



Report Series

How Home Governments Can Incentivise Responsible Business Conduct of Extractive Companies Operating Abroad

3. Multi-Stakeholder Initiatives



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Report Series

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About this Report Series

Creating an accountable marketplace in a widely interconnected world is a necessary corollary to globalisation, in which governments, companies and civil society play important roles. In a world where business activities and value chains span across many countries, finding the right types of measures to incentivise responsible business conduct (RBC) that crosses borders can be a challenge for states. The primary duty to protect human rights is with states, but companies too have a responsibility - a responsibility to respect human rights, as set out in the UN Guiding Principles for Business and Human Rights (UN Guiding Principles).¹ The Institute for Human Rights and Business (IHRB) has examined the role of states in advancing the protection of human rights in relation to business activities in its “State of Play” report on Human Rights in the Political Economy of States which highlighted examples from 70 countries of recent action.²

This series of Reports (the Reports) build on this line of work and IHRB’s activities in East Africa³ on the extractive sector (oil, gas and mining) under the “Nairobi Process.”⁴ The newly emerging East African producer nations as “host states” to extractive activities, bear the primary responsibility for regulating business activities within their territories. Generally, there are limits on states adopting laws that will take effect on the territory of another state. Nonetheless, the principle of sovereignty does not prevent the “home states” of extractive sector companies, large and small, from exploration companies to supermajors in the oil, gas and mining sectors, from setting clear expectations and legal requirements addressing how businesses domiciled in their jurisdiction should operate abroad. Many of the home states reviewed in these Reports have extractive companies domiciled in their jurisdictions currently operating in or considering operations in East Africa. These Reports are addressed to those home states to serve as inspiration for creating clear incentives and disincentives for responsible business conduct by “their” extractive companies while operating in East Africa and in other emerging producer nations.

The extractive sector is crucial to the development of both developing and industrialised countries, but it remains a high-risk sector with often significant human rights, environmental and social impacts.⁵ Extractive companies are more likely to operate in fragile and conflict-affected situations than other businesses⁶ and states where there may be limited regulation of

1 Office of the UN High Commissioner for Human Rights, “UN Guiding Principles on Business and Human Rights: Implementing the ‘Protect, Respect, Remedy’ Framework” (2011), at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

2 IHRB, ‘State of Play 3: Human Rights in the Political Economy of States: Avenues for Application’ (2014) p. 21. Available at: https://www.ihrb.org/uploads/reports/2014-03-18%2C_Report%2C_State_of_Play_-_Human_Rights_With_in_the_Political_Economy_of_States_-_Full_Report.pdf (IHRB State of Play 3)

3 In particular, Kenya, Tanzania, Uganda, Ethiopia, South Sudan.

4 <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-2-addendum-23-May-2008.pdf>

5 See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, “Corporations and human rights: a survey of the scope and patterns – of alleged corporate-related human rights abuse” (2008) highlighting human rights impacts in the extractive sector at the start of his mandate <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-2-addendum-23-May-2008.pdf>, the work done since then on human rights by some of the main international industry associations – the International Council of Mining & Metals: <https://www.icmm.com/en-gb/society-and-the-economy/mining-and-communities/human-rights> and IPIECA (global oil and gas industry association for environmental and social issues): <http://www.ipieca.org/our-work/social/human-rights/> as well as the active attention by civil society in documenting and addressing human rights impacts of the oil, gas and coal sectors: <https://business-humanrights.org/en/sectors/natural-resources/oil-gas-coal> and mining sector: <https://business-humanrights.org/en/sectors/natural-resources/mining>

6 World Bank Group, ‘Investment Climate in Practice: Promoting Foreign Investment in Fragile and Conflict-Af-

human rights, environmental or social impacts or where existing standards are not rigorously enforced. And while there has been significant developments among some of the major international extractive sector companies in developing policies and practices to implement the UN Guiding Principles, supported by work at the industry association level, these measures have been challenging to put into practice. These experiences are nonetheless important in demonstrating that these issues are relevant and are being addressed to the far wider group of extractive companies large and small that have not yet started to address these issues or are resolutely ignoring RBC developments.

