Research Handbook on International Energy Law

International energy law is an elusive but important concept. There is no body of law called 'international energy law', nor is there any universally accepted definition for it, yet many specialised areas of international law have a direct relationship with energy policy. The *Research Handbook on International Energy Law* examines various aspects of international energy law and offers a comprehensive account of its basic concepts and processes.

Adopting a practical approach, the *Handbook* traces the wide and somewhat informal notion of international energy law and covers the latest developments in the field. The expert contributors offer original research and analysis on pertinent topics such as energy investment, international energy disputes and energy trade. In addition to examining public international law issues and their application to energy activities, the *Handbook* also includes studies focused on private contractual arrangements and provides an angle on the human rights aspects of energy.

This book will be a valuable tool for the expert audience – both academics and practitioners – and will provide students and early career practising lawyers with a good understanding of what 'international energy law' really means.

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Research Handbooks in International Law

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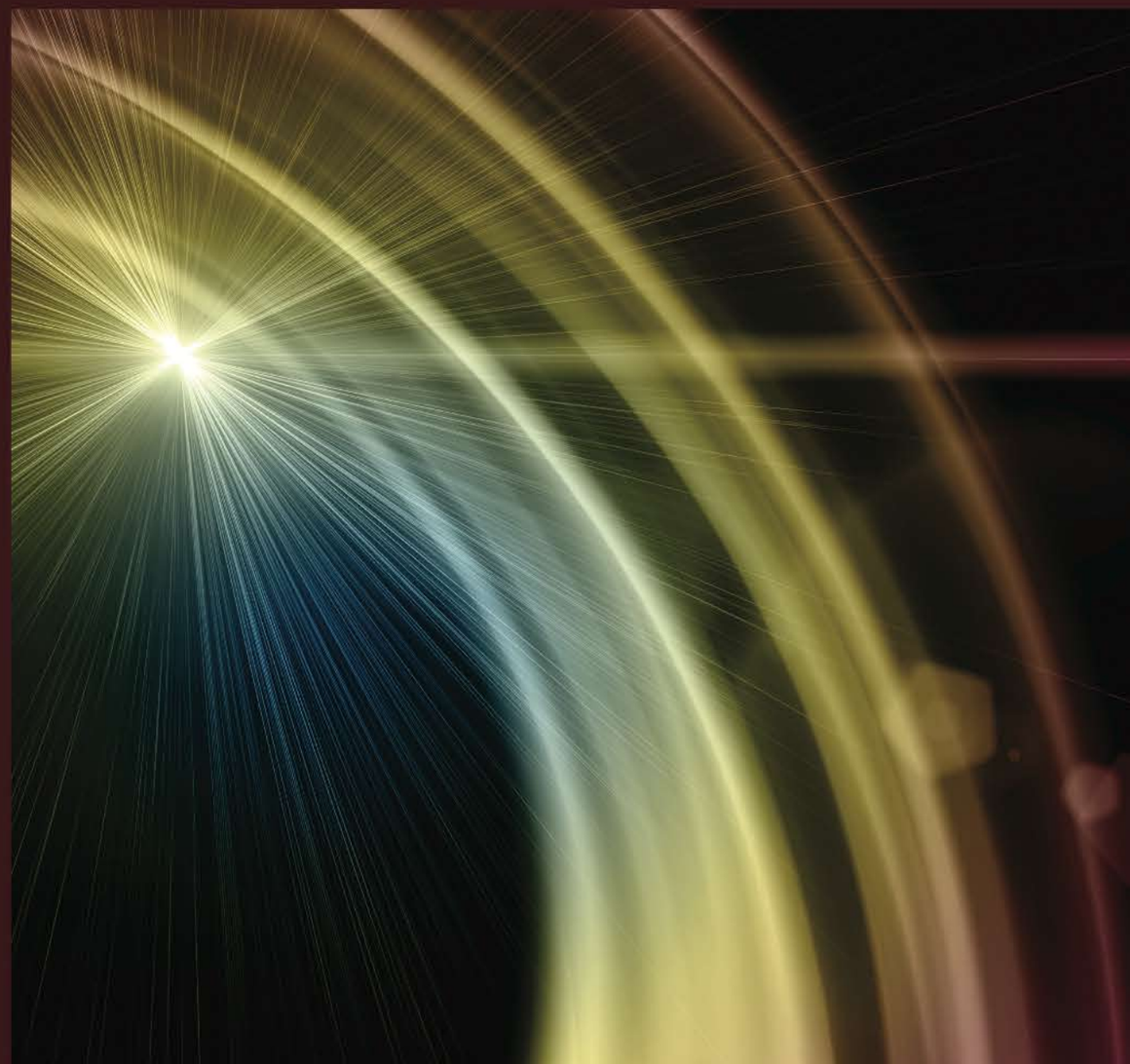
Edited by **Kim Talus**



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Introduction

International law is in motion. Over the last decades, international law has developed and expanded from rules on armed conflict or formal diplomacy, to deal with a wide range of areas and topics. Some call this development 'fragmentation' of international law, others call it 'specialization'. The choice depends, among others, how one views this development, positive or negative. Many of these specialized areas of international law have a direct linkage with energy. Such areas would include human rights law, environmental law, maritime law, international trade law, international investment law and so on.

Fragmentation of international law has in practice translated into the emergence of specialized and quite autonomous areas of international law with their own legal principles, institutions and legal practice. The purpose of this Research Handbook is to explore this development through those specialized areas of international law that have the above mentioned linkage with energy.

In addition to these 'pure' or 'traditional' areas of international law or public international law and the more recent and specialized areas, the Research Handbook will also examine certain private contractual arrangements that can nevertheless be seen as an integral part of 'international energy law'.

As with other Edward Elgar Research Handbooks, this book has two objectives. On one hand, it will provide students and early career practising lawyers with a good understanding of what 'International Energy Law' is. The book contains a number of chapters that provide the reader with an understanding of the basic concepts and approaches and an overview of specific areas of international energy law. On the other hand, the book will be a valuable tool for the expert audience, from both academia and practitioners of energy law. To this end, the book contains chapters covering the latest developments in various areas of international energy law. It also examines many of the contemporary issues of international energy law.

19. Transparency and international energy

*Tonje Pareli Gormley**

1. INTRODUCTION

There is high demand for increased transparency in the governance of natural resources, in particular in relation to extractive industries such as the petroleum industry.[1] First voiced by civil society organizations some fifteen years ago, today many governments and companies also take active part in transparency efforts. The development of the Extractive Industries Transparency Initiative (EITI) is an example of how civil

* The efforts towards increased transparency and accountability in the extractive industries are many and strong. The topic is of great immediate interest. Therefore, this area is ever developing and much has happened between the time when this chapter was first written and the time the book went to print. The chapter must be read in this light. For instance, a revised EITI standard was launched at the EITI Conference in Sydney on 25–27 May 2013. This also led to changes in the EITI Rules. (The former EITI standard is discussed in section 3.1 and the revised EITI standard is presented here: http://eiti.org/document/standard). Moreover, EU requirements for country-by-country reporting (see discussion on proposals in item 4.3) were adopted on 26 June 2013 (Directive 2013/34/EU, which replaced directives on accounting rules for annual accounts and consolidated accounts (78/660/EEC and 83/349/EEC)) and on 22 October 2013 (Directive 2013/50/EU amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonization of transparency requirements). Norway also enacted legal requirements to country-by-country reporting on 5 December 2013 (section 4.4). Not all recent developments can be considered as steps towards increased transparency. The US court case briefly mentioned in section 4.2 has delayed the effectuation of the US reporting requirements as the District Court of Columbia vacated the Final Rules implementing the US legal requirement for country-by-country reporting to the effect that the Security Exchange Commission must make revised Final Rules before the requirements can enter into effect. By the time this book is in the hands of the reader, more developments are sure to have taken place. Irrespective of this, the author hopes that the chapter will provide the reader with an overview of the issues at hand and give some sort of historical backdrop of the development of two important legal measures to increase transparency in the extractive industries.

[1] i.e. petroleum and mineral industries; this chapter has focus on governance of petroleum resources.

society, governments and companies involved in the extractive industries can work together for increased revenue transparency.[2]

The term 'transparency' is used in many contexts and, as one author aptly observes, appears to have become 'the Swiss army knife of policy tools'.[3] In this chapter 'transparency' refers to openness and communication of information in connection with public and corporate governance. In this sense, transparency is widely assumed intrinsically interlinked with the term 'accountability' which implies taking responsibility for actions, decisions, policies, and the implementation thereof. It appears to be widespread belief that because increased transparency will provide citizens with information, it will also increase the possibilities for democratic control of, and holding governments accountable for, the management of natural resources. Thus, transparency, through increased accountability, is deemed to be an effective measure against mismanagement, corruption and the 'resource curse', to aid promoting sustainable management of non-renewable resources and further the host country's development and economic growth.

Although there has been progress towards increased transparency in the petroleum industry, the road has been rocky. The campaign for increased transparency has been driven forward by similar motives as those that lead to the development of the public international law principle of permanent sovereignty over natural resources as from the late 1950s and up until the 1970s[4] and, just like there were conflicts of interest back then, there are different views among involved stakeholders today as to how measures for increased transparency shall be modelled and how far reporting requirements shall reach. These indifferences were lately illustrated by the law suit filed by the American Petroleum Institute and others to contest the US Securities and Exchange Commission's (SEC) implementation of the

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[2] Initially the EITI was a campaign initiated by civil society organizations for the publication of payments by extractive companies to host governments. However, as the initiative quickly gained support from governments and companies, the EITI soon became a multi-stakeholder initiative and the organizational structure of the EITI was based on this tripartite cooperation. See the EITI Articles of Association, available at http://eiti.org/articles. Last accessed on 2 April 2013, Arts 2(1) and 5(1) and (2).

[3] Virginia Haufler, 'Disclosure as governance: The extractive industries initiative and resource management in the developing world', 10(3) *Global Environmental Politics* (2010), 53.

