Interdisciplinary Studies in Human Rights 3

Isabel Feichtner
Markus Krajewski
Ricarda Roesch *Editors*

Human Rights in the Extractive Industries

Transparency, Participation, Resistance

Springer

Interdisciplinary Studies in Human Rights

Volume 3

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Isabel Feichtner • Markus Krajewski • Ricarda Roesch
Editors

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Editors
Isabel Feichtner
School of Law
University of Würzburg
Würzburg, Germany

Markus Krajewski
Faculty of Law
University of Erlangen-Nuremberg
Erlangen, Germany

Ricarda Roesch
School of Law
University of Erlangen-Nuremberg
Erlangen, Germany

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Preface

The idea of this book was first developed in the context of the research project "Human rights as standards for transnational economic law" funded by the German Research Foundation (Deutsche Forschungsgemeinschaft, DFG) at the Centre for Human Rights Erlangen-Nürnberg (CHREN) of Friedrich-Alexander-University Erlangen-Nürnberg. Later, the topic of this volume became the theme of an international conference entitled "Human Rights in the Extractive Industries" organised in Frankfurt by the Graduate Programme Law and Economics of Money and Finance (LEMF) of Goethe University Frankfurt am Main and CHREN in July 2016. This conference was generously supported by LEMF and the Wilhelm Merton Centre for European Integration and International Economic Order, both at Goethe University Frankfurt, the German Branch of the International Law Association (ILA) and the Dr. Alfred Vinzl-Stiftung Erlangen.

Many of the papers delivered and debated at the conference were the basis of the chapters of this book. As a result of the conference, papers were revised and partly rewritten and reviewed by the editors. A long process came finally to an end in the fall of 2018 when the final versions of the contributions to this volume were delivered and submitted to the publisher.

We would like to thank all those who helped in the long process from the first idea to the final book. Franziska Wohltmann, research fellow at the project "Human rights as standards for transnational economic law", provided enormous input and many invaluable suggestions in the conceptual phase leading to the conference. Ronja Hess and Pia Zecca took care of the tedious tasks of copy-editing the manuscripts according to the publishing guidelines. In addition, Franziska Oehm, Selina Roßgardt and Monika Wehrhahn were of extraordinary help during the Frankfurt conference. We hope that they as well as all readers of this book will feel that their efforts were worthwhile.

Würzburg, Germany — Isabel Feichtner
Erlangen, Germany — Markus Krajewski
Erlangen, Germany — Ricarda Roesch
November 2018

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Editors and Contributors

About the Editors

Isabel Feichtner is professor of public law and international economic law at Würzburg University. Before moving to Würzburg, she worked as researcher at the Max-Planck-Institute for Comparative Public Law and International Law and was associate professor at Goethe University. She is a member of the *European Journal of International Law*'s editorial board and of the ILA Committee on the Role of International Law in Sustainable Resource Management. Her main research interests lie in the field of international economic law, transnational resource law and the legal design of money.

Markus Krajewski is professor of public law and public international law at Friedrich-Alexander-University Erlangen-Nürnberg. He is one of the directors of the Master programme Human Rights and coordinator of the Center for Human Rights Erlangen-Nürnberg (CHREN). He also chairs the Board of Trustees of the German Institute for Human Rights. Before taking up his current position he taught at King's College London and the University of Potsdam. He holds a PhD and post-doctoral qualification from the University of Hamburg.

Ricarda Roesch is PhD candidate at Friedrich-Alexander-University of Erlangen-Nuremberg. From 2014 to 2017, she worked in the research project "Human Rights as Standards for Transnational Economic Law". She holds law degrees from Hanse Law School, Universities of Bremen and Oldenburg and the School of Oriental and African Studies (SOAS), University of London. The focus of her research is on the right to free, prior and informed consent (FPIC) in sub-Saharan Africa.

Contributors

Armi Beatriz E. Bayot Commission on Human Rights of the Republic of the Philippines, University of the Philippines Diliman, Quezon City, Philippines

C. Ignacio de Casas Universidad Austral, Buenos Aires, Argentina

Cathal M. Doyle Middlesex University School of Law, London, UK

Liesbeth F. H. Enneking Erasmus School of Law, Erasmus University Rotterdam, Rotterdam, The Netherlands

Isabel Feichtner School of Law, University of Würzburg, Würzburg, Germany

Heidi Feldt Beratung entwicklungspolitischer Prozesse, Berlin, Germany

Sotonye Frank Rivers State University, Port Harcourt, Nigeria

Nora Götzmann Human Rights and Business, The Danish Institute for Human Rights, Copenhagen, Denmark

Centre for Social Responsibility in Mining, Sustainable Minerals Institute, The University of Queensland, Brisbane, QLD, Australia

Charis Kamphuis Thompson Rivers University, Kamloops, BC, Canada

Patrick J. Keenan University of Illinois College of Law, Champaign, IL, USA

Wasima Khan Erasmus University Rotterdam, Erasmus School of Law, Rotterdam, The Netherlands

Markus Krajewski Faculty of Law, University of Erlangen-Nürnberg, Erlangen, Germany

Pacifique Manirakiza University of Ottawa, Faculty of Law, Ottawa, ON, Canada

Radu Mares Dr. Docent Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden

Karsten Nowrot University of Hamburg, Hamburg, Germany

Evaristus Oshionebo Faculty of Law, University of Calgary, Calgary, AB, Canada

Osgoode Hall Law School, York University, Toronto, ON, Canada

Aline Rose Barbosa Pereira Center for Development Research (ZEF), University of Bonn, Bonn, Germany

Ricarda Roesch School of Law, University of Erlangen-Nürnberg, Erlangen, Germany

Almut Schilling-Vacaflor Osnabrück University, Institute for Social Sciences, Osnabrück, Germany

Introduction

Isabel Feichtner, Markus Krajewski, and Ricarda Roesch

Contents

Environmental pollution through oil leakages in the Niger delta, forced evictions of Indigenous peoples from their ancestral lands and the exploitation of children in gold and diamond mines are among the most prominent cases of human rights violations caused by or directly associated with extractive industries. However, they are by far not the only examples. In one of his first interim reports, the then newly appointed Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *John Ruggie* noted in 2006:

> The extractive industries (…) account for most allegations of the worst abuses, up to and including complicity in crimes against humanity. These are typically for acts committed by public and private security forces protecting company assets and property; large-scale corruption; violations of labour rights; and a broad array of abuses in relation to local communities, especially Indigenous people[1]

The Special Representative based his findings on a survey of 65 instances of alleged corporate human rights abuses reported by NGOs in the 2000s. Even though

[1] Commission on Human Rights. Interim Report of UN Special Representative on Business and Human Rights, E/CN.4/2006/97, 22 February 2006, para. 25.

