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Workshop Summary Report Governing Extractives on a Global Scale: Challenges and Opportunities

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Extractive industries, which focus on extracting natural resources such as oil and minerals from the ground, are crucial for the global economy, but they are frequently accompanied by corruption, poor governance, environmental degradation, and human rights abuses. Revenues are often siphoned off by individuals and lax oversight fails to contain pollution or address the mistreatment of workers. This inspires resentment from local communities, which in turn can foment violent conflict. In an attempt to interrupt this destructive relationship, multilateral organizations and civil society groups have built a number of governance structures over the past few decades. In general, these have focused on increasing transparency, pressuring governments to provide public services by using tax revenues. One of the more recent initiatives, the Extractive Industries Transparency Initiative (EITI), requires that participating countries mandate that extractive companies disclose payments and that governments disclose receipt of payments. Another increasingly popular strategy involves supporting “contract transparency,” or requesting that companies disclose contracts so that civil society knows if governments have negotiated terms that will benefit local populations. Both sets of approaches are promising, but provide no guarantee that transparency translates into actual improvements in living standards. To assess policy options, the workshop “Governing Extractives on a Global Scale: Challenges and Opportunities” explored the successes and challenges facing today’s governance mechanisms.

Session One

How Well Are Existing Extractives Governance Initiatives Doing?

The extractive industries hold rich potential to contribute to economic development worldwide. The challenge lies in creating and implementing industry-wide standards of governance, to ensure that the wealth generated by natural resource extraction contributes to broadly shared social prosperity and sustainable development, rather than engendering poverty, conflict, and corruption. Existing governance mechanisms on both the domestic and multilateral level seek to hold companies and governments to higher environmental and social standards, but these have often struggled to prevent exploitation. In the past decade, activists and policymakers have increasingly championed transparency as a potential solution, with an emphasis on demanding accountability from both host governments and multinational corporations. Transparency has the potential to improve management and governance in resource extraction, reduce corruption in the private and public sectors, and increase benefits for citizens on the ground.

A number of existing initiatives seek to address the governance gap in the extractive industries. These initiatives range from legally binding domestic and industry-level regulations to global voluntary codes of conduct and guidelines for best practices. However, the volume of initiatives, standards, and regulations has created duplication and overlap. This raises the question of whether the solution lies in creating new initiatives or in reforming existing schemes to address current gaps. Several participants proposed fusing existing initiatives into one overarching umbrella organization. Alternatively, one participant suggested that existing global initiatives should be replaced with country-level or regional initiatives that avoid a one-size-fits-all approach to the issue, as capacities and challenges vary. Another major problem these initiatives face is the vast difference in commitment among their members. For voluntary initiatives with weak or nonexistent enforcement mechanisms or penalties, this challenge is compounded.

The issue of host government capacity, and often lack thereof, is an acute problem for existing mechanisms that require substantial resources for implementation. When resource-rich but underdeveloped countries lack institutional capacity, the consequences are all too real. As one participant noted, in a country like the Republic of Congo—where extractive industries makes up 85 percent of government revenue—improving governance in the extractive industries is “a matter of life or death.” It is therefore crucial that existing initiatives, with the support of civil society, rethink how to build institutions in countries receiving this investment. Furthermore, participants noted, companies have a responsibility to contribute to development by creating contracts that ensure that revenues are accounted for and used by governments to build social welfare and institutional capacity. One option—transparent contracts—theoretically allows citizens to identify revenues that are siphoned off by corruption and to pressure governments to account for them.

Designing successful governance mechanisms requires recognizing the essential and unique roles of the myriad actors that are involved in extractive industries, including government, civil society, and the private sector. Only governments have the authority to ensure implementation of legal regulations, although civil society is vital to ensuring accountability. Meanwhile, the private sector has an integral role in implementing honest business practices and rooting out corrupt or unfair practices. Unfortunately, governments often lack the resources, political will, or institutional capacity to oversee implementation of governance mechanisms. At the same time, civil society requires freedom of expression and civil liberties that are constrained or nonexistent in many resource-rich countries.

