

Anti-corruption conventions and EITI

Query:

How does the EITI relate to conventions? What would be the potential of using the OECD Convention against Bribery and the UNCAC in the context of EITI? It is surprising that EITI makes no direct reference to anti-corruption conventions, e.g. UNCAC, AU Convention or OECD Convention.

Purpose:

Since EITI makes reference to donors/sponsors like G8, WB and OECD countries and also to EITI member countries from e.g. Africa that have signed and ratified anti-corruption conventions, a clarification of the links could strengthen EITI and at the same time could support compliance with anti-corruption conventions.

Content:

Part 1: Information on the EITI, with a discussion of its successes, challenges, and relationship to conventions

Part II: Details about how anti-corruption conventions can be used by donors and civil society to support and strengthen the EITI

Please also see:

- <http://u4.no/helpdesk/helpdesk/queries/query68.cfm> This U4 Expert Answer details international initiatives, similar to the EITI, that are aimed at promoting better fiscal transparency, accountability and reporting.
- <http://u4.no/helpdesk/helpdesk/queries/query88.cfm> This U4 Expert Answer looks at the use of the OECD Convention against multinational companies in the extractive industries.
- The U4 theme pages on how donors can use anti-corruption conventions: <http://www.u4.no/themes/conventions/condonoruse.cfm>

Definition of Query:

The query is concerned with how anti-corruption conventions can complement the work of the Extractive Industries Transparency Initiative (EITI). The questioner makes suggestions and opens up several issues for debate. In our U4 Expert Answer we try to respond to the suggestions made and to provide some more background to the issues. The subject is certainly one that could be discussed further within the U4 forum.

Part 1: Information on the EITI

The Extractive Industries Transparency Initiative (EITI) is designed to increase transparency in revenue flows between oil, gas and mining companies and their host governments, in essence to monitor and publicise these revenues so that

Authored by:
Dr. Victoria Jennett
U4 Helpdesk
Transparency International
vjennett@transparency.org

Date:
07 September, 2006



citizens can hold their governments to account for their use of the money. The goal is to use revenue transparency to help tackle poverty, conflict and corruption in what has come to be known as the “resource curse”, or the “paradox of plenty”.

EITI is a multi-stakeholder initiative involving representatives from national governments, the extractive industries, intergovernmental institutions and civil society, the first of its kind to bring together so many different stakeholders. Today, twenty-one countries have committed to implement EITI. Twenty-two companies are involved, as well as civil society, investors, donor governments and international organisations such as the International Monetary Fund and the World Bank.

What makes EITI special is that it is a voluntary agreement - the actors participating in EITI want to be involved despite the fact that they have no legal obligation, in many cases, to do so. In the case of each actor, they have joined the initiative because they felt they had something to gain, whether it may be a more attractive environment for Foreign Direct Investment, a signal of good governance which can attract donor nations and institutions, or improved corporate reputation/corporate social responsibility for business. Compliance to an initiative is always higher when it is intrinsically motivated rather than externally imposed.

Peter Eigen, the Chair of the International Advisory Group, EITI has recently addressed some of the issues at stake in this query. http://www.transparency.org/publications/newsletter/2006/july_2006/spotlight What follows is a summary of his comments. The recent development in Nigeria, where EITI commitments are being codified in law, may be of particular interest to the questioner. Using the law is certainly one means of making progress on EITI commitments: however the challenges and difficulties of gathering sufficient evidence to make a legal approach effective is one of the reasons why international development actors have sought non-legal approaches and voluntary commitments from countries, companies and other stakeholders.

Increased awareness and stated commitments on the part of stakeholders
Four years into the initiative, the number of participants and stakeholders in the process is growing. Nigeria and Azerbaijan, countries at the forefront of implementation, have published their first extensive audits. Their citizens can now see for the first time how much money is collected for their resources, empowering them to monitor how the government spends that money. In addition, the Group of Eight (G8) industrialised nations specifically endorsed EITI at annual summits in 2004 and 2005. In some cases, international lenders such as the World Bank and its subsidiary the International Finance Corporation have pledged to make revenue transparency a requirement for all financing of extractive-sector projects.