[4] For instance, the preamble to General Assembly resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources' states 'Attaching particular importance to the question of promoting the economic development of developing countries and securing their economic independence'.

Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[5] section 1504 which introduces an obligation to undertake country-by-country, and project-by-project, reporting for extraction companies. Indeed, such indifferences sometimes put a curb on the developments towards increased transparency. However, it appears that whilst one effort may be challenged, new efforts may arise; there are current proposals for rules on country-by-country reporting in the European Union (EU).[6] Moreover, existing efforts expands and evolves; for instance, the EITI is at the time of writing looking at improving the EITI standard.[7]

This chapter comments on the need for measures to address good governance in the petroleum industries. It provides a short account of the development of the principle of permanent sovereignty over natural resources which this author considers to be the cradle for today's demand for transparency. The core of this chapter is a review of two legal mechanisms developed to further increased revenue transparency in the extractive industries; i.e. national implementation of the EITI standard and the introduction of domestic law requirements for companies to undertake country-by-country reporting on their international operations. Both mechanisms are aimed at increasing revenue transparency through reporting requirements for the purpose of achieving greater societal changes. Moreover, both mechanisms are both highly topical and under development at the moment. This chapter discusses the likeliness of these legal mechanisms to serve their intended purpose, and, further to this, the often assumed coherence between increased transparency and increased accountability.

The chapter concludes that Nigeria is an illustration of how national implementation of the EITI standard appears to be apt to fully deliver on fulfilment of the objective of increasing revenue transparency in the extractive industries, but that there is a need for complementary measures in order to achieve and ensure the democratic control and accountability which this author assumes is required for achieving broader societal change through political pressure. The Nigerian example illustrates the important question: in a given country or cultural context, is the link between transparency and accountability always as close as commonly assumed? Country-by-country reporting does not have the same track record as national implementation of the EITI standard. However, because both legal mechanisms are reporting obligations aiming to

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[5] Dodd-Frank Act, § 1504 (amending Section 13 in the Securities Exchange Act, 1934 (15 U.S.C. 78m), by adding a new letter q).

[6] See Section 4.3.

[7] January 2013, see http://eiti.org/blog/towards-better-eiti-standard.

increase transparency through publication of financial information there is reason to assume that the effect of country-by-country reporting may be similar to that of implementation of the EITI standard. Last, but not least, the chapter highlights that despite the deliberations that the Nigerian example may spur, it is still early days for passing judgment of the long term effects of increased transparency in itself, whether in Nigeria or elsewhere, and perhaps future evaluations of the effects of the increased transparency of today will judge their impact differently.

2. FACTUAL AND LEGAL BACKGROUND

2.1 The Factual Challenge: The 'Resource Curse'

Exploitation of petroleum and minerals carry much potential for economic development, but not all countries with extractive industries have realized this potential. On the contrary, research shows that for many host countries resource wealth has had negative effects such as greater poverty, slower development and low growth – a phenomenon or theory referred to as the 'resource curse.'[8] Nigeria is amongst those countries that have reportedly suffered from negative effects of petroleum exploitation.[9] In contrast, the impact that exploitation of petroleum resources has made on the Norwegian society within a relatively short period of time is a good example of how petroleum resources, if managed well, may benefit a host country. Since the commencement of the petroleum activities in the

[8] On this issue it has been stated that: 'Significant research reveals the paradox that, instead of benefiting countries' economies and political systems, extractive wealth is far more likely to have the opposite effect – a phenomenon known as the "resource curse." The negative effects of resource wealth include greater poverty, lower growth, and slower development, with resource-rich countries ranking near the bottom of most measures of human development. Another effect is corruption and weak democracy, with natural resource wealth becoming a powerful incentive for authoritarian rule. Resource wealth is also a clear contributor to violence and civil wars as the desire to control resources takes its most extreme form', quote from a report entitled Jim Shultz, 'Follow the Money: A Guide to Monitoring Budgets and Oil and Gas Revenues', *Open Society Institute*, 2005, 14, available at http://cps.ceu.hu/sites/default/files/publications/cps-joint-publication-follow-the-money-2004.pdf. Last accessed on 2 April 2013.

[9] See for instance Xavier Sala-i-Martin and Arvind Subramanian, 'Addressing the Natural Resource Curse: An illustration from Nigeria', Columbia University, Department of Economics Discussion Paper Series, May 2003, available at http://academiccommons.columbia.edu/catalog/ac%3A116405. Last accessed on 2 April 2013.

North Sea in the 1960s, Norway has moved from being a post-occupancy state[10] with an economy mainly based on farming, shipping and fishery to a welfare state with sound financial growth which is largely funded on revenues from petroleum exploitation.[11] However, success stories such as the Norwegian are unfortunately not as common as they might have been. It is against this background that addressing governance of the extractive industries has its importance.

2.2 Legal Background: Evolvement of the Principle of Permanent Sovereignty of Natural Resources and its Incorporation into Domestic Petroleum Law

The Norwegian example illustrates that exploitation of petroleum and minerals can be a driving force for the economic development of a country. Securing sovereignty of natural resources has therefore historically been an important issue for host countries. This is now settled by the public international law principle of permanent sovereignty over natural resources, a principle which implies that permanent sovereignty over natural resources is vested in the state in which the resources are located, on behalf of its people. The principle was developed in a series of UN resolutions very much as a reaction to and as a result of decolonization and a desire for sovereignty and development.

The evolution of the principle must be viewed against the history of exploitation of natural resources in developing countries and colonies. During colonial times, the typical concession agreements for exploitation of petroleum were extremely favourable to the foreign investors.[12] These concessions were characterized by covering immense areas for very long periods of time (e.g. between 60–75 years). The host country had limited

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[10] German occupation during the period 1940–45.

[11] In 2012, the Norwegian Petroleum Directorate reported that petroleum production on the Norwegian Continental Shelf has added more than NOK 9000 billion to Norway's GDP. (Norwegian Petroleum Directorate, "The Petroleum Sector – Norway's Largest Industry", available at http://www.npd.no/en/Publications/Facts/Facts-2011/Chapter-3/. Last accessed on 2 April 2013).

[12] Wolfgang Peter, *Arbitration and Renegotiation of International Investment Agreements: A Study with Particular Reference to Means of Conflict Avoidance under Natural Resources Investment Agreements* 2nd Edition (Kluwer Law International, The Hague 1995), Paper 1, section 1 and Claude Duval, Honoré Le Leuch, André Pertuzio et al., *International Petroleum Exploration and Exploitation Agreements: Legal, Economic & Policy Aspects* (Barrows, New York 2009), paper 5.4 entitled "The early concessions" where a 1937 concession between the Sultanate of Muscat and an IOC is used as an illustrative example of the features described here.

power, if any at all, to control resource management and petroleum operations generally. Moreover, the typical concession of the era generated very little revenue for the host country; the concessionaire was granted exclusive ownership rights to the petroleum reserves that were found and the right to freely dispose of such reserves. The government take would mainly consist of royalties based on production volumes only without taking the concessionaire's profit or internal rate of return into consideration. To make matters worse, renegotiation possibilities were typically unheard of.

Therefore, as the period after World War II was one marked by extensive decolonization, the newly independent states, as well as other developing countries, called for new rules and principles of international law in order to ensure and regain control over the exploitation of non-renewable natural resources located within their territories. Ensuring legal authority for the amendment or even annulment of inequitable legal arrangements of the nature as described above was also an objective. In response, a series of UN resolutions on issues related to permanent sovereignty over natural resources emerged as from the late 1950s and up until the 1970s. The evolution of these resolutions were marked by the opposing interests involved; largely industrialized countries would be preoccupied with promotion and protection of foreign investment and newly independent states and developing countries would wish to assert economic independence and sovereignty. The resolutions were, therefore, an expression of '. . . an agreement beneficial to all of them'.[13]

One of many important resolutions made by the General Assembly on this issue[14] is General Assembly Resolution 1515 (XV) of 15 December 1969, which inter alia reads in relevant part: '5 . . . the sovereign right of every State to dispose of its wealth and its natural resources should be respected in conformity with the rights and duties of States under international law . . .'

The principle is now an accepted general principle of public international

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[13] See Janeth Warden-Fernandez, 'The Permanent Sovereignty over Natural Resources: How It has Been Accommodated Within the Evolving Economy', CEPMLP Annual Review 2000, item 2.1, Article 4, available at http://www.dundee.ac.uk/cepmlp/car/html/car4_art4.htm. Last accessed on 2 April 2013. The article also gives a more detailed account of the evolvement of the principle.

[14] See also the Declaration on Permanent Sovereignty over Natural Resources (Resolution 1803 (XVIII) of 14 December 1962, UN Doc A/RES/1803 (1962), 2(1) ILM 223 (1963)); the Declaration on the Establishment of a New International Economic Order (Resolution 3201 (S-VI) of 1 May 1974, UN Doc. A/RES/3201 (1964), 13(3) ILM 715 (1974)); the Charter of Economic Rights and Duties of States (Resolution 3281 (XXIX) of 12 December 1974, UN Doc A/9631 (1974), 14 ILM (1975), 215).

law, but nevertheless most countries today also establish ownership rights to natural resources situated within their territories as well as on their part of the continental shelf,[15] as well as exclusive right to resource management, in the domestic law. For instance, the Norwegian Petroleum Act section 1-1 states that 'The Norwegian State has the proprietary right to subsea petroleum deposits and the exclusive right to resource management.'[16] In the same way, the current Petroleum Act of Nigeria reads: '(1) The entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State . . .'[17]

The resolutions also establish that permanent sovereignty of natural resources is vested in the State on behalf of its people. The Declaration on Permanent Sovereignty over Natural Resources section 1 reads: 'The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.'[18] This principle, which is guiding for resource management, must inter alia be based on an understanding that due to the non-renewable nature of some natural resources and the potential they carry to create wealth, benefits thereof should be enjoyed by the people of the state in question. This is much of the same rationale that spurred the demand for transparency and accountability in the extractive industries, see section 1.