I. Feichtner
School of Law, University of Würzburg, Würzburg, Germany
e-mail: feichtner@jura.uni-wuerzburg.de

M. Krajewski (✉)
Faculty of Law, University of Erlangen-Nürnberg, Erlangen, Germany
e-mail: markus.krajewski@fau.de

R. Roesch
School of Law, University of Erlangen-Nürnberg, Erlangen, Germany
e-mail: ricarda.roesch@fau.de

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this survey is more of an illustration and not a representative sample, its findings coincide with the observations of many human rights activists and scholars.[2] Indeed, the pervasiveness of human rights violations in the extractive industries is so widely acknowledged that the Committee on Social, Economic and Cultural Rights merely referred to "the well-documented risks associated with the extractive industry" in its 2017 General Comment No. 24 on business and human rights noting that "particular due diligence is required with respect to mining-related projects and oil development projects."[3]

In light of the human rights violations and risks associated with the extractive industries, states, international organisations and non-state actors have developed a variety of different national and international legal instruments and initiatives aimed at mitigating, preventing and remedying human rights violations in this field. These instruments do not amount to a uniform area of law, but form multilevel, pluralistic and transnational responses to human rights challenges in the extractive industries. Despite its diversity, the transnational law of protecting human rights in the extractive industries is based on general principles that inform and shape the application and development of existing norms and legal instruments.

Key principles informing the transnational law of protecting human rights in the extractive industries are the general principles of transparency and participation. Both, transparency and participation, bear the promise of enhancing collective self-determination as concerns questions of whether to exploit natural resources as well as the distribution of costs and benefits once extraction is taking place. It should be cautioned, however, that while participation and transparency may help to bring the extractive industries in line with the promise of self-determination and human rights, transparency and consultation may also serve to legitimize extractive industry projects with dubious human rights records. In order to assess the human rights record of the extractive industries it is therefore also important to take account of resistance. Participation and transparency may facilitate effective resistance to particular extraction projects; yet, resistance may also be a reaction to transparency and participation initiatives that do not afford real opportunities for populations to actively shape and benefit from political economies of extraction; and, finally, rights of participation and transparency, as do human rights more generally, provide a vocabulary to affected communities in which to voice their grievances concerning extraction projects. Transparency, participation and resistance therefore emerge as three distinct, but interrelated categories of responses to the challenges and violations of human rights in the extractive industries. They form the three main themes of this volume.

Transparency is an important part of many attempts to prevent, reduce and mitigate human rights violations in the extractive industries. Legal instruments that enhance transparency in the extractive sector may enable affected communities,

[2] Francioni (2016), pp. 66–67.

[3] Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, para 32.

populations of resource states, shareholders and consumers to shape the political economy of extraction through political and economic action. Transparency is a key element of legal initiatives at the international level—including most prominently the Extractive Industries Transparency Initiative (EITI). Its effectiveness in making revenue flows transparent for public scrutiny is enhanced by national and regional legislation mandating corporations to report on payments to governments. Furthermore, legislation on conflict minerals and non-financial reporting seeks to complement transparency of financial flows with transparency regarding the origin of raw materials used in the production of consumer goods. Transparency does not function as a direct instrument of change. Yet, by allowing the public, stakeholders, shareholders, and consumers to access information regarding revenue flows and the origin of products it meets a necessary condition for actions for change—as for example the exercise of consumer choice or the implementation of accountability mechanisms. Transparency, moreover, is central to meaningful consultation and participation, the subject of the second part of the book.

The volume's second chapter addresses the development, impact and reform options of the EITI. *Heidi Feldt* discusses how the EITI seeks to enhance accountability of governments and the sharing of financial benefits from extraction with affected stakeholders. While the EITI has contributed to greater disclosure of information about the extractive sector, Feldt argues that there is little progress towards greater accountability. She suggests that in the absence of freedom of expression and political rights, the impact of the EITI is minimal. Therefore, protection and respect of these human rights are key if the EITI is to achieve its goal.

While EITI remains a voluntary framework at the international level, some states have adopted and implemented binding transparency obligations for the extractive industries. They are part of a broader movement to address the human rights impacts of corporate activity through disclosure-based rules. Disclosure shall allow consumers through their consumption choices to express their human rights concerns and thus to ultimately influence production processes. Disclosure legislation requires companies to gather and disclose to regulators information about their own supply chains and the materials used to make their products. A prominent example of such regulation are the conflict minerals and disclosure of payments provisions of the U.S. Dodd-Frank Act, discussed by *Patrick Keenan* in the third chapter. These provisions would require thousands of companies to investigate their supply chains, report their findings, and disclose payments to foreign officials. *Keenan* also notes the Trump Administration's steps to dismantle these rules and abandon the U.S. leadership role in the human rights movement. Based on analyses of recent cases, *Keenan* argues that in the absence of U.S. rules less transparency can create the conditions for more corruption and diminished respect for human rights.

Following the model of the U.S., but also deviating from it, the EU adopted its own transparency regulation. *Karsten Nowrot,* in the fourth chapter, takes account of the EU Conflict Minerals Regulation that was adopted by the European Parliament and the Council in spring 2017 and entered into force in June 2017. *Nowrot* takes a closer look at this recent and rather ambitious regulatory regime in the field of raw materials governance aimed at promoting responsible business in the context of

so-called conflict minerals. The analysis shows that the regulatory features of the 2017 EU Conflict Minerals Regulation transcend the distinction between traditional law enforcement and law-realisation approaches by combining command and control elements in the form of legally binding supply chain due diligence obligations with more indirect steering tools aimed at improving transparency.

The next chapters take perspectives of the Global South: *Evaristus Oshionebo* examines the nature, scope and content of Community Development Agreements (CDAs) in Africa's extractive industries and assesses the degree to which CDAs enable host communities to participate in project implementation and resource revenue-sharing. He identifies certain factors inhibiting the utility of CDAs in Africa including the power imbalance between extractive companies and host communities. While extractive companies have enormous financial resources that allow them to retain the services of highly trained experts, including lawyers, local communities in Africa often lack the requisite capacity and expertise to negotiate and implement CDAs. As a result, in some cases extractive companies dictate the terms of CDAs. Given this reality, the article suggests that African countries should enact legislative provisions mandating certain contents of CDAs in the extractive sector. Such legislative provisions could ameliorate the power imbalance and ensure that extractive companies do not take advantage of their superior power in the course of negotiating CDAs with host communities in Africa.

