

Global and Regional Mechanisms for Governing the Resource Curse in Africa

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Introduction

Global and regional mechanisms for natural resource governance such as Publish What you Pay (PWYP), Extractive Industries Transparency Initiative (EITI), the Kimberley Process Certification Scheme (KPCS), the U.S. Congress' Frank-Dodd Act, and the African Mining Vision (AMV) have evolved against the backdrop of ideas and practices undergirding the resource curse. The latter has been popularized to capture the conflicts, instabilities, and economic inequities faced by poor countries endowed with natural resources. To address these negative outcomes, international and regional actors have sought to craft governance mechanisms that promote sustainable utilization of natural resources. But recent publicised news accounts illustrate the tremendous obstacles that these instruments have confronted. First, the Kofi Annan African Progress Report 2013 entitled *Equity in Extractive Industries* revealed that between 2010 and 2012, the Democratic Republic of Congo (DRC) lost over \$1.3 billion in revenue through the undervaluation of assets and sales to foreign investors in "highly opaque and secretive deals."¹ This figure was double DRC's health and education budgets combined. In response, the DRC's minister for mining asserted that the "country had lost nothing . . . the assets were ceded in total transparency."² Second, the same report charged that between 2005 and 2009, 500,000 copper mine workers in Zambia paid a higher rate of tax than major multinational mining firms.

Third, amidst reports by the Canadian NGO, Partnership Africa Canada (PAC), that Zimbabwe's President Robert Mugabe and his ZANU-PF allies had plundered the country's diamonds to the tune of R16 billion, former South African President Thabo Mbeki urged members of the African Diamond Producers Association not to allow Western powers to abuse the Kimberley Process to overthrow Mugabe's government. But ostensibly seeking a balanced voice on Zimbabwe, Mbeki "implored the Zimbabwean government to ensure that the country's diamond industry is not governed by a predatory elite that use access to power to enrich itself in collusion with mining companies at the expense of the public."³ At the same time, in his 2012 budget, Zimbabwe's finance minister claimed that while the government had promised \$600 million in diamond revenues to finance crumbling health care, education and other public services, he had received only one-fourth of that pledge.⁴ Finally, in March 2013 the African Development Bank (AfDB) and the Global Financial Integrity (GFI) observed that Africa lost \$1.4 trillion in illicit financial flows between 1980 and 2008, far exceeding foreign aid over the same time period.⁵

1 Africa Progress Report 2013, "Equity in Extractives: Stewarding Africa's Natural Resources for All," <http://www.africanprogresspanel.org/publications/policy-papers/africa-progress-report-2013/>

2 AllAfrica.com,

3 "Mbeki Stirs Zimbabwe Gem Pot," South African Press Association, November 13, 2012. For the PAC report see "Zimbabwe's Marange Diamond Funds Plundered," Duetsche-Welle, November 13, 2012.

4 Political Analysis South Africa, "Report States that Zimbabwe's Diamonds Revenues go Into the Pockets of Political Elites," <http://www.politicalanalysis.co.za/2012/11/19/report-states-that-zimbabwes-diamond-revenues-go-into-the-pockets-of-the-political-elite/>

5 African Development Bank and the Global Financial Integrity, "Illicit Financial Flows and the Problem of Net Resource Transfers from Africa 1980-2009," May 2013, <http://africanetresources.gfintegrity.org/index.html>

These reports underscore the efficacy, legitimacy, and credibility crises of global and regional mechanisms for resource governance. An interesting question to ponder is why despite their proliferation, these institutions have hardly addressed the enormous problems around natural resource governance. Why are these instruments weak and how can these weaknesses be overcome? This paper attempts to probe questions of the evolution and performance of these mechanisms from the perspective of international regime formation. When and how do international governance regimes emerge? How does the coalescence of actors and institutions around these regimes affect their ability to perform effectively?

The paper suggests that global and regional natural resource governance mechanisms face severe constraints for two reasons. First, they are fundamentally regimes of restraint that seek to contain errant and predatory elite behaviour in weak, corrupt, and dysfunctional states. Crafted largely in the context of civil wars, these mechanisms have increasingly hampered the evolution of practices anchored in solid local frameworks of responsibility and national ownership. Second, as governance mechanisms, regimes of restraint have been weakened by the inordinate fixation with transparency at the expense of accountability and participation. In overcoming the flaws in regimes of restraint, this paper proposes regimes of responsibility which potentially privilege the construction of consensual, collective, and participatory mechanisms on natural resource governance without the overbearing hand of external actors. Unlike regimes of restraint, regimes of responsibility also entail a broad conception of governance that better links transparency to accountability and participation. The assumption that the benevolent hands of external actors can restrain local actors needs to be replaced by creative efforts toward building strong African institutions that govern natural resources.

The first section addresses the conceptual debates on the evolution of global transparency, a salient component of the regimes of restraint. The objective is to assess how important actors have articulated these regimes; this section also outlines the major assumptions of the alternative regimes of responsibility. The second section examines the major global and regional mechanisms through an assessment of strengths and weaknesses. The conclusion briefly revisits the conceptual debates on balancing restraints with responsibilities in light of on-going debates around natural resource governance.

International Transparency Regime Formation

Transnational processes have spurred ideas, practices, and networks that seek solutions to new and old global problems. At the centre of these processes have been attempts to manage global problems around the economy, ecology, environment, and human rights. Many scholars have identified the role of ideas and policy entrepreneurs in galvanizing various transnational

movements.⁶ Policy entrepreneurs have teamed up with civil society organizations, governments, and international institutions to influence substantive changes in approaches to dealing with these problems.

