

The Extractive Industries Transparency Initiative (EITI): Voluntary Codes of Conduct, Poverty and Accountability in Africa

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Abstract

This article examines the Extractive Industries Transparency Initiative (EITI). Lack of transparency in the management of revenues from extractive industries in developing countries has entrenched corruption and worsened poverty and the problems of underdevelopment in these countries. The EITI is an attempt to induce transparency and accountability in order to create an environment for the reduction of poverty and its associated social conflicts and political instability in resource-rich developing countries. The article examines the Nigerian experiment at implementing the EITI, assessing its effectiveness, implications and prospects for other countries and stakeholders of the initiative. At a wider level, the article draws attention to the relationship between poverty and corruption, and the role that voluntary codes of conduct can play in addressing these issues.

Keywords: Extractive Industries Transparency Initiative (EITI), voluntary codes of conduct, Nigeria, Africa, resource-rich countries, resource curse, accountability, transparency, poverty, oil, gas.

Introduction

The EITI is sponsored by the Government of the United Kingdom to promote transparency in the reporting of revenues from mineral resource extraction. Launched by British Prime Minister, Tony Blair, at the World Summit on Sustainable Development in Johannesburg, in September 2002, the EITI is a coalition of governments, companies, civil society groups, investors and international organisations.¹ The EITI requires subscribing countries to publish all payments received from operators of the oil, gas, and mining industries. Ultimately, EITI aims to encourage the deployment of revenues from natural resource extraction in developing countries towards the satisfaction of basic needs, such as health and education, and the alleviation of poverty, rather than the private pockets of corrupt officials in the private and public sectors. It is part of the burgeoning movement for good governance in the developing world as represented by the Publish What You Pay coalition,² Global Witness,³ Transparency International,⁴ the New Partnership for Africa's Development (NEPAD),⁵ the UN Global Compact,⁶ and a host of other global and regional initiatives.⁷ In tandem with other anti-corruption initiatives and measures, the EITI aims to infuse transparency and accountability into the processes by which extractive industry revenues are earned and expended by host governments.

The EITI is also a voluntary multi-stakeholder code of conduct, being the result of joint initiatives by companies, governments, and Non-governmental organizations. In an increasingly globalised and deregulated world, codes of this kind have come to be seen as innovative instruments for the promotion of important ideals, such as fundamental human rights, labour rights, environmental rights and anti-corruption practices, especially in countries where public authorities have failed to articulate and/or enforce minimum standards.⁸ While the widespread adoption of codes of conduct is driven by an increased emphasis on corporate social responsibility and the anticipated benefits of good corporate citizenship to stakeholders, it is also a reflection of national and international regulatory difficulty in an era of intense competition among developing countries for foreign investment.⁹ The implementation of a code of conduct could have a positive impact on corporate reputation and on the relationship between business partners. It could also result in improved business climate, and a much lower susceptibility of business to draconian national regulatory intervention. Yet codes of conduct suffer from several limitations.¹⁰ By their nature, they cover only a limited number of issues, usually those issues that have a high profile and potential to damage corporate image – such as human rights, the environment and corruption; they may serve only a symbolic purpose, deflecting criticism and weakening or reducing the demand for external regulation while lack of independent monitoring ensures that the status quo is essentially protected; and they signify what some have described as a dangerous trend towards ‘privatisation’ of social rights, in effect undermining or pre-empting potentially transforming social dialogues.¹¹

Given the limitations and dangers of voluntary codes of conduct, commentators warn against attaching to them more significance than they really merit. It has, thus, been suggested that ‘codes can only complement and not replace national and international legislation or social dialogue and collective bargaining.’¹² Indeed, codes only identify but do not solve problems, and they are, therefore, better seen as ‘an area of political contestation, not as a solution to the problems created by the globalization of economic activity’.¹³

In the light of the benefits, limitations and dangers of voluntary codes of conduct, this article aims to evaluate the EITI through a case study of its implementation in Nigeria. It begins by providing the contextual background to the initiative. It then lays out the principles and criteria which animate the initiative. This is followed by a case study of Nigeria’s experience with the EITI, and an examination of the implications of the experience for the future of the initiative. Throughout the case study, the article would seek to shed light on the following questions: (1) Is the EITI merely a symbolic gesture, aimed at deflecting criticism of the activities of the Nigerian government and the operators of the oil and gas industry or does it represent a genuine stakeholder control of the revenues accruing from the industry? (2) Is the EITI a realistic alternative to the traditional mechanisms of state regulation or is it more properly to be seen as complementary to state regulation?