Finally, private companies are often wary of implementing transparency initiatives for fear of operating at a competitive disadvantage in noncompliant countries.

Participants noted that these initiatives will struggle to achieve their goals unless they can also incorporate other actors and issues. First, many current initiatives fail to adequately include major emerging economies like the BRICS countries (Brazil, Russia, India, China, and South Africa). As a result, state-owned enterprises from these countries, which conduct extensive operations in many extractive industries around the world, are not subject to the same mandates as Western companies whose governments have acceded to transparency initiatives. Second, governance initiatives often fail to address reform of the security sector. This is a major oversight, since countries with natural resource wealth have a 50 percent greater risk of experiencing conflict. Resource-related conflicts tend to last twice as long and result in double the number of casualties, and are more likely to include mass human rights abuses than other conflicts. Until governance initiatives integrate these actors and issues, participants were skeptical that they would achieve their goals.

Finally, participants pointed to the importance of incentives in encouraging actors to cooperate with, implement, and abide by standards of governance. It can be expensive for companies to adhere to industry standards and reporting mechanisms, and it is costly for governments to scrutinize companies' performance in fulfilling these obligations. Particularly when it comes to enforcing voluntary standards, it is easy for companies to cheat and get ahead by doing so. Existing initiatives, participants agreed, do a poor job of creating incentives for private sector compliance. Indeed, the role of incentives is poorly understood and is a critical area for future focus by policymakers.

Session Two

How Can Voluntary Initiatives Be Improved?

Voluntary initiatives and codes of conduct serve to strengthen governance in the extractive industries, especially at the international level, where industry-wide regulation is often inconsistent or unfeasible. And yet, the effectiveness of these initiatives is often undercut by gaps in participation, enforcement, and accountability. Still, participants generally agreed that voluntary mechanisms have come to play an essential and legitimate role in providing companies and governments with functional guidance and a foundational knowledge of best practices. The priority should be building industry-wide acceptance, improving implementation, and expanding oversight.

The Extractive Industries Transparency Initiative is perhaps the most prominent voluntary initiative. Some participants objected that EITI is “voluntary” in only a partial sense. Namely, governments can choose whether to implement the standard. Once a sovereign country decides to join the initiative, however, its government needs to disclose all payments to and from extractive companies operating within its borders. Furthermore, where the EITI is adopted, it is mandatory for all companies operating in and from that country to be compliant. Others pointed to the EITI as a laudable example for other voluntary initiatives, inasmuch as its implementation mechanisms are significantly stronger than those of most voluntary initiatives. They also praised the EITI for its inclusive board, comprising not only representatives from governments and the private sector, but also from civil society and international institutions. Nonetheless, other participants argued that many developing countries lack the institutional capacity to ensure accountability and transparency in EITI compliance.

Another major initiative is the Guidelines for Multinational Enterprises, which the Organization for Economic Cooperation and Development (OECD) has developed. They are non-legally binding recommendations on ethical business practices for multinational corporations operating in or from countries that adhere to the OECD Declaration on International Investment and Multinational Enterprises. These guidelines are not specific to the extractive industries, but do cover them. Participants pointed to the guidelines' continuous evolution (since they were first adopted in 1967, the guidelines have been updated five times) as a lesson for other initiatives in adapting to the constantly changing economic and business landscape. One participant discussed the relevance of the 2011 update, noting the addition of Professor John Ruggie's "protect, respect, and remedy" principle as well as the addition to the policies section that recommended that companies conduct risk-based assessments. In a step to integrate China into accountability efforts, the OECD guidelines were published in Mandarin for the first time this year. Furthermore, in response to criticism that the National Contact Points (NCPs) were inconsistent and demonstrated uneven performance across countries, the OECD is moving toward increasing consultation with local actors to bolster the capacity of weaker NCPs.