The transparency revolution at the heart of the natural resource governance arose in the triumphalist phase of global neo-liberalism that celebrated market efficiency, limited states, and good governance. But this triumphalism was counter-balanced by the profound pessimism occasioned by civil wars, failed, and collapsed states in most of developing countries. These two trends deepened the disciplinary drive of the emerging regimes of restraint that Collier had popularized in the 1980s as the underpinnings to the externally-driven Structural Adjustment Programmes (SAPs).⁷ Transparency became neo-liberalism's core tenet to foster economic openness but also an antidote to the destructive governance practices identified with developing countries, notably corruption, conflict, and corporate irresponsibility. Hauffler uncovers these links:

Liberalism anoints the private sector as having significant legitimacy and authority, while simultaneously delegitimizing expansive government action. In this environment, transparency is viewed as a way to regulate the private sector, and information disclosure as efficiency-enhancing and necessary for the proper functioning of markets. Liberal norms of democratic accountability also require public disclosure of information in order to have an informed citizenry. The normative environment today includes ideas about corporate responsibility, which is widely supported by publics around the world. All of these – market efficiency, democracy, and corporate social responsibility – support and facilitate the adoption of policies of information disclosure by corporations as a means of achieving public benefits.⁸

In addition, proponents of transparency prescribed these mechanisms to conflict-prone African governments who, deprived of Cold War financing from major superpowers, had turned to natural resources to finance their wars against rebels. As Hauffler adds:

6 For discussions of these scholars see Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization*, vol. 52, no. 4, Autumn 1998, pp. 887-917; Thomas Risse, "Let's Argue! Communicative Action in World Politics," *International Organization*, vol. 54, 2001, pp. 1-40; Ann Florini, "The National Context for Transparency-based Global Environmental Governance," *Global Environmental Politics*, vol. 10, no. 3, August 2010, 120-131; Aarti Gupta, "Transparency under Scrutiny: Information Disclosure in Global Environmental Governance," *Global Environmental Politics*, vol. 8, no. 1, 1998, pp. 1-7.

7 Paul Collier, "Learning from Failure: The IFIs as Agencies of Restraint in Africa," In Andreas Schedler and Larry Diamond, eds., *The Self-Restraining State: Power and Accountability in New Democracies*. Boulder: Lynne Rienner Publishers, 1999.

8 Virginia Hauffler, "Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World," *Global Environmental Politics*, vol. 10, no. 3, August 2010, p. 56.

For rebels and governments in Africa and elsewhere, the end of the Cold War cut off access to foreign aid and weapons from the US and USSR. They turned increasingly to exploitation and sale of natural resources to finance war and violence, with the result that resource rich countries were the least wealthy in other ways, ranking at the low end of economic and human development rankings. The so-called 'resource curse' became an article of faith among policymakers and activists. Failed interventions such as Somalia and elsewhere led policymakers to search for new ways to resolve these conflicts, and resource revenue management appeared to be an innovative alternative.⁹

The key actors in the resource transparency movement were policy entrepreneurs who induced governments, intergovernmental organizations, NGOs, and corporations to buy into the norms and ideas around the governance of natural resources. These actors touted the significance of transparency in enhancing information about revenues and budgets as enshrined in Article 19 of the Universal Declaration of Human Rights. But, more important, transparency and access to information would also permit citizens to monitor government action, yielding improved accountability and better development outcomes. Thus, the links between transparency and accountability were taken as an article of faith, propelling the popularity of the new global movement. Over time, however, as Florini contends, transparency became the catch-all phrase for many different ills confronting the governance arena.¹⁰

Three criticisms have been offered around the excessive fixation with transparency. First, critics of transparency have charged that the focus on information ignores the tenuous links between transparency and governance. Specifically, there are doubts whether transparency translates into improved accountability and hence better development outcomes. Fenster claims that the interest in transparency stems from a "simplistic model of linear communication that assumes that information, once set free from the state that creates it, will produce an informed, engaged public that will hold officials accountable."¹¹ From this perspective, the links between transparency and accountability are depended on a host of additional factors, including strong oversight institutions. Second, Kolstad and Wiig have argued that international initiatives in resource-rich countries focus on boosting transparency in public revenues rather than expenditures, a fact that denudes their effectiveness, particularly in mitigating the resource curse:

9 Haufler, "Disclosure as Governance," p. 60.

10 Ann Florini, *The Coming Democracy: New Rules for Running the World*. Washington DC: The Brookings Institution, 2005. See also Michael Mason, "Transparency for Whom? Information Disclosure and Power in Environmental Governance," *Global Environmental Politics*, vol. 8, no. 2, 2008, pp. 8-13.

11 Mark Fenster, "The Opacity of Transparency," *Iowa Law Review*, vol. 91, no. 3, 2005-2006, p. 885. See also Klaus Dingwerth and Margot Eichinger, "Tamed Transparency: How Information Disclosure under the Global Reporting Initiative Fails to Empower," *Global Environmental Politics*, vol. 10, no. 3, 2010, pp. 74-96

If transparency is important, it is so to the extent that it impacts on the basic mechanisms underlying the resource curse, which are rent-seeking and patronage. It follows that transparency reform should focus on increasing access to information in areas that matter for reducing rent-seeking and patronage ... In particular, patronage is a question of the allocation of public expenditures, which suggests that transparency reforms should focus on expenditures rather than on revenues. There is something of a disconnect between prominent current transparency initiatives, and the literature on the resource curse.¹²

Third, transparency reforms aimed at better resource management often target corrupt and insular countries that are less inclined to accept international pressures on governance in the first place. The fundamental dilemma is that countries that have strong governance institutions for resource management do not need external entreaties for transparency, yet those that need these institutions most are always reluctant to accept pressures for reforms. As Hauffler shows, advocates of transparency seek to change “resource politics in states governed by closed and repressive regimes or those classified as failed states due to inept and corrupt government, violent opposition, and civil conflict. In other words, activism surrounding transparency in resource management is aimed at the most difficult countries to penetrate, and those with the most severe governance problems.”¹³ Equally Weinthal and Luong have asserted that these efforts have frequently failed because in authoritarian contexts “making the state a ‘better’ manager of its mineral wealth requires institutions that promote transparency, accountability, and oversight – that is, institutions that are widely absent in [these] developing countries.”¹⁴

Toward Regimes of Responsibility

As part of the global normative revolution, transparency regimes have been pivotal in pushing the conceptual and policy envelopes around natural resource governance. But as the critics have cautioned, these mechanisms were created in the celebratory contexts of external pressures on weak states perceived to be incapable of governing themselves in the face of resource abundance. The difficulties in obtaining traction on transparency efforts lie in the fact that regimes of restraint have depended primarily on the draconian arms of donor conditionalities

¹² Ivar Kolstad and Arne Wigg, “Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?” *World Development*, vol. 37, no. 3, 2009, p. 527.