Perhaps a reflection of an increased acceptance of the need for a more democratic involvement in national resource management and the principle of the Declaration on Permanent Sovereignty over National Resources section 1 as quoted above, the draft Petroleum Bill of Nigeria introduces a clear reference to the Nigerian people in the provision regulating title to the petroleum resources. Section 1 'Vesting of petroleum and natural gas' reads: 'Property and sovereign ownership of petroleum within Nigeria, its territorial waters, the continental shelf, the Exclusive Economic Zone and the extended continental shelf shall vest in the sovereign state of

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[15] The use of natural resources situated in the continental shelf was first regulated by the 1958 Geneva Convention on the Continental Shelf and later the 1982 United Nations Convention on the Law of the Sea.

[16] Act, November 29, 1996, No. 72, available at http://www.npd.no/en/Regulations/Acts/Petroleum-activities-act/. Last accessed on 2 April 2013.

[17] Act, November 27, 1969, Paper P10, Paper LFN 1990, available at http://www.babalakinandco.com/resources/lawsnigeria/LAWS/90350petroleum%20act.htm. Last accessed on 2 April 2013.

[18] Declaration on Permanent Sovereignty over Natural Resources, supra, note 14.

Nigeria for and on behalf of the people of Nigeria.'[19] Furthermore, article 3 'Management of petroleum resources' subsection (1) reads: 'The management and allocation of petroleum resources and their derivatives in Nigeria shall be conducted strictly in accordance with the principles of good governance, transparency and sustainable development of Nigeria.'[20]

3. NATIONAL IMPLEMENTATION OF THE EITI STANDARD

3.1 The EITI Standard

The development of, and the on-going work for an improvement in,[21] the EITI standard is the result of cooperation between governments, companies and civil society. At the international level, this multi-stakeholder cooperation has since 2009 mainly taken place through the EITI Association.[22] Pursuant to the EITI Association's Articles of Association article 2(2), its objective is:

> . . . to make the EITI Principles (Annex A) and the EITI Criteria (Annex B) the internationally accepted standard for transparency in the oil, gas and mining sectors, recognizing that strengthened transparency of natural resource revenues can reduce corruption, and the revenue from extractive industries can transform economies, reduce poverty, and raise the living standards of entire populations in resource-rich countries.[23]

The EITI Association is thus established to further a standard for revenue transparency in the extractive industries commonly referred to as the

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[19] This piece of Nigerian draft legislation has been pending for a very long time. It is the 2008 version that is quoted here, available at http://www.nnpcgroupagecom/PublicRelations/PetroleumIndustryBill/BillDownloads.aspx. Last accessed on June 5, 2012.

[20] Ibid.

[21] At the time of writing, in January 2013, the EITI standard is reported to undergo improvements after the next EITI Conference to be held in Sydney, Australia, see http://eiti.org/blog/towards-better-eiti-standard.

[22] The EITI Association is a tripartite coalition consisting of personal representatives of governments, companies and civil society organizations (the 'Members' of the EITI Association), see the Articles of Association, *op. cit*. note 2, art. 5. The Articles of Association were adopted when the EITI Association was established at the EITI Conference in Qatar in February 2009.

[23] See the Articles of Association article 2(2), available at http://eiti.org/fr/node/765.

'EITI Standard'. In short, the EITI Standard, established through the development of the EITI Principles[24] and the EITI Criteria,[25] is a set of voluntary minimum requirements for extractive companies to publish all material payments paid to governments and for governments to publish all material revenues paid from extractive companies.[26] However, as the EITI Principles are vague and the EITI Criteria are concise, these documents alone do not provide much practical guidance for implementing countries. Thus, in order to meet the demand for guidance on implementation, there has been steady development towards a more comprehensive set of guiding documents for those involved with national implementation of the EITI Standard.

The first main step in this development was the issuance of the EITI Validation Guide in 2006. Though it was intended to be a tool for those appointed as validators, it was also used by the implementing countries for guidance on implementation. To meet the implementing countries' demand for guidance, the EITI Secretariat issued the first 'EITI Rules' in 2009. The EITI Rules is a publication that brought together the sources, requirements and guidelines for implementation. In its 2011 edition, the 'EITI Requirements', which provide more detailed and practical step-by-step guidance on the implementation of the EITI standard, were introduced.[27] The EITI Requirements reflect and detail the EITI Principles

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[24] The EITI Principles are a set of twelve principles agreed at a multi-stakeholder conference in 2003. See EITI Rules, 10, available at http://eiti.org/document/rules. Last accessed on 2 April 2013. The principles are more policy statements on common grounds and beliefs than clear requirements that a country must meet in order to achieve increased transparency. For example, Principle 1 expresses a shared belief that 'prudent use of natural resource wealth should be an important engine for sustainable economic growth' and Principle 4 states that 'a public understanding of government revenues and expenditures over time could help public debate and inform choice of appropriate and realistic options for sustainable development'. Ibid. Nevertheless, these principles are important as they form the basis on which the EITI grew into its present form.

[25] The EITI Criteria is a set of six criteria agreed by EITI stakeholders in 2005. The EITI Criteria, though very concise, are more substantive than the EITI Principles as they stipulate more concrete directions for the countries wishing to implement the EITI. For example, Criteria 1 requires regular publication of "all material oil, gas and mining payments by companies to governments [and vice versa] to a wide audience in a publicly accessible, comprehensive and comprehensible manner." See ibid., 11.

[26] The EITI standard as reflected in the EITI Principles and the EITI Criteria has later been supported by further developments, notably the more comprehensive and precise EITI Requirements. See ibid., 12.

[27] At present the EITI Rules include the EITI Principles, the EITI Criteria, EITI Requirements for EITI implementing countries, the Validation Guide, and

and EITI Criteria. Most of them were already embedded in the EITI Validation Guide, but some were new and reflect how the guiding documents and the requirements for implementation have evolved through interpretation, clarification and refinement as the EITI Association has encountered new issues and challenges over the past years.[28]

As mentioned, the EITI Standard is stated in the Articles of Association to be expressed in the EITI Principles and the EITI Criteria. However, the current Validation Guide now expresses that: 'Where Validation verifies that a country has fully implemented the EITI (*i.e., has met all of the EITI Requirements*), the Board will designate that country as EITI Compliant'[29] (emphasis added). Given this clear statement that implementing countries must meet the EITI Requirements to successfully implement the EITI standard, the question arises whether the introduction of the EITI Requirements in effect replaces the EITI Principles and EITI Criteria as the EITI standard. The answer to this is probably in the negative; whereas the EITI Requirements definitely will be the practical tool that implementing countries most often will refer to, the EITI Principles and the EITI Criteria are of a different nature. The EITI Principles and the EITI Criteria were the first documents to be agreed by those engaged in the initiative that became the EITI. This is reflected in the Articles of Association; they are referred to as the expression of the EITI standard in Article 2(2) of the Articles of Association and they are part of the Articles of Association of the EITI Association as Annex A and B. If the EITI Requirements were to replace the EITI Principles and EITI Criteria, then a corresponding amendment of the Articles of Association would be appropriate. Moreover and importantly, due to the nature of the EITI Principles and EITI Criteria,[30] it can be argued that these are instruments better suited to maintain the flexibility required for the EITI standard to be adaptable for implementation into any legal system and to be sustainable over time than the EITI Requirements, which are more specific and thus more vulnerable for change. On this basis, it is argued that form a legal point of view, the EITI Principles and the EITI Criteria must be deemed to remain the main expression of the EITI standard and that the EITI Requirements must be deemed to be a mere tool for national implementation, at least until it

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EITI Policy Notes, which are notes on key decisions taken by the EITI Board. See the EITI Rules, supra, note 24.

[28] The 2011 edition of the EITI Rules state that such new requirements have been introduced in order to ensure 'quality and consistency of the EITI process'. See Clare Short, 'Foreword', EITI Rules, supra, note 24.

[29] EITI Rules, paper 4.1, 34.

[30] See supra, notes 24 and 25.

is clearly stated that the EITI Standard is replaced or amended and the Articles of Association is correspondingly amended.

3.2 National Implementation Process: What are the Challenges?

The goal for implementing countries is to implement the EITI standard nationally and to be declared EITI Compliant by the EITI Board.[31] The status as EITI compliant is awarded after the completion of a process consisting of three main steps. Firstly, the country must apply for and gain status as a candidate country. This is done by meeting five sign-up requirements to the satisfaction of the EITI Board.[32] The sign-up requirements entail, inter alia, an obligation for the implementing country 'to commit to work with civil society and companies on the implementation of the EITI'[33] and 'to establish a multi-stakeholder group to oversee the implementation of the EITI'.[34] When a country achieves candidate status, it is given two and a half years to undergo an implementation process which includes preparation requirements, disclosure requirements for companies and governments, dissemination requirements, and, finally, review and validation requirements. The validation process,[35] which is said to be the EITI's quality assurance,[36] is an independent, external evaluation mechanism for the purposes of establishing an impartial assessment of whether the country in question meets the EITI Requirements.

Where the validation process is successful, the EITI Board will declare that the country is EITI compliant.[37] Once a country has achieved status as EITI compliant, it must maintain adherence to the EITI requirements. If, on the other hand, the validation process reveals that there has not been an adequate progress towards EITI compliance, the EITI Board will revoke the country's candidate status.[38] Revocation does not prevent the country from reapplying for candidate status in due course. In addition to

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[31] Azerbaijan was the first country to be declared compliant on 16 February 2009. See 'Azerbaijan: Compliant Country', available at http://eiti.org/Azerbaijan. Last accessed on 2 April 2013.

[32] See the EITI Rules, supra, note 24, 13–15.

[33] EITI Rules, supra, note 24, 13, sign-up Requirement 2.

[34] Ibid., sign-up Requirement 4.

[35] The validation process is performed by a validator 'who is selected by the multi-stakeholder group in the country being validated, from a list of suitable organizations or individuals pre-approved by the EITI Board' that oversees the implementation of the EITI in the candidate country. Ibid., 35.

[36] See EITI Rules, supra, note 24, 34.

[37] See EITI Rules, supra, note 24, 36.