Participants noted that efforts increasingly aim to reduce competition among and harmonize existing multilateral initiatives and guidelines. For instance, the OECD is a partner organization of the EITI and has endorsed the EITI standards. One participant even suggested bringing existing mechanisms under a single umbrella institution, to create coherence and to reduce overlap. Others were skeptical of such ambitious aims and argued that maintaining a variety of mechanisms could encourage strong governance, as each mechanism plays its own part (for instance, in securing human rights or providing knowledge on how to better implement sustainable environmental practices). Other participants called for creating new initiatives based on lessons learned and identification of gaps that existing governance mechanisms do not address.

In examining how to strengthen and reform existing voluntary initiatives, participants weighed the benefits of broad, inclusive initiatives versus more targeted efforts. One participant noted that the former approach could reach a larger audience. Others countered that broad initiatives—such as the United Nations (UN) Principles for Business and Human Rights—were likely to have weaker standards, and even when implemented, were likely to be implemented variably across countries, undermining their legitimacy. Smaller, more nuanced initiatives, in contrast, could tackle specific problems in specific scenarios, avoiding the pitfalls of one-size-fits-all approaches.

The conversation then turned to the question of distinguishing between voluntary and legally requisite initiatives. Some participants warned that this debate could distract from designing more effective governance—and that the focus of analysis should be on enforcement and accountability. The Voluntary Principles on Security and Human Rights in Business, for instance, are strongly worded and would improve governance if they were implemented; but unfortunately, they have achieved little because they lack an enforcement mechanism. Participants observed that certification programs—which require certain standards be met and verified before membership or "compliant" status is awarded—would help improve accountability in extractive industries. But one member argued that unless there are measurable metrics, certification programs will not achieve much. Several participants agreed that initiatives that rely on certification programs should have strict rules that

require a company or country to continue to assiduously implement standards in order to maintain its certified status. Others suggested that accountability was only possible through third-party verification (undertaken by an independent company or civil society group) of a member's compliance with a set of standards.

Participants also discussed the essential roles that civil society and businesses play in ensuring enforcement and accountability. Some argued that when policymakers are designing governance mechanisms, they should consult with civil society from the outset, rather than wait to seek support when it comes to the implementation phase. Unfortunately, in most cases voluntary initiatives are led from the top down without consultation with civil society or private business, which might otherwise offer unique and critical perspectives. Furthermore, one participant noted that management consultants could help voluntary initiatives understand how to embed their standards in management systems or develop incentives that better encourage compliance.

Lastly, workshop participants discussed the relevance of local-level participation in voluntary initiatives to govern extractive industries in resource-rich countries. In many countries, governments lack the resources or will to enlist local communities in such arrangements. Civil society involvement is also complicated where there is limited access to the Internet or low literacy. In many cases, the goals and rules of governance mechanisms are not articulated to local communities or even translated into a language the local community can understand. One participant suggested that dissemination of information about these initiatives should be tailored to each country's circumstances (e.g., through radio broadcasts, news bulletins, pamphlets, or campaigns led by community or religious leaders). Another noted that initiatives should promote development as the ultimate goal, because devoting precious resources to a governance initiative should benefit their citizens, to whom they are accountable. Finally, the international development community and donor governments have a responsibility to give civil society the means to strengthen institutional capacity on the ground before voluntary initiatives can be effectively implemented.

Session Three

Is Contract Transparency the Answer?

Underlying many of these voluntary initiatives is the idea that fully disclosing contracts to the public—or contract transparency—allows citizens to hold governments and investors accountable. Over the past decade, this norm has steadily earned support in settings as diverse as Mexico, Mozambique, and the European Union. Increasingly, national governments and private companies have disclosed contract data, after which nongovernmental organizations (NGOs) and civil society organizations have helped make that data available to the public. At the same time, multilateral organizations such as the International Monetary Fund (IMF) and the World Bank have increasingly advocated for contract transparency. The International Finance Corporation (IFC) performance and sustainability standards now require the disclosure of contract data. The EITI, as one of the most visible initiatives implementing revenue transparency, also underscores the benefits of contract transparency for both the extractive industries and national governments.

