/auditor of the scheme. Therefore, at the national implementing level, if a country complies with the EITI Criteria—in particular number four³²—it is not voluntary for a company to participate. Although there is a difference between those which do so willingly and those which have to be drawn in kicking and screaming to the party while lobbying hard to minimize the demands placed on it.

Countries will vary in the methods they use to require engagement with the process: some may use legislation or regulation and others may use simple persuasion. At the end of the day, however, all companies’ figures must be submitted.

D. *Benefits*

Why should the government of an oil or gas producing country want to implement EITI? Both countries and companies will benefit from this increase in transparency.³³ Generally, it can be said that it is good to see companies, governments, and

31. EITI Principles and Criteria, *supra* note 30.

32. *Id.*

33. EITI SECRETARIAT, INCENTIVES FOR STAKEHOLDERS IN EITI: OVERVIEW PAPER (2005), available at http://eitransparency.org/UserFiles/iagincentivesoverviewpaper17_08.pdf (providing a list of benefits including the benefits listed in this section).

CSOs working together constructively at both the national and international levels. Too often there is friction and mistrust between these parties, and working together on a shared enterprise bodes well for the future. This is particularly true in the extractive industries.

Internally, within countries rich in natural resources, serious schisms can develop between society, government, and industry. Opening up of the books can be used to facilitate a rebuilding of trust. Transparency in the extractive sector will lay the basis for budget accountability. Improved allocation of the funds raised from oil, gas, and mineral extraction into investments that are economically and socially productive and sustainable will lead to significant poverty reduction. Obviously, this will lead to greater political and social stability.

Looking in from the outside world, investors will see a cleaner and more reliable location where they can direct their funds. Direct foreign investment is affected negatively by the perception of corruption, and signs of increasing transparency have a positive effect. EITI can play a powerful role in demonstrating a resource-rich nation's commitment to open management of its wealth, thus encouraging investors to view the country as less risky. Although transparency is only one component in the package of measures necessary to build a truly attractive location for investors, it can certainly have a positive effect within the companies' due diligence processes.

A Nigerian minister, recently commenting for the first time on her country's acquiring an attractive credit rating, attributed a sovereign debt rating in substantial part to the reputational effect of its energetic application of EITI to uncover, for public scrutiny, the previously hidden fiscal flows of the oil and gas industry.³⁴ Also, donor nations and institutions are constantly on the lookout for signals of improved governance as they seek to protect and give good account for the usage of their taxpayers' money.³⁵

34. Ngozi Okonjo Iweala, *Impact of the Sovereign Credit Rating on Nigeria's Economic Development*, BUSINESS DAY, July 20, 2006, <http://www.businessdayonline.com/?c=56&a=7640>.

35. EITI Secretariat, *supra* note 33.

Corporate reputation in the contemporary business world is a vital asset. Increasingly, extractive industry companies are recognizing that transparency initiatives can do much to improve that reputation. Companies wish to recruit the best young people, but the youth of the world are increasingly sensitive to questions of corporate responsibility. Investors are becoming increasingly sensitive to reputational issues and view transparency as a positive corporate characteristic, not only from an ethical perspective, but within a broad portfolio of risk assessment measures. Greater transparency will reduce political risk, especially that associated with coups and other regime changes; the greater the openness about business dealings, the less the opportunity for accusations of past corrupt dealings under previous administrations.

Often, companies believe they must adopt unfair or even illegal practices because they feel threatened by competing operators vying for contracts in countries that have unstable or unreliable institutions regulating the sector. In the area of natural resource revenues, EITI provides a level playing field in countries which adopt it and implement it fully.

IV. EITI—EXAMPLES

A. *Nigeria*

Nigeria, as I have already said, was the first country to come out formally and declare its intention to implement EITI. It formally launched its program in February 2004.³⁶ Led by the Minister of Solid Minerals, its team has been working hard and hopes to extend its program from oil to solid minerals soon.³⁷ The project has the personal backing of the President and is steered by an impressive National Stakeholder Working Group—one of whose meetings I have been privileged to attend as an observer. Recently, a comprehensive series of audit reports were produced, including analyses of the financial flows during

36. See *supra* note 29 and accompanying text.

37. See Ministry of Solid Minerals Development Nigeria, Ministry of Solid Minerals Development, http://www.msmd.gov.ng/About_MSMD/Objectives.asp (last visited Feb. 5, 2007).