¹³ Virginia Hauffer, “Disclosure as Governance,” p. 8.

¹⁴ Erika Weinthal and Pauline Jones Luong, “Combating the Resource Curse: An Alternative Solution to Managing Mineral Wealth,” *Perspectives on Politics*, vol. 4, 2006, p.42.

and moral suasions from assorted policy entrepreneurs in international civil society. The alternative regimes of responsibility are thus grounded in ideas that re-examine critically the links between transparency, accountability, and participation, the foundational blocks of governance. Focusing on these tripartite dimensions of governances is germane to illuminate reforms that need to underpin natural resource governance. Also, although regimes of responsibility borrow from some of the key assumptions of the regimes of restraint, particularly on the importance of transparency, unlike the latter, regimes of responsibility recognize that transparency alone is not enough and needs to be mediated through institutions of democratic participation and accountability. I also propose that at the global level, regimes of restraint may be transitional mechanisms toward regimes of responsibility through two mechanisms. First, when most international actors and institutions embrace the principles underlying regimes of restraint. Second, when regimes of restraint lose their initial association with failed and weak states, they may gradually become universal norms in the repertoire of global public goods.

Transparency, accountability, and participation are the keys to governance, capturing the array of questions subsumed under the conventional conception of governance as the use of power in the management of resources for development.¹⁵ From this perspective, transparency needs to be meaningfully embedded in political contexts that also shape accountability and participation. The criticisms against the single-minded fixation with transparency speak largely to its disengagement from power contestations among groups (the question of participation) and the translation of these contests into internal systems of restraint (the question of accountability). Ideally, accountability and transparency should emanate from participatory frameworks that furnish the foundations for stable engagements between the citizenry and public authorities. Since the onset of democratization in Africa, there have been attempts to minimize participation at the expense of transparency and accountability because of the assumptions that participation would be detrimental to development and that, over time, developmental outcomes would incrementally produce participation.¹⁶ Leftwich, for instance, suggested that what Africa required was not a “democratic state ... but a developmental state. By that I mean, a state whose political and bureaucratic elite has the genuine determination and autonomous capacity to define, pursue, and implement development goals.”¹⁷ But few African countries have been able to achieve the outcomes of rapid economic development by sacrificing the values of participation and accountability on the altar of development. In fact, in resource rich countries, autocratic regimes have postponed democratic accountability and

15 Yi Feng, *Democracy, Governance, and Economic Performance: Theory and Evidence*. Boston: MIT Press, 2003; Merilee Grindle, “Good Enough Governance: Poverty Reduction and Reforms in Developing Countries,” *Governance*, vol. 17, 2004, pp. 525-548; Thomas Weiss, “Governance, Good Governance, and Global Governance: Conceptual and Actual Challenges,” *Third World Quarterly*, vol. 21, no. 5, 2000, pp. World Bank, *Governance: The World Bank’s Experience*. Washington DC: World Bank, 1994; and UNDP, *Governance for Sustainable Human Development*. New York: UNDP, 1997.

16 Thandika Mkandawire, “Thinking about Developmental States in Africa,” *Cambridge Journal of Economics*, vol. 25, no. 3, 2001, pp. 289-313.

17 Adrian Leftwich, “Governance, Democracy, and Development in Africa,” *Third World Quarterly*, vol. 14, no. 3, 1993, pp. 605-624.

participation through the rhetorical appropriation of notions of the developmental state. Rarely have these undemocratic regimes unleashed the developmental impulses that can then, like the East Asian developmental states, lay the groundwork for democratic participation. This explains the vicious cycle of growing economic inequities, elite abuse of resources, and the democratic deficit that has compromised governance in Africa.¹⁸

Regimes of responsibility recognize the centrality of participation-- the expansion of people's voices in the regular choice of leaders and in wider decision-making. Once the institutions of participation are established, they force debates about the parameters of accountability and transparency, laying the foundations for state-society relationships that are stable and predictable. Despite disagreements about participation, there is consensus about its core ingredients such as regular elections, rotation of power, functional representative bodies, and a vigilant civic sector. As a DIFD reports notes:

Improving governance matters not only for tackling material deprivations— achieving freedoms from want, disease, and ignorance – but it also matters for addressing poverty experienced through powerlessness and lack of voice. Better governance enables all people to gain the freedom to make their views heard; to choose people to represent their views; to associate freely with others; to join political parties or trade union; and to worship and practice their own religion. We believe that this is fostered within a framework of democratic politics: a means by which all people are included in determining how a society makes choices ... The demand for democratic politics must come from within.¹⁹

The renewed focus on democratic participation dovetails with the initial conceptions of governance that paid attention to the intersection of various institutional dimensions. Thus, as Kaufmann noted, governance denotes the traditions and institutions by which authority in a country is exercised for the common good including: “the process by which those in authority are selected, monitored and replaced (the political dimension); the government’s capacity to effectively manage its resources and implement sound policies (the economic dimension); and the respect of citizens and the state for the country’s institutions (the institutional respect dimension).”²⁰

18 Akbar Noman and Joseph Stiglitz, “Strategies for African Development,” In Noman and others, eds., *Good Growth and Governance in Africa: Rethinking Development Strategies*. Oxford: Oxford University Press, 2012, pp. 3-50; Thandika Mkandawire, “Institutional Monocropping and Monotasking in Africa,” In Noman and others, eds., *Good Growth and Governance*, pp. 80-114;

19 Department for International Development, *Governance, Development, and Democratic Politics: DFID’s Work in Building More Effective States*. London: DFID, 2006, p. 3.

20 Daniel Kaufmann, “Ten Myths about Governance and Corruption,” *Finance and Development*, vol. 42, no. 3, 2005, p. 23.

Overcoming the democratic and governance deficits facing African countries entails that participation drives the quest for institutions of transparency and accountability rather than the other way round. Without the prioritization of participation, tenuous links will persist between it and accountability and transparency. Thus at the domestic level, regimes of responsibility around natural resource governance require broadening institutions of participation to guarantee political inclusiveness. It is broad-based constituencies that are scrambled by participation that then evolve genuine stakes in accountability and transparency. At regional levels, regimes of responsibility revolve around building norms of shared values and practices on governance as participation, accountability, and transparency while also strengthening the capacity of regional institutions to mediate between regional and international actors.