Acceptance of the norm varies among sectors and across countries. In general, the mining industry has embraced the norm more enthusiastically than the oil and gas industry. Furthermore, some national

governments fear that if companies agree to contract transparency, they will argue that they have already provided full transparency and use it as an excuse to avoid participating in other governance initiatives that improve transparency (such as disclosing payments made to governments). Consequently, the track record of contract transparency thus far has been mixed.

The main actors—government, the private sector, and civil society—share incentives to publish contracts. From the perspective of governments, advantages include:

- a reduction over time in global information asymmetries, which should enable officials to sign smarter contracts that benefit from a full picture of global markets;
- a means of leveraging public pressure to their competitive advantage; and
- a mechanism for holding private companies accountable over the lifetime of natural resource development projects.

For their part, private companies can also benefit from contract transparency, because it requires that their partner governments also fulfill their obligations. Furthermore, it reduces the risk of reputational damage since it forces a company to consider local concerns from the outset. Finally, for local civil society representatives, the advantages are obvious: knowing the terms of a contract provides them with vital information in the fight against corruption or exploitation of local communities.

However, these incentives do not always align. Companies and governments alike may fear public backlash after publishing a contract. Many governments are conscious that they will, fairly or unfairly, be held responsible for poor contracts signed in the past, especially if a previous government did not have the information or experience to drive a hard bargain with multinational corporations. Retroactive disclosure of inequitable terms can lead to harsh domestic criticism, regardless of whether the sitting government was in power at the time the deal was negotiated.

Participants suggested that one way of addressing this issue is to encourage governments and companies to see transparency as a means of managing expectations. Releasing the data early helps citizens understand from the outset what the project entails and how it will benefit the local communities. This approach helps reduce the chances that public demonstrations will motivate governments to force future renegotiations of contracts and consequently delay projects, inflicting considerable losses on the investors.

Contract transparency provides other advantages to governments as well. Often, government officials with natural resource-related portfolios operate with little coordination among each other. Transparency can help build bridges between agencies about management and oversight responsibilities. In addition, citizens' groups and researchers can use disclosed licenses to help governments improve planning and bolster their negotiation skills for future contracts. Contract transparency can also help create a more stable investment climate by boosting confidence that governments will meet their obligations and thus improve a country's access to capital.

Despite these incentives, participants identified one obstacle to expanding support for contract transparency: lack of empirical evidence demonstrating that it improves governance of natural resource development. Participants agreed that a study of Peru could be useful, because the country

has a long track record of contract disclosure. This would allow experts to analyze the effects of contract transparency over time, including whether levels of foreign investment dropped and whether releasing contracts reduced future disputes about contract terms. To support such empirical studies, the participants noted, the NGO and academic communities should agree on a set of indicators to compare the success of contract transparency across countries.

Experts should also seek to clarify what details of a contract need to be released to uphold the norm of contract transparency. Though the norm appears to suggest publishing the entire contract, complete disclosure is not imperative. Perhaps, for example, the data gathered in order to draw up the contract might be most valuable to the public, argued one participant.

Adding a contrarian note to this discussion, one participant argued that the practice of regulating extractive industries in developing countries by negotiating individual contracts with investors is in fact detrimental. In the developed world, the participant observed, extractive industries are typically managed by regulations that are established in legislation. By contrast, allowing governments the discretion to negotiate on a case-by-case basis often invites corruption. When governments are dependent on state corporations for financial flows, they also have an interest in ensuring that state corporations remain free to make contracts that are closed to the public to avoid scrutiny of that relationship. Furthermore, negotiating contracts for each project requires extensive resources from the local government, which many developing countries lack.

Other participants added that focusing only on transparency in the contractual enclave for natural resources risks deflecting attention from wider legislative and governance reforms that would support broader development. To be sure, such a broad reform agenda could carry drawbacks. Legislation is not irreversible, so companies risk losses if a subsequent government decides to repeal the laws. Governments might also fear that promulgating general legislation will render them less competitive if other countries avoid similar legislation.