2003 and 2004, as well as a mapping of the physical flows of oil, so that eventually the figures for financial and physical flows can be reconciled.³⁸ This work was publicly discussed at a second anniversary briefing in the capital, Abuja, in February 2006.³⁹

Nigeria has gone beyond the most basic level of EITI, and requires the open publication of not only aggregated payments from all companies to government, but also the breakdown by individual company, production field, and category of payment.⁴⁰ This goes beyond the basic requirements of the EITI Criteria, and some companies are unhappy with it. On the other hand, some other companies have no difficulty with this degree of disclosure.

Personally, I do not understand why a degree of transparency that gives no problem to some of the major players should be found so objectionable by others. It is also disappointing to discover companies that previously expressed an intent to always comply with the legal requirements of their host governments now objecting when those requirements turn out to demand a higher degree of transparency than expected.

B. Azerbaijan

Azerbaijan is the other oil-producing country that has made great progress. The country has adopted a basic model of EITI, publishing at the aggregated level rather than in the detail required by Nigeria. It also has a multistakeholder approach to the initiative that is led by the head of the State Oil Fund and includes the National Chapter of Transparency International in a leading role.⁴¹

38. HART NURSE LTD., NIGERIA EXTRACTIVE INDUSTRY TRANSPARENCY INITIATIVE, FINANCIAL AUDIT: FINANCIAL FLOWS 1999–2004 (2006), <http://www.neiti.org/FARFinFlowsUpload.pdf>.

39. See Nigeria Extractive Industries Transparency Initiative, IAG Meeting & 2nd Year Anniversary of the NEITI, <http://www.neiti.org/IAG%20meeting%20and%20second%20anniversary.htm> (last visited Feb. 5, 2007).

40. See HART NURSE LTD., *supra* note 38.

41. State Oil Fund of the Republic of Azerbaijan, Answers to Frequently Asked Questions, 2006 http://www.oilfund.az/index_en.php?n=15#1 (last visited Feb. 4, 2007).

A Memorandum of Understanding (MOU) was negotiated, and in November 2003, the country was able to announce that twenty foreign and local extractive (oil and gas) industry companies, including State Oil Company of the Republic of Azerbaijan, Exxon, Statoil, Total, Lukoil, Unocal, Shell, and Devon Energy signed the MOU.⁴²

In January of this year, a press release was issued, jointly prepared by the Committee on EITI, extractive industry companies, and the NGO Coalition, announcing the release of the Azerbaijan government's third EITI report (covering January through June 2005).⁴³ The report had been audited by the independent aggregator appointed by the multistakeholder committee.⁴⁴ Last week the ancient city of Baku generously hosted the fourth meeting of the EITI International Advisory Group.⁴⁵

C. Other Countries

In addition to Azerbaijan and Nigeria, other countries working on implementation include the Congo, Ghana, Kyrgyz Republic, Sao Tome and Principe, Timor Leste, Trinidad, and Tobago. There is also a group of countries whose governments have made statements endorsing EITI, some of which are working actively on the initiative, including Angola, Bolivia, Cameroon, Chad, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Kazakhstan, Mauritania, Mongolia, Niger, Peru, and Sierra Leone. Other countries, such as Mexico, are interested.⁴⁶ Presently, one of the challenges is to develop a

42. MEMORANDUM OF UNDERSTANDING ON EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE IMPLEMENTATION IN AZERBAIJAN (Nov. 13, 2003), <http://www.eitransparency.org/UserFiles/File/azerbaijanreports/azerbaijanmou.pdf>.

43. REPORT OF THE GOVERNMENT OF THE REPUBLIC OF AZERBAIJAN (HOST GOVERNMENT) ABOUT AGGREGATED RECEIPTS FROM THE EXTRACTIVE INDUSTRIES (2005), http://www.oilfund.az/download2/jan-dec-2005_en.pdf.