In the meantime, several East African countries are working to upgrade their nascent national legal and regulatory frameworks to address these increasingly important sectors but face many challenges.⁷ Managing the extractive sector in a way that contributes to sustainable development and economic prosperity is an imperative. The African continent is all too familiar with the cost of getting it wrong.

While host states have the primary responsibility for shaping their own approach and regulation of the extractive sector, home states can play an important role in supporting a sustainable, accountable sector. The UN Working Group on Business and Human Rights has recommended that countries should set clear expectations for business and “take into account extraterritorial implications of business enterprises domiciled in their territory in accordance with the UN Guiding Principles.”⁸ This series of Reports seeks to highlight what home states are doing and what more they can do in supporting that vision.

Under the UN Guiding Principles, home states have a role to play in setting clear expectations that all businesses domiciled in their territory and/or jurisdiction respect human rights throughout their operations.⁹ In addition, in conflict-affected areas, (a characterisation that can be applied to South Sudan and parts of Uganda in the Eastern African region) in which “the ‘host’ State may be unable to protect human rights adequately due to a lack of effective control,” home states of multinationals have roles to play in assisting both the businesses and the host state in ensuring that businesses are not involved in human rights abuse, particularly gross human rights abuses. A home state’s duties vis-à-vis its often significant state owned enterprises in the extractive sector has recently been addressed by the UN Working Group on Business and Human Rights.¹⁰

Terminology

- The “**home state**” refers to the country where a company is legally registered.
- The “**host state**” refers to the country where a company operates.

ected Situations’ (April 2014) p. 3. Available at: https://www.wbginvestmentclimate.org/advisory-services/investment-generation/investment-policy-and-promotion/upload/In_Practice_Note_No_22.pdf

7 See Institute for Human Rights and Business, “Human Rights in Kenya’s Extractive Sector: Exploring the Terrain” at: <https://www.ihrb.org/focus-areas/commodities/human-rights-in-kenyas-extractive-sector-exploring-the-terrain> and Institute for Human Rights and Business, “Human Rights in Tanzania’s Extractive Sector: Exploring the Terrain” at: <https://www.ihrb.org/focus-areas/commodities/human-rights-in-tanzanias-extractive-sector-exploring-the-terrain>.

8 UN Working Group on Business and Human Rights, “Guidance on National Action Plans on Business and Human Rights, (2015), p. 12, available at: http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance

9 UN Guiding Principles on Business and Human Rights, Principle 2.

10 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, “On the duty of States to protect against human rights abuses involving those business enterprises that they own or control, which are generally referred to as State-owned enterprises,” A/HRC/32/45 (4 May 2016).

Where a company operates solely in its domestic market, the country is the home and host country at the same time. When a company operates abroad, host and home countries are distinct. Both home and host states have different tools at their disposal to incentivise RBC of companies and disincentivise irresponsible conduct.

The series of Reports is published in five parts:

1. Overview of the key international standards
2. Multi-stakeholder initiatives
3. Reporting requirements
4. Innovative new approaches
5. The role of capital markets

Each Report draws the spotlight to particular legislative, regulatory or engagement tools that home countries can use to incentivise RBC among extractive companies operating abroad. Each Report will also provide a direct country-by-country comparison and identify trends.

The Reports examine how a select number of home states seek to meet UN Guiding Principles expectations and incentivise the RBC of extractive companies when operating abroad. The analysis focuses on eight Organisation of Economic Cooperation and Development (OECD) countries with significant extractive sector companies (Australia, Canada, France, Germany, the Netherlands, Norway, the United Kingdom and the United States), the European Union (EU) and five BRICs countries (Brazil, Russia, India, China, and South Africa). The topics covered highlight measures available to home states to set expectations, if not legal requirements, applicable to extractive companies based in their countries and operating abroad. These examples can serve as models for other sectors that have drawn less attention but which may have increasingly significant human rights impacts when operating abroad. Also of importance, the examples discussed provide input to civil society and other stakeholders as part of the broader toolkit for promoting greater accountability, and should stimulate further debate on the efficiency and effectiveness of such measures.¹¹

There are more tools and approaches that could be highlighted in a more in-depth study. For example, the extraterritorial application of home country laws is the subject of extensive and on-going studies in the business and human rights space. Further research on the economic incentives certain home states provide to their extractive companies operating abroad would provide an interesting comparison to the efforts put into the kinds of RBC measures highlighted in this set of Reports. Further coherence between economic diplomacy and RBC diplomacy opens interesting possibilities for leveraging further action in the future.