Sotonye Frank, in the chapter "Stabilization Clauses and Human Rights: The Role of Transparency Initiatives", shows how the use of stabilization clauses in state-investor-contracts declines as transparency increases. On the basis of case studies of Tanzania, Liberia, Sierra Leone and Zambia, Frank argues that a lack of transparency in the extractive industry contractual process correlates with a wide scope of stabilization clauses. This has implications for human rights as stabilization clauses either freeze the law regulating the extraction project or make legislative changes subject to compensation payments by the state to the investor and thus limit the scope of the state to adopt and implement legislation protecting populations and environment from harm caused by extraction projects. Conversely, the increases in transparency, including the publication of contracts, that have resulted from resource states' involvement with the EITI contributed to a reduced scope or even an abolition of stabilization clauses.

In the final chapter of this volume's first part, *Wasima Khan* addresses the link between taxation and human rights. Many of the world's resource-rich countries are developing countries and dependent on their natural resource wealth. Yet, they systematically fail to translate this wealth into economic stability and growth and an enjoyment of basic human rights—such as access to health, education, and sanitation—for their citizens *inter alia* due to tax avoidance and evasion by multinational companies. While wealthy resource importing states have contributed to an international tax law that impedes resource states' capacity to effectively tax and share in the revenues from extraction, *Khan* focusses on multinational companies. In her chapter *Khan* proposes a legal obligation for multinational companies to establish and publish a tax strategy as a pragmatic means building on a strategy of "naming and faming" to counter tax avoidance.

The second part of the book focusses on the participation of affected communities throughout the mining cycle. The right to free, prior and informed consent (FPIC) increasingly is being understood as a continuous process of participation and thus as a way of preventing and mitigating human rights violations in the course of extraction projects. FPIC originated in the context of international indigenous rights and is seen as an expression or derivate of the indigenous right to self-determination. By drawing on examples from different regions of the world, the chapters in this part show how contested the legal status and scope of FPIC still are, as well as the potential and limits of participation in realizing self-determination and human rights.

The part begins with *Cathal Doyle's* comparison of FPIC in Canada and the United States. In both jurisdictions, ambiguity persists regarding the nature of the duty to consult. While Canadian and US Courts have interpreted the governments' responsibilities and duties under international law, their jurisprudence is still informed by historical international law principles. These tend to be blind to the role that indigenous sovereignty and consent of Indigenous peoples play and should be playing. Doyle argues that in both jurisdictions legislation could be brought in line with the human rights of Indigenous peoples. Despite recent judicial setbacks effective protection of indigenous rights seems more likely in Canada than in the US given the Trump administration's endeavours to facilitate resource extraction, including in Native American territories. As Indigenous peoples in Canada have repeatedly and effectively pressed their government to implement the UN Declaration on the Rights of Indigenous Peoples, Canada could set an important precedent that would help Indigenous peoples throughout the world.

Pacifique Manirakiza sheds light on the re-negotiation of FPIC in sub-Saharan Africa. FPIC is even more controversial in sub-Saharan Africa than in other regions of the world, as the traditional concept of indigeneity does not take African experiences into consideration and is subject to contestation by many African governments. Taking a resistance theory perspective on human rights, *Manirakiza* argues that FPIC needs to be detached from indigeneity in sub-Saharan Africa, extending its scope to non-indigenous local communities. The chapter posits that, in the African human rights context, the right to FPIC does not entail the right to veto extraction projects. Rather, it has to be exercised in relation to other compelling interests, meaning that the rights and interests of affected communities are balanced against the legitimate interests of the rest of the population to benefit from the economic exploitation of the national natural wealth.

Ignacio de Casas moves the discussion on FPIC to Latin America and the corporate responsibility to respect consultation rights. While he finds that the Inter-American Human Rights System (IAHRS) does not give rise to direct obligations of corporations, he argues that it includes implicit corporate responsibilities that arise from the state due diligence standard. He proposes a way to construe direct corporate responsibilities on the basis of the existing Inter-American human rights framework and suggests how the organs of the IAHRS may promote these responsibilities.

The Philippines are often portrayed as one of the role models in Asia with regard to the recognition of the rights of Indigenous peoples. In her chapter entitled "Free,

Prior, and Informed Consent in the Philippines: A Fourth World Critique", *Armi Beatriz Bayot* explores the limits of FPIC in the Philippines from a Fourth World perspective to international law. She argues that due to the state-centrism of international and domestic law, state prerogatives trump Indigenous peoples' rights over natural resources. FPIC continues to be qualified by the Regalian doctrine, according to which natural resources belong to the state as well as the international law principle of Permanent Sovereignty over Natural Resources. Consequently, FPIC remains a regime of unfulfilled promises in a framework based on a Western conception of state sovereignty and characterized by the denial of the (pre-)existence and validity of indigenous polities and their sovereignty. The way forward, according to *Bayot*, is to assert Indigenous peoples' participation in international lawmaking, based on their right to self-determination and historical sovereignty, and to empower them to influence the content of international law norms that affect them—not just those that exist specifically for the protection of Indigenous peoples.

Almut Schilling-Vacaflor in her chapter on "Norm Contestation and (Non-) Compliance: The Right to Prior Consultation and FPIC in the Extractive Industries" looks at FPIC in Latin America, in particular Bolivia, Columbia and Chile who have adopted and implemented prior consultation legislation from a legal anthropological perspective. She finds, based on empirical data, that divergent claims of authority, territorial control and decision-making coexist within the analysed domestic contexts and that these divergences lie at the root of the fierce contestations over indigenous participatory rights. In addition, such claims and competing resource sovereignties are embedded within power asymmetries that advantage strategic economic interests in extraction over strong indigenous and participatory rights. *Schilling-Vacaflor* concludes that as long as these contestations persist, the emergence of a shared understanding remains improbable.

The contributions on FPIC are complemented by two chapters of which one focusses on the potential of state-investor-contracts to promote participation and the other on corporations' changing perspectives on corporate social responsibility and in particular their engagement with affected communities.