Global Regimes of Restraint

As stated above, transnational norm entrepreneurs responded to the escalation of civil conflicts in Africa in the late 1990s by encouraging public and private actors in the extractive industries to strengthen the transparency-accountability relationships around the governance of natural resources. The PWYP and EITI are the most well-known initiatives that sought a plethora of best practices to ensure that income from natural resources would benefit local development. By the same token, the KPCS and Dodd-Frank legislation are interventions that tried to enhance transparency and corporate accountability with regard to trade in minerals in conflict countries. As regimes of restraint, all these initiatives emanated from the pessimistic perspectives that underlay the resource curse and reflected yearnings for institutional reforms in failed and conflict-afflicted states.

The Publish What You Pay (PWYP) Coalition

The PWYP coalition of civil society actors was galvanized by a 1999 Global Witness report that highlighted the questionable role of foreign business actors in Angola's civil war.²¹ Launched in 2002, the PWYP includes over 300 NGOs such as the high profile Save the Children, Revenue Watch Institute (RWI) and Transparency International (TI) and operates in over 50 countries. Since its inception, the PWYP has advocated the mandatory publication of payments made by extractive companies to governments in resource rich countries and the mandatory publication of revenues received by governments from these companies. The PWYP has emphasized the significance of revenue transparency in the prevention of corruption and embezzlement by officials in resource rich states. More critical, the PWYP contends that "revenue transparency

²¹ Global Witness, *A Crude Awakening: The Role of the Oil and Banking Industries in Angola's Civil War and the Plunder of State Assets*. London: Global Witness, December 1999.

will also help civil society groups to work toward a democratic debate over the effective use and allocation of resource revenues and public finance in order to meet development objectives, improve public services, and redistribute income.²² The PWYP's campaigns for mandatory disclosure paved the way for what has been hailed as the Transparency Revolution around natural resource governance. With the increasing global expansion of its membership, the PWYP coalition has underscored the power of norm-setting, helping to influence subsequent initiatives.²³

The Extractive Industries Transparency Initiative (EITI)

The Extractive Industries Transparency Initiative (EITI) is the most prominent norm of extractive industries transparency. Established at the World Summit for Sustainable Development in Johannesburg in 2002 at the behest of British Prime Minister, Tony Blair, EITI seeks to assist resource rich countries to transform their wealth into tangible development outcomes, through improved transparency. Officially launched in 2003, the EITI is a coalition of governments, companies, civil society groups and international organizations. To its proponents, the EITI is targeted at mitigating the resource curse:

The EITI supports improved governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas, and mining ... Good governance is a precondition for converting large revenues from extractive industries into economic growth and poverty reduction. When transparency and accountability are weak, the extractive industries may instead contribute to poverty, corruption, and conflict – the so-called ‘resource curse.’ The EITI is an important step in defeating this ‘curse.’²⁴

The EITI criteria require the regular publication of all material oil, gas, and mining payments made by companies to governments (“payments”) and all revenues received by governments from these companies (“revenues”) to a wide audience in a publicly accessible, comprehensive, and comprehensible manner. The figures reported are then reconciled by an independent administrator using international auditing standards. Supporters of the EITI have emphasized

22 Publish What You Pay Website, <http://www.publishwhatyoupay.org/>

23 At the G8 summit in June 2013, David Cameron, British Prime Minister, touted the UK's Open Government Partnership (OGP) initiative as the driver of “a transparency revolution in every corner of the world,” see Mark Tran, “EU's New Laws will Oblige Extractive Industries to Disclose Payments,” *The Guardian*, June 12, 2013.

24 Extractive Industry Transparency Initiative Website, <http://eiti.org/>

the participation of civil society groups in the design, monitoring and evaluation of the EITI process as a key element to enhance transparency.²⁵

Since its inception, the EITI has been supported by some 70 of the world's largest oil, gas and mining companies who also work with EITI national groups. At the same time, 25 compliant countries have undergone validation in accordance with EITI's quality assurance mechanisms. Through the efforts of the EITI international board or the members of each national program, compliant countries also undergo more validation procedures in regular time intervals to make sure that they remain compliant. In addition, there are 16 candidate countries that are undergoing the initial validation steps. Of the 25 compliant countries, 14 are African: Burkina Faso, Cameroon, Cote d'Ivoire, Ghana, Liberia, Mali, Mauritania, Mozambique, Niger, Nigeria, Republic of the Congo, Tanzania, Togo, and Zambia. By October 2013, four African countries that had initially met the criteria had their compliant status suspended because of formidable challenges they face in remaining compliant: Central African Republic (CAR), Democratic Republic of the Congo (DRC), Madagascar, and Sierra Leone.²⁶ In temporarily suspending the DRC, the EITI Board Chair, Clare Short, noted:

The DRC still receives shockingly little for its mineral resources. It is not surprising that there are great challenges for the DRC to produce reliable and comprehensive EITI reports, but it is making progress and generating important debate. As the data becomes more reliable and more comprehensive and the debate more widespread, the EITI will help identify areas for improvement in the government and company systems and create momentum for reform. Alongside government efforts on contract and license transparency and other reforms, the EITI in the DRC could be a powerful tool for a better governed sector.²⁷

Supporters of the EITI have lauded its contribution to improving natural resource sector governance at three levels: the establishment of an internationally accepted standard for reporting resource revenues by both corporations and governments; the creation of a model framework of multi-stakeholder dialogues on critical public policy issues in signatory countries; and the creation of an international network of governments, NGOs, and corporate actors who share

25 D auda Garuba, "Is There Need for EITI Reloaded? An Assessment of the EITI Process," in Michael Roll and Sebastian Sperling (eds.), *Fuelling the World – Failing the Region?* Abuja: Friedrich Ebert Stiftung, 2011, pp. 141-152.