¹¹ Given the broad scope of the task, the Reports do not attempt to evaluate the effectiveness of the measures. IHRB acknowledges that monitoring and evaluation of the various initiatives and tools discussed in this series would be important to track the impact and assess progress made, particularly at the host country-level. However it does seek to compare countries' engagement as an indicator for the relevance and range of the various incentives.

Executive Summary



This Report is the third in a series reviewing measures that home governments can use to incentivise responsible business conduct (RBC) and disincentivise irresponsible conduct of extractive companies operating abroad. It reviews how a select number of countries in the Organisation of Economic Cooperation and Development (OECD)¹² and BRICS groupings of countries and the European Union (EU) have engaged with multi-stakeholder initiatives (MSIs) to develop and promote RBC standards for the extractive industries. The Report features a selection of MSIs relevant for extractive industries and draws on information from the comparative table in Annex 1.

The term multi-stakeholder initiative (MSI) as used in this Report refers to voluntary initiatives where representatives of two or more different stakeholder groups cooperate to address some area(s) of sustainability, corporate social responsibility, the environment or human rights. MSI participants usually include some combination of companies, industry associations, non-governmental organisations (NGOs), trade unions, governments, academics and international organisations. MSIs have become an increasingly common response to global business and human rights challenges for a number of reasons. Actors have often turned to MSIs in situations where international and domestic law or other governance mechanisms have failed to address the full range of environmental, social or human rights impacts of business. They have also emerged in response to industry-specific crises, seeking to change the conduct of that industry by promoting collaborative governance models that set and monitor agreed performance standards.

A growing number of states have deliberately turned away from traditional regulatory approaches to address corporate related responsibilities in favour of new forms of collaborative governance.¹³ States may choose to participate in MSIs because multi-stakeholder groups are seen “as a means of promoting dialogue and building consensus, not as the locus of policy implementation and oversight.”¹⁴ Indeed, in several cases, multi-stakeholder engagement has resulted in new standards of corporate conduct, new certification procedures or new monitoring mechanisms, as well as in greater public awareness of corporate activities and influence. States may also be motivated to participate in MSIs because they seek to improve their reputation with the international community and because the MSI helps them achieve foreign policy goals. Host states participating in MSIs may be seen as behaving in line with international “rules” and thus more attractive to business actors and foreign aid.

12 Australia, Canada, France, Germany, Netherlands, Norway, UK, and the USA.

13 Anne Peters, Lucy Koechlin, Till Förster, and Gretta Fenner Zinkernagel, “Non-state actors as standard setters: framing the issue in an interdisciplinary fashion”, in Anne Peters, Lucy Koechlin, Till Förster, and Gretta Fenner Zinkernagel (eds), *Non-State Actors as Standard Setters*, Cambridge University Press, Cambridge, 2009, p.2 and see Tim Büthe and Walter Mattli, “The New Global Rulers: The Privatization of Regulation in the World Economy”, Princeton University Press, Princeton, 2001, p. 5.

14 Rory Truex and Tina Søreide, “Why Multi-stakeholder Groups Succeed and Fail”, World Bank Policy Research Working Report 5495, Sustainable Development Network, Finance, Economics and Urban Development Unit, December 2010, p. 3. Available at: <<https://openknowledge.worldbank.org/bitstream/handle/10986/3977/WPS5495.txt?sequence=2>>