The EITI in Context: The Paradox of Plenty

Extractive industry resources, such as crude oil and solid minerals, abound in developing countries. Globally, there are 35 petroleum-rich countries, and 20 mineral-rich countries in the developing world. Sub-Saharan Africa is experiencing an oil boom.¹⁴ New proven reserves of oil have been published to exist in the Atlantic waters of the Gulf of Guinea, stretching from Nigeria to Angola. In the hinterland, Mauritania, Chad, and Sudan, and the littoral countries of Sao Tome and Principe as well as Equatorial Guinea, are set to join older oil and other mineral producers, such as Nigeria, Gabon, Cameroon, Angola, Democratic Republic of the Congo, and the Republic of Congo. Gold, Diamond, Manganese, Cobalt, Tin, are some of the minerals produced in commercial quantities on the African continent. Revenues from the export of these resources account for a huge share of the GDP of these countries, with export earnings accounting for as high as 90 per cent of government revenues in some cases. Extractive industry resource wealth often creates a steady stream of revenue for the producing countries. The wealth creates an enormous potential for social and economic development. Not unexpectedly, in Africa high hopes have been placed on the opportunity, which this wealth creates, to effectively address the question of poverty on the continent. Among the expected dividends of minerals and oil and gas production are jobs, food, schools, roads, hospitals, electricity and potable water.

However, at the center of extractive industry resource wealth lies a fundamental paradox: an inverse relationship between wealth and poverty.¹⁵ The development potential of oil and mineral wealth has not been realised. Consequently, it appears that poverty is on the rise on the continent even as more and more dollars in mineral wealth flow into the continent. Resource-rich African countries are recording poor performance on almost all human and economic development indicators: per capita growth rate (more than 70% of the population subsist on less than US \$1 a day); high infant mortality; high illiteracy levels, below average life expectancy etc.¹⁶ The foundation of colonial economies in most parts of Africa rested on mineral wealth. By the end of colonialism in the 1960s, the development plans of such countries as Congo, Gabon, Mali, Ghana, Zimbabwe, and Zambia were based heavily on revenues from the mines which were developed during the colonial era. Minerals were the financial backbone of South Africa's racial supremacy both under the British and the Afrikaners. The competition for control of diamond and gold was a huge part of the decades of civil war in Liberia, Sierra Leone, the Democratic Republic of the Congo (DRC), and Angola. Likewise, oil instigated the civil wars in Chad, the Sudan, Angola, and the massive human rights abuses in the Niger-Delta region of Nigeria.¹⁷ In sum, African countries which have received billions of dollars in revenue from their extractive resources are not only economically troubled, but they are the most socially unstable and politically unaccountable on the continent. They have not

been able to use oil and mineral wealth to reduce poverty; in most cases, poverty has worsened. It is the worst case of the “resource curse”¹⁸.

By the end of this decade, there will be a lot of money available for poverty reduction from Africa's oil boom. Oil exploration and production are set to double. Nigeria bids fair to increase production to 3 Million barrels per day, while Angola will increase its production to 1 million barrels per day. There will be an estimated investment flow to the oil industry of over \$50 billion, with about 25% of the total oil needs of the United States being satisfied from the African region. In total, it is estimated that Sub-Saharan African governments will receive \$200 billion in oil revenues over the next decade. This windfall will occur amidst increasing donor fatigue and a shift in emphasis among donors from aid to trade. Under those circumstances, it will be crucial for African governments to maximize the opportunity of the oil boom to reduce poverty on the continent. This will not happen without a concerted effort against the resource curse.¹⁹

In Africa, the major problem in this regard is lack of transparency and democratic management of wealth. Excessive state secrecy surrounding key facts about resource revenues often alienates the people from the processes through which the wealth is generated, managed, and distributed. Transparency is central to good governance. The more opaque the book-keeping, the greater the opportunity for stealing, mismanagement and misappropriation of public funds. Transparent book-keeping, on the other hand, increases accountability and reduces the risk of mismanagement and corruption. Transparency also fosters democratic debate about policies and priorities, and enriches political development. Lack of transparency erodes the legitimacy of the state, unleashing authoritarianism, lawlessness, violence and other forms of social conflict. None of this fosters a stable business climate for investors.

EITI Principles and Criteria

The EITI is organised around twelve principles.²⁰ These principles encapsulate in broad strokes the emerging international consensus on the importance of transparency by governments and non-state actors, and the need for collaborative effort by the public and private sectors as well as civil society in ensuring accountability and good governance. In March 2005, a set of operational criteria was also agreed at the EITI London Conference. They are as follows:

- (a) 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.

- (b) Where such audits do not already exist, payments and revenues are the subject of a credible, independent audit, applying international auditing standards.
- (c) 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.
- (d) This approach is extended to all companies including state-owned enterprises.
- (e) Civil society is actively engaged as a participant in the design, monitoring and evaluation of this process and contributes towards public debate.
- (f) 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.²¹

These criteria embody three core principles. First is independent verification of payments and receipts and the publication of same. Without independent verification and publication of payments and receipts, the implementation of the EITI would become a pointless exercise, devoid of credibility. Such an exercise would only become a symbolic gesture, not intended to produce real transparency and accountability. Secondly, the process cannot be controlled exclusively by governments; civil society must be involved in the process. The results of the initiative must be open to free discussion, scrutiny and debate by civil society. Unless this is the case, results would be vulnerable to suspicion, and the long-term benefits envisaged for governments and investors would not materialize. Thirdly, although the EITI is a voluntary initiative, participation in the process is mandatory for all extractive industry operators, once the host country endorses the initiative. These principles occupy the core of the initiative, although their actual implementation may vary from country to country according to the variety of local conditions. The EITI Source book provides an illustrative guide to the implementation of the criteria. The criteria are only minimum standards, and implementing countries are encouraged to exceed these standards where possible.