[38] In certain circumstances and when pertaining to a transitional period only,

revocation, the EITI Board may temporarily suspend or delist[39] a country where it is '. . . manifestly clear that the EITI Principles and Criteria are not in a significant aspect adhered to and honoured by an implementing country.'[40] The same applies in cases where countries fail to publish EITI Reports within the required intervals.

Making the EITI standard the 'internationally accepted standard'[41] for transparency in the extractive industries is, however, challenging. First, the EITI standard is a voluntary minimum standard[42] for the promotion of revenue transparency in the extractive industries at a national level. This starting point implies inter alia that the EITI standard will only be implemented in a host country if the government of that country expressly commits to do so and pursues this commitment by taking the necessary steps for implementation. Second, this also implies that the EITI standard must be of a flexible nature in order to be adaptable to the differences in specific circumstances in each and every implementing country such as the applicable law, the legal traditions, the characteristics and challenges of the national extractive industries,[43] and the powers, strengths and weaknesses of relevant stakeholders in those countries.

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the EITI Board has extended the deadlines set for various countries, see EITI Rules, supra, note 24, 32–4.

[39] The EITI Rules describe the concepts of suspension and delisting as follows: 'Suspension of an implementing country is a temporary mechanism. The Board shall set a time limit for the implementing country to address breaches of the EITI Principles and Criteria. If the EITI Board is satisfied that corrective measures have been undertaken in that period, the suspension will be lifted. If the matter is not resolved to the satisfaction of the EITI Board by the agreed deadline, the country will be delisted.' EITI Rules, supra, note 24, 65.

[40] EITI Rules, supra, note 24, 66.

[41] See the Articles of Association, supra, note 2, Art. 2 (2).

[42] The EITI is a minimum standard and as such there is room to go beyond the EITI standard. An example of this is Liberia, which has extended the EITI to comprise not only minerals and petroleum, but also tropical timber. See 'An Act Establishing the Liberia Extractive Industries Transparency Initiative (LEITI)', available at http://www.leiti.org.lr/doc/act.pdf. Last accessed on 2 April 2013.

[43] See, e.g., as one author notes in his account of the EITI: 'A technical shortcoming of both initiatives [the work of the Publish What You Pay coalition and the EITI] is that they are vehicles to promote revenue transparency, but largely ignore expenditure . . . [T]he problem in Angola, where these initiatives began, was at that time substantially a revenue problem, but in many other countries (including Nigeria) expenditure is generally a bigger issue in terms of transparency and corruption.' Nicholas Shaxson, *Nigeria's Extractive Industries Transparency Initiative: Just a Glorious Audit?* (Chatham House, London 2009), 2, available at http://eiti.org/files/NEITI%20Chatham%20house_0.pdf. Last accessed on 2 April 2013.

In contrast, there is also a need for certain unreserved requirements connected to the implementation process itself in order to achieve and ensure full compliance with the EITI standard; e.g. EITI Requirement 8 which states: 'The government is required to remove any obstacle to the implementation of the EITI.' What such obstacles might be varies with each country's specific circumstances. The core requirement of regular publication of all material payments can be used as an illustrative example. EITI Criterion 1 reads: '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.'[44] Clearly, in countries where the public's right to access to information is already embedded in existing legislation and where state budgets and revenues are already publicly available, compliance with the disclosure and dissemination requirements may not require major legislative reforms.

The EITI implementation process in Norway[45] is an example of this; the main legislative measure was the introduction of a short regulation on reporting and reconciliation of revenue streams in the petroleum sector (the EITI Regulation).[46] In connection with the public consultation of the draft EITI Regulation, the Ministry of Petroleum and Energy stated that the proposal was based on the assumption:

> . . . that Norway already materially meet[s] the EITI Principles on transparency and control with respect to revenue streams from the petroleum industry. In this connection, one may point out that tax payments to the Norwegian State from the licensees on the continental shelf are published and the information thus is already available for the public. The revenue streams to the State are also subject to independent control through the Office of the Auditor General. The established system for control with revenue streams from the petroleum industry to the state will continue, and regulation to implement the EITI will come in addition to this.[47]

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[44] EITI Rules, supra, note 24, 11. This criterion is reflected in EITI Requirements 14: Companies comprehensively disclose all material payments in accordance with the agreed reporting templates, 15: Government agencies comprehensively disclose all material revenues in accordance with the agreed reporting templates and 18: The government and multi-stakeholder group must ensure that the EITI Report is comprehensible and publicly accessible in such a way as to encourage that its findings contribute to public debate. Ibid. at page 13.

[45] Norway was the first OECD country to implement the EITI and was declared compliant on 1 March 2011. See Norway: Compliant Country, available at http://eiti.org/Norway. Last accessed on 2 April 2013; see also infra, section 3.2.

[46] See Regulation, June 26, 2009 number 856.

[47] The author's translation from the consultation memo, available in Norwegian at

The Norwegian example is not, however, a typical illustration of an EITI implementation process; many of the current implementing countries that embark on implementation of the EITI standard do not practice free access to public records and information on state revenues and therefore major legislative reforms may be required in order to meet the disclosure and dissemination requirements embedded in the EITI standard. In addition, petroleum licences and upstream petroleum contracts, and in particular financial information pertaining to these, are traditionally subject to confidentiality. Dealing with confidentiality clauses is an obstacle often encountered in EITI implementation processes. This can for instance be illustrated by the Azerbaijani implementation process, where it was reported that confidentiality clauses were initially an obstacle to EITI implementation.[48] Likewise, in Nigeria, confidentiality clauses have been reported to have represented initial obstacles for obtaining the required information for the preparation of early EITI reports.[49]

The tripartite nature of the EITI, in particular the clear requirement that implementation shall involve civil society along with governments and companies, has proved to be troublesome in many countries.[50] EITI

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http://www.regjeringen.no/en/dep/oed/dok/hoeringer/hoeringsdok/2009/horing---utkast-til-forskrift-for-gjenno/horingsnotat/gjennomforing-i-norge-av-initiativet-for.html?id=545362. Last accessed on 2 April 2013.

[48] See Coffey International Development, 'The EITI Azerbaijani Validation report: Validation of the Extractive Industries Transparency Initiative (EITI) in the Republic of Azerbaijan', February 2009, 11, available at http://eiti.org/files/Azerbaijan%20EITI%20Validation%20Report.pdf (last accessed on 2 April 2013) where it is stated: 'To address this, [the State Oil Company of Azerbaijan Republic] issued a communication (No. 01-44/832) on 18 November 2004 which states that: "Disclosure of the information about the payments constitutes a part of implementation of EITI and it does not contradict the confidentiality provisions of the agreements concluded between your Company or Joint Company and the Republic of Azerbaijan". The Government has also lifted contract restrictions allowing companies to publish disaggregated data if they wish.'

[49] Reference is made to Scanteam, 'Achievements and strategic options: Evaluation of the extractive industries transparency initiative', 191–2, available at http://eiti.org/document/2011-evaluation-report. Last accessed on 2 April 2013; Mary Ella Keblusek, 'Is EITI really helping global good governance?: Examining the resource curse, corruption, and Nigeria's EITI implementation experience', January 2010, 10, available at: http://nidprodev.org/EITI%20-%20Nigeria%20Analysis.pdf. Last accessed on 2 April 2013.

[50] See, e.g., Anders Tunold Kråkenes, 'EITI process in Niger', *EITI*, 20 August 2009, available at http://eiti.org/node/1126. Last accessed on 2 April 2013; EITI, Minutes from 7th EITI Board Meeting: held at Oslo, 5 March 2009, available at http://eiti.org/files/Minutes%20of%20the%207th%20EITI%20Board%20

Principle 12 reads: '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 non-governmental organizations.'[51] Furthermore, EITI Criterion 5 reads: 'Civil society is actively engaged as a participant in the design, monitoring and evaluation of this process and contributes towards public debate.'[52,53]

The above reflects that the effect of EITI Requirement 8, under which the implementing country is under an obligation to remove any obstacles to the implementation of the EITI, often implies an obligation to effectuate significant legislative, and perhaps contractual, amendments. Such amendments may cause debate and be time-consuming.[54] An example of this is the extensive legal reforms that may be required in order to meet the requirements for civil society participation is provided in a long list of recommendations to the Government of Equatorial Guinea in a report entitled 'Disempowered Voices – the status of Civil Society in Equatorial Guinea'.[55] The list includes, inter alia, requests to introduce and access to information law, remove restrictions on the freedom of press, et cetera.

Meeting%20Final.pdf. Last accessed on 2 April 2013. Commenting on the situation in Gabon.

[51] EITI Rules, supra, note 24, 10.

[52] Ibid. at page 11. The Principle and Criterion is reflected, inter alia, in EITI Requirements 2: The government is required to commit to work with civil society and companies on the implementation of the EITI and 6: The government is required to ensure that civil society is fully, independently, actively and effectively engaged in the process. Ibid., 13.

[53] In EITI Policy Note No. 6 the EITI Board addresses complaints that active civil society participation in national EITI processes is impeded due to restraints on the freedom of public speech, either in general or in particular related to revenue transparency and public expenditure of revenue streams from the extractive industries as well as complaints of intimidation and harassment of civil society representatives, see EITI Rules, supra, note 24, 68.

[54] It is not only the requirements for material changes that can challenge national implementation of the EITI standard; the timeframe of two and a half years for implementation of the EITI standard timeframe has proven to be a challenge to meet. This was illustrated at an EITI Board Meeting in Berlin in April 2010, the EITI Board considered 17 applications for extension of deadlines for completing validation. See http://eiti.org/news-events/eiti-board-agrees-status-20-countries.

[55] EG Justice, 4, available at http://www.egjustice.org/post/pambazuka-disempowered-voices-status-civil-society-equatorial-guinea. Last accessed on 2 April 2013.