Nora Götzmann, in her chapter on "State-Investor Contracts and Human Rights: Taking a Critical Look at Transparency and Participation", analyses the potential of state-investor-contracts for strengthening participation rights and improving transparency. While state-investor-contracts are globally on the decline, they are still common in some regions, in particular in Africa. *Götzmann* notes that they, generally, make little reference to human rights. They may further limit the realization and protection of human rights as corporations frequently have greater negotiating capacity than the governments of resource states and contract negotiations often are conducted secretively and without participation of civil society actors. Stabilisation clauses, for instance, may impair the host government's ability to adopt human rights-related laws. Moreover, the classification of investor-state-contracts as purely commercial is problematic as is the possibility that bilateral investment treaties offer to investors for enforcing contractual claims through investor-state arbitration. *Götzmann*, consequently, supports reforms to remedy this situation. These include the promotion of human rights expertise and training of negotiators, greater contrac-

tual transparency and the implementation of mining frameworks that provide investors with legal certainty and thus render stabilization clauses unnecessary.

Radu Mares examines, in his chapter "Disruption and Institutional Development: Corporate Standards and Practices on Responsible Mining", how corporations in the extractive industry sector understand and implement their corporate duty to respect human rights with a particular focus on participation. From an institutional development perspective, he examines reports of mining companies and international development organisations. He observes a growing commitment of companies and industry associations to local capacity building and institutional development, while cautioning that these new commitments might remain of a declaratory character. As concerns the operational level, *Mares* notes that some companies and multi-stakeholder processes seek to move beyond the rhetoric of institutional development and put their commitments into practice. He concludes that institutional development as a cross-cutting dimension creates an opportunity for more transparency and participation.

Human Rights not only provide guidance and content for the (self-)regulation of extractive industries. Human Rights also provide important references, narratives and instruments to resist extractivism. Civil society actors and parliamentarians invoke human rights to advocate for legal change; persons adversely affected by extraction bring their grievances formulated as human rights claims to the courts—often aided by institutions that support these cases for strategic litigation purposes to achieve legal change beyond the individual case; and affected local populations, workers, and farmers use human rights as a powerful language to express their protest against extraction projects that threaten to unsettle and hurt them and their habitat. Researchers in the contentious field of extraction not seldom become themselves part of a human rights activism resisting expulsions resulting from extraction. The third part of the book explores these links between human rights and resistance.

In her chapter entitled "Taking Sides in Scientific Research? The Struggle for the Right to Participate in Public Decision-Making Related to a Mining Project in Brazil", *Aline Pereira* not only presents the struggle of local communities affected by the Minas-Rio iron-ore mining project in Minas Gerais in Brazil, but also reflects on her role as a researcher engaging in action research. *Pereira* conceptualizes the rights to information and participation in decision-making on extraction projects as empowering individuals and communities and as important elements of democratic self-determination. She shows, on the basis of her field work, how during the environmental licensing process these rights were being continuously undermined, and a merely functional value was accorded to participation. She acknowledges her positionality and subjectivity as a researcher and stets out the ethical and methodological challenges of action research in general and of her own interactions with the affected communities in Conceição do Mato Dentro engaging in resistance against the Minas-Rio iron-ore mine in particular.

Charis Kamphuis in her chapter entitled "Building the Case for a Home-State Grievance Mechanism: Law Reform Strategies in the Canadian Resource Justice Movement", offers a detailed account of the strategies that social justice advocates in Canada between 2000 and 2017 employed in their endeavour to make the Canadian government address Canadian corporate conduct in the extractive sector

abroad. According to *Kamphuis* these strategies eventually led to a breakthrough in 2018 when the Canadian government announced that it would establish the Canadian Ombudsman for Responsible Enterprise as a new grievance mechanism. Steps in this struggle for resources justice included the empirical documentation not only of human rights violations by Canadian extractive industry corporations abroad but also the support provided to these companies by the Canadian government; sustained debate with policy makers, industry leaders and international human rights bodies over appropriate regulatory responses by the Canadian government, as well as the civil society proposal in 2016 of a draft Business & Human Rights Act.

In this volume's last chapter *Liesbeth Enneking* presents an analysis of a number of transnational human rights and environmental litigations in the US, the UK and the Netherlands, all relating to operations of Shell in Nigeria. She holds these cases to be indicative of a trend towards increased foreign liability litigation to hold companies engaging in resource extraction accountable in their home states. Through an assessment of rules on jurisdiction, the applicable law, the legal basis of claims as well as procedural rules and practices, *Enneking* identifies the hurdles which litigants have to take in different jurisdictions in order to succeed with their claims.

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Isabel Feichtner is Professor for Public Law and International Economic Law at Würzburg University. Before moving to Würzburg, she worked as researcher the Max-Planck-Institute for Comparative Public Law and International Law and was associate professor at Goethe University. She is a member of the European Journal of International Law's editorial board and of the ILA Committee on the Role of International Law in Sustainable Resource Management. Her main research interests lie in the field of international economic law, transnational resource law and the legal design of money.

Markus Krajewski is professor of public law and public international law at Friedrich-Alexander-University Erlangen-Nürnberg. He is one of the directors of the Master programme Human Rights and coordinator of the Center for Human Rights Erlangen-Nürnberg (CHREN). He also chairs the Board of Trustees of the German Institute for Human Rights. Before taking up his current position he taught at King's College London and the University of Potsdam. He holds a PhD and postdoctoral qualification from the University of Hamburg.

Ricarda Roesch is PhD candidate at Friedrich-Alexander-University of Erlangen-Nuremberg. From 2014 to 2017, she worked in the research project "Human Rights as Standards for Transnational Economic Law". She holds law degrees from Hanse Law School, Universities of Bremen and Oldenburg, and the School of Oriental and African Studies (SOAS), University of London. The focus of her research is on the right to free, prior and informed consent (FPIC) in sub-Saharan Africa.

Part I
Transparency

The Extractive Industries Transparency Initiative (EITI) as a Human Rights Instrument: Potentials and Shortcomings

Heidi Feldt

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1 Extractive Industries Transparency Initiative (EITI)

While there is an on-going discussion about whether living free of corruption should be enshrined as a human right,[1] the Human Rights Council has already recognised the negative impact of corruption on the enjoyment of human rights. Navi Pillay, former United Nations High Commissioner for Human Rights, stated 2013: "*Let us be clear. Corruption kills. The money stolen through corruption every year is enough to feed the world's hungry 80 times over. Nearly 870 million people go to bed hungry*

[1] Bantekas and Oette (2016); Peters A, Corruption and Human Rights. Basel Institute on Governance, Working paper series No. 20, September 2015, http://www.mpil.de/files/pdf4/Peters_Corruption_and_Human_Rights20151.pdf (last accessed 12 June 2018); Murray M and Spalding A, Freedom from Official Corruption as a Human Right. Governance Studies at Brookings, January 2015, https://www.brookings.edu/wp-content/uploads/2016/06/Murray-and-Spalding_v06.pdf (last accessed 12 June 2018).