Implementation of the EITI: A Case Study of Nigeria

Nigeria is one of the few countries which have endorsed the EITI initiative, the others being Angola, Bolivia, Cameroon, Chad, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Kazakhstan, Mauritania, Mongolia, Niger, Peru, and Sierra Leone, Azerbaijan, Trinidad and Tobago, East Timor, Sao Tome and Principe. Of the eight countries currently implementing the EITI, Nigeria is foremost in terms of the pace and depth of implementation. In the following, an attempt will be made to evaluate the Nigerian process against the generally agreed key elements of voluntary initiatives.²² These are: *commitment* (the political will to achieve effective implementation); *content* (the goal or target); co-operation (the involvement of stakeholders in the preparation and

implementation of the initiative); *checking* (monitoring of implementation and the results); and *communication* (reporting to the public on results and the treatment of feedback).

President Olusegun Obasanjo launched the Nigerian Extractive Industries Transparency Initiative (NEITI) on February 19, 2004.²³ A National Stakeholders Working Group (NSWG) was subsequently assembled to implement the EITI in Nigeria. It was made up of twenty-eight members drawn from civil society, the media, the government, indigenous and multinational corporations, the organized private sector, the National Assembly, and the State Houses of Assembly. The objectives of the NEITI, which the NSWG was set up to pursue, are as follows:

1. An independent audit of Nigeria's extractive industries (with oil and gas being the first of these to be so audited)
2. Codification of the EITI principles and criteria to institutionalize and ensure the continuity of independent annual audits beyond the life of the current government
3. Capacity building for the NEITI, particularly among government agencies and civil society
4. Development and implementation of a communications strategy to ensure deeper civil society penetration and to foster a sense of ownership of extractive industry resources among Nigerians.

The implementation of all of these objectives would be coordinated by the NEITI Secretariat.

The Structure and Work of the NSWG

The NSWG was inaugurated on 19 February, 2004. It resolved itself into five committees, namely, technical, legislative, focal, civil society, and media. The technical team, composed of four members, was formed to evaluate all tenders for NEITI assignments. The team was instrumental to the selection of the Hart Group through an international competitive tender on March 15, 2005, to conduct an audit of the oil and gas industry.

The legislative team, also composed of four members, had a mandate to set the agenda and strategy for the translation of EITI principles and criteria into legislation. A bill was presented to the National Assembly on December 22, 2004. The bill was passed by the House of Representatives on January 19, 2006, and is currently awaiting second reading at the Senate.

The focal team, made up of 11 members, was set up to design and oversee a technical assistance program which includes a variety of coordinated training programs, inward secondment and infrastructure support for government agencies. In this regard, the focal team has since drawn up a short, medium and long-term agenda which includes generic biannual networking seminars,

conferences and workshops for a wide variety of stakeholders, the setting up of technical advisory teams, and the sourcing of sustainable funding for capacity development.

The civil society team was composed of four members, and was charged with the responsibility to design a communication strategy for the dissemination of information and the engagement of rural communities, and regional civil society groups. The team proposed and has carried out a number of road shows in six geopolitical zones of Nigeria, aimed at taking the NEITI message to the grassroots and to receive feedback. The road shows have been held at Port Harcourt (South-South zone), Kaduna (North-West zone), Lagos (South-West zone), and Abuja (North Central zone).

Finally, the media team; this has two members drawn from the print and electronic media. The media team is mandated to publicise the work of the NSWG in order to elicit responses from the widest possible spectrum of the society. This team was instrumental to the local and international publicity which the presentation of the first ever comprehensive transparency audit of the oil and gas industries received.

The NEITI Audit Program

In accordance with international best practices, the NEITI audit program began with a strategic two-stage approach: (a) an international invitation for expression of interest in the selection of an auditor (b) a request for proposals from shortlisted firms to carry out the following: a physical audit, consisting of a reconciled figure and a coherent map that will give a complete picture of the amount of oil/gas that has been produced, lifted, lost, refined or exported in the given period of review; a financial audit consisting of a reconciled picture of payments, showing how much, by whom and to whom; and (c) a process audit consisting of a critical examination of crucial extractive industry processes, such as levels and justification of capital expenditure proposals, checks and balances in the importation of refined products, comparative analysis, benchmarking and recommendations for improvement. The audit program covered the period 1999-2004.

The Hart Group is an international UK-based consultancy firm with a 16-year track record of work in the management of underground resources, such as oil, gas, and solid minerals. Over the years, the Hart Group completed complex projects in Europe, the former Soviet Republics, South America, the United States, Canada and Africa. The Hart Group participated in the Money-for-Value audits of the Nigerian National Petroleum Corporation's joint ventures in the 1990s, and also completed audits for the National Electric Power Authority and other private sector entities. The Hart Group was assisted by an array of technical experts, including CMA, Chris Morgan Associates, TRACS, and Ariane Transiciel (a subsidiary of Cap Gemini). A local multidisciplinary accounting firm, S.S. Afemikhe and Company, was also selected to assist the Hart Group. The local firm was a group of

chartered accountants, procurement specialists, management and value for money review consultants with 18 years of experience in statutory audits, supply chain management, and procurement contract reviews in the public and private sectors.