3.3 Nigerian Implementation of the EITI Standard: What can be Learned?[56]

National implementation of the EITI standard in Nigeria provides yet other examples of how the national implementation of the EITI standard can be problematic; on the one hand there are elements of the Nigerian implementation that have been widely acclaimed for its innovation, but on the other hand the road from national commitment to the EITI to the achievement of EITI Compliant status has been referred to as bumpy.[57] Nigerian commitment to implementation of the EITI standard was declared as early as November 2003 by the former Nigerian president Olusegun Obasanjo, who had political focus on anti-corruption measures and good governance. Abutudu and Garuba comments on the reigning Nigerian political climate at that time:

> The NEITI process was premised on the holistic anti-corruption agenda of the Obasanjo administration . . . Nigeria's sense of urgency to sign on to the EITI was largely influenced by the findings of a World Bank study commissioned by President Obasanjo's administration in 2000 that revealed 'disturbing declines in crude oil output and sales, weak institutional capacities, and ineffective management of extractive industry revenues.'[58]

In February 2004, the Nigeria EITI (NEITI) was launched. Efforts to institutionalize and empower the NEITI by law led to passing of a Bill (the NEITI Bill).[59] Today, the Nigeria Extractive Industries Transparency Initiative Act (NEITI Act)[60] is recognized as the main legislative instrument for the implementation of the EITI standard in Nigeria.[61] Nigeria

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[56] Reference is made to Nigeria: Compliant Country, available at http://eiti.org/Nigeria. Last accessed on 2 April 2013.

[57] See Shaxson, supra, note 43 (discussing the Nigerian EITI implementation up until the 2009 publication of the 2005 NEITI audit and the political aspects that led to Nigerian commitment to the EITI in the early 2000s and reviewing key Nigerian transparency reforms in the period 2003–06).

[58] Musa Abutudu and Dauda Garuba, *Natural Resource Governance and EITI Implementation in Nigeria*, *Current African Issues 47* (Nordiska Afrikainstituttet, Uppsala 2011), 11, available at nai.diva-portal.org/smash/get/diva2:471319/FULLTEXT01. Last accessed on 2 April 2013.

[59] The Bill was pending in the National Assembly for a very long time and it was only on the day before Obasanjo resigned, that the Bill was passed.

[60] Full text available on http://www.neiti.org.ng/.

[61] See also The IDL Group and Synergy, 'Final report: Validation of the extractive industries transparency initiative in Nigeria', 5 May 2010, 35 [hereinafter Nigeria Validation Report].

became an EITI candidate country on 27 September 2007 and was declared compliant on 1 March 2011.[62]

As illustrated above, EITI implementation in Nigeria has been time consuming. One reason for this delay may of course be that the EITI standard was not fully developed in the early years of the EITI and that further practical guidance was needed for implementation.[63] However, there are reports that while the personal involvement and political motives of President Obasanjo were driving forces for Nigerian transparency efforts in the period as from 2004–06, there was less dedicated political will to follow these commitments up after President Obasanjo resigned in 2007.[64] When the NEITI Act was still pending,[65] an NGO commented:

> . . . in Nigeria the executive has drafted the Nigeria Extractive Industry Transparency Initiative (NEITI) bill, which is currently under consideration by the legislature. If passed, the bill would legally establish the institutions and codify the functions of the NEITI. This is particularly important in Nigeria, where the impending 2007 presidential and legislative elections have stoked concerns that the new president might not demonstrate the same level of commitment to EITI.[66]

Indeed, it appears that legislative anchorage for the NEITI and its powers and functions was; as stated in a NEITI Handbook September 2005, which addressed confidentiality clauses as an obstacle for transparency in the Nigerian petroleum sector: 'For over 40 years international extractive resource companies had operated in an opaque manner protected by confidentiality clauses with the Nigerian government that prevented them from disclosing fundamental details of their operations to Nigerians . . .'[67] Moreover, on the topic of the then proposed NEITI Bill, which at the time was under consideration in the National Assembly, the Handbook states

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[62] As mentioned, the road towards compliance was bumpy; firstly an audit report for the years 1999–2004 was published in December 2006 but the publication of the 2005 and the 2006–08 audits were delayed. Secondly, Nigeria commenced its validation in December 2009 but had to complete a remedial action plan before she was declared compliant.

[63] Recall that the EITI Principles were adopted in 2003 and the EITI Criteria in 2005.

[64] Shaxson, supra, note 43; Keblusek, supra, note 49.

[65] October 2006.

[66] Publish What You Pay, 'Eye on EITI – New Report Finds Action Needed to Manage Natural Resource Revenues', 5(2) *Oil Gas and Energy Law Intelligence* (2007), 1, 23, available at: www.ogel.org. Last accessed on 2 April 2013.

[67] NEITI Handbook, 4, available at http://www.scribd.com/doc/86787211/NEITI-Handbook4. Last accessed on 2 April 2013.

that: 'The NEITI Bill would void gagging clauses in license agreements enabling disclosure of key financial data as is required by law in every developed country.'[68]

The NEITI bill will also:

- ensure due process and transparency in the payments made by extractive industry (EI) companies
- ensure accountability in the revenue receipts of the Federal Government from EI companies
- eliminate all forms of corrupt practices in the determination, payments, receipts and posting of revenue accruing to the Federal Government from EI companies.[69]

The passing of the NEITI has been referred to as the '. . . outcome of a lobbying process, in which oil company interests, as well as civil society groups, appear to have successfully influenced its wording.'[70] Nevertheless, it was also widely acclaimed as it was the first of its kind.[71] The NEITI Act establishes the NEITI as a governmental agency that shall report to the President and the National Assembly, pursuant to its Article 1. The primary objectives of the EITI are broadly stated and range from, inter alia, ensuring due process and transparency in the payments made by all extractive industries companies to the Federal Government and statutory receipts, to monitoring and ensuring accountability in the revenue receipts of the Federal Government from extractive industry companies, eliminating all forms of corrupt practices in the determination, payments, receipts, and posting of revenue accruing to the Federal Government from extractive companies. There has been criticism of this broad approach; one commentator expresses concerns that the objectives of the Act are too ambitious and open-ended.[72]

Further, in pursuance of realization of its objectives, the NEIT's

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[68] Ibid., 23.

[69] Ibid., 25.

[70] Shaxson, supra, note 43, 38.

[71] Other countries have later followed suit, such as Liberia. Another aspect of the NEITI and the NEITI Act that has been subject to much attention is the way that it goes beyond the EITI standard; the NEITI shall for instance evaluate the transparency and accountability in acreage releases and procurement processes, art. 3(b), and 'ensure that all fiscal allocations and statutory disbursements due from the Federal Government to statutory recipients are duly made', Art. 3(j). NEITI Act, available at http://www.neiti.org.ng/sites/default/files/documents/uploads/neitiact.pdf. Last accessed on 2 April 2013.

[72] See Uche Igwe, 'Prescoping the Nigeria's NEITI Act 2007', *Sahara Reporters*,

functions are listed in article 3, starting with an obligation to develop a framework for transparency and accountability in the reporting and disclosure by all extractive industries companies of revenue due to or paid to the Federal Government. Moreover, Article 3(e) stipulates that the NEITI shall request from any company in the extractive industry or from any relevant organ of the Federal, State or Local Government, an accurate account of money paid by and received from the company at any period, as revenue accruing to the Federal Government from such company for that period but this is provided, however, that '. . . such information shall not be used in any manner prejudicial to the contractual obligation or proprietary interests of the extractive industry company or sovereign obligations of government.' This provision bears the mark of a compromise between stakeholders by including the reservation that 'such information shall not be used in any manner prejudicial to the contractual obligation or proprietary interests of the extractive industry company or sovereign obligations of government.'[73] Indeed, this wording could open for reluctant companies to argue for the continued observance of confidentiality clauses,[74] and if so, the objective of making 'gagging clauses' void as expressed in the 2005 NEITI Handbook cannot be fulfilled.[75]

In any event, the NEITI Act has been labelled as a key victory for transparency in Nigeria because it protects the autonomy of NEITI and ensures that EITI implementation in the country cannot be subject to political manipulation or reversal by any incoming government.[76] Moreover, the Nigerian implementation of the EITI Standard provides an example of how countries will, for a variety of reasons, have to undergo significant legislative reforms in order to ensure implementation of the EITI standard.

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31 January 2011, available at http://saharareporters.com/article/periscoping-nigeria%E2%80%99s-neiti-act-2007. Last accessed on 2 April 2013.

[73] See NEITI Act Article 3 (e).

[74] See also Abutudu and Garuba, supra, note 58, 28.

[75] The NEITI Act further details the establishment and the composition of the National Stakeholders Working Group (NSWG) including its funding. Section 16 establishes rules on offences and penalties; interestingly, article 16(4) stipulates that the President may on the recommendation of the NSWG suspend or revoke the operational licence of any extractive company that fails to perform its obligations under the Act, which, if enforced, is a powerful enforcement tool. There has, however, been expressed scepticism about the prospects of enforcing the NEITI Act, ibid.

[76] Nigeria Validation Report, supra, note 61, 17.

4. COUNTRY-BY-COUNTRY REPORTING

4.1 Background and Concept

Most transparency measures, including national implementation of the EITI standard, are fully dependent on the political will of governments of host countries to increase transparency in revenue streams. For a variety of reasons, many countries have yet to initiate such measures and thus the governance of natural resources may be characterized by opaqueness rather than transparency. Mandatory country-by-country reporting is a legal mechanism for increased transparency that may have extraterritorial effects to counter such opaqueness. In this context it is important to understand the crucial role that foreign investors, e.g. oil companies, play in most host countries' petroleum industry. Exploitation of petroleum resources involves high-risk and costly activities and requires technical expertise, financial strength and access to infrastructure. There is normally a long time span as from the time when the first investment is being made to the time when the first revenues can be collected. The host country may lack the necessary expertise, infrastructure or capacity or it may not wish to bear the sole risk for conducting such activities. Therefore, most host countries prefer to award rights to exploit petroleum resources to international oil companies that can contribute with the assets, technical competency, financial strength and know-how required to carry out petroleum activities.