44. Press Release, Committee on EITI, Extractive Industry (Oil and Gas) Companies, & Non-Governmental Organizations Coalition for Increasing Transparency in the Extractive Industries of Azerbaijan, Azerbaijan discloses Third EITI Report (Jan. 27, 2006), http://www.oilfund.az/eiti_en.php.

45. Press Release, State Oil Fund of the Republic of Azerbaijan, Baku Hosts International EITI Events (Apr. 11, 2006), http://www.oilfund.az/eiti_en.php.

46. See Extractive Industries Transparency Initiative, EITI Countries,

process to validate a country's implementation so that credit for transparency cannot be claimed without substantiation.

V. EITI—ISSUES

As should be expected, the development of EITI has had some challenges. The differences of opinion over whether individual company payments or only aggregated figures should be publicly reported have already been referred to. I will now look briefly at a few others.

A. *Legal Implementation*

There is the challenge of ensuring compliance with the requirement that the initiative must cover “all companies including state-owned enterprises” (Criterion 4).⁴⁷ Various approaches are being adopted, including calling for signatures of a Memorandum of Understanding, issuing a government decree, and passing legislation through parliament.⁴⁸ The Principles and Criteria do not specify how implementation should be achieved, but do require the collation of fully comprehensive national figures.

B. *Contract Confidentiality*

The public's divulgence of the terms of contracts between governments and companies is associated with EITI, but not strictly part of it. Governments take different approaches to contract confidentiality. Some have gone as far as publishing production sharing agreements on their websites for the public. As to the aggregation/disaggregation debate, some companies have no problem with this which others object strongly.

From my personal experience as mineral law advisor to the government of Botswana in the early 1970s, I have to ask the question: “Why should the people of a nation not be free to see the financial terms on which their government has sold their prime asset?” Transparency gives more stability and predictability to these investment arrangements.

<http://www.eitransparency.org/section/countries> (last visited Feb. 4, 2007).

47. EITI Principles and Criteria, *supra* note 30.

48. *See supra* Part IV.

C. Civil Society Involvement

One of the pillars of this process is the cooperation between the government, industry, and civil society. In some countries, however, there is very little organized civil society due to authoritarian repression. The fifth EITI criterion clearly states that civil society must be “actively engaged as a participant in the design, monitoring and evaluation of this process and contribute[] towards public debate.”⁴⁹

In some places, this may require a significant shift in the government’s attitude to freedom of discourse in the public space. It may also require the willingness of civil society activists to adopt a less politically confrontational and more competent role, and develop a nonpartisan approach. It certainly means that public attacks and threats from government ministers and officials, aimed at members of civil society coalitions working on the subject of revenue transparency, are intolerable within the multistakeholder philosophy of EITI. Governments should not put together national working groups made up of only their own tame friends.

Just last weekend, I received bad news from the Republic of Congo that two members of the civil society coalition involved in the revenue transparency question, had been arrested.⁵⁰ This is not what we look for in the behavior of a government claiming to be implementing a multistakeholder transparency process.

D. Whitewash

“Whitewash” has for centuries been a term to describe hypocrisy. EITI, like many other aspects of good governance and good corporate behavior, is something potentially prone to abuse.

It is important that we do not allow EITI to simply become a badge worn to declare good intentions without any reality under the surface. There must be effective arrangements for the validation of claims by both governments and companies to implement the EITI requirements.

49. EITI Principles and Criteria, *supra* note 30.

50. Publish What You Pay, *supra* note 18.

Yes, companies as well as governments! Implementing companies deserve protection against “rotten apples” in their basket that undermine the credibility of the whole process. There are many ways in which companies can make life difficult for the people collating data at the national level, and this needs to be monitored just as much as the governmental side. At the international level, it is not inconceivable that a company might claim to be a supporter of the EITI Principles but quietly, behind the scenes, lobby to prevent or minimize its endorsement by the government of a country where it operates; or publicly declare transparency while simultaneously negotiating fresh confidentiality clauses aimed at obscuring financial realities. This type of behavior at the international level must be identified and publicly reported. “Whitewash” has no place in the EITI scheme of things.