26 Extractive Industry Transparency Initiative Website, <http://eiti.org/>.

27 "Democratic Republic of the Congo Temporarily 'Suspended'," EITI, April 18, 2013, <http://eiti.org/news/democratic-republic-congo-temporarily-suspended>.

a commitment to revenue transparency.²⁸ Tanzania has been cited as an example where EITI compliance has improved information on revenue receipts. In 2009, EITI reports showed a discrepancy of nearly \$37 million between what companies said they had paid and what the government said it had earned. In 2010, that discrepancy had dropped to nearly \$4 million; in December 2012, the EITI declared Tanzania a compliant country.²⁹

Critics of the EITI have, however, pointed out that revenue transparency has neither improved resource governance nor overall development outcomes because the majority of compliant countries have long histories of corruption, civil violence, and dictatorships. Moreover, despite some improvements in the governance arena, most of them retain low levels of citizen participation in politics, weak accountability systems, and corruption.³⁰ In addition, the implementations of EITI policies depend largely on the very weak institutions that produced the resource curse. As Hilson and Maconachie observe:

For ordinary Africans, the call for host governments to take the lead on implementing the EITI certainly sends mixed signals. On the one hand, it signifies that oil companies and donors are aware that corruption is a problem that plagues mineral- and petroleum-rich sub-Saharan Africa and are demanding that host governments become more transparent and take greater responsibility for their actions. On the other hand, with no penalties in place for inappropriate behaviour, those driving the EITI indicate a willingness to work with people like Presidents Bongo, Obiang, and Deby, who have long siphoned mineral and /or petroleum revenues for personal gain. Why should they change their attitudes with the onset of a voluntary initiative if there is no evidence that corruption discourages foreign investment in the extractive industries?³¹

Transparency International's annual reports on corruption in most of these countries strongly support the view that EITI's compliant countries do not in fact do better than their peers.

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- 28 Peter Eigen, "Is There Need for EITI Reloaded? Building on its Successes," In M. Roll and S. Sperling, eds., *Fuelling the World – Failing the Region? Oil Governance and Development in Africa's Gulf of Guinea*. Abuja. Friedrich Ebert Stiftung, 2011, pp. 136-140; D. S. Garuba, "Is There Need for EITI Reloaded? An Assessment of the EITI Process," in Michael Roll and Sebastian Sperling, *Fuelling the World – Failing the Region?*, 2011, pp. 141-152; and D. Yates, "Enhancing the Governance of Africa's oil Sector," Johannesburg, South African Institute of International Affairs (SAIIA), Occasional Paper, no. 51, 2009.
- 29 "Enough Lessons: Time for Africa to benefit from its Oil, Gas and Mining," *The East African* (Nairobi), February 2, 2013.
- 30 M. L. Norman, "The Challenges of State Building in Resource Rich Nations," *Journal of International Human Rights*, vol. 10, no. 3, 2012, pp. 173-190; M.H. McFerson, "Extractive Industry and African Democracy: Can the Resource Curse be excoriated?" *International Studies Perspectives*, vol. 11, 2010.
- 31 Gavin Hilson and Roy Maconachie, "'Good Governance' and the Extractive Industries in Sub-Saharan Africa," *Mineral Processing and Extractive Metal*, vol. 30, 2009, pp. 70-71.

Thus, although the EITI seeks to ensure transparency in revenue flows between companies and states, it is incapable of policing how officials eventually make use of payments made by corporate actors. As Kolstad and Wig note: “The EITI focuses on one facet of the value chain only; transparency in revenue collection. It does not address upstream activities, such as procurement, which constitute a significant part of the value chain in oil and gas, nor does it cover the distribution of income and public expenditure stemming from the extractive industry revenues.”³² The suspension of countries from EITI compliant status may probably be one of the means to deflect some of these criticisms, but it does not address the fundamental problem that without comprehensive institutional change, EITI as a policy mechanism cannot promote participation and accountability.

To address some of these criticisms, the World Bank and other development actors launched new initiatives such as the EITI++ that have attempted to push for macroeconomic policies to complement EITI’s initial focus on transparency. Launched in April 2008, the EITI++ goes further by providing member states with technical assistance on improving the management and spending of resource revenues. The EITI++ technical assistance and capacity building also aim at improving the quality of contracts, the collection of taxes and royalties, economic decisions on resource extraction, managing price volatility and investment for national development.³³

A potentially interesting policy development that could transform the EITI from a global regime of restraint targeted at poor countries to a global public goods regime is the suggestion by the French and British authorities to become members of EITI. As part of the triple themes of Trade, Taxation, and Transparency at the G8 summit in June 2013 Prime Minister David Cameron and President Francois Hollande signalled interest to join the EITI and urged the rest of the G8 members to do the same; the United States also announced plans to join the initiative.³⁴ Australia was one of the first OECD countries to lend its support to the EITI. As more G8 countries come on board, this would make this regime more global and remove the negative connotations associated with restraining poorly-governed countries. Levelling the global playing field would help strengthen the efficacy of EITI in the long run.

The Kimberley Process Certification Scheme (KPCS)

The KP was crafted to address the role of diamonds in fuelling violent conflicts in Angola and Sierra Leone. Subsequently, it has targeted diamonds from other civil wars such as Liberia,

³² Kolstad and Wig, “Is Transparency the Key,” p. 521.

³³ E.M. Alba, *An Integrated Approach for Improved Governance and Transparency in Oil, Gas, and Mining Sector*. Washington DC: The World Bank, 2008.

³⁴ EITI, “France and the United Kingdom Commit to Global Transparency Standard,” May 22, 2013, <http://eiti.org/news/france-and-united-kingdom-commit-global-transparency-standard>

Cote d'Ivoire, and the DRC. As a regime of restraint, its fortunes have hinged primarily on the question of "blood" diamonds and the evolution of civil conflicts.³⁵ As civil wars have declined, the KP has faced considerable problems of relevance and credibility, forcing debates on how to broaden it beyond conflict diamonds. Like the EITI, the future of the KP depends on redefining it in the direction of a global public goods regime with emphasis on participation, accountability, and transparency.