The petroleum industry is thus by and large an international industry. Many large oil companies are multinational companies based in industrialized countries whilst operating globally. In this chapter, the term 'country-by-country reporting' refers to a legal mechanism embedded in the legislation of the home country of the foreign investor company[77] requiring companies to report payments made to the governments of the host countries in which the company (typically including its subsidiaries) conducts extractive activities. The reports are to be submitted to the authorities in the home country. Information so reported will typically be publicly available to the same extent that other financial information reported by companies is publicly available in the home country. As such, country-by-country reporting will have extraterritorial effects by creating partial revenue transparency in host countries. This effect will come irrespective of whether the host countries have taken action to promote

[77] I.e. where the company (or parent company) is based or listed on the stock exchange.

transparency or whether the information so disclosed is subject to confidentiality duties in the host countries. The European Commission is clear that such extraterritorial effect is an objective for the introduction of country-by-country reporting requirement in the European Union, as it is being introduced: '. . . *to make governments accountable for the use of these resources and promote good governance*.'[78]

The concept of revenue reporting in relation to activities abroad is not entirely new. Some companies are reportedly already voluntarily publishing data on a country-by-country basis[79] and less wide-ranging versions were in force in some other countries prior to the entry into force of the US legislation.[80] However, at the time of writing,[81] only the United States has established a requirement for country-by-country reporting by law, but the US legislation has spurred similar proposals in other jurisdictions and the European Union (EU) is reported to follow suit shortly.[82] There is, amongst other, a proposal for new EU rules that are currently[83] in the final stages of negotiation and expected to be issued shortly. If and when that proposal is enacted, its application will extend to all European Economic Area (EEA) countries.[84] In addition to the EU initiative, a separate pro-

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[78] See European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC, 8-9, available at http://ec.europa.eu/internal_market/securities/docs/transparency/modifying-proposal/20111025-provisional-proposal_en.pdf. Last accessed on 2 April 2013, (emphasis added).

[79] See European Commission, Commission staff working paper on impact assessment for financial disclosures on a country-by-country basis, 16, available at http://ec.europa.eu/internal_market/accounting/docs/other/20111025-impact-assessment-part-2_en.pdf. Last accessed on 2 April 2013 (finding that 'Statoil, Rio Tinto plc and Anglo American plc voluntarily publish some [country-by-country] financial but not to the same level of detail as under EITI').

[80] For instance in Hong Kong, see GEM Listing Rules, 18A.05 ('Contents of listing documents for new applications') (6) litra c, see http://www.hkex.com.hk/eng/rulesreg/listrules/gemrules/documents/chapter_18a.pdf. The rule applies to Mining Companies, defined in 18A.01 (3) available at http://www.hkex.com.hk/eng/rulesreg/listrules/gemrules/documents/chapter_18a.pdf.

[81] Primo April 2013.

[82] EU officials were reportedly expecting to conclude negotiations on EU rules April 19, 2013, see http://www.argusmedia.com/News/Article?id=840606. Last accessed on 2 April 2013.

[83] Mid-March 2013.

[84] The Agreement on the European Economic Area (EEA Agreement) brings together the EU Member States and the three EEA EFTA States (Iceland, Liechtenstein and Norway) in a single market, referred to as the 'Internal Market'.

posal for a Norwegian statutory provision was submitted prior to the submission of the Commission's proposal for new EU requirements. There are also reports of similar measures being implemented in other countries.

In the following, an overview of the US requirement is provided in section 4.2 and of the European proposals in section 4.3.

4.2 The US Rules on Country-By-Country Reporting

The US country-by-country reporting requirement was passed as section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in July 2010. At that time, the Dodd-Frank law reform was said to be '[a] financial reform mandating greater transparency, accountability and oversight of the industry.'[85] Section 1504 introduced amendments in the Securities Exchange Act 1934[86] Section 13 by introducing a new letter (q).

The new section 13(q)(2)(A) is a framework provision that establishes an obligation for the SEC to prepare rules that require issuing companies in the extractive industries to provide information on all payments that the issuing company, its subsidiaries or entities controlled by the issuing company has made to the Federal Government and foreign governments in connection with the commercial extraction of oil, gas or mineral resources. The information shall be submitted in an annual report. The obligation to provide information shall encompass the type of payment and the total amount for each project the issuing company has relating to the extraction of oil, gas or minerals, as well as the type of payment and the total amount paid to each individual government.

Moreover, section 13(q)(1) establishes key definitions that provided

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The EEA Agreement provides for the inclusion of EU legislation covering the free movement of goods, services, persons and capital and cooperation in certain other areas. The proposal is marked EEA relevant, which implies that the regulation or directive in question is either marked as EEA relevant by the EU or considered as such by the EEA EFTA States and currently under discussion for incorporation into the EEA Agreement. EU legislation does not apply for the EEA States unless expressly incorporated. See European Economic Area, available at http://www.efta.int/eea.aspx. Last accessed on 12 June 2012.

[85] Diana Golobay, 'Frank-Dodd [sic] financial reform bill signed into law', *NuWire Investor*, 22 July 2010, available at http://www.nuwireinvestor.com/articles/frank-dodd-financial-reform-bill-signed-into-law-55706.aspx. Last accessed on 2 April 2013.

[86] Securities Exchange Act, 15 U.S.C. 78m (1934).

guidance for the SEC in its work to prepare the final rules.[87] Furthermore, pursuant to Section 13(q)(2)(E), the final rules shall to the degree it is suited to purpose, support the commitments that the U.S. Government has to international transparency efforts relating to the extractive industries and the SEC therefore repeatedly sought guidance in the EITI guiding documents and EITI practice in preparing the final rules.[88]

Despite this relatively clear guidance, there were substantial delays in issuing the final rules due to conflicting views of the further implementation of section 1504. Whereas proposed final rules and a hearing note were issued as early as 15 December 2011, these documents spurred an extensive debate amongst stakeholders. Consequentially, the final rules were not issued before 22 August 2013 – more than two years after section 1504 was passed – and therefore the reporting requirement will only be operational for payments made after 1 October 2013. Extensive input and debate both during and after the hearing illustrated the conflicts of interest at hand.

One of the main points of debate was the definition of the term 'project'. There was no definition of the term in the wording of section 13(q)(1) and no guidance was provided in the EITI source documents.[89] The debate on

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[87] Letter (A) defines 'commercial development of oil, gas, or minerals' as encompassing 'exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity', as determined by the SEC in its final rules. Letter (B) defines 'foreign government' as 'a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government', as determined by the SEC in its final rules. Letter (C) defines 'payments' as payments that are made to further the commercial extraction of oil, gas or minerals and that are not *de minimis* and that include taxes, royalties, fees (including licence fees), production shares, bonuses and other material benefits, that the SEC, to the extent practicable consistent with the guidelines of the EITI, determines are part of the commonly recognized revenue stream for the commercial extraction of oil, natural gas, or minerals. Letter (D) defines the term 'resource extraction issuer' as an issuer that 'is required to file an annual report with the [SEC]' and that 'engages in the commercial development of oil, natural gas, or minerals.' Dodd-Frank Act, supra, note 5, § 1504(q)(1).

[88] E.g., when discussing the further implementation of the term 'payment' the SEC turns to the EITI Source Book for guidance. See SEC, 'Disclosure of payments by resource extraction issuers', Release No. 34-63549, 18–21, available at http://www.sec.gov/rules/proposed/2010/34-63549.pdf. Last accessed on 2 April 2013.

[89] As discussed above, the EITI standard is a minimum standard for revenue transparency reporting and only entails a requirement for aggregate reporting. The requirement to report on a project-by-project basis thus takes a step further than the current EITI minimum requirements. However, in Indonesia and Mali, EITI reporting is broken down to contract/licence level. See Revenue Watch Institute,

this issue intensified especially after Publish What You Pay[90] proposed that the term should be defined as each contract and licence that the company in question holds. This definition was criticized by the companies as being too detailed and it has, inter alia, been argued that such reporting would impair the competitiveness of companies subject to such reporting requirements and that such companies risk acting in breach of domestic legislative and contractual confidentiality requirements.[91] In the final rules, the term 'project' is left undefined. The SEC does, however, provide some guidance on the meaning of the term, stating that: 'In this regard, we note that resource extraction issuers routinely enter into contractual arrangements with governments for the purpose of commercial development and therefore, we believe it generally provides a basis for determining the payments, and required payment disclosure, that would be associated with a particular "project".'[92] Moreover, it is also stated that 'We believe the term "project" requires more granular disclosure than country-level reporting.'[93]

Moreover, the heat of the debate is further illustrated by its continuance; the American Petroleum Institute reported on 10 October 2012 that,

> The American Petroleum Institute (API), along with a coalition of concerned business groups, sued the U.S. Securities and Exchange Commission (SEC) in federal court to challenge the SEC's implementation of Section 1504 of the Dodd-Frank Act because the SEC disregarded its clear legal obligations to limit the costs and anti-competitive harm of the rule.

'Costs & criticisms: The facts about disclosure rules', September 7, 2011, available at http://www.revenuewatch.org/publications/fact_sheets/costs-criticisms-facts-about-disclosure-rules. Last accessed on 2 April 2013.

[90] An NGO. See Publish What You Pay (PWYP), available at http://www.publishwhatyoupay.org/. Last accessed on 2 April 2013. PWYP's input is available at http://www.sec.gov/comments/s7-42-10/s74210-29.pdf. Last accessed on 2 April 2013. [hereinafter PWYP Hearing Note]. The hearing closed on 31 January 2011.

[91] The criticism was met by NGOs. In contradiction to the latter statement Revenue Watch Institute stated that: research shows that national laws and contracts routinely allow for disclosure of information as required by securities regulation. Petrobras, the Brazilian state-owned oil company, has confirmed to the SEC that, to the company's knowledge, none of the 30 countries in which it operates prohibits disclosure. Notably, Petrobras is active in Angola and China, countries that some companies have claimed would forbid compliance with the disclosure provision. It is in precisely the countries most reluctant to engage in voluntary transparency where this provision would be most valuable. Revenue Watch Institute, supra, note 89.