H. Feldt (✉)
Beratung entwicklungspolitischer Prozesse, Berlin, Germany

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every night, many of them children; corruption denies them their right to food, and, in some cases, their right to life. A human rights-based approach to anti-corruption responds to the people's resounding call for a social, political and economic order that delivers on the promises of freedom from fear and want."[2]

This is the underlying assumption of the EITI: As billions of US dollars slip past the national budgets of resource-rich countries each year, those countries lack the revenue they need to build schools, maintain health systems or undertake infrastructure programmes. And yet in almost every country of the world, mineral resources are the property of the state or its population. It follows that the population has the right that the revenue from extracting such resources should benefit it and that governments can be held accountable. A precondition to citizens demanding accountability is that there is transparency with relation to the level of revenue and the prices and terms under which resources are extracted in their countries. Transparency of payments, disclosure of extraction contracts and disclosure of the true owners ("beneficial owners" in EITI terminology[3]) of the mining, oil and gas companies, as required by EITI, are essential if it is to be at all possible to curb corruption and hold governments accountable. This is vital to ensure that the revenue can be used to realise social human rights such as the right to education and the right to healthcare.

The extractive industries are considered one of the most corrupt business sectors. It is difficult to assess the corruption of different sectors due to the obfuscating nature of corruption itself. Most of the information concerning corruption is anecdotal, whether in the mining and the oil/gas sector or any other sector. Nevertheless, the Bribe Payers Index of Transparency International indicates mining and oil and gas industry as bribe payers, listed after construction, utilities and real estate.[4]

EITI focuses on the transparency of payments made by gas, oil and mining companies to the governments of the countries in which they operate and on disclosure of the relevant revenue by these governments. The aim is to enable a public debate on the economic use of raw materials and the use of revenue, as well as empower the populations to hold their governments accountable. The initiative brings together governments, companies, NGOs and banks seeking to create an international framework for transparency of payments to governments by the extractive industry.

[2] Office of the United Nations High Commissioner for Human Rights (2013) The human rights case against corruption. 22nd session of the Human Rights Council, https://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCaseAgainstCorruption.pdf (last accessed 12 August 2017), p. 3.

[3] Extractive Industries Transparency Initiative, Beneficial ownership, Revealing who stands behind the companies, https://eiti.org/beneficial-ownership (last accessed 24 May 2018).

[4] Hardoon D and Heinrich F, Bribe Prayers Index 2011. Transparency International, 2011, http://issuu.com/transparencyinternational/docs/bribe_payers_index_2011?mode=window&backgroundColor=%23222222 (last accessed 12 June 2018), p. 15.

1.1 Brief History of EITI

In the 1990s, studies by Global Witness, Christian Aid, Save the Children and various other organisations revealed that public budgets in many resource-rich countries in Africa, Asia and Latin America were losing out on billions of dollars of revenue as a result of bribery and corruption in the extractive industries. Pressure on governments to take action against corruption had yielded little success. As a result, NGOs adopted a different tactic, urging the extractive industries—the mining, oil and gas companies—to publish the payments they were making to governments. This gave the campaign its name—"Publish What You Pay" (PWYP). PWYP found important advocates and supporters elsewhere, notably in George Soros, whose Open Society Institute and Revenue Watch Institute provided vital financial and political support and played a key role in opening doors for the campaign.

When Global Witness launched its report, "A Crude Awakening", on the mismanagement of oil revenues of the Angolan government in 1999, they challenged the oil industry, lending banks and the national governments involved to change their policy and adopt one of "full transparency".[5] Responding to the demand, British Petroleum (BP) announced the publication of payments it made to the Angolan government for an offshore licence in 2001.[6] In response, the Angolan Government threatened the company with losing its licence to less scrupulous competitors.[7] According to the former chair of EITI, Clare Short, as a reaction the oil companies argued for a shift away from company reporting, as demanded by PWYP, to reporting by governments, in order to reduce conflict with host governments. If company reporting was to be required, they wanted a global effort to level the playing field that required all companies operating in a country to disclose, so that those, which embraced transparency would not be at a competitive disadvantage.[8]

These demands were taken up by the UK government, which presented the idea of the Extractive Industries Transparency Initiative in 2002. EITI was officially launched in June 2003, when representatives of governments, industries, and civil society groups met in London and agreed upon a common set of EITI Principles. Four countries started piloting national EITI implementation: Azerbaijan, Ghana, Nigeria and the Kyrgyz Republic.

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[5] Global Witness, A crude awakening. Report, 1 December 1999, https://www.globalwitness.org/en/archive/crude-awakening/ (last accessed 1 October 2018), p. 21.

[6] Global Witness, Campaign success: BP makes move for transparency in Angola. Press release, 12 February 2001, https://www.globalwitness.org/en/archive/campaign-success-bp-makes-move-transparency-angola/ (last accessed 1 October 2018).

[7] Global Witness, Time for transparency: Coming clean on oil, mining and gas revenues, Report, 26 March 2004, https://reliefweb.int/report/angola/time-transparency-coming-clean-oil-mining-and-gas-revenues (last accessed 12 August 2017), p. 6.

[8] Short C The development of the Extractive Industries Transparency Initiative. Journal of World Energy Law & Business, 16 January 2014, https://eiti.org/sites/default/files/documents/The-development-of-the-EITI-Clare-Short.pdf (last accessed 1 October 2018), p. 2.

The EITI Principles of 2003 set out the shared basis of the initiative. The basic principle is that "the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts."[9] The approach is that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development. The principles reaffirm the importance of all stakeholders to contribute—including governments and their agencies, extractive industry companies, service companies, multilateral organisations, financial organisations, investors and non-governmental organisations. The mechanism to bring the principles to fruition is the EITI Standard.

This standard has evolved over time. In 2006, the standard only reflected a minimum requirement of transparency, allowing for aggregated data. Information on project base was recommended but not obligatory. There was a danger that EITI reporting would be reduced to a tick box assessment of compliance with the rules but not provide meaningful information for the population of resource extracting countries. With adoption of the 2013 standard and its update in 2016, implementing countries now have to go beyond the minimum requirements.