The Hart Group presented its audit report in two stages. The first stage consisted of interim financial and physical audit reports, both of which were presented in January, 2006. These reports were followed by international high level consultative roundtable discussions. The final reports – financial, physical and process – were presented to the public in April, 2006, again followed by intense roundtable discussions. The reports were presented to the Federal Executive Council of the Nigerian government, which comprises, among others, the president, his deputy, former heads of state, and ministers of the federal government.

The Audit Report

The final audit report was presented in three volumes. The report identified a number of major extant and potential transparency issues in Nigeria's oil and gas industry.

The Financial Audit. The financial audit was submitted in two volumes. The first volume, titled 'Baseline Analysis of Financial Flows', documented the current processes utilized by Covered Entities by which financial and related data transactions are executed to establish upstream and downstream financial flows in the oil and gas sector. It also prepared a mapping of the financial flows and the relationships among various entities in the industry. In the course of documenting the systems, issues were identified which could inhibit transparency in financial flows and potentially reduce the government's earnings.

The report found several points of difficulty and/or system weaknesses arising from lack of information sharing among government entities. In addition, confidentiality provisions of the joint venture agreements between government entities and producers in the industry stood in the way of disclosure of information by the government entities to relevant organs of government. Secondly, the report documented several problems with the collection of petroleum profits taxes from upstream operators. Currently, these operators submitted low monthly estimates of the petroleum profits taxes (PPT) owed, but they did not follow it up with prompt reconciliation of their estimates with actual production figures. Thirdly, there was inadequate interface between the Federal Inland Revenue Service (FIRS) and the Central Bank of Nigeria (CBN) regarding non-oil and gas taxes. This made it impossible to reconcile various payments in the oil and gas sector to the respective payers. Also, the FIRS was unable to access and validate PPT information from various entities. The information relevant to validation of PPT accounts include realizable price, crude oil lifting information, production volumes, approved annual budgets, Well Cost Reports, licence fees, etc,

but these were regularly unavailable to the FIRS. The FIRS's work was made more difficult by the impact of the Memorandum of Understanding (MOU) on PPT assessment and payment. The MOU did not only seem to supersede the PPT in many key aspects, but it contained a very complex formula that was not easily understood by a majority of stakeholders in the industry. This complexity, in the words of the report 'inhibits transparency and defeats verification and accountability of PPT assessment.'²⁴ Finally, crude lifting contractors were not being taxed, because the FIRS encountered difficulty identifying who they were, and the amount of freight income that they received.

The Department of Petroleum Resources was reported to have departed, without explanation, from its statutory mandate to apply 'casinghead petroleum spirit after separation' in the computation of petroleum royalties; instead, it used focalized production volumes and local consumption data for the computation, a practice that appeared to have led to losses of government royalty income. Another significant transparency issue arose from the management of the proceeds of crude oil sales through the Nigerian National Petroleum Corporation (NNPC). The proceeds of sales were paid into NNPC accounts from which certain approved payments were made; the net amount was then remitted to the Central Bank. This procedure was designed to resolve cash flow problems, but, the report noted, 'it is not a transparent procedure'²⁵.

The second volume of the financial audit report was titled "Issues in Government Financial Systems". The volume indicated systemic difficulty in several areas at the level of government. The Revenue Mobilization Allocation and Fiscal Commission, which has the constitutional duty to monitor federally collected revenues, was not allowed access to vital information by the NNPC. The Commission also appeared under-resourced for the monitoring of revenue flows from the oil and gas sector. More troubling, however, was the marginalisation of the Accountant general of the Federation (AGF) by both the paying entities and the Central Bank. The paying entities did not notify the AGF of expected inflows, and the CBN did not notify the AGF of actual receipts or inflows. The auditors found significant inefficiencies in the Central Bank's documentation and reporting of financial inflows as the AGF's bankers.

The Physical Audit: The physical audit report was critical of the way in which oil companies accounted for oil. They did this by developing hydrocarbon volume balances. Some companies produced only net volume balances, while others produced, in addition, gross liquid balances (including water and losses). The report indicated that the information supplied by the companies was unreliable and did not help to establish the amount of unaccounted oil. The aggregation of net and gross balances gave a misleading picture of the relationships between the figures presented. Although the auditors were able to materially verify the volumes of crude exported by NNPC, there

was a discrepancy between the volumes lifted by NNPC and the sales volumes recorded by the Crude Oil Marketing Department (COMD). There was also a discrepancy between the volumes used by oil companies and the PPT and royalty returns, which were based on reconciled hydrocarbon flows.

The report noted that arrangements for monitoring the entire hydrocarbon balance of the sector, from wellhead to terminal/refinery were not being enforced. Even with weak standards, unreliable reporting by oil companies and unenforced arrangements, it seemed that oil fared better than gas in terms of accounting, as the report noted that gas suffered from a total “lack of regulation”²⁶.

The Process Audit. The process audit covered the process of marketing natural gas, the licensing process, expenditure processes, and the process for marketing Federation Equity Crude.