[92] See the final rules, 86.

[93] See final rules, ibid., 88.

The complaint goes against both Section 1504 of the Dodd-Frank Act and the final rules and includes, amongst other, submissions that the Dodd-Frank Act 'Section 1504 and the Extractive Industries Rule violate the First Amendment of the US Constitution and that is and are null, void, and without force and effect'.[94]

For the time being, however, the US requirement to undertake country-by-country reporting applies and provided that it remains in force it will have a significant impact as a very large proportion of the multinational companies in the extractive industries are listed on American stock exchanges.[95]

4.3 European Proposals

The Commission launched a public hearing as early as 2012 to gather viewpoints on the possible introduction of a requirement for country-by-country financial reporting for multi-national companies in the European Union.[96] Inter alia, the consultation document established that whereas listed companies are under an obligation to prepare and submit group accounts in accordance with the International Financial Reporting Standards (IFRS) standards, the IFRS standards did not at that time include any requirement for the publication of financial information on a 'country-by-country' basis. The consultation document also highlighted the discussions in recent years concerning the introduction of legislation to require larger companies (listed and unlisted) to publish financial information on their activities outside the EU/EEA in annual accounts.

The public hearing was followed by the issuance of a Summary Report on the responses received in April 2011.[97] The Summary Report reveals the following pattern of opinions:

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[94] Consequentially, the final rules were not issued before 22 August 2013 – more than two years after section 1504 was passed. This version is available at http://www.google.no/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=3&ved=0CDoQFjAC&url=http%3A%2F%2Fwww.sec.gov%2Frules%2Ffinal%2F2012%2F34-67716.pdf&ei=hgavUs6FDcWLyQP6woAI&usg=AFQjCNFD_3bQWy_e-zAfrOgAjNN1NZN9Cg.

[95] PWYP Hearing Note, supra, note 90, 3 (stating that the American rules are assumed to encompass over 90 per cent of the world's major oil companies).

[96] The consultation closed on 22 December 2010. Information on the consultation and further work is available at http://ec.europa.eu/internal_market/consultations/2010/financial-reporting_en.htm. European Commission, 'Consultation on financial reporting on a country-by-country basis by multinational companies', available at http://ec.europa.eu/internal_market/consultations/2010/financial-reporting_en.htm. Last accessed on 2 April 2013.

[97] European Commission, 'Summary report of responses received to the

> The overall result of the consultation shows a rather diverse pattern of opinions . . . where preparers, accountants and auditors were in general opposed to requirements to report on a country-by-country basis, users and other respondents were in favour . . . A majority of the respondents were preparers (43 companies and industry associations out of 73 contributions) who expressed a rather dismissive view on most of the questions. However, a detailed analysis shows that the industry most directly concerned – the extractive industry, in particular oil and gas – expressed in general a constructive view as they consider this to be conducive to improving domestic accountability and governance in resource-rich countries . . . The NGO's were of similar views.[98]

Some stakeholders argued against introduction of country-by-country reporting requirements by stating that the EITI is the preferred vehicle for improving transparency. This position was based on an argument that only EITI implementation provides the full picture of payments to governments because under the EITI, the company reporting is matched with corresponding government reporting. It was further argued that the EITI ensures full involvement of host countries and therefore, within the framework of the EITI, the risk of breaching local legal or contractual obligations would be avoided.[99] Some stakeholders that were in favour of an introduction of country-by-country reporting requirement also involved the EITI; it was stated that whereas the EITI is a very useful initiative, it requires commitment of the host countries and only a limited number of countries are categorized as 'compliant'. It was therefore argued that now was the time for the European Union to implement a systematic approach of mandatory country-by-country reporting.

These preparatory processes culminated in the Commission's proposals of 25 October 2011 for a directive amending Directive[100] 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and a new directive to replace the current Directives on accounting

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Commission's consultation on country-by-country reporting by multinational companies', April 2011, available at http://ec.europa.eu/internal_market/consultations/docs/2010/financial-reporting/consultation_summary_en.pdf. Last accessed on 2 April 2013. [hereinafter Summary Report].

98 Ibid., 2.

99 Ibid., 19.

100 A directive is EU legislation that is '. . . binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.' See Treaty of the Functioning of the European Union, signed 25 March 1957, Art. 288, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF. Last accessed on 2 April 2013. The Directive will normally state a deadline for implementation into domestic law of 18 or 24 months after publication.

rules for annual accounts and consolidated accounts (78/660/EEC and 83/349/EEC). The proposals are part of a Responsible Business Initiative package of measures and include inter alia requirements for certain issuers to undertake country-by-country and project-by-project reporting.

The proposals for country-by-country reporting requirements are by and large based upon the US model as expressed in the Dodd-Frank Act.[101] There are, however, two important differences. First, the proposal for EU rules comprises not only the issuers whose securities are admitted to trading on a regulated market and which have activities in the extractive industries (i.e. petroleum and minerals), but it also includes those issuers that have activities within logging of primary forest industries. Second, the requirement will also apply to unlisted companies defined as 'large' in the proposal for a new accounting directive, i.e. companies that exceed two of the three following criteria; (i) turnover of 40 million Euros, (ii) total assets of 20 million Euros or (iii) 250 employees.[102]

In connection with the adoption of the proposals, it is interesting to note that the European Commission stated in a press release that these rules are intended to strengthen the EITI:

> An EU mandatory disclosure requirement would complement the EITI efforts by legally requiring companies registered or listed in the EU to disclose payments to governments along the same lines as EITI. In doing so, the EU proposal's ultimate objective is to contribute to the strengthening of the EITI and to extend its scope to all resource-rich countries.[103]

The proposals adopted by the Commission shall pass through both the European Council and the European Parliament before they are sent to the EU member states for consideration. The proposals may therefore be subject to change and it is unclear when the Directives will be adopted and enter into force.[104]

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[101] Publish What You Pay has, however, proposed a much wider scope, see PWYP, 'An extended country-by-country reporting standard: A policy proposal to the EU', January 2012, available at http://www.publishwhatyoupay.no/extended-country-country-reporting-standard-policy-proposal-eu. Last accessed on 2 April 2013.

[102] See European Commission, Proposal for a Directive of the European Parliament and of the Council on the annual financial statements consolidated financial statements and related reports of certain types of undertakings, COM(2011)684 final, October 25, 2011, Article 3(3).

[103] Item 16 in press release published at http://europa.eu/rapid/press-release_MEMO-11-734_en.htm?locale=en.

[104] European Union, Proposal for directive on transparency requirements for listed companies and proposals on country by country reporting – frequently

4.4 Country-By-Country Reporting: Elsewhere

In the Norwegian Government's plan of action against economic crime[105] which was issued in March 2011 it is stipulated as a measure that the Norwegian Government shall assess whether there is a basis for introducing country-by-country reporting, either as a step in the process in connection with any new EU rules on this area or on an independent basis. The non-governmental organization Publish What You Pay (PWYP) argued that Norway should proceed on an independent basis, mainly in order to contribute to global recognition of the concept.[106]

In April 2010, PWYP therefore proposed to incorporate such reporting requirements as a new sub-paragraph in the Norwegian Securities Trading Act[107] § 5-5, and that the provision could be worded in the spirit of the Dodd-Frank Act as follows:

> The issuer of shares shall in the annual report provide information on all payments to another state, public body in another state or a foreign state-owned company for the commercial exploitation of natural resources. The Ministry can issue regulations regarding which payments this applies to, which recipients are encompassed, what information is required, the application of the mandatory obligation for subsidiary companies of the issuer, and further rules of the reporting.

The proposal was presented to the Norwegian Ministry of Finance on 4 April 2011, and subsequently sent on consultation to, inter alia, the Financial Supervisory Authority who recommended that Norway should await the development in the European Union. The Ministry of Finance has not communicated any of its further deliberations since the consultation. However, considering that the European Union has now submitted its proposals, which are assumed to be EEA relevant, it is unlikely that Norway now will proceed with any legislative measures on an independent basis unless the EU process is significantly delayed or in case the proposal is not deemed as EEA-relevant.

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asked questions, 25 October 2011, available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/734&format=HTML&aged=0&language=EN&guiLanguage=en. Last accessed on 2 April 2013.

[105] The Norwegian Government's Action Plan against Economic Crime, March 2011, available at http://www.regjeringen.no/upload/JD/Vedlegg/Handlingsplaner/Handlinsplan_oko_krim.pdf. Last accessed on 2 April 2013.

[106] See PWYP, 'Brief summary from legal report launched 4th April on country by country reporting for extractive companies', available at http://www.pwyp.no/brief-summary-legal-report-launch-4th-april-country-country-reporting-extractive-companies. Last accessed on 2 April 2013.

[107] Norwegian Securities Trading Act, June 29, 2007, Number 75.

5. ACCOUNTABILITY THROUGH INCREASED TRANSPARENCY: OBSERVATIONS AND COMMENT

5.1 National Implementation of the EITI Standard

To evaluate whether national implementation of the EITI standard is fit for purpose, its objective must be established. The objective of the EITI Association is, as mentioned above, stated in the Articles of Association as follows:

> . . . to make the EITI Principles (Annex A) and the EITI Criteria (Annex B) the internationally accepted standard for transparency in the oil, gas and mining sectors, recognizing that strengthened transparency of natural resource revenues can reduce corruption, and the revenue from extractive industries can transform economies, reduce poverty, and raise the living standards of entire populations in resource-rich countries.[108]

The above wording does not expressly regulate the objective of national implementation of the EITI standard, however, an interpretation thereof indicates that the objective of the EITI standard is primarily to achieve and strengthen transparency of revenues in the extractive industries. Further, the wording indicates that achieving and strengthening transparency in the extractive industries is an objective because the results of transparency are assumed to be the reduction of corruption, transformation of economies, reduction of poverty and a raise in living standards. It is unclear whether these latter elements must also be considered to be objectives for national implementation of the EITI standard or whether they are merely perceived results of fulfilment of the main objective. However, considering the rationale for the establishment of the EITI and the EITI Principles, it appears clear that these elements must be deemed to be ultimate objectives for national implementation of the EITI standard.