However, contracts will continue to be used in the interim and transparency is necessary for all parties to negotiate the best possible deal. Though the burden of transparency is too often shifted onto companies, it should be evenly distributed between governments and corporations and pressed for by civil society. Transparency is essential for companies to operate successfully and to empower civil society. And for governments, it encourages a stable and sustainable investment and political climate.

Session Four

Empowering Civil Society: Information as a Tool for Accountable Governance

Contract transparency alone cannot root out corruption and prevent abusive exploitation of natural resources. Once the contract—or some form of it—is published, civil society and external actors should be able to harness the data and exert pressure on a government or corporation that is participating in corrupt or harmful activity. Fundamentally, then, nonexperts should be able to interpret the information. However, natural resource contracts and business operations are wildly complex. Multilateral organizations and policymakers should therefore forge initiatives to help civil society groups understand the legislative processes, oil and gas life cycle, profit expectations, and

payment structures. Information should be presented in a way that can facilitate a public debate in local communities.

Participants observed that careful consideration of what is meant by “civil society” and “accountability” should underpin discussions of how to better involve nongovernmental groups in monitoring compliance with voluntary initiatives. There is no single process to establish the legitimacy of a civil society representative. In some cases, individuals that are chosen to speak on behalf of one large group may not, in fact, present consensus viewpoints developed through discussing the matter with its entire membership. For example, industry associations do not necessarily disclose their membership, and therefore it is difficult to determine whether they are representing the interests of all those they claim to represent. As a result, participants suggested that the first step should be to establish a selection process that ensures a wide range of perspectives are reflected at the table.

Globally, civil society groups are not always eager to participate. In some countries, civil society groups fear that joining a broadly inclusive process will undercut their credentials as critics, whether of their government, foreign corporations, or domestic industry operators. In other countries, insufficient capacity to monitor execution of contracts remains the primary challenge. Where governments have little or no experience in monitoring natural resource governance, local communities are often even less prepared to track adherence to governance standards. Even in developed countries, capacity building is challenging; one participant observed that U.S. efforts to reach out to civil society groups in the United States about the EITI had often struggled to find groups that had enough background in natural resource governance to participate in a meaningful way. Consequently, some participants advocated greater efforts by international civil society and multilateral organizations to train local civil society groups.

It is imperative for civil society groups working to improve governance of extractive industries to carefully tailor their missions to specific audiences. Civil society organizations need to be able to mediate between information providers and consumers. Mining, gas, and oil companies (among others in the sector) should not be solely responsible for explaining their actions to the public; civil society should also help translate data into information that can be used to drive policy reform.

In many countries, this will be an uphill battle, especially where authoritarian governments are unwilling to tolerate public criticism and are thus violently oppressing civil society. This is a serious concern as civil society organizations are unable to serve as an effective force for change when their safety is threatened, and there is evidence that some groups have been threatened for advocating participation in the EITI framework. Participants pointed to Azerbaijan and Liberia as examples of countries where the situation for civil society groups—including those involved in the EITI—has deteriorated significantly. These threats are particularly severe where there is competition for and conflict over access to resources.

Threats to civil society groups hamper their ability to use information as a tool for accountable governance. For contract transparency to lead to accountability, the political environment should accept—and ideally encourage—the robust and sustained participation of civil society. A pressing challenge for the EITI is how to respond to countries that are technically compliant with the EITI standards but repress civil society and obstruct its integration into the EITI conversations. To date, the

EITI has not developed a mechanism to sanction or call attention to countries that officially adhere to the standard, but that undercut its effectiveness by persecuting civil society groups. Indeed, the EITI has not even attempted to broach the subject in a meaningful way and EITI donors have not pressed the issue.

This imperative of civil society involvement raises the critical question of whether to admit repressive governments into the EITI, or other voluntary agreements, and risk delegitimizing the initiative, or to remain open to repressive governments with the hope that their interactions in the forum will foster more openness.

