



To: Madame Oby Ezekwesili
From: David L. Goldwyn
Subject: Comments on the Nigerian Extractive Industry Transparency Initiative Bill 2004
Date: 9 February 2005

We have analyzed the draft NEITI bill, compared it with other international legislative models for authorizing an independent monitoring body and examined whether it provides a clear, sustainable charter for assuring the transparency of Nigeria's extractive sector. While the draft bill provides an excellent framework, we recommend that it be expanded and in some cases amended to ensure that the composition, role and authority of both the National Stakeholders Working Group (NSWG) and the EITI Commission are clear and that the ability of the EITI commission to carry out its mandate is assured.

Key Points

Stronger Organizational Foundation. The EITI Commission needs 1) an independent source of funding, 2) adequate qualified staff, 3) sufficient funding to hire and monitor independent auditors, carry out sustained, multimedia public diplomacy programs at the federal state and local levels, 4) a multiyear budget to provide organizational stability.

Stronger Authority. The EITI Commission needs independent authority to demand data from other public agencies and from private companies, to sanction noncompliance with its requests, to publish both aggregate and non aggregated data, and, where necessary and appropriate, clear authority to supercede, waive or prohibit confidentiality provisions in public contracts.

Composition of the NSWG. The bill should not only define the composition of the NSWG, but ensure that its members serve for fixed terms, and cannot be removed other than for cause (or if a new incumbent occupies a seat reserved for a federal or state office holder). We suggest that the NSWG would be enhanced if some of its members were selected by the legislature or by private organizations to ensure its effectiveness in the event that future president is less committed to NEITI than the incumbent President.

Lessons Learned from Other Cases

Organization of the EITI Commission. Government organizations which carry out monitoring or quasi-investigative functions can expect to encounter resistance from their public and private sector targets, from bureaucratic competitors, and from successor administrations. For this reason it is critical to provide the organization with the capacity to carry out its mandate, even in the face of resistance. The Chadian *Collège de Contrôle et de Surveillance des Ressources Pétrolières* (CCSRP), responsible for supervising the income from the Chad-Cameroon pipeline and the appropriate expenditure of funds has been severely handicapped by the refusal of the Chadian Executive branch to provide it with office space, a staff sizable enough to carry out its mandate, or a budget that would allow the CCSRП to effectively publicize the challenges to its mission.¹

In Sao Tome and Principe, the 2004 Oil Revenue legislation grants additional powers to the Petroleum Oversight Committee, including the right to initiate investigations, based on its own knowledge or that of a third party, of irregularities or violations of this law; and act as a party to judicial actions; as well as mandating the composition of the Committee, with specific provisions for representatives of labor, NGO's and state governments.²

By defining the rights, responsibilities and authority of all relevant actors, including companies, public institutions and civil society and the Commission's mandate would be set out in the context of existing legislation and institutions.³

General recommendations

Staff.

The legislation should mandate that the Commission be headed by a Presidential Appointee, and that it have, at minimum, a deputy director, an accounting specialist, an attorney, a communications or outreach director, a procurement officer and support staff.

Industry and Public Entity Obligations

The Bill should set forth the obligations of relevant companies and government bodies: (i) to regularly report on revenue and payments in the form prescribed by the EITI Commission; (ii) to provide underlying contracts and documents; (iii) to waive confidentiality provisions, as necessary and; and (iv) to cooperate fully with the EITI Commission and the Commission's "independent auditor." The Bill should acknowledge and address the extent to which these reporting requirements are consistent or

¹ "Analysis of Chad's Revenue Management Law" outlines the weaknesses of Chad's CCSRП. Study completed by Peter Rosenblum of Harvard University. See:
http://www.environmentaldefense.org/documents/2134_Chad-Cameroon.pdf

² Oil Revenue Law, Sao Tome and Principe, 2004. Article 24 outlines the powers of the Petroleum Oversight Committee. See:
http://www.earthinstitute.columbia.edu/cgsd/STP/documents/stp_oil_law_english.pdf

³ The Bill's objectives and the proposed functions of the EITI Commission overlap with a number of existing institutional mandates, including the work of the Ministry of Finance, the Budget Office, the ICPC, the Economic and Financial Crimes Commission and the National Assembly.

conflict with existing legislation/regulations and with confidentiality provisions in contracts with companies.