NGO campaigns against conflict diamonds led to an agreement in May 2000 in Kimberley, South Africa, among representatives of the diamond industry, governments, and NGOs to set up a "system of regulations and safeguards to prevent the trade in conflict diamonds." The KP was eventually launched in January 2003, covering 75 countries and representing 99 per cent of all producers of rough diamonds worldwide. Despite the flaws in the certification of "conflict free" diamonds and non-compliance by some of the actors, the KP has played a critical role in reducing conflict in most of the diamond-producing countries by undercutting the ability of armed groups to use the trade in diamonds to finance their activities.³⁶ With the resumption of civil conflict in the CAR, its diamonds have met the criteria of blood diamonds.³⁷

With the decline of civil conflicts, the KP has confronted questions of redefining conflict and blood diamonds, questions that have been highlighted in the divisive debates around the Marange diamonds in Eastern Zimbabwe. Western NGOs, including Human Rights Watch and Global Witness, led a spirited campaign to brand Marange diamonds as blood gems because of the military's use of forced labour, human rights abuses, and brutal killings. But African members of the KP, supported by powerful international actors, rejected this designation, permitting Zimbabwe to resume exports of Marange diamonds; by August 2011, Zimbabwe had entered the top 10 league of the world's diamond-producing countries. In May 2011, Global Witness, one of the founders of the KP, withdrew from the process, citing the decision on Marange diamonds.³⁸

Marange diamonds ignited debates about the need to broaden the mandate over the KP to address wider governance issues. In June 2012, the then chairperson of the KP, Gillian Milovanovic, signalled the need to redefine conflict diamonds. But definitional disagreements have persisted

35 A. Grant and Ian Taylor, "Global Governance and Conflict Diamonds: The Kimberley Process and the Quest for Clean Gems," *The Round Table*, vol. 93, 2004, no. 375, pp. 385-401; Carol Kantz, "The Power of Socialization: Engaging the Diamond Industry in the Kimberley Process," *Business and Politics*, vol. 9, no. 3, 2007, pp. 1-20; J.L. Fisherman, "Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme, The First Step Down the Long Road in Trying to Resolve the Diamond Trade Problem," *University of Miami Business Law Review*, vol. 13, 2005.

36 J. Burbank, *The Effect of Kimberley Process on Governance, Corruption, and Internal Conflict*. Washington DC: The Fund for Peace, 2102; F. Bieri, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Global Industry*. London: Ashgate Publishers, 2010.

37 See the proceedings at the KP Plenary in Johannesburg, November 2013.

38 "Global Witness Quits Blood Diamond Scheme," [Deutsche-Welle](#), May 5, 2011

largely because there is no consensus on how to broaden the regime that was crafted essentially around conflict diamonds. These disagreements were highlighted by the 2013 Chair of the KP, Welile Nlapho at the November Johannesburg KP Plenary meeting:

The inter-sessional meeting of the KP in June [2013] tasked the Chair with the responsibility of examining the vexed matter of the definition. As you would no doubt imagine, this has not been an easy task as there are many competing interests. Consultations on this matter will continue, but we must remember that at the end of the day, if we are able to move forward on the matter of the definition, the solution lies with agreement among all of you as members of the KP. To do this, we must work together to find solutions. Maintaining hardened positions without any willingness to compromise and find mutually beneficial solutions will not help. When dealing with the definition, we have to recognize the role and limitations of the KP, otherwise we will be taking on much more than we are mandated to bear. To keep the KP relevant and effective, we should focus on implementation of our existing mandate, such as following up on outcomes of review visits, and assistance we can provide to allow countries to improve their compliance capabilities. The KP was created for a specific purpose to address the trade in conflict diamonds. It was not created to end conflict, or to end human rights abuses or to take redistributive action against sovereign states. Other mechanisms exist in the international system for addressing these challenges.³⁹

The Johannesburg meeting failed to come up with a broad definition. Civil society representative, Shamiso Mtisi, noted that it was necessary to come up with a new definition of conflict diamonds “to capture the abuses that are on-going in communities; these are abuses committed by state entities, by the police, the military, and also private security guards.”⁴⁰ One approach out of the impasse would be to expand the definition of the KP to questions of participation, accountability, and transparency. Thus diamond-producing states that do not meet these criteria would fail the certification benchmarks. Such broadening would capture more actors and objectives and may constitute the first step toward universalization of the regime. In the absence of redefining the regime, it may be necessary to declare victory and close the KP altogether.

39 “Statement by the Chair of the Kimberley Process, Ambassador Welile Nlapho for the Opening of the KP Plenary—November 19, 2013” <http://www.kimberleyprocess.com/>

40 “Blood diamonds: Kimberley Process Meeting Fails to Redefine ‘blood diamonds’,” *Duetsche-Welle*, November 23, 2013.

The Dodd-Frank Legislation

Since 2008, the U.S. Congress has considered a number of measures to prohibit rebel movements and other negative forces in the Eastern DRC from using the sale of tin, tantalum, and tungsten to fuel conflict in the region. Like the KP, these measures were driven by broad mobilization of civil society actors seeking a regime that would restrain rebels implicated in fuelling violent conflict and widespread human rights abuses. The U.S. Congressional measures also form a part of international initiatives including the due diligence principles adopted by the OECD and the UN sanctions against anybody who engages in the illegal extraction and trade of cassiterite (the ore for tin), coltan (the ore for tantalum), and wolframite (the ore for tungsten) from the Eastern DRC that benefit belligerents from the DRC and neighbouring countries.⁴¹

In July 2010, the U.S. Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (commonly called Dodd-Frank Act). Sections 1502 and 1504 of Dodd-Frank address the problem of conflict minerals originating from the DRC. Section 1502 requires companies under the jurisdiction of the Security and Exchange Commission (SEC) to report annually on whether they are using minerals from the DRC. All companies, regardless of whether they are importing to the U.S. raw or processed minerals, or as finished components, are expected to report on the due diligence they have undertaken to verify their supply chain and avoid conflict-promoting metals. Section 1504 requires publicly traded oil, gas, and mining companies to make project-level disclosures of payments above \$100,000 made to governments around the world for the purpose of commercial development of natural resources. Although signed into law in 2010, Sections 1502 and 1504 provisions took effect in August 2012 after the SEC issued the implementation regulations.⁴²

Industry advocates fought vigorously to water down the disclosures in Section 1502, claiming that there would be high compliance costs and that such disclosures would not address the sources of regional instability.⁴³ As a result, the SEC gave some reprieve from full disclosures, giving big companies a two-year phase-in period and a four-year phase-in period for small companies. But the SEC remained steadfast on Section 1504 provisions pertaining to project-level disclosures. Oil companies lobbied against disclosure rules because, they argued, by being transparent, they would not obtain contracts in countries where there are legal prohibitions to disclosures or which prefer to work with companies that are not subject to payment disclosures. The SEC nonetheless rejected arguments that sought to allow industry

41 T. Vircoulon, "Behind the Problem of Conflict Minerals in DR Congo," Brussels, The International Crisis Group, 2011; D. Verbruggen, E. Franq, and J. Cuvelier, Guide to Current Mining Reform Initiatives in Eastern DRC, Antwerp, IPIS, 2011.