One major flaw in the process of marketing natural gas, report indicated, was the absence of a ‘proper’ gas market based on usual economic criteria, such as costs and market signals. The pricing structure of gas did not bear any relationship to the costs of production and distribution. The report also disclosed that consumers did not meet their obligations to pay for gas consumption. In this regard, government parastatals and entities, such as NEPA, were the most notorious culprits. Non-payment of gas bills, and the use of subsidized or non-market pricing of gas, constituted major constraints on the development of the gas market.

The licensing process raised serious procedural and transparency issues. The *Petroleum Act*, 1969, which covers the licensing process for gas as well, is antiquated and ambiguous in many areas, inviting arbitrariness and chaotic procedure. Key terms and processes, such as licences and leases, oil prospecting licence and oil mining licence, and the bidding criteria and parameters, were all not clearly defined and specified. There was no recognizable model for production sharing contracts, and the quantity and quality of information available to the public were very low. The bidding process was all but transparent.

The expenditure process related to financial decision-making and operating and capital expenditure, including the procurement of goods and services. While the report found the processes used by the large international oil companies consistent with best practices and the requirements of the production sharing contracts, it found the processes of some of the smaller companies deficient. Other administrative deficiencies were associated with the dual capacity of the NNPC as a joint venture partner and supervisor of the operations. This sometimes bred conflict of interest without necessarily improving the contract awarding procedure or the joint venture budget monitoring process.

The procedure for marketing Federation Equity Crude (FEC) also raised transparency issues. FEC refers to the equity streams of crude oil that flows to the NNPC from the joint ventures in which it participates, and to which NNPC has title under the terms of the joint operating agreement between it and the joint venture partners. The joint ventures account for some 75% of the total Nigerian crude production. The report found that there was no evidence of written and authorized procedures, nor was there documentary evidence of delegation of authorities; there were conflicts in the contract procedure for the sale and purchase of crude; the process for setting the monthly official selling price for FEC was deficient in many ways: for example, the pricing clause was imprecise; there was no written procedure for formulation of Oil Market Outlook; no written procedure for communication by NNPC personnel with price assessment agencies; and there was a lack of record keeping of communication on market intelligence. Although these issues fell primarily within the purview of the Crude Oil Marketing Department, there were some sale and purchase procedures that fell under the discretionary purview of the high levels of the NNPC hierarchy; these procedures, the report noted, 'are currently opaque'²⁷.

The Audit Recommendations and NEITI Remediation Strategy

On each of the problems of book keeping and process identified by the auditors, detailed recommendations were made for improvement. The auditors acknowledged, however, that the solutions to the problems were not necessarily straightforward. They recommended more detailed analysis and development of the recommendations to make them practically implementable. In particular, 'consultations will be required to ensure that affected organizations agree with the analysis and understand the reasons for change.'

Following the submission of the final audit report, the NEITI held a remediation/reconciliation strategy implementation meeting with the auditors and the covered entities. It was agreed that the auditors would disaggregate their report and send specific issues concerning respective entities to those individual entities. Specific tasks were identified and a template for proforma timetable for the conclusion of the audit were distributed to the covered entities, showing what needed to be done, who to do it, what procedures to apply, and when it should be done. NEITI's responsibility to monitor compliance with the audit recommendations was reaffirmed.

Assessing the Effectiveness and Implications of the Nigerian Experiment for EITI

The successful completion of the EITI audit program in Nigeria is significant for a number of reasons. First, this is the first time that a comprehensive audit of Nigeria's oil and gas industry would be undertaken since Nigeria became an important player in the global industry some three decades ago. As such, not only does the audit signify a shift from "business as usual" both in letter

and in spirit, but it sends an important message about governance to the civil society that has the potential to increase trust and improve state-society relations. Secondly, Nigeria completed the audit in spite of a lack of clarity on the benchmarks for the implementation of the EITI globally. This shows that, given the commitment, governments might implement the spirit, not just the letter, of the initiative and make the EITI the broad framework for transparency that it was intended to be. Thirdly, the lateral support which Nigeria's experiment received from international governments and institutions and the full participation of the covered entities – an agglomeration of domestic and international companies doing business in the oil and gas sector of Nigeria's economy – reflects the emerging consensus that the responsibility for fighting corruption and supporting good governance in the extractive industry is not exclusive to those countries which host extractive resources; the responsibility is shared among these countries and the companies that extract the resources, the companies that export the resources, and the international financial institutions that support these kinds of economic development in the developing countries. Finally, the progressive denuding of secrecy in the extractive industry, which the audit processes implied, is bound to have broader consequences for the way transparency is viewed in other areas of the bureaucracy.