Regardless, neither the original nor the revised EITI standard (which was released in 2013) was designed to protect civil society or to define the parameters of countries' efforts to improve resource governance. The revised EITI standard is intended to require disclosure of payments between companies and governments as a mechanism for ensuring accountability. One participant argued that its overarching goal is to ensure reasonably helpful, lowest-common-denominator requirements to participate.

Still, since certain governments may retaliate against civil society in response to data that uncovers corruption or criticizes their negotiating strategy, external actors pushing for transparency have a collective responsibility to empower and also to protect transparency advocates from harm. The need to protect activists is expanding as more data is made available and more individuals are simultaneously empowered and put at risk. The secretariats of voluntary initiatives—and the relevant agencies in democratic governments—should therefore consider developing a mechanism to alert all individuals and groups with the capacity to help in the event of an unwarranted reprisal.

Conclusion: The Future of Extractives Governance

Throughout the workshop, participants emphasized five themes. First, civil society and NGO involvement in increasing accountability in the extractive industries has expanded rapidly over the past two decades and is likely to continue growing. Second, contract transparency could be an invaluable tool, but it requires broader support. If corporations investing in extractives would openly state that they would be willing to have contracts published, this would give developing countries more confidence to implement the norm. Third, contract transparency, and the information that is disclosed via voluntary initiatives, needs to be presented in a coherent way for various constituencies to effect change. To do this, civil society groups and the international development community should invest in mechanisms for communicating data to the public and training local civil society groups to interpret that information.

Fourth, many participants emphasized that focusing on constructing a new global initiative in response to frustration about implementation of existing initiatives would be counterproductive. Rather, the international aid community and representatives from the extractive industries should devote their resources to designing platforms that are accessible and comprehensible for local communities. Civil society groups should identify the data most relevant to various communities and target their requests to government and companies accordingly. Similarly, governments and private companies should evaluate what they can release that will be most helpful to various constituencies.

Fifth and finally, the success of contract transparency depends on amassing empirical evidence that demonstrates that transparency increases accountability, reduces corruption, and diminishes abusive exploitation of people or the environment during resource extraction processes. This should also focus on how contract transparency could further broader development objectives.

Some participants cautioned, however, that contract transparency is still new and that efforts to evaluate it may be premature. Voluntary initiatives on contract transparency are still developing. Focusing solely on progress to date could preempt further progress before these initiatives have a chance to gather momentum. Nevertheless, participants agreed that establishing and monitoring indicators of progress remains critical, as is acknowledging that indicators will inevitably vary to some extent among countries according to their baseline capacities.

Transparency in the extractive industries should not be viewed in isolation from the wider objective of sustainable development. The core obstacles preventing governments from supporting effective transparency mechanisms—institutional infrastructure and capacity deficits—are the same challenges that stymie many other development goals. Governments in many developing countries simply do not possess the capacity to perform day-to-day monitoring of compliance with extractives regulations and ensure that contractual and legal obligations are respected. There are no easy approaches to strengthening government capacity. Nesting contract transparency squarely within sustainable development plans is therefore imperative. This would also include initiatives to help countries draft and implement legal frameworks that govern the private sector more consistently.

To achieve this goal, government aid agencies from numerous donor countries will need to boost their coordination and cooperation. Participants suggested that one possible next step would be to facilitate a discussion between the relevant agencies to discuss a coordinated effort to improve governance in the extractives sector.

Fundamentally, however, participants emphasized that the success of these initiatives requires that local governments fully commit to improving oversight of natural resource extraction. Only governments are endowed with the authority to legislate mandatory disclosure, to distribute tax revenue to local citizens, and to spearhead security reforms that reduce resource-related conflicts. To be sure, donor countries and corporations can support reform efforts by educating themselves about local power asymmetries and attempting to avoid empowering some actors at the expense of marginalizing others. However, local governments should support contract transparency and initiatives to improve governance of the extractive industries in order to be effective.