The extractive industry may be exceptional in terms of its size, its impact and its revenue-generating potential but its real uniqueness lies in its willingness to invest almost regardless of the operating environment, including areas of weak governance and violent conflict. The MSIs covered in this Report developed particularly in response to calls for greater state and corporate accountability just such circumstances. Given these operating contexts, a home state can play an important role in supporting these initiatives but also in supporting their companies to understand their operating contexts and maintain pressure to meet RBC standards even in challenging circumstances. What is much harder to judge is how far home states have gone in providing that support to companies operating in conflict-affected areas and drawing clear lines in specific circumstances. As Professor John Ruggie, who led the UN effort to develop the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) as the UN Special Representative of the Secretary General on Business and Human Rights, stressed when addressing participants in the Voluntary Principles on Security and Human Rights (Voluntary Principles) in 2011:

“When operating in difficult environments, companies need granular advice and assistance from home and host states alike. They need to be able to count on the in-country government-to-government interface that is a critical component of the Voluntary Principles . . . In my experience, most embassies are not well instructed or equipped for these tasks. In addition, home governments of companies need to be honest with them when their activities approach critical thresholds, and promote corrective measures if they are crossed.”¹⁵

If MSIs could be considered as responses to governance gaps,¹⁶ their success can at the same time potentially diminish home and host states’ motivation to take action on their own. That may not be the ideal outcome in the face of the governance challenges that prompted creation of such MSIs in the first place. Instead, these initiatives should be seen as among a suite of approaches that home states use to prompt RBC among extractive companies operating abroad. Home states should continue to explore ways to use the range of tools at their disposal to support the implementation of MSIs. Actively encouraging extractives companies domiciled in their jurisdiction to participate in MSIs is one step, but state participation should not be a necessary precondition for extractive companies to join. Indeed, a number of large companies participate in MSIs without their home governments’ involvement as members of the initiatives. Home States can also use their market power to incentivise extractive company membership and adherence to MSIs. This is demonstrated by the procurement practices of states that require private security providers to be members of The International Code of Conduct for Private Security Providers’ Association (ICoCA) as a condition of providing security services to the state. Contractual obligations reinforce national commitments but are often easier to enforce across borders.

All the MSIs covered in this Report preceded the adoption of the UN Guiding Principles in 2011,¹⁷ however all, except the Kimberley Process, have explicitly recognised the UN Guiding

15 http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/Ruggie_Speech_VPs_September_2011.pdf

16 IHRB, ‘State of Play 3: Human Rights in the Political Economy of States: Avenues for Application’ (2014) p. 60. Available at: https://www.ihrb.org/uploads/reports/2014-03-18%2C_Report%2C_State_of_Play_-_Human_Rights_With-in_the_Political_Economy_of_States_-_Full_Report.pdf

17 Office of the UN High Commissioner for Human Rights, “UN Guiding Principles on Business and Human Rights: Implementing the ‘Protect, Respect, Remedy’ Framework” (2011), at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. The Extractive Industries Transparency Initiative (EITI), the Voluntary Principles on Security and Human Rights (VPs), and the Kimberley Process Certification Scheme (KPCS) were created around the same time between 2000 and 2003. The International Code of Conduct for Private Security Service Providers (ICoC) was cre-

Principles and their relevance to the MSI in some way. Prompting extractive sector MSIs to consider the express linkage between the MSI's obligations and the UN Guiding Principles – both for the state and for companies – not only sends a clear signal but starts to bring coherence to the discussion. Encouraging states to exert proactive leadership within existing initiatives and with companies in their jurisdictions and providing clear thresholds for corporate performance in these initiatives aligned with the UN Guiding Principles, is a clear priority in the time ahead.¹⁸ The three-pillar framework and concepts of the UN Guiding Principles¹⁹ can both enrich the MSIs, while the experiences in the MSI can also contribute to the maturation and deepening of experiences in applying the UN Guiding Principles.

Another challenging area that remains unfinished business is the UN Guiding Principles' call on "industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards [to] ensure that effective grievance mechanisms are available."²⁰ The UN Guiding Principles post-date all the MSIs addressing the extractive sector, except ICoCA, so it is not too surprising that so far, only ICoCA has committed to establishing a grievance mechanism in line with the UN Guiding Principles. The EITI has a Civil Society Organisation (CSO) Protocol and a rapid response mechanism to respond to concerns around treatment of civil society participants. The Voluntary Principles have a more informal process to respond to "requests" from members about particular concerns in country. Given the potentially severe human rights impacts addressed by these MSIs, it is likely that calls will continue for more formalised systems to address grievances related to the implementation of MSIs.