Yet, the Nigerian experiment sheds light on some of the areas of difficulty in the implementation of the EITI. Prominent among these is the possibility that transparency may not necessarily lead to accountability.²⁸ The Chairman of NEITI and the Minister of Solid Minerals, who presented the audit report to the Federal Executive Council, noted some fairly serious irregularities exposed by the report. For example, while cash calls would normally be expected to be distributed evenly over any given year, at the end of 2004 there was a total of \$933 Million held in NNPC transitory account out of a total cash call of \$4.3 billion for that year. There was no explanation for this surplus. Furthermore, the amount recorded in the PPT accounts of the Central Bank were higher than what the oil companies indicated that they had paid in both 2003 and 2004. 'On disaggregate basis', the Chairman said, 'CBN records show that the amount of PPT received from Chevron (Nigeria) Limited in 2003 was lower than what the company said it paid (\$471 Million as against \$518 million). A similar pattern was observed for Chevron Oil Company of Nigeria in 2004 (\$23 million as against \$9 million).'²⁹ Also in an interview with the BBC soon after the report, Chris Nurse, Managing Director of Hart Group, the auditors, said '[W]e found some strange situations. For the year 2002, there were \$250 million that the companies say they paid to the Central Bank that do not appear in Central Bank records.'³⁰ The amount of funds involved here are huge, but the audit report indicated that the auditor's mandate did not extend to looking into what might have happened to the money. Nor is this the only major item on which matters were left only half-explored. Another matter was the lack of certainty over the measurement of physical volumes of exported crude. There was good data on how much oil reached export platforms but almost no data on how much was originally pumped from the oilfields. It was, thus, impossible to determine how much oil was

missing. Oil theft has been a serious issue which the government has not been able to resolve. Oil industry officials have speculated that upwards of 5% of Nigeria's output is lost annually to a highly sophisticated international network of oil thieves. Beyond the remediation strategy described above, however, there is no statement from the government of its willingness to pursue accountability for the missing oil and funds.

Accountability is the central purpose of transparency. Unless EITI spurs accountability, audit reports would only amount to going through the motions with no substantial consequences for those who engage in corruption and theft of public funds.

The primary mode of dissemination of the audit report (through the NEITI website) in a country in which the internet is only accessible to less than 5% of the population, raises issues about the physical accessibility and effectiveness of the report. So far, months into its release, analysis of the report in the usually vociferous Nigerian media has been quite scanty. Apart from the issue of accessibility, other factors which may be responsible for this could be a lack of capacity among civil society groups, and widespread functional illiteracy. Whatever the causes of the scant attention which the report has received, there is no doubt that this represents a big challenge to the central mission of NEITI, namely, engendering accountability through transparency. Again, all of the effort put into producing the audit report would be to no consequence unless more creative ways are found to disseminate the report among the vastly illiterate population of Nigeria.³¹

The audit presented an opportunity to require the government of Nigeria and its oil and gas industry partners to disclose the nature and structure of the production sharing agreements (PSAs) that govern the industry, in order to invite scrutiny and input from industry watchers, experts, and civil society. Concession agreements, which were the forerunners of the PSA in the developing world, were rejected by oil-producing countries in the 1960s because they tended to cede ownership of the product to oil companies. They were replaced by the PSAs. But even the PSAs have proven to be no less injurious than the concession agreements.³² Production sharing contracts, running into hundreds of pages of complex legal and financial provisions which are generally subject to confidentiality, are known to lock host countries into arrangements for decades. They generally exempt oil companies from any new laws that might affect their profits, and they usually exclude domestic jurisdictions, favouring dispute resolution by international tribunals whose decisions privilege commercial rather than national interest considerations. As one commentator has noted of PSAs, "[O]il experts agree that their purpose is largely political: technically they keep legal ownership of oil reserves in state hands, while practically delivering oil companies the same results as the concession agreements they replaced"³³.

The PSAs in Nigeria may have been negotiated under less than transparent circumstances, given that for three decades the country was ruled by military dictatorships, and certain gaps or loopholes might exist which are hurting or might have the potential to hurt, the country's take from the industry. As the audit report noted in many instances, some oil companies and government entities in Nigeria resisted the auditors request for certain information by citing the need for confidentiality. The auditors then recommended that "a discussion be initiated with producers with a view to amending the contractual arrangements so as to permit (certain covered entities) to disclose information, currently considered to be confidential, to relevant organs of Government".³⁴ Obviously this was a significant issue for the auditors. That the opportunity to open up the PSAs was successfully resisted by the oil companies speaks to the limitations of the EITI as a regulatory mechanism and the need to deepen and expand the EITI templates for reporting.

An important lesson from the Nigerian experiment is that a voluntary code of conduct, such as EITI, is not necessarily an effective alternative to state regulation. Apart from the "confidentiality" bottleneck referred to above, covered entities either failed to produce required information in full or were sluggish in providing the information, thereby impeding the work of the auditors. These problems were anticipated by the EITI coalition, for one of the issues highlighted in the EITI Source book is how to ensure that all companies report. The Source Book states: *Governments will need to consider how best to ensure that all companies report in a timely manner and using the agreed reporting templates. Whilst in some countries this may be achieved through voluntary agreements with the companies, in other countries this may require a legal framework to be established. Governments implementing the EITI can be expected to fully exhaust their legal possibilities for compelling companies to cooperate.*

In order to ensure that all necessary information is disclosed by covered entities, the problems highlighted clearly call for legislative intervention. A bill is currently before the Nigerian National Assembly for an *Act to make provision for the establishment of the Nigeria Extractive Industry Transparency Initiative (NEITI) and for Other Matters Connected Therewith*. The closest that this Bill comes to prescribing any sanctions against delinquent companies or entities is a provision that 'An extractive industry company which – (a) gives false information or report to the Federal Government or its agency regarding its volume of production, sales and income; or (b) renders false statement of account to the Federal Government or its agency, resulting in the underpayment of revenue accruable to the Federal Government, commits an offence which is deemed to be an economic and financial crime under the Economic and Financial Crimes Commission (Establishment, etc) Act, 2004, and the provisions of that Act relating to investigation and punishment of offenders, as far as they are applicable, shall apply accordingly.'³⁵ The Bill is silent about entities which fail to disclose any information at all, or dither in providing such information. Of

course, in requesting that oil companies must provide information, a huge obstacle, which the Bill ignores, is the PSA. Ultimately, the EITI process needs to include a renegotiation of PSAs if the 'confidentiality' problem would ever be overcome.