Monitoring implementation of EITI

Many countries are at different stages of implementation, leaving people to question the meaning of “implementing EITI”. While Nigeria and Azerbaijan are at the final stages of implementation, other countries have indicated their support but have not fully developed a work plan; others have not moved beyond an oral commitment. This raises the issue of how to validate countries’ claims of implementation. Effective arrangements are required to ensure that governments and companies comply with EITI criteria throughout the four stages of implementation: sign up, preparation, disclosure and dissemination. For example, repression of civil society in an implementing country violates EITI principles. The validation process, currently in its closing stages of development, addresses the challenge of ensuring that implementation is “real”.

On 20 June 2006, the IAG agreed a new basis for validation, with two objectives: to ensure that a country that has produced an EITI report is implementing in accordance with EITI principles and criteria; and where no report has yet been produced, to measure a country's progress. Any country that claims to be implementing EITI will need periodically to validate that claim. The EITI board may also ask a country to undergo validation if a lack of "meaningful" progress is perceived. If a lack of progress is confirmed, the country will be removed from the list of implementing countries.

"Meaningful" is an important concept: EITI does recognise progress in addition to absolute achievement, and it may take some countries several years to develop the structures for successful implementation. Country-specific context must also be taken into consideration.

Implementing countries are required to ensure that all extractive industry companies, foreign and domestic, submit their data. One way is to encode EITI in law, as is being done in Nigeria. Azerbaijan has followed a different route, persuading companies to sign a memorandum of understanding covering the terms of their involvement in the process. Most important is to ensure that all material payments are covered by the auditors' report. Companies should also commit to transparency in all their operations, and not claim compliance in one country whilst lobbying against its adoption in another.

Addressing gaps in participation and implementation

A number of countries currently implementing EITI have raised the urgent need for full involvement by companies from emerging economies. In growing economies like Brazil, China, India, Russia, and South Africa, the need for oil and gas is increasing. Rising energy needs in China accounted for 40 percent of the growth in oil demand over the last four years. As global demand increases, countries may resort to paying bribes to secure access to oil reserves. A lack of commitment to transparency from these countries and companies has the potential to undermine EITI progress.

The question of incentives is an important one. How can countries be convinced to implement EITI with oil prices so high? How can national oil and energy companies in emerging economies be convinced to sign up when their main concern is securing a steady supply of oil?

While some resource rich countries may not currently see a tangible benefit to implementing EITI, many countries and companies see long term benefits. To be seen as implementing EITI offers a huge reputational advantage, as well as potentially increasing energy security and long-term investment security. The IAG recognised both direct and indirect incentives, and has developed suggestions to make them more attractive. In the case of indirect incentives, more research is needed to demonstrate the connection between EITI implementation and benefits like improved energy security and business climate. In terms of direct incentives, EITI implementation can be an indicator in performance assessments, for example, for use by donor governments and international financial institutions for funding, as many resource rich countries are dependent on this aid.

There are many benefits to implementation of the Extractive Industries Transparency Initiative. Transparency in the oil sector can improve overall budget accountability and make the environment more attractive for foreign direct

investment. As a sign of good governance, implementation can attract donor nations and institutions, and improve the corporate reputation of businesses.

But much work remains. Supporters of EITI must push for more countries to adopt its principles. Rapidly developing economies should endorse it in their oil production and importation. Developed countries should insist on rigorous implementation from companies headquartered within their borders. In the years ahead, EITI should build on successes in the oil and gas sector, moving forward quickly to include solid mined minerals, and possibly industries such as forestry and fishing.

Most importantly, as accurate information about the collection of revenue becomes available in countries implementing EITI, donors and civil society must seize the opportunity to open discussion of how that revenue is used, a question central to their successful development.