Citizen rights

The Bill should acknowledge in preambular language relevant constitutional and human rights and define the specific rights of citizens and civil society institutions: (i) to access to information relating to revenues from extractive industries; (ii) to participate through representatives in the work of the EITI Commission; and (iii) to hold extractive industries companies, government bodies and the EITI Commission accountable (e.g. through the authority to initiate investigations or bring legal action).

Composition of the EITI Commission

The Bill should set forth certain standards for the staff of the EITI Commission, particularly in terms of (i) relevant and recognized expertise; and (ii) independence. The Bill should compel members and staff to disclose all relevant relationships and dealings with extractive industries. The Bill should likewise prescribe that the “independent auditor” designated by the EITI Commission be of international reputation and free of any overt conflict of interest.

Section-by-Section Analysis and Recommendations

Section 1 (2) **Analysis.** We understand that “autonomous self accounting body” is not a well established term under Nigerian law. We believe EITI’s independence will be better secured and enhanced by defining what kind of body it is more precisely, how its members are chosen, what terms they will serve, and how they can (and cannot) be removed from office. The Bill should clarify relations between EITI and other public entities and make explicit the legal authority of EITI to compel the cooperation of these other bodies. The provision by which EITI “reports to the President” should not limit the EITI mandate to make public reports on revenue payments, to make discrepancies public, to recommend enforcement or other actions to the NSWG and its authority to compel cooperation from other agencies and from state owned enterprises.

The relationship between the NSWG and the EITI Secretariat should be clarified, and the basic staffing of the Secretariat should be codified in law.

The Bill does not otherwise elaborate on the relationship of the EITI Commission to the President, NSWG or other public entities with related oversight functions, including various ministries, the National Assembly and state/local governments.

Recommendations.

1. Rephrase: *“The EITI shall be an independent agency (or commission) of the Executive branch of the Federal Government. It shall be governed by a board, called the National Stakeholders Working Group, and it shall have a Secretariat composed of officers and staff who shall implement this Act, carry out the directives of the NSWG, and implement such regulations and policies as the NSWG may issue from time to time. The officers of the Secretariat shall be nominated by the President for five year terms, which may be renewed. Officers shall not be removed from their office other than for cause. Cause shall be malfeasance of office, conflict of interest or dereliction of duty”.*

2. Add Section 1(4) that outlines staffing for the EITI Commission, specifically that the Commission be headed by a Presidential Appointee, and that it have, at minimum, a deputy director, an accounting specialist, an attorney, a communications or outreach director, a procurement officer and support staff. The Bill should set forth certain standards for the staff of the EITI Commission, particularly in terms of (i) relevant and recognized expertise; and (ii) independence. The Bill should compel members and staff to disclose all relevant relationships and dealings with extractive industries. The Bill should likewise prescribe that the “independent auditor” designated by the EITI Commission be of international reputation and free of any overt conflict of interest.

Section 2 (a)

Analysis. The term “extractive industry” should be defined more clearly than it is in Section 18. It is unclear whether it covers public/private joint ventures such as those where the government has a majority or 50% interest, or government entities like NNPC and NAPIMS. **The current definition appears not to cover state owned enterprises which deeply undermines all of the functions and authorities of EITI which follow in the act.** In our view EITI’s jurisdiction and powers must extend to all operators and producers, public and private, and in all extractive industries for it to be effective. If state owned enterprises are not included, then the EITI will miss an important objective: ensuring the disposition of government funds by state controlled enterprises is conducted in a manner that provides the taxpayers with value for money, is transparent and competitive and free of corruption.

Recommendations.

1. Capitalize “extractive industries” here to demonstrate that it is a defined term, and redefine in Section 18. Redefine to include state owned enterprises.

2. Add a clause (d): *“to ensure due process and transparency in the use*

of government funds and resources by state owned enterprises in the extractive industry.”

Section 3

Analysis. It must be clear that EITI has not only functions (i.e. to the obligation to request information) but also powers (the authority to demand compliance). In other systems, such as the US Securities and Exchange Commission, commissions have independent authority to subpoena information, investigate, demand appearances and seek judicial relief to enforce their orders. In Sao Tome the new law permits its commission to be a party to lawsuits, to conduct investigations, or to subpoena documents. In other US analogues, an agency must seek relief by requesting that the Department of Justice enforce its demands. The EITI Commission (and its agents and auditors) must be imbued with sufficient legal authority to carry out its broad mandate to obtain information, publicize information and sanction violators

Recommendations.