As the Tables in Annex 1 demonstrate, OECD home states are the driving forces behind MSIs in the extractive sector, motivated in part by the risks to the operations and reputations of "their" flag companies, maintaining access to strategic extractive resources and broader foreign policy goals around conflict reduction, the protection of human rights and strengthening transparency. None of the BRICS countries participate in the MSIs listed except for the Kimberley Process. Given the size of the domestic and overseas extractive sector within BRICS countries, continued outreach to those individual states should be an on-going priority, building on commitments in other forums, such as the G20 and on relevant national initiatives such as the Chinese Chamber of Commerce of Metals, Minerals and Chemicals Imports and Exports (CCCME), supervised by the Ministry of Commerce's *Guidelines for Social Responsibility in Outbound Mining Operations*.²¹

ated most recently in 2010 and is not extractive-sector specific but creates standards for private sector security providers and thus quite relevant to the extractive sector as a sector that engages private security providers.

18 S Jerbi, Assessing the Roles of Multistakeholder Initiatives in Advancing the Business and Human Rights Agenda, *International Review of the Red Cross*, Volume 94 Number 887 Autumn 2012. Available at: <https://www.icrc.org/en/international-review/article/assessing-roles-multi-stakeholder-initiatives-advancing-business-and>

19 The UNGPs are built on a three pillar framework of the: 1) state duty to protect human rights; 2) the corporate responsibility to respect; and 3) remedy for victims.

20 UN Guiding Principles on Business and Human Rights, Principle 30, p.32, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

21 D. Munje, 'The BRICS countries should open their extractives' (24 September 2014). Available at: <https://eiti.org/blog/brics-countries-should-open-their-extractives>

Using Multi-Stakeholder Initiatives to Prompt Responsible Business Conduct

2

2.1 The Extractive Industries Transparency Initiative

2.1.1 Overview and Government Participation

The Extractive Industries Transparency Initiative (EITI) is an international voluntary standard to promote the open, transparent, and accountable management of natural resources. The process is supported by a coalition of governments, corporations,²² and civil society²³ working collaboratively.²⁴ “Somewhat against the odds, extractives sector transparency has emerged as an international norm in a short period”²⁵ and EITI has been both a product and a spur to the further update of that norm.

When a government joins EITI, it becomes a candidate country, meaning that it is committed and has a plan and a structure to achieve the EITI requirements. To become a compliant country, States must complete an independent assessment known as the EITI validation.²⁶ The validation process assesses the country’s progress against the EITI requirements, analyses the impact, and makes recommendations for strengthening the process. A compliant country is regularly revalidated. Member countries can also be suspended or delisted.²⁷

States use their participation to burnish their international reputations, demonstrating leadership in transparency and anti-corruption matters to their peers. Membership strengthens the credibility of advocacy on the adoption of the EITI with other governments.²⁸ Industrialised

22 <https://eiti.org/supporters/companies>

23 <https://eiti.org/supporters/civil-society>

24 EITI, ‘What is the EITI’ <<https://eiti.org/eiti>>.

25 E. David-Barrett and K. Okamura, “Norm Diffusion and Reputation: The Rise of the Extractive Industries Transparency Initiative,” *Governance: An International Journal of Policy, Administration, and Institutions* (2015) Volume 29, Issue 2, pages 227–246, April 2016.