VI. EITI—SKEPTICAL VOICES.

It is often pointed out that EITI will not eliminate the transparency problems of countries dependent upon oil and gas economies. Of course not! No one connected with the EITI would claim this. There are many other forms of theft, fraud, and corruption than the illicit diversion of revenues. It does not, for example, seek to address the rigging of licensing rounds, the corruption surrounding construction contracts, or the theft of oil. Similarly, EITI does not attempt to cure the ills of poorly budgeted and weakly controlled public expenditure, but it does lay the basis for greater budget accountability. It does not recommend any particular form of fund for the preservation of revenues for the benefit of future generations.

The EITI seeks to do one thing only: ensure that the amounts of money paid by companies are monitored and publicly reported so that the population of a country can hold its government accountable by whatever processes are in place for that specific country. There have been many requests for the initiative to be broadened, but it has been held to a sharp focus, seeking to do one thing well.

VII. EITI—INTERNATIONAL ADVISORY GROUP

I have referred more than once to the International Advisory Group (IAG), which I chair. It is a privilege to work with a group of women and men from around the world, from very different backgrounds, and with different perspectives on many of the subjects discussed, but united by a solid commitment to develop an effective EITI for the future.

We are grateful to the governments of the United Kingdom, Nigeria, and Azerbaijan, and to the World Bank, for generously and efficiently hosting our four meetings so far. One more session is scheduled for June in London before presenting our work at the next high level conference in Oslo on October 17th.

Our principal areas of work are on validation of payment information and on the future governance and structure of EITI. The evolving consensus in the group has been documented in a series of detailed technical papers on the validation of implementation at country and company levels; the future management and transition to new arrangements; the provisions of financial and technical support for implementation; incentives to implementation; possible extensions to subnational levels, especially in mining countries; and the promotion of a greater acceptance of EITI, particularly by the governments of rapidly developing and energy-hungry economies. The papers relating to the IAG meetings are published, transparently, on the EITI website.⁵¹

Validation addresses the extremely important challenge to ensure that implementation is real. EITI “implementation,” which does not fulfill the minimum requirements of the six criteria, must not be allowed to boost a country’s reputation while providing a smokescreen for malpractice. This includes not only the technical assembly of data, but also the processes by which the scheme is run—especially the independence of auditing and the full involvement of civil society.

I must also say a few words here about future organization. The initiative has been very generously supported by the U.K. government, and in some parts of the world it is still seen as

51. See Extractive Industries Transparency Initiative, International Advisory Group, http://www.eitransparency.org/section/_iag (last visited Feb. 4, 2007).

U.K.-driven. However, although the U.K. has been the major contributor, it also has solid support from other governments, several of which have donated to a trust fund administered by the World Bank to help provide financial and technical support to countries and civil society as needed. France, Germany, Norway, the Netherlands, and the United States, together with the U.K., have all contributed, substantially, either in active support, financially, or both. It also has benefited greatly from the backing of the IMF and the World Bank, which has provided technical advice for many countries.⁵²

It is felt that the time has come to create a governance structure that can give EITI the nature of a truly international program; this structure will be “light touch,” including an ultimate authority of a biannual, high-level conference, a small multistakeholder board, and an independent secretariat under its guidance. It will mainly support the work that is carried out in implementing countries within their similar organizations.⁵³ In its meeting last week in Baku, the IAG developed draft recommendations about this structure for presentation at the next high-level conference in Oslo.⁵⁴

The structure is not proposed as a permanent institution, because eventually, perhaps in approximately five years, it is hoped that the program will have become so well entrenched as “the normal way of doing business” that there will be no need for a dedicated body at the international level.

VIII. THE FUTURE OF REVENUE TRANSPARENCY

Where does this initiative need to go? Clearly we need to see it spread to more countries, and we are encouraged by the positive reference to EITI in the IMF guide to fiscal transparency in resource rich economies—which we hope will be followed widely. As to the rapidly developing economies of

52. See Extractive Industries Transparency Initiative, Supporters, <http://www.eitransparency.org/section/supporters> (last visited Feb. 4, 2007).