1. Change the title of this section to “*powers*”.
2. Change the introductory sentence to read: For the purpose of realizing its objectives under this Act, the EITI shall have the following *powers*. The Bill must set forth this authority explicitly with respect to both private and public entities, including the authority to: (i) collect production, revenue, expense and tax/other payment data and underlying contracts; (ii) require standardized reporting and record-keeping; (iii) hold hearings and investigations, including the ability to subpoena data and witnesses; (iv) publish and disseminate relevant information and documents; and (v) enforce its requests and sanction violators, itself or through another entity, with civil and criminal penalties.

Section 3(a)

Analysis. If EITI’s reporting templates are to be mandatory, then the section should provide that it will issue regulations that will be binding on the extractive industry and supercede similar authority that may be vested in other agencies (such as NNPC, NAPIMS, the Auditor General) or other ministries.

Recommendation. Change language to read: “to develop *regulations* for transparency in the reporting and disclosure by extractive industry companies of revenue due to the Federal Government, *including reporting templates, regulations with respect to the timing, frequency and modality of reporting.*”

Section 3 (b) **Analysis.** This language appears to only give EITI the right to evaluate industry practices, but not to regulate them. If this is the intent then EITI may presumably only recommend to the President and to the legislature what changes must be made. If the intent is to allow EITI to regulate these practices, the language should be changed accordingly.

Recommendation. Clarify the Act’s intent in this section.

Section 3(d) **Analysis.** Extractive industry companies already report certain information to NNPC, FIRS and other agencies. If EITI is to have prompt and effective reporting, it should have the power to “obtain” not simply request information. Again, here it must be clear that EITI can obtain this information from state owned enterprises as well. The list of information EITI requests seems to be exclusive and limited. EITI will want to also obtain sales price and other information.

Recommendations.

1. Change “request” to “obtain”. Make the same change to Section 3(e).
2. Add at the end of the clause: “at any period, *as well as sales price and any other material financial information, EITI may require.*”

Section 3(e) **Analysis.** This section is unclear. Is it intended to make companies or entities that act as tax collectors for the government to report how much tax they collect? It is unclear to the reader and could therefore be contested as ambiguous.

Recommendation. Clarify section.

Section 3(g) **Analysis.** EITI may want the authority to disseminate information about the distribution of federal extractive industry revenue to states and local governments. If so, this should be explicitly stated. The Bill should also clarify what EITI and the “independent auditor” are expected to publish. The categories of revenue disclosure should be enumerated to make clear that they include aggregated and disaggregated payments of all kinds by companies, including taxes by category, royalties, bonus payments, mandated community investment funds.

Recommendations.

1. Assert power of EITI to disseminate information about the distribution of federal extractive industry revenue to states and local governments.
2. Specify the form of disclosure how regularly it should be

published. It should specify the power to compel disclosure of revenues of all kinds on an aggregated and disaggregated basis. We recommend semiannual reports to ensure current reporting.

Section 3(h) **Analysis.** EITI needs the ability to take actions, rather than simply promote activities. We suggest the language of this section be changed to reflect EITI's powers to take action.

Recommendation. Change this section to read: "*to undertake measures* related to its functions...."

Section 4 (1) **Analysis.** The independent audit must cover the crude oil value received by NNPC and other state owned enterprises and the royalties paid and value for money earned by the government by its disposition of that resource. This must be covered by the audit, either through definition of "extractive industry" in Section 18 or expressly in this section.

Recommendation. Ensure that the independent audit covers state owned enterprises.

Section 5 **Analysis.** It should be clear that members of the NSWG cannot be removed, other than for cause. The definition of cause should be in section 18.

Recommendation. The definition of cause should be in section 18.

Section 6 (1) **Analysis.** There is precedent for sharing the appointment of commissions like the NSWG among different groups, such as political parties (in two party systems), or among various private sector groups. This sharing, which involves a substantial portion of seats for the President, ensures that groups like the NSWG enjoy broad based support, and can survive future administrations when a future President might have a different view of the Commission's mission. In this case we suggest that that no more than half the seats be reserved for government. These seat might include the legislature (chairman of energy committees in both houses), for the key executive agencies (Petroleum adviser, Finance Ministry), the commercial sector (perhaps rotating seats from the national petroleum chamber and association of indigenous producers) and perhaps fixed seats for labor unions and civil society. It is always difficult to find a group that family represents a civil society, but these members could be agreed upon by executive

and legislative members.

Recommendations.