In Lieu of Conclusion

All in all, evaluated in terms of the key elements of voluntary initiatives, the Nigerian experiment seems to be on the right track. Given that there is a palpable lack of accounting culture in Nigeria, the audit of the oil and gas industry represents progress and a demonstration of uncommon political will by the current leadership of the country. But a lot remains to be done to translate transparency into accountability. The dissemination of audit reports is still very limited, and feedback from civil society is almost non-existent. The commitment of oil and gas companies to transparency is not total, as demonstrated by their ready resort to confidentiality provisions in the PSAs. Above all, sustained progress on transparency would depend on the exercise of greater political will to confront impunity by bringing concerned entities and individuals to account for the reported missing oil and funds. It is also essential to continuity that the NEITI Bill be passed into law.

The extent to which the EITI was implemented in Nigeria without legislation is significant for other countries which have committed to implementing the initiative. It shows that a lot can be accomplished through this kind of mechanism, and that legislation need not be the only way to induce or enforce transparency. However, the need for legislation is not completely obviated, especially because the full implementation of the initiative might involve renegotiation of contracts or application of sanctions for delinquency. The more the level of co-operation by covered entities, however, the less likely might be the need for radical or draconian legislation.

The voluntary nature of the EITI means that while some countries, such as Nigeria, see value in implementing the initiative, others might not, even though they may commit themselves for public relations purposes. International pressure would, therefore, continue to be essential to translating policy into meaningful action. Such pressure could be in the form of mandatory requirements in loan or technical assistance agreements for public disclosure of all extractive industry-related revenues, and public disclosure of contractual agreements, such as PSAs. Industrialized nations can offer support for the initiative by passing laws making it mandatory for their companies to disclose revenue payments to governments.

The issues which the EITI seeks to address may appear localized to developing resource-rich countries, but they are global in character as the international spread of the coalition behind the initiative indicates. Corruption, poverty and underdevelopment generate social conflict and political instability. In a globalised world, no part is immune from the effects of social injustice in other parts.

Reference:

- ¹ See *Extractive Industries Transparency Initiative* at <http://www.eitransparency.org/about.htm> .
- ² See <http://www.publishwhatyoupay.org>
- ³ See <http://www.globalwitness.org>
- ⁴ See <http://www.transparency.org>
- ⁵ See <http://www.nepad.org>
- ⁶ See <http://www.unglobalcompact.org> , and especially the 10th Principle announced at the UN Global Compact Leaders Summit on 24 June 2004. The *UN Convention Against Corruption*, adopted at Merida, Mexico, in December 2003, which came into force on 14 December 2005, is the underlying legal instrument for the 10th Principle.
- ⁷ E.g., the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1999; Inter-American Convention Against Corruption, 1996; African Union Convention on Preventing and Combating Corruption and Related Offences, 2002; World Economic Forum Partnership Against Corruption Initiative; International Council on Mining and Metals Sustainable Development Charter; Trade Union Anti-Corruption Network, etc.
- ⁸ See Jenkins R (2001) *Corporate Codes of Conduct: Self-Regulation in a Global Economy* (Geneva: UNRISD).
- ⁹ Jenkins R (1999) 'The Changing Relationship Between Emerging Markets and Multinational Enterprises' in Buckley P J and Ghauri P N (eds) *Multinational Enterprises and Emerging Markets: Managing Increasing Interdependence* (London: Pergamon).
- ¹⁰ Sullivan R (2001) 'Voluntary Approaches: An Assessment and Overview', a presentation at the Royal Institute of International Affairs Conference on 'Corporate Social Responsibility: From Words to Actions', Chatham House, London, 15-16 October, 2001 (on file with the author). See also Carnegie Council on Ethics and International Affairs (2006) 'The Promise of Corporate Codes of Conduct', available online at <http://carnegiecouncil.org> ; and Pearson R and Seyfang G (2001) 'New Hope or False Dawn Codes of Conduct and Social Policy in a Globalising World', *Global Social Policy*, Vol.1, No.1., 49
- ¹¹ For perspectives on the debate about voluntarism versus regulation, see (2001) *Human Rights and Business Matters* (London: Amnesty International (UK) Business Group), Issue No.5.
- ¹² European Commission Employment and Social Affairs 'Codes of Conduct', online at http://ec.europa.eu/employment_social/soc-dial/csr/abc11.htm .
- ¹³ Jenkins R (2001) v.
- ¹⁴ See, e.g., (2002) 'Risky Money: Oil Companies Meet Human Rights and Political Challenges in Africa's New Fields' *Africa Confidential*, vol.43, No.6, March 22; (2002) 'Sub-Saharan African Oil: Black Gold' *The Economist*, October 24; Maidment P (2003) 'The Other Gulf', *Forbes*, March 10; Cambridge Energy Research Associates (2002) 'Potential versus Reality: West African Oil and Gas to 2020; (2000) *The Offshore West Africa Report 2000-2005*