53. See EITI SECRETARIAT, THE FUTURE MANAGEMENT OF EITI: THIRD TECHNICAL PAPER (2006), <http://www.eitransparency.org/UserFiles/File/iagbaku/futuremanagement.pdf>.

54. See Extractive Industries Transparency Initiative, Oslo Conference, http://eitidev.forumone.com/section/events/_oslooctober2006 (last visited Feb. 4, 2007).

China, Brazil, India, Mexico and South Africa, we would like to see them endorse EITI and encourage its implementation, not only in their own territories, but also in countries from which they must obtain their oil and gas from in the future to meet rapidly escalating energy needs, and especially where their national oil companies become active. It is important to develop a level playing field of transparency internationally.

Considerable encouragement for countries to endorse and implement EITI would come from the passing of a U.N. General Assembly Resolution. I would like to see this happen. Energy security will be a major geopolitical issue for a long time. It will certainly be on the agenda of the forthcoming G8 meetings in Russia and Germany. If EITI can make a small contribution to the increase of trust, the strengthening of currently poor economies, and the avoidance of conflict, it will have been effort well spent.

So far, although some countries have applied it to mining, the emphasis has been on oil and gas. Two international conferences are planned for the next few months to explore issues specific to solid mining revenues. Another question currently being investigated is whether and how EITI might effectively be applied to other extractive industries, such as forestry or fisheries. It might also be applied at the subnational level; this is seen as particularly important by the mining industry.

IX. CONCLUSION

In closing, I should repeat my earlier plea for approaching transparency in extractive industries as a joint challenge for the rich and poor countries and for the public and private sectors alike. Although EITI is presently designed for the protection of operations in developing countries with a history of corruption and looting by the state, I would like to see developed countries join as major actors in EITI, including their insistence on a rigorous implementation by companies headquartered in their jurisdictions. Countries which are major producers, even though not on the IMF's natural-resource dependency list—such as the United Kingdom and the United States—could send a strong

signal by voluntarily submitting themselves to the same transparency processes that they advocate for others.

Your invitation for me to address you on these issues at such a prestigious forum in Houston is a very promising signal. It is a signal that the message about transparency in the extractive industries sector has been accepted by the people that matter. It is a signal that the present problems of global governance are seen as a common responsibility, a joint challenge for joint solutions. It is a signal that the idea of building coalitions between the state, the private sector, and civil society organizations for a better world is gaining ground. This bodes well for shaping globalization in a way that is sustainable, fair, safe, peaceful, and prosperous for all the people on this earth.

X. APPENDIX 1

*The EITI Principles*⁵⁵

1. We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.
2. We affirm that management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development.
3. We recognize that the benefits of resource extraction occur as revenue streams over many years and can be highly price dependent.
4. We recognize that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development.
5. We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability.
6. We recognize that achievement of greater transparency must be set in the context of respect for contracts and laws.
7. We recognize the enhanced environment for domestic and foreign direct investment that financial transparency may bring.
8. We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure.

55. EITI Principles and Criteria, *supra* note 30.

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9. We are committed to encouraging high standards of transparency and accountability in public life, government operations and in business.
10. We believe that a broadly consistent and workable approach to the disclosure of payments and revenues is required, which is simple to undertake and to use.
11. We believe that payments' disclosure in a given country should involve all extractive industry companies operating in that country.
12. In seeking solutions, we believe that all stakeholders have important and relevant contributions to make—including governments and their agencies, extractive industry companies, service companies, multilateral organizations, financial organizations, investors and nongovernmental organizations.