26 <https://beta.eiti.org/about/how-we-work>

27 <https://beta.eiti.org/about/how-we-work>

28 E. David-Barrett and K. Okamura, “Norm Diffusion and Reputation: The Rise of the Extractive Industries Transparency Initiative,” *Governance: An International Journal of Policy, Administration, and Institutions* (2015) Volume 29, Issue 2, pages 227–246, April 2016.

countries view the EITI as providing an additional tool to change social conditions in some countries from the global south without direct conditionality.²⁹

Participating host states joining the initiative are able to demonstrate that domestic policy is consistent with international efforts to increase transparency, including in tax systems, transmitting the image that their countries are taking the steps necessary to achieve a stable investment climate. These host states can see net positive links between EITI participation and greater foreign investment with limited costs of compliance.³⁰ EITI, in turn, is seeking to demonstrate that more concretely by reaching out to credit rating agencies, highlighting the relevance of EITI information in deepening their analysis and making more accurate assessments of host states, highlighting that EITI information “offers credible insights into institutional strength and governance,” a marker used by the ‘big three’ credit rating agencies in their ratings methodologies.³¹

Of the 14 countries reviewed in this Report, Norway is the only compliant country. The United Kingdom³² and the United States³³ are candidate countries and will be validated in 2017. Germany submitted its formal EITI candidature in 2015 but has not yet been formally accepted as an EITI candidate country.³⁴ Australia announced in May 2016 that it will join the initiative.³⁵ France and Italy have committed to implement it as well.³⁶ EU Member States have implemented reporting requirements under EU legislation that is aligned with relevant parts of the EITI initiative, without becoming supporters or candidates.³⁷

Countries can also be “supporting countries” that contribute to the EITI’s goals and work on various levels (without being an EITI candidate or a compliant country) through political, technical or financial support.³⁸ Of the 14 countries reviewed in this Report, supporting countries include: Australia, Canada, France, Germany, the Netherlands, Norway, the United Kingdom and the United States.³⁹ A supporting country can also participate in the EITI through support to the EITI Secretariat, the EITI Multi Donor Trust Fund or EITI related initiatives. For instance, Australia contributed a total of \$18.45 million from 2006 to 2015 as a supporting country to the EITI International Secretariat and the EITI Multi-Donor Trust Fund (MDTF).⁴⁰

29 S.A. Aaronson, “Limited Partnership: Business, Government, Civil Society, and the Public in the Extractive Industries Transparency Initiative (EITI)” (2011) 31(1) Public Administration and Development 50, 57.

30 Ibid

31 EITI, “Quantifying Intangibles: Using The Extractive Industries Transparency Initiative In Credit Ratings Assessments” (2015). Available at: https://eiti.org/sites/default/files/documents/20150825_eiti_brief_how-to-use-the-eiti-in-credit-rating-assessments.pdf

32 <https://www.gov.uk/guidance/extractive-industries-transparency-initiative>

33 <https://eiti.org/united-states-america>

34 Germany submitted its formal EITI candidature on 22 December 2015, <http://www.d-eiti.de/wp-content/uploads/2016/01/Kandidaturantrag-Deutschland_22-12-2015.pdf> but has not yet been formally accepted as EITI candidate country.

35 <http://www.minister.industry.gov.au/ministers/frydenberg/media-releases/increasing-transparency-global-resources-sector>

36 https://eiti.org/files/document/Supporting_Companies_Factsheet.pdf

37 See the companion Briefing Paper on Reporting Requirements. [H TO ADD LINK IF YOU CAN]

38 For the principles of EITI funding see <<https://eiti.org/about/funding>>. For detailed accounts on financial contributions to EITI see EITI International Secretariat, “2014 EITI Annual Accounts and Q1 2015 forecast” (30 March 2015) <https://eiti.org/files/BP-29-8_2014-EITI-Annual-Accounts-2015-Forecast.pdf>.

39 See: <https://eiti.org/supporters/countries>

40 Australia contributes to EITI through financial and technical support, see <<https://eiti.org/supporters/countries/australia>>. For details on the financial support see EITI International Secretariat ‘2014 EITI Annual Accounts and Q1 2015 forecast’ (30 March 2015) p. 4 https://eiti.org/files/BP-29-8_2014-EITI-Annual-Accounts-2015-Forecast.pdf.