(Canterbury, UK: Douglas-Westwood Ltd); and US Department of Energy (2002) International Energy Outlook 2002

- ¹⁵ See Catholic Relief Services (2003) Bottom of the Barrel: Africa's oil Boom and the Poor; Karl T L (1997) The Paradox of Plenty: Oil Booms and Petro-States (Berkeley: University of California Press); and Amuzegar J (2001) Managing the Oil Wealth: OPEC's Windfalls and Pitfalls (London & New York: I.B. Tauris Publishers).
- ¹⁶ UNDP (2006), Human Development Report (New York: UN)
- ¹⁷ See, e.g., the following: Christian Aid (2004) Fuelling Poverty: Oil, War and Corruption; Catholic Relief Services (2005) Chad's Oil: Miracle or Mirage? Following the Money in Africa's Newest Petro-State; Global Witness (2006) Digging in Corruption: Fraud, Abuse and Exploitation in Katanga's Copper and Cobalt Mines; Global Witness, A Crude Awakening: The Role of the Oil and Banking Industries in Angola's Civil War and the Plunder of State Assets; Global Witness (2004) Same Old Story: A Background Study on Natural resources in the Democratic Republic of Congo, and UNDP (2006) The Niger Delta Human Development Report, and European Coalition on Oil in Sudan (2006) Oil Development in Northern Upper Nile, Sudan.
- ¹⁸ See Sachs J D and Warner A M (1997) 'Natural Resource Abundance and Economic Growth', Development Discussion Paper No.517a (Cambridge: Harvard Institute for International Development); Ross. M L (1997)'The Political Economy of the Resource Curse', World Politics , Vol.51, No.2.; Gelb A (1988) Oil Windfalls: Blessing or Curse? (New York: Oxford University Press); and Auty R M (1993) 'Sustainig Development in the Mineral Economies: The Resource Curse Thesis (London: Routledge)
- ¹⁹ See, e.g., Overseas Development Institute (2006) Meeting the Challenge of the 'Resource Curse': International Experiences in Managing the Risks and Realising the Opportunities of Non-Renewable Natural Resource Revenues (London: Overseas Development Institute)
- ²⁰ See (2005) EITI Source Book available at the EITI website – <http://www.eitransparency.org> .
- ²¹ EITI Sourcebook
- ²² See, e.g., Gordon R and Miyake M 'Deciphering Codes of Conduct: A Review of Their Contents', OECD Working Papers on International Investment 1991/2. and UN Atlas of the Oceans, 'Voluntary Initiatives' at <http://www.oceansatlas.org/servlet/>
- ²³ See <http://www.neiti.org> . All of the information on the activities of the Nigeria Extractive Industries Transparency Initiative are available on this website.
- ²⁴ Audit Report, 17, para. 5.53
- ²⁵ Audit Report, Financial Audit, 2, para 1.9
- ²⁶ Audit Report, Physical Audit, 4
- ²⁷ Audit Report, Process Audit: The Process for Marketing Federation Equity Crude, 4
- ²⁸ See, e.g., Human Rights Watch (2004), Vol. 16 No.1, Some Transparency, No Accountability: The Use of Oil Revenue in Angola and Its Impact on Human Rights.

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- ²⁹ Press conference reported by BusinessDay Newspaper (Nigeria) on the first audit report, January 13, 2006, 'NEITI Audit Indicts NNPC, Others for Irregularities':
<http://www.businessdayonline.com/>
- ³⁰ BBC News, April 4, 2006, 'Audit Shows Lost Nigeria Oil Taxes', also available at
<http://news.bbc.co.uk/go/pr/fr/-/2/hi/business/4902474.stm> .
- ³¹ Among other things, the EITI does not set clear standards for publication of audit reports. This is a source of concern to many observers: see, e.g., Global Witness and Save the Children, UK, Making It Add Up: A Constructive Critique of the EITI Reporting Guidelines and Source Book, Recommendation 9. See also Global Witness (2005) Extracting Transparency: The Need for an International Financial reporting Standard for the Extractive Industries (London: Global Witness Ltd), and Save the Children UK, Beyond Rhetoric: Measuring Revenue transparency in the Oil and Gas Industries.
- ³² See, e.g., Platform (2005) Crude Designs: The Rip-Off of Iraq's Oil Wealth; see also Oil and Gas Energy Law Intelligence (2005) Vol.1, Special Feature: Production Sharing Contracts.
- ³³ Platform (2005), 4.
- ³⁴ Audit Report, Financial Audit (Baseline Analysis of Financial Flows Mapping and Interim Report), 4.
- ³⁵ Section 16 of the Bill. The Bill is available on the at <http://www.neiti.org>