XI. APPENDIX 2

*The Extractive Industries Transparency Initiative (EITI) International Advisory Group (IAG)*⁵⁶

Members of the IAG:

Chairperson

Peter Eigen, Transparency International

Industry

Sam Laidlaw, Executive Vice President, Chevron Texaco

Graham Baxter, Vice President, Corporate Responsibility, BP

Edward Bickham, Executive Vice President, External Affairs, Anglo America

Countries

Yannick Tagand, DE/ETI, Ministère des Affaires étrangères, France

Larry Greenwood, Deputy Assistant Secretary for International France and Development Bureau of Economic and Business Affairs, U.S. Department of State

Tormod Endresen, Government of Norway

Samir Sharifov, Executive Director, State owned Oil Fund of Azerbaijan

Dr. Oby Ezekwesili, Minister for Solid Minerals Development, Nigeria

Carlos Garaycochea, EITI Coordinator, Adviser to the Minister of Energy and Mines, Peru

Stephen Krasner, U.S. Government

NGOs

Karin Lissakers, Open Society Institute

Gavin Hayman, Lead Campaigner, Global Witness

Sabit Bagirov, Chairman of Board, TI Azerbaijan NGO Coalition

Father Patrick Lafon, General Secretary, Central African Bishops Conference, Cameroon

56. See EITI, IAG Members, http://www.eitransparency.org/section/_iag/_iagmembers (last visited Feb. 4, 2007).

Investors

Karina Litvack, Director, Head of Governance & Socially Responsible Investment, F&C Asset Management

Support to IAG

Ben Mellor, Head of EITI Secretariat

Tim Ayres, EITI Secretariat

Peter van der Veen, Manager, Mining Department, World Bank

XII. APPENDIX 3

*The EITI Criteria*⁵⁷

1. Regular publication of all material oil, gas and mining payments by companies to governments (“payments”) and all material revenues received by governments from oil, gas and mining companies (“revenues”) to a wide audience in a publicly accessible, comprehensive and comprehensible manner.
2. Where such audits do not already exist, payments and revenues are the subject of a credible, independent audit, applying international auditing standards.
3. Payments and revenues are reconciled by a credible, independent administrator, applying international auditing standards and with publication of the administrator’s opinion regarding that reconciliation including discrepancies, should any be identified.
4. This approach is extended to all companies including state-owned enterprises.
5. Civil society is actively engaged as a participant in the design, monitoring and evaluation of this process and contributes towards public debate.
6. A public, financially sustainable work plan for all the above is developed by the host government, with assistance from the international financial institutions where required, including measurable targets, a timetable for implementation, and an assessment of potential capacity constraints.

57. EITI Principles and Criteria, *supra* note 30.

XIII. APPENDIX 4

Boston Globe, *Congo Holds 2 Activists Who Assailed Oil Deals*⁵⁸

April 7, 2006

PRETORIA—Republic of Congo authorities yesterday arrested two activists—who had sharply criticized the country’s oil deals as corrupt—for allegedly stealing money from their nonprofit organizations, according to Global Witness, a London-based group that has called on African countries to be more transparent in their oil contracts.

Christian Mounzeo, president of Rencontre pour la Paix et les Droits de l’Homme, and Brice Mackosso of the Catholic Justice and Peace Commission, were being held in jail and at first were denied access to a lawyer, according to Sarah Wykes, a Global Witness researcher. She said that attorney Maitre Senga eventually was allowed to see Mounzeo and Mackosso.

Senga could not be reached for comment last night. Two senior Congolese officials also could not be reached by telephone.

Late last year, the World Bank delayed Congo’s application for debt relief because of what it called irregularities in Brazzaville’s oil contracts, including the existence of numerous private companies controlled by government officials who sold the country’s oil by using a maze of transactions. But two months later, the executive boards of the World Bank and the International Monetary Fund agreed to cancel \$2.9 billion in debt as long as the country met several obligations to reducing the country’s high poverty levels.

No court date has been set for Mounzeo and Mackosso, Wykes said. Her organization has protested the arrests. She said the two were arrested “because of the work both men were doing on the mismanagement and corruption of oil revenue.”

58. John Donnelly, *Congo Holds 2 Activists Who Assailed Oil Deals*, BOSTON GLOBE, Apr. 7, 2006, http://www.boston.com/news/world/africa/articles/2006/04/07/congo_holds_2_activists_who_assailed_oil_deals/.