1.2 Requirements

To join EITI, the government must appoint an EITI coordinator to oversee implementation, inter alia of the work plan agreed by the Multi-Stakeholder Group (MSG). The government must undertake work with civil society organisations and the private sector. The national MSG is the backbone of the implementation process.[10]

If these requirements are met, an application for membership can be submitted to the EITI Board. At that point the country has candidate status and must publish its first EITI report within 18 months, publishing further reports annually thereafter. The reporting standards cover publication of all relevant payments and revenues and extractive industry production data; however, it is left to the MSG to define the materiality of the payments and revenues in its country.[11]

The typical process of producing an EITI report comprises the following stages (Fig. 1):

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[9] Extractive Industries Transparency Initiative International Secretary, The EITI Standard 2016. Extractive Industries Transparency Initiative, 24 May 2017, https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf (last accessed 1 October 2018), p. 10.

[10] Extractive Industries Transparency Initiative International Secretary, The EITI Standard 2016. Extractive Industries Transparency Initiative, 24 May 2017, https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf (last accessed 1 October 2018), pp. 13–16.

[11] Extractive Industries Transparency Initiative International Secretary, The EITI Standard 2016. Extractive Industries Transparency Initiative, 24 May 2017, https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf (last accessed 1 October 2018), p. 22.

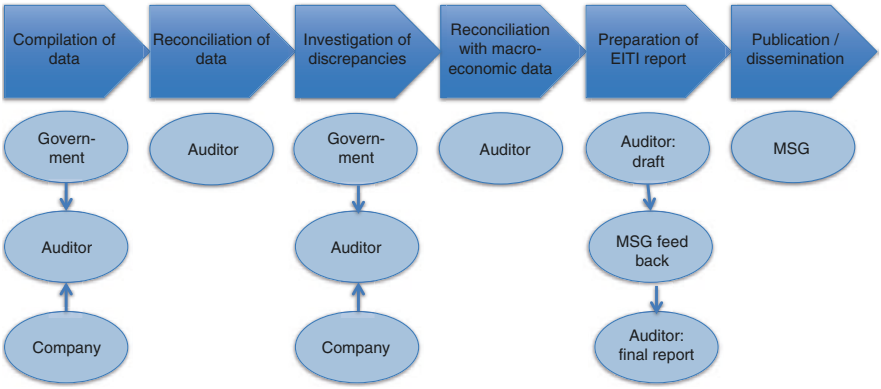

Fig. 1 Stages in the production of an EITI report. Source: author based on EITI

An external auditor collates and reconciles the details provided by companies and the government. The external auditor is appointed by the MSG, which ultimately adopts the final report and releases it for publication.

1.3 Development of the EITI Standard

The EITI Standard was revised at the 2013 EITI Conference in Sydney. Ten years after the official founding of EITI and an external evaluation, it was necessary to improve reporting obligations and processes. The survey team found that "*there is not any solid theory of change behind some of the EITI aspirations, nor do data show any links at this aggregate level*." The team concluded that "*the lack of societal change is also a function of the narrow focus of EITI activities. If the Standard were more in line with its own Principles and if it had more focus on strategic partnerships beyond the sector, EITI would be more likely to reach its objectives. The main Recommendation is thus for EITI to consider a Standard that covers a greater part of the value chain in the sector, combined with a flexible rating scheme that would grade actual performance rather than giving a Yes/No value*."[12]

While transparency has improved, accountability does not appear to have changed greatly. One reason is that most EITI activities were dissemination activities and were not designed for supporting social actors to empower them to use the data, which is difficult if the government of a given country is the owner of the process.

[12] Reite et al., Achievements and Strategic Options: Evaluation of the Extractive Industries Transparency Initiative. Scanteam, Final Report, May 2011, https://eiti.org/sites/default/files/migrated_files/2011-EITI-evaluation-report.pdf (last accessed 1 October 2018), p. 1.

The reporting standards were therefore expanded and further substantiated at the 2016 EITI Conference in Lima. To make national EITI reports clearer, they must now include contextual information including information about the legal basis, the contribution of extractive industries to the country's economy, state holdings in the resource industry and the allocation of revenue.

Disclosure of beneficial ownership has been included as a new requirement. A pilot project in 12 countries explored how the publication of the names of the real owners of companies can be achieved in the EITI context.[13] At the 2016 EITI Conference in Lima, Peru, the disclosure of beneficial ownership was included in the EITI list of information that must be published. By 1 January 2020, all countries have to ensure that privately held companies disclose their beneficial owners as part of their EITI reports. This information must include the identity of the beneficial owner, the level of ownership and details about how control and ownership is exerted. It is also recommended that this information be maintained in a public beneficial ownership register. Furthermore, the reporting obligations of state-owned enterprises have been extended. All transfers of funds between state-owned enterprises and state institutions must be disclosed including volumes sold and received, retained earnings, reinvestments and third party financing.[14]

Another addition is the requirement for member states to maintain a publicly accessible register containing the names of licence or concession holders and geographical and resource-related information.[15] Experience with recommendations showed that relatively few recommendations based on EITI reporting have been implemented. The new standard requires plans for implementing recommendations to be outlined in the national EITI work plans. Furthermore, publication of project-specific data is called for. However, it is the responsibility of the MSG to define the level of disaggregation required. Encouraged but not obligatory is the publication of contracts.[16]

Overall, the aim is to make EITI reports easier to read, comprehensible to a wider audience and therefore more useful. EITI hopes that clear and contextual reports will help it to achieve its goal of enabling an informed public to hold its government accountable. One of the biggest changes was the inclusion of beneficial ownership as a reporting requirement. It was launched in 2013 as a pilot process, until it became mandatory in Lima.

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[13] Extractive Industries Transparency Initiative, Beneficial ownership, Revealing who stands behind the companies, https://eiti.org/beneficial-ownership (last accessed 1 October 2018).

[14] Extractive Industries Transparency Initiative International Secretary, The EITI Standard 2016. Extractive Industries Transparency Initiative, 24 May 2017, https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf (last accessed 1 October 2018), p. 21.

[15] Extractive Industries Transparency Initiative International Secretary, The EITI Standard 2016. Extractive Industries Transparency Initiative, 24 May 2017, https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf (last accessed 1 October 2018), p. 18.