42 Daniel Kaufmann and Veronica Penciakova, "SEC Passes Natural Resource Transparency and Conflict Minerals Rules: The Glass is Fuller than Expected," Brookings Institution Briefing Report, August 28, 2012 <http://www.brookings.edu/research/opinions/2012/08/28-sec-transparency-kaufmann>.

43 For such opposition see, for instance, William MacNamara and Christopher Thompson, "Shell Chief's Warning on Dodd-Frank," Oil and Gas, March 2, 2011, <http://www.ft.com/cms/s/0/f5dcb758-450a-11e0-80e7-00144feab49a.html#axzz37jTM2Ocu>

exemptions around project-level disclosures, noting that such disclosures would empower citizens to obtain information on how much their governments earn from natural resources.⁴⁴

Dodd-Frank measures have been hailed as a major milestone in the global transparency regimes around conflict minerals. There is equally broad acknowledgment that company disclosures are not sufficient to solve the intractable nature of the conflicts in the eastern DRC without the resuscitation of state institutions.⁴⁵ Since the illegal exploitation of natural resources is a manifestation of state inability to establish its authority across its territory, there have been calls to establish complementary national and regional initiatives that restore security and strengthen governance in the region. As Dizole observed, “Unless Dodd-Frank supports existing internal efforts to deal with the problem, it will not yield positive results. Any semblance of success will be superficial and not sustainable. The Dodd Frank can only succeed if it is supporting and closely integrating with national mechanisms. In the absence of a Congolese designed and owned national strategy to combat the conflict minerals, it is not assured that the Dodd Frank will succeed despite its good intention.”⁴⁶

The more innovative trend established by Dodd-Frank is the globalization of mandatory disclosure of payments by extractive sector companies. On the eve of the G8 summit in June 2013, the European Parliament and Council agreed on EU Accounting and Transparency Directives that compel oil, gas, and mining companies to publish payments they make to governments and release information on their earnings in each country. Under the new laws, European companies are required to report project-level payments of more than €100,000 made to governments in countries in which they operate, including taxes levied on their income, production or profits, royalties, and licence fees. In addition, the EU directive goes a step further than the Dodd-Frank by including the forestry industry.⁴⁷ Similarly mandatory rules of disclosure have already been adopted by the Hong Kong Stock Exchange and Canada has signalled interest in enacting similar legislation. In the aftermath of the EU directives, campaigners for transparency described them as “game-changers for activists fighting poverty” and pledged to push for the replication of such laws in other industries.⁴⁸

44 Kaufmann and Penciakova, “SEC Passes Natural Resource Transparency and Conflict Minerals Rules.”

45 O. Sematumba, “The Mining Economy in Eastern DRC: After Joseph Kabila’s Hammer, Barack Obama’s anvil? In Sematumba, ed., DRC: The Mineral Curse. Goma. Pole Institute, 2011.

46 Mvemba Dizole, “Conflict Minerals in the Congo: Let’s be Frank about Dodd-Frank,” Huff Post World, August 22, 2011, http://www.huffingtonpost.com/mvemba-dizolele/conflict-minerals-congo-dodd-frank_b_933078.html.

47 Mark Tran, “EU’s New Laws will Oblige Extractive Industries to Disclose Payments,” The Guardian, June 12, 2013, <http://www.theguardian.com/global-development/2013/jun/12/european-union-laws-extractive-industries-payments>.

48 Mark Tran, “EU’s New Laws will Oblige Extractive Industries to Disclose Payments.”

African Regional Mechanisms

The plethora of global resource sector governance initiatives and institutions are complemented by mechanisms that are gradually evolving in Africa. As targets and recipients of global regimes of restraint, African mechanisms have attempted to borrow and incorporate global norms, standards, and strictures within the overarching framework of African responsibility captured in the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM). In crafting these institutions, Africa has confronted the dilemmas of balancing international restraints and local responsibilities. Moreover, as some regional mechanisms seem to duplicate global instruments, questions have been raised about whether resources should be on the reiteration of existing norms or whether the priority should be domestication and implementation. Responding to the passage of Dodd-Frank, Mo Ibrahim observed that Africa needs to “ensure that we are enacting similarly transparent legislation. If we are to ensure that good governance—covering all aspects of transparency, corporate and social responsibility—becomes the norm in Africa for all foreign investors and African governments, it can only be achieved through domestic legislation.”⁴⁹

The African Union (AU) took the lead in 2009 by unveiling the African Mining Vision (AMV) as the continental framework for natural resource governance. The objectives of the AMV are transparency, equity, and optimal exploitation of natural resources; in addition to building multiparty engagement in the management of natural resources, it puts emphasis on the integration of mining enclaves into local and national development objectives.⁵⁰ The AMV seeks to ensure that mining activities benefit Africa primarily, and in the long term, ensure the transformation of the continent from an exporter of raw materials to a manufacturer and supplier of knowledge based services. Four years since its articulation, the AMV has faced constraints in transforming the vision into effective policy. Among the factors that have hampered this transformation are the nature of existing contractual obligations of some member states, the asymmetric relations between African states and multinational corporations, weak funding, and limited state capacity.⁵¹

The AU has also addressed the issue of resource governance as part of the process of peace building and reconstruction in post-conflict countries. The AU's policy framework on Post-Conflict Reconstruction and Development adopted in 2006 calls for the creation and strengthening of frameworks that promote the sustainable and equitable management and exploitation of natural resources as part of the transition to peace in post-conflict societies (African Union 2006). Alongside the AU, the African Development Bank (ADB) has a number of governance

49 Mo Ibrahim, “Europe Should Emulate the U.S. and Fight Corruption,” *AfricanGlobe*, September 12, 2012, <http://www.africanglobe.net/business/europe-emulate-fight-corruption/>

50 African Union, *African Mining Vision*. Addis Ababa, AU, February 2009.

51 African Mining Vision.

initiatives to support member states implement resource governance mechanisms. The main aim of the Bank's Governance Strategic Directions and Action Plan (GAP) 2008-2012 was to strengthen transparency and accountability in the management of public resources at the sector, country and regional levels, with particular emphasis on the extractive industries. The ADB created the the African Legal Support Facility in 2008 to assist countries to negotiate complex commercial and extractive industry contracts and thereby help to resolve problems of asymmetric relations between African actors and MNCs.