1. The number of members is not specified in the legislation. It should be fixed.
2. We advise that the size of the committee not be reduced from 28, that the share of government seats (federal, legislative, state and local) be no more than half, that the government held seats be designated, that the commercial sector representative be expressly representatives of groupings of international domestic producers, and that there be shared authority for designating the civil society (media and NGO) groups.

Section 6(2) **Analysis.** The number and composition of seats for the group and for civil society should be fixed, so the balance of the group cannot be changed at the discretion of a future President. This is the case in Chad Cameroon and Sao Tome legislation as well.

Recommendation. The number of seats for civil society, labor, media, industry, federal and state governments should be fixed by statute.

Section 7 **Analysis.** It should be clear that members of the NSWG can only be removed for cause, so they are not subject to removal for political reasons or able to stay in office if they themselves have conflicts of interest.

Recommendation. Members of the NSWG shall not be removed from their office other than for cause. Cause shall be malfeasance of office, conflict of interest or dereliction of duty.

Section 8 **Analysis.** Non-governmental members of the NSWG should either all be paid a fixed amount (consistent with some government pay scale for commission members) or not at all. If the government will reimburse all NSWG members for travel and expenses to meetings and per diem, this should be stated as a right of members on the Committee and be budgeted for.

Recommendation. There should be no salary for NSWG members. Expenses should be reimbursed for those who must travel. The reimbursement should be for hotel, airfare and government rate of per diem.

Section 13 **Analysis.** For the NSWG to remain autonomous it should have an autonomous source of multi-year funding. Future administration may view EITI less favorably and budget is the surest way to handicap such

an effort. The Chad-Cameroon pipeline expertise has shown that the failure to provide funding for adequate staff and office space has severely disabled the commission. The US Minerals Management Service now draws half its budget from a share of lease rental payments to provide budget stability. EITI will need a substantial budget for its staff, for the procurement of the independent auditor, for hiring experts to assess practices such as acreage allocation, as well as budget for public diplomacy, travel and expertise in law, mining, information technology and other disciplines. Communications will be an indispensable part of the Commission's mission. It should have a budget adequate to place regular print, radio and television advertisements at the Federal and local level, to staff regional offices, to travel around the country and explain the Commission's work, and to operate and maintain a website that will explain the findings of the audits, and offer downloads and links to the audit reports.

Recommendation. We recommend that an account be established for EITI in the Central Bank. Funds from the Petroleum Profits Tax, or another source of tax revenue should be directed to that account, up to the maximum of the EITI budget. EITI should not rely on industry for funding. EITI's initial budget should be stated in the legislation and fixed for five years. Increases in future appropriations should be requested by the NSWG, submitted by the President in his budget and approved by the legislature. We recommend a five year budget be approved at enactment to ensure the stability of EITI. Budget renewals should also be for five years, and recommended by the NSWG, approved by the President and submitted to the legislature for approval. The EITI Commission and NSWG should be prohibited from receiving funds from extractive industries to avoid any actual or apparent conflict of interest.

Section 16

Analysis. The Bill should set forth the obligations of relevant companies and government bodies: (i) to regularly report on revenue and payments in the form prescribed by the EITI Commission; (ii) to provide underlying contracts and documents; (iii) to waive confidentiality provisions, as necessary and; and (iv) to cooperate fully with the EITI Commission and the Commission's "independent auditor." The Bill should acknowledge and address the extent to which these reporting requirements are consistent or conflict with existing legislation/regulations and with confidentiality provisions in contracts with companies.

Noncompliance with this Act should also be a crime enforceable in

Nigerian courts. We offer no opinion on whether it should be a crime under the Economic and Financial Crimes Commission or some other act.

Recommendations.

1. Add a section which outlines the obligations of the relevant companies and government bodies, including (i) to regularly report on revenue and payments in the form prescribed by the EITI Commission; (ii) to provide underlying contracts and documents; (iii) to waive confidentiality provisions, as necessary and; and (iv) to cooperate fully with the EITI and its “independent auditor.”
2. Noncompliance with this Act should also be a crime enforceable in Nigerian courts.

Section 18

Analysis. Define what termination for cause means and expand the definition of extractive industries.

Recommendations.

1. The definition of “Extractive Industries” should be expanded as follows:

“any company *or Federal or state agency, or state owned enterprise* that is engaged in the business of ...”

2. The definition of cause (for usage in removal of a person for cause) should be a common standard usage under Nigerian law including reasons such as malfeasance of office, conviction of a felony, conflict of interest or dereliction of duty.

[END]