[16] Extractive Industries Transparency Initiative International Secretary, The EITI Standard 2016. Extractive Industries Transparency Initiative, 24 May 2017, https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf (last accessed 1 October 2018), p. 19.

Enforcement mechanisms are weak, as in any other organisations based on voluntary membership. The first step to assess compliance with EITI rules is the validation process. EITI implementation is verified in each country through a validation process headed by the secretariat of EITI. The secretariat prepares the validation and visits the country concerned, talking to the different stakeholders. The findings are then verified by an independent validator, who performs a risk-based analysis and proposes an overall rating of the country's performance. The first validation is due two and a half years after the country has been accepted as a candidate. If the outcome of the validation is positive, the country is recognised as a full member. Full members are required to repeat the validation process every 3 years.

The Board rates the country as (a) having made satisfactory progress (being "compliant"), (b) having made meaningful progress, (c) having made inadequate progress or no progress. If the country does not improve its performance, a compliant country can be downgraded to candidate status. If progress continues to be inadequate or if there has been no progress, a country can be suspended or finally delisted (Fig. 2).

Hence, sanction mechanisms are internal to the organisation. There are no further sanction mechanisms such as conditions to access credit. This set-up is entirely inherent to the kind of initiative based on self-regulation.

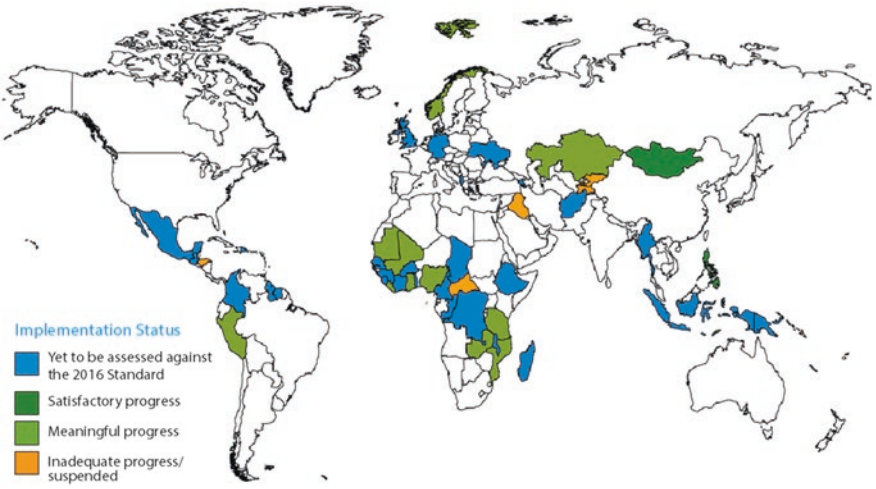

Fig. 2 EITI member countries and implementation status. Source: EITI Factsheet, February 2018 (https://eiti.org/sites/default/files/documents/data_eiti_2_0.pdf) accessed: 24.05.2018

1.4 Structure of EITI

The initiative is coordinated internationally by a multi-stakeholder board consisting of representatives of implementing and supporting countries, companies, non-governmental organisations and investors. EITI International lays down the framework; implementation is the responsibility of member countries. Formally, EITI is a non-profit association organised under Norwegian law. The permanent institutional bodies are the EITI Members' Meeting alongside the EITI Global Conference, which must be organised at least every 3 years, the EITI Board led by the EITI Chair and the EITI Secretariat in Oslo which supports the work of the EITI Board as well as of the members. The constituency groups of EITI are implementing and supporting countries and companies, including institutional investors, and civil society organisations. The Members' Meeting aims to adopt all decisions by consensus. If a vote is necessary, the votes of the three constituencies are equally balanced. The main task of the Members' Meeting is to appoint the EITI Board, the constituencies determine amongst themselves whom they wish to nominate to the EITI Board. Between the Members' Meetings, the EITI Board is the decision making body of the EITI International. The EITI Board has 21 members, with each constituency being entitled to representation. The EITI Board is represented by the EITI Chair.[17]

EITI is a government-led initiative. Governments are members and are ultimately responsible for national implementation: they have to ensure the implementation of the work plan, finance the coordinator of the national process and provide the enabling political framework for EITI. From four piloting countries in 2003, membership has grown to currently 51 implementing countries, of which just 23 have been assessed according to the new 2016 standard.[18] Only three countries (Mongolia, the Philippines and Timor Leste) made satisfactory progress and complied with all the requirements of the standard. Fourteen countries made meaningful progress. One country (Central African Republic) is currently suspended for political reasons, as the state is almost non-existent. Five more countries (Honduras, Iraq, the Kyrgyz Republic, Solomon Islands and Tajikistan) are suspended for failure to comply with the requirements of the EITI Standard. Since 2015, more industrialised countries joined EITI: the UK and Germany have been among the member countries required to publish their reports during 2017.[19]

The reasons for countries to join EITI diverge largely. Some most likely expected to receive better credit conditions, while others wanted to curb corruption in the

[17] Extractive Industries Transparency Initiative International Secretary, The EITI Standard 2016. Extractive Industries Transparency Initiative, 24 May 2017, https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf (last accessed 1 October 2018), pp. 47 et seq.

[18] Extractive Industries Transparency Initiative, https://eiti.org/countries (last accessed 26 March 2018).

[19] The USA joined Extractive Industries Transparency Initiative in 2014, when the Extractive Industries Transparency Initiative board excepted the country as a candidate. In November 2017, the U.S. announced its withdrawal from EITI—a serious setback for Extractive Industries Transparency Initiative trying to integrate resource rich industrialized countries.

sector (Liberia, Nigeria). Others wanted to contribute to setting a transparency standard (Norway, Germany).

A shortcoming is that EITI cannot oblige extractive companies to disclose. Although some do so voluntarily, the majority do not. Another shortcoming of EITI is that as a membership-based organisation, non-member states are not bound to adhere to its transparency standards—for instance, the major economies based on resource extraction like Australia, Brazil, Canada, China, India, Russia and South Africa as well as Angola, Equatorial Guinea and Venezuela. In other words, a large percentage of payment flows is not covered by EITI.

As a consequence, civil society organisations organised in PWYP have successfully lobbied for mandatory disclosure for mining, oil and gas companies in host jurisdictions of companies such as the USA,[20] Canada and Europe.[21] It is still too early to assess how EITI and mandatory disclosure are connected to one another and what impacts the combination of both approaches will have. Some companies are lobbying against mandatory disclosure rules and have been successfully doing so in the USA where the American Petroleum Institute (API) in the name of its members, like ExxonMobile, have opposed the Dodd Frank Act Section 1504 since the very beginning. Nevertheless, in conjunction with the European Union's Accounting Directive and similar provisions in Norway, Canada and Switzerland, EITI bears the potential to become an international reporting standard for the resource sector.