Based on this, the question remains whether national implementation of the EITI standard is a legal mechanism that is fit for purpose? Implementation is a matter to be addressed in the domestic law hence the answer must be sought at country level. Again, Nigeria is used as an example. In 2010, the EITI Board commissioned an evaluation of the EITI in order to document, evaluate and assess the relevance and effectiveness of the EITI.[109] The findings were presented in a report entitled

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[108] Articles of Association, supra, note 2, Art. 2(2).

[109] Following the EITI Evaluation, the EITI Board agreed that there was a need to 'to carefully consider the EITI's strategic options' and a Strategic Working

'Achievements and Strategic Options',[110] which evaluated 'EITI results' at country and global levels, and whether the EITI's governance and support structures were fit for purpose. Among the three countries that were subject to evaluation was Nigeria. The findings and conclusions of the Nigeria country case report[111] highlights the audits performed during the implementation as the most important contribution of NEITI:

> These reports provided a wealth of information into the public domain on a range of issues that till then had been missing, either because it was considered confidential (financial, physical quantity data on the production side), or because nobody had looked (structure, management, roles and performance of the various actors, in particular public agencies). NEITI has produced reports covering the ten years 1999–2008, which is a massive input to the public discourse on the issues and contributions from the petroleum sector.[112]

The report concludes that the implementation of the EITI standard has clearly contributed to the level of transparency in the Nigerian petroleum sector. An example of the acceptance that the principles of transparency have gained in the governance of the Nigerian petroleum sector is inter alia their inclusion in the draft Petroleum Industry Bill.[113] However, there are no findings that confirm that the broader societal objectives such as reducing corruption et cetera have been achieved to date: the report points out that the perceived corruption levels in Nigeria have improved, but that there is no evidence that this can be linked to the implementation process and NEITI. The report expresses, albeit on a general basis and with an expressed recognition that it is still early days, strong doubt as to whether the EITI standard in its present form is adequate for achieving the ultimate objectives of reduc-

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Group has been established in order to facilitate such process and to present options and recommendations to the EITI Board regarding the strategic direction of the EITI for the next three–five years. Inter alia, the Strategic Working Group shall review the EITI Principles, the EITI Criteria and the scope of the EITI, the findings of the evaluation and proposals and feedback from partners and stakeholders and any proposals and feedback from a public consultation held on EITI strategy. See http://eiti.org/about/strategy-review.

[110] Scanteam, supra, note 49, 1.

[111] Ibid., 160–210.

[112] Ibid.,190.

[113] Note, however that despite the efforts to incorporate transparency in the governance of the Nigerian petroleum industry in the PIB, the NEITI has expressed concern that the PIB may not fully meet these objectives. See 'Position of NEITI on the Petroleum Industry Bill (PIB)', *NEITI Blog*, available at http://www.neiti.org.ng/press-releases/position-neiti-petroleum-industry-bill-pib. Last accessed on 2 April 2013.

ing corruption and poverty, transformation of economies and raising living standards.[114] There are many reasons for this, one being that the causes leading to the problems such as corruption are multifaceted and complex and that the EITI standard is too narrow to address all of these. The report does, however, highlight an interesting point: to date the Nigerian context appears not to fulfil the normally assumed link between transparency and accountability as discussed initially in this chapter.[115] On the contrary, the report points out that whilst the NEITI financial audits have ensured a flow of information to the public domain, domestic accountability, which in turn may lead to societal changes as expressed in the abovementioned ultimate objectives, has not been changed much. As Shaxson put it:

> . . . the first link – that better transparency leads to improved governance and accountability – is widely *assumed to be true* but has not been very well researched in the context of mineral-dependent states such as Nigeria. It should be noted at this point that one thing is to *enlighten* citizens; it is another thing to *empower* them.[116]

This is an illustration of how the legal mechanism of national implementation of the EITI standard in its current version appears to be apt to fully deliver on the fulfilment of the objective of increasing revenue transparency in the extractive industries, but there is a need for complementary measures in order to achieve and ensure the accountability which this author assumes is required for achieving broader societal change through political pressure. The final shape of a revised EITI standard that is to be decided on during the EITI Conference in Sydney in May 2012 is yet to be seen. However, we have seen in section 3.1 that the proposal for a revised standard indeed includes elements aimed at increasing the EITI reports' accessibility for the layman such as contextual information, licence and contract transparency and capacity building in the civil society. Whereas these would be important improvements, this author doubts that even a revised and broader EITI standard would suffice to fully address the important question that the Nigerian example: in a given country or cultural context, is the link between transparency and accountability always as close as commonly assumed?

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[114] For an overview of the findings and recommendations, see Scanteam, supra, note 49, 1.

[115] See section 1 and also Shaxson, supra, note 43.

[116] Ibid., 24 (emphasis in original).

5.2 Country-By-Country Reporting Requirements – Suitable for Purpose?

The varieties of country-by-country reporting enacted and proposed as presented in section 4 show that there may be slight variations in the objectives for the U.S. legislation[117] and the proposed EU legislation. However, increased transparency and accountability are common denominators, as are the close links between the EITI standard and the requirement for country-by-country reporting. To date, there is no empirical record of whether this legal mechanism is fit for purpose. Nevertheless, as both country-by-country reporting requirements and national implementation of the EITI standard are reporting obligations aiming to increase transparency through publication of financial information,[118] this author is of the opinion that there is reason to assume that the effect of country-by-country reporting will be similar to that of implementation of the current EITI standard. It is therefore reasonable to expect that country-by-country reporting is a mechanism that is apt to increase the level of transparency in countries that do not already publish information on natural resource revenues, even on a short term basis. However, as discussed, it is not a matter of course that an increase in the transparency level in itself can deliver quick results on improvement of the level of democratic accountability in countries that have an opaque approach to the publication of such information or achievement of any underlying objectives such as avoidance or combating the resource curse. In some countries, broader governance and perhaps cultural issues must be addressed if democratic accountability is to be achieved.

Complex as these issues are, a legal requirement for reporting and disclosure may appear to be an inadequate tool to achieve this. However, in the EU the introduction of country-by-country reporting also has as a clear objective to further the EITI standard and speed up EITI implementation, see section 4.3. This may of course be a potential outcome on a long-term basis, but in a short-term perspective there is a risk that the

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[117] Note that the author has not had full access to preparatory works for the Dodd Frank Act section 1504.

[118] The legal mechanisms have different scope: On the one hand the EITI standard implies that both the government and the companies shall disclose the relevant payments and is as such broader than country-by-country reporting. On the other hand, the US requirement is broader in the sense that it also requires a break down to project level, although it remains to be seen how the term 'project' will be defined. If the proposed EU rules are adopted as proposed, the scope in Europe will also comprise certain unlisted companies and certain parts of the logging industry.

extraterritorial effects may trigger resistance in countries that have not taken steps towards a more transparent management regime for natural resources. Recalling the strong pressure for international acceptance for permanent sovereignty over natural resources that led to the UN resolutions discussed in section 2.2, it is reasonable to assume that some of the countries being affected by yet another Western initiative aimed at influencing development countries' policies and their management of their own natural resources will react negatively to the pressure to adopt more transparent practices. However, if the consequence of opaque practices is a lower investment level, economic hardship may force changes of policy despite reluctance.

5.3 Conclusions

The benefits of transparency have been assumed to be many, but the example of the effects of the Nigerian implementation of the current EITI standard shows that there might be reason to conduct further research as to the assumed link between transparency and accountability; in some countries there are no immediate links between the two – at least not on a short-term basis. However, the evaluations of the implementation of the EITI standard in a handful of countries cannot form a basis for a judgment of the EITI standard as such. Shaxson expresses the following opinion:

> It is the personal belief of this author . . . that it is often a mistake to extrapolate lessons drawn from mineral-dominated states such as Nigeria and apply them to other types of countries. Whatever conclusions are reached in this report about the effectiveness or otherwise of transparency in promoting positive change, the only safe lesson to draw is that these are applicable to Nigeria – and perhaps partly to some other mineral-rich states . . . If transparency has not had the desired effects in Nigeria, as this report suggests, that does not mean it cannot work elsewhere.[119]

This approach is sensible to this author. A revised EITI standard in line with the current proposal would indeed improve the accessibility of the information given in an EITI report. However, the many problems for which transparency is assumed to offer a solution are complex and can be deeply rooted in the history and even culture of a country. Therefore, in order to achieve major societal changes such as the reduction of corruption and poverty and so forth there is a need for complementary measures in order to empower the civil society, achieve accountability and to instigate broader social reforms. Such measures could be aimed

[119] Shaxson, supra, note 43, ix.

at strengthening the democracy, ensuring that transparency permeate the governance of country and not only revenues from natural resources, securing human rights and basic freedoms of press, speech and association to mention a few relevant factors. There has been debate on whether an expanded version of the EITI could address some of these issues. However, this author believes that it is precisely in its relatively limited scope that the EITI has found its success; comprising a limited number of absolutes may just be the reason why countries and companies can commit so easily. There are therefore good reasons for arguing that, at least for the time being, the EITI should maintain its scope and thereby continue to be a vehicle for the first steps for many countries towards transparency and, perhaps, ultimately accountability.

At a global level, there are a number of international and national initiatives that could serve as being complementary to the transparency efforts discussed in this chapter. A recent, and much needed, example is the Open Government Partnership which is stated to be a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.[120] In addition, much work is being undertaken by international organizations like the United Nations, OECD and so forth.

As already mentioned in section 1, it is important to stress that it is too early to pass judgment on the long-term effects of increased transparency which, on a long-term basis, must be assumed to have the potential to pave the way for increased accountability despite the somewhat gloomy outcomes of the evaluation of the EITI standard in its present form. Perhaps, with the wisdom of hindsight, future evaluations of the transparency efforts of today will judge their impact more favourably.

[120] Open Government Partnership, 'About', available at http://www.opengovpartnership.org/about. Last accessed on 2 April 2013.