Part 2: Using anti-corruption conventions to support the work of EITI

Anti-corruption Conventions contain measures that should make it easier to comply with EITI. The UNCAC emphasis on public and private sectors is consistent with government and company commitments to EITI. EITI is a necessary and good international standard but is not the maximum that can be reached and conventions play a role in paving the way for increased commitments.

Donors and civil society can promote ratification and accession to the anti-corruption conventions and in so doing ensure that EITI commitments are realised. They can also play a role in highlighting behaviour that is contrary to the Conventions, for example many countries have adopted laws that call for the declaration of assets. These laws are either ignored or selectively applied. Conventions, with their monitoring mechanisms should permit pressure groups to make this fact a public issue. Donors should use their influence to bolster political will of governments, as well as influence companies within their own jurisdictions, to comply with Convention provisions and EITI commitments. Several guides to promoting anti-corruption conventions and making them work exist. Although they do not all specifically refer to EITI countries and although many may be addressed specifically at civil society, we recommend you consult these for further ideas:

- Anti-corruption Conventions in the Americas: What civil society can do to make them work
http://www.transparency.org/content/download/6978/42645/file/Guide_Conventions_Americas.pdf
- Muna, Akere, Understanding the African Union Convention on Preventing and Combating Corruption and Related Offences (TI 2004)
The author is a Lincoln's Inn barrister, member of the Cameroon Law Society and member of the Board of Transparency International and prepared for TI a useful explanatory booklet of about 50 pages on the African Union Convention aimed legislators, journalists and NGO activists.
- Kolawole Olaniyan, African Union (AU): Convention on Preventing and Combating Corruption: introductory note, 43 Int'l Legal Mats. #1, Jan 2004, p1
- Mpazi Sinjela, Mpazi, The African Union takes a legal stand on corruption, African Yearbook of International Law; vol. 11, p143-159 / 2005

- Schroth, Peter W., National and international constitutional law aspects of African treaties and laws against corruption, Transnational law & contemporary problems; vol. 13, 1, p 83-108, 2003

How does UNCAC relate to the work of the EITI?

The extent of UNCAC's provisions on the private sector is particularly noteworthy. All these provisions can be used to compel companies to live up to their EITI commitments. They include, amongst others:

- Promotion of standards and procedures, such as codes of conduct, to safeguard the integrity of private entities.
- Promotion of transparency among private entities.
- Prevention of abuse of procedures regulating private entities, including those regarding subsidies and licences granted by public authorities.
- Preventing conflicts of interest by imposing restrictions on private sector employment of public employees leaving the public sector.
- Ensuring auditing controls in the private sector.
- Ensuring accounting and auditing standards.
- Prohibition of tax deduction of expenses that constitute bribes.

Article 12 UNCAC in particular, requires prohibition of off-the books accounts and transactions, of recording non-existent expenditure, of incorrect identification of liabilities, of use of false documents and intentional destruction of bookkeeping records earlier than prescribed by law.

Similarly the provisions regarding the public sector can be used to compel countries to abide by their EITI commitments. As indicated above, further discussion of conventions can be found on the U4 thematic webpages.

How does OECD Convention relate to the work of EITI?

The OECD Convention on Bribery of Foreign Officials in International Business Transactions (OECD Convention) is the most focused of the major anti-corruption conventions in terms of subject matter. Its aim is to "address the supply side of bribery by covering a group of countries accounting for the majority of global exports and foreign investment". It does so by providing a framework for developed countries to work in a coordinated manner to criminalise the bribery of foreign public officials in international business transactions. The 36 states (30 OECD and 6 non OECD) that have ratified the OECD Convention have undertaken to introduce criminal sanctions against such bribery. The obligations of the parties to the Convention regarding private sector are that states must establish the liability of companies to prohibit accounting practices that enable the bribing of foreign officials or that allow disguising of such bribery. Thus, parties are required to prohibit the establishment of off-the-book accounts and similar practices used to conceal bribery.

By contrast EITI's aim is to introduce transparency to just oil revenue (not the revenue management process): nevertheless the two are complementary.