2 EITI and Human Rights Challenges

Human rights violations seriously endanger the success and the implementation of EITI. The initiative itself in its 2013 version lists reported violations of human rights of its civil society members. According to the EITI Board, civil society representatives participating in the implementation of the EITI have been harassed and intimidated and, in several cases, travel permits sought by civil society representative to attend related meetings have been denied. Furthermore, governments interfered in the autonomy of civil society representation in the EITI process mounting legal, administrative, procedural and other obstacles to the registration and

[20] The Dodd-Frank Wall Street Reform and Consumer Protection Act, otherwise known as the Dodd-Frank Act, was signed in the USA in July 2010. It is designed to promote transparency and stability in the financial system and includes new provisions on corporate accountability. Section 1504 requires all resource extraction companies listed on the US stock exchange to disclose payments made to governments anywhere in the world on a project-by-project basis. One of the first actions of the Trump government on coming into office was to suspend Section 1504. See on this the contribution by *Keenan* in this volume.

[21] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC. The Directive has now been transposed into the national law of EU member states. See the contribution by *Nowrot* in this volume.

operation of independent civil society organisations or impeding the free selection of civil society representation for the Multi-Stakeholder Group.[22]

2.1 Civil Society Organisations' Participation in EITI

Civil society organisations' participation in EITI is a key factor and has been at the centre of EITI right from the outset as it is civil society, which gives—inter alia—credibility to the EITI system. For EITI to attain its goal of accountability and public debate, civil society organisations must be able to organise themselves without interference from government, to speak out freely and to have access to public policy. There is no strict definition of civil society organisations (CSO) in EITI. NGOs, unions, journalists, representatives of religious organisations and in some cases even parliamentarians are all considered representatives of civil society.

The importance of civil society organisations is underlined by the fact that a specific Civil Society Protocol (CSP)[23] is an integral part of the EITI Standard and that in the validation process a country's compliance with this Protocol is the single most relevant issue. The Civil Society Protocol evolved from a set of principles intended to allow civil society representatives to express their opinion without any restraint, coercion or reprisal. The CSP states that civil society must be able to fully, actively and effectively engage in the EITI process. The government must ensure that there is an enabling environment for civil society participation with regard to relevant laws, regulations, and administrative rules as well as actual practice in implementation of the EITI. According to the CSP the fundamental rights of civil society substantively engaged in the EITI, including but not restricted to members of the Multi-Stakeholder Group, must be respected.

Furthermore, EITI introduced a safeguard policy under its validation provisions. A country will be suspended if it infringes the requirements. In practice, this has already been done in two cases, Azerbaijan and Tajikistan, where the validation process found severe shortcomings when it came to the possibilities for civil society to participate.

While the CSP and the validation process address human rights as structural issues, a Rapid Response Committee addresses human rights violations against individuals.[24] The members of the committee are EITI Board members. They have

[22] Extractive Industries Transparency Initiative International Secretary, The EITI Standard. Extractive Industries Transparency Initiative, 1 January 2015, https://eiti.org/sites/default/files/documents/english_eiti_standard.pdf (last accessed 1 October 2018), pp. 40–41.

[23] Extractive Industries Transparency Initiative, EITI Protocol: Participation of Civil Society, February 2016, https://eiti.org/document/eiti-protocol-participation-of-civil-society (last accessed 1 October 2018).

[24] Extractive Industries Transparency Initiative, EITI Board Committees, https://eiti.org/board-committees#rapid-response-committee (last accessed 1 October 2018).

to react in cases where detention or other forms of intimidation against civil society members of national EITI MSGs or representatives of organisations engaged in EITI occur—if the repression is somehow related to EITI. This last point often gives rise to debate between CSO representatives in the Committee and the other members as it is not easy to determine if one suffers harassment because of his or her engagement in general or because of his or her engagement in EITI. A case in point is the example of Gabon, where the CSO representative in EITI was detained and the government denied any relation with EITI and justified the detention with "treason".[25] The Rapid Response Committee was at odds whether this was a case for the Committee or not. The Committee ultimately decided to call for release, but the case illustrates how difficult it is to demonstrate unequivocally whether a matter is linked to EITI or not.

2.2 Enabling Environment for Civil Society Participation in Repressive States

In recent years, structural restrictions upon freedom to operate, such as those imposed by laws on NGOs, e.g. in Ethiopia and Azerbaijan, have fundamentally curtailed the activities of civil society organisations in EITI.

But the case of Ethiopia shows how fractured the debate is and how divergent the positions adopted by different civil society organisations can be.[26] In 2012, the EITI Board rejected Ethiopia's application for membership. The reasons stated included a law designed to control non-governmental organisations, and the generally repressive response of the government to dissent. Although the human rights situation in the country had not improved, in 2014 Ethiopia was accepted as candidate. Both decisions were preceded by internal discussions within Ethiopia's civil society about whether joining EITI would expand the scope for activity by the organisations or not. A further question was whether EITI would lose credibility through Ethiopia's accession, given that NGOs cannot operate freely in the country and there was therefore serious doubt as to whether the members of the national MSG could work freely. In the meantime, Ethiopia's membership was suspended because the country did not meet the deadlines for reporting.

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[25] Publish What You Pay International, Gabon: Anti-Corruption advocates imprisoned on trumped-up charges. Press release, 9 January 2009, https://webcache.googleusercontent.com/search?q=cache:BlDkgxrv70UJ:https://www.globalwitness.org/documents/15088/microsoft_word_gabon_pr_9janeng.pdf+&cd=14&hl=de&ct=clnk&gl=de (last accessed 1 October 2018); Kråkenes A, EITI Chairman expresses concern about arrests of Civil Society representatives in Gabon. Extractive Industries Transparency Initiative, 8 January 2009, https://eiti.org/news/eiti-chairman-expresses-concern-about-arrests-of-civil-society-representatives-in-gabon (last accessed 1 October 2018).

[26] Human Rights Watch, Extractive Industries: A New Accountability Agenda. 21 May 2013, https://www.hrw.org/news/2013/05/21/extractive-industries-new-accountability-agenda (last accessed 1 October 2018), pp. 50 et seq.