African Regional Economic Communities (RECs) and other regional mechanisms are incrementally incorporating natural resource governance in their treaties in the search for collective solutions; rhetorically, these institutions have indicated willingness to promote more participatory or inclusive processes in the management of natural resources in their sub-regions. Most of these provisions borrow primarily from existing international mechanisms. In 2008, the Economic Community of West Africa States (ECOWAS) adopted provisions on "Natural Resource Governance" included in Articles 64 – 67 of the ECOWAS Conflict Prevention Framework (ECPF). The provision seeks to ensure that the management processes for natural resources are transparent, equitable, environment-friendly and ensure a balanced and sustainable development, social cohesion and stability. Article 65 of the ECPF seeks to facilitate the establishment of a network of relevant government institutions, private sector organisations, NGOs, and community structures to develop and apply regional norms and standards in natural resource governance, based on the models provided by existing national, regional and international mechanisms such as the KP.⁵² It also highlights the need for member states to develop a mechanism for peaceful resolution of natural resource-related conflicts within the sub-region. In Southern Africa, SADC adopted a Protocol on energy which aims to promote stakeholder (citizen and private sector) participation and environmental protection in the development and use of natural resources. SADC's mining protocol also seeks to promote the adoption of common certification standards for minerals from the region.⁵³

African inter-governmental agencies have also attempted to respond to specific sub-regional concerns, including the promotion of peace and the sound management of natural resources. The most prominent are the International Conference on the Great Lakes Region (ICGLR) and the Gulf of Guinea Commission (GGC). At the ICGLR's December 2010 summit in Lusaka, member countries adopted the Regional Initiative on Natural Resources (RINR) which includes six tools to fight the illegal exploitation of natural resources: a regional certification mechanism (RCM) for cassiterite, wolframite, coltan and gold; the harmonization of national legislation; the formalization of the artisanal mining sector; a regional database on mineral flows; the promotion of the EITI and a whistle-blowing mechanism. Although member states of ICGLR

52 ECOWAS, Conflict Prevention Framework. Abuja: ECOWAS, 2008.

53 SADC, Protocol on Mining. Gaborone, SADC, 1997; SADC; SADC, Protocol on Energy. Gaborone, SADC, 1996.

did not meet the December 2011 deadline for launching the RCM (the core tool of RINR), many countries are working to begin certifying their minerals.⁵⁴

The Gulf of Guinea Commission (GGC) was established in February 2001 by Angola, Cameroon, the DRC, the Republic of Congo, Gabon, Equatorial Guinea, Nigeria and Sao Tome and Principe. The commission aims to harmonise respective state policies on the exploitation of natural resources, including the development of a framework for legal regulation of oil multinationals operating in the region, the protection of the region's environment and the provision of a framework for dialogue, prevention, management and settlement of conflicts between member states. Despite the commission's goals and the strategic importance of the Gulf of Guinea in global economic and political relations, the implementation of the treaty remains weak. As of 2011, measures were still being taken by member states to introduce the treaty in to their respective legal frameworks. Further, there is very limited knowledge on the commission, both at the academic and local levels, creating problems for the domestication and local ownership of the Treaty.⁵⁵

Conclusion: Reconciling Restraints with Responsibilities

Regimes around natural resource governance are of recent vintage, germinating in the inhospitable environments of civil wars, war-lordism, and state collapse. The targets of these regimes have overwhelmingly been African states, as well-intentioned international actors have tried to restrain the behavior of both governments and international actors in extractive industries. Over time, however, regimes of restraint are incrementally transforming into universal, global, and normalized regimes of responsibility. This transformation is still contested and may take decades to take a definitive shape. With time, such transformation will proceed from the assumption that states have to wean themselves from the legacy of restraints as they invest in sturdy institutions of participation, accountability, and transparency. Moreover, the separation of participation from accountability and transparency is no longer tenable because undemocratic regimes ultimately cannot be restrained or constrained by transparency norms alone. This is why future debates on natural resource governance should return to the agenda of participation and democratization at national and regional levels. As they have done before, international actors can prescribe, but not force the pace of change around questions of ownership, national and regional responsibility.

54 D. Verbruggen, E. Franco, and J. Cuvelier, Guide to Current Mining Reform Initiatives in Eastern DRC, Antwerp, IPIS, 2011, 17.

55 Friedrich Ebert Stiftung Abuja, "Overview of Existing Regional Initiatives in the Oil and Gas Sector in the Gulf of Guinea," in Michael Roll and Sebastian Sperling, *Fuelling the World – Failing the Region? Oil Governance and development in Africa's Gulf of Guinea*, Abuja. Friedrich Ebert Stiftung, 2011, p. 129.

SARW is a formative project within the Natural Resources Governance Initiative of OSISA. Its main objective is to monitor corporate and state conduct in the extraction and beneficiation of natural resources in Southern Africa. It seeks to assess the extent to which the policies, practices and efforts of the players in the sector can and do contribute to sustainable development. Other specific objectives include:

- To consolidate research and advocacy on natural resources extraction issues in Southern Africa;
- To put a spotlight on the specific dynamics of natural resources in Southern Africa, building a distinctive understanding of the regional geo-political dynamics of resource economics;
- To provide- for researchers, policy makers and social justice activists especially in academic and civic spaces- a platform of action, coordination and organisation, in the watching and strengthening of corporate and state accountability in natural resources extraction;
- To highlight the relationship between resource extraction activities and human rights as they obtain on the ground, and develop advocacy efforts that engage this reality.

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