In contrast to the growing number of industrialised countries that have committed in recent years to implementing the EITI Standard, it is notable that although the G20 group of governments, which includes the BRIC countries,⁴¹ has publicly supported the EITI, none of the BRICS countries have become candidates or even EITI supporters, despite their significant extractive sectors.⁴² China has expressed support in international forums and Chinese companies operating in EITI countries have (like other extractive companies) reported as required.⁴³ The Chinese Chamber of Commerce of Metals, Minerals and Chemicals Imports and Exports (CCCMC), supervised by the Ministry of Commerce, has Guidelines for Social Responsibility in Outbound Mining Operations⁴⁴ that recommend that companies “disclose all payments which are made to foreign government entities in countries of operation, including in-kind payments and infrastructure projects, in line with global transparency standards, in countries where those apply”.⁴⁵ The Guidelines also specifically highlight the EITI.

For companies, the EITI is seen as a useful structure to help mitigate reputational risks faced when operating in countries where revenue payments to governments have been questioned, coupled with a view that the EITI does not impede their competitiveness.⁴⁶ Indeed, one of the real values of the initiative to companies is that it levels the playing field as all companies in EITI countries are required to disclose the same information, rather than disclosure being tied to national reporting requirements of home countries or listing on a particular stock exchange.⁴⁷

2.1.2 Implementation

EITI membership by a host state has clear legal implications for companies operating in the state, because all companies operating in the country will be required to disclose payments and other information in line with national implementation of the EITI. The increasing scope of the 2016 Standard and its emphasis on the entire extractive sector value chain provides the opportunity to leverage national implementation to improve extractive company performance against RBC standards and particularly respect for human rights. Both host and home states have a role in strengthening that linkage.

To date, there has been little focus on the how the EITI standard can strengthen company performance. Revenue disclosure should be part and parcel of a strengthened anti-bribery and corruption system. The multi-stakeholder engagement process that accompanies the EITI provides opportunities to build stronger stakeholder dialogues in the sector between companies and CSOs. But there are wider gains to be made, particularly in light of the changes in the 2016 Standard. Importantly, the 2016 Standard matches the EITI requirements to each step in the extractive sector value chain, which will help all stakeholders better understand how

41 EITI, “G20 Reaffirms Support for EITI”, 9 September 2013, <https://eiti.org/news/g20-reaffirms-support-eiti>

42 <https://eiti.org/blog/brics-countries-should-open-their-extractives>

43 <https://eiti.org/document/chinese-companies-reporting-eiti-implementing-countries>

44 The China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCMC), ‘Guidelines for Social Responsible Outbound Mining Investments’ contain the sector-specific guidance on social responsibility https://www.emm-network.org/case_study/cccmc-developing-guidelines-for-social-responsibility-in-outbound-mining-investment/, (CCCMC Guidelines).

45 CCMC Guidelines, Section 2.2.5.

46 Ibid.

47 See: <https://eiti.org/files/business-guide-may-2013.pdf>

the sector works, and what steps are taken, and should be disclosed at each step.⁴⁸ Contract transparency will make fiscal terms available for scrutiny by national and international stakeholders, but also other contractual operating requirements (or lack thereof) around environmental protection, human rights, local content, and social investment – all of which are acknowledged as part of a responsible extractive sector. Disclosure of social and economic contributions should help local communities and host governments understand whether those contributions are having a positive impact.⁴⁹ The further transparency requirements around beneficial ownership⁵⁰ will provide new tools to local communities and civil society to understand who is behind the payments.

2.1.3 Critical Perspectives

EITI commissioned a formal, independent evaluation of the MSI in 2011, an important step in reviewing the effectiveness of the initiative.⁵¹ The 2011 evaluation concluded that the EITI is an international brand with impressive support from governments, the private sector, and civil society but also highlighted a number of deficiencies.⁵² However, there is no easily available information on the EITI website about how the organisation responded to the findings of the evaluation.⁵³ The changes to the EITI Standard in 2013 were a response to the important question raised in the evaluation of what precisely the EITI is meant to achieve, between the narrow goal of publishing reports and the very broad aspirations of the EITI Principles. The 2013 Standard answer was a new rule that each multi-stakeholder group must relate EITI reporting to wider national priorities for the extractive industries making reporting a tool for helping to assess how far these priorities are being met in each country and where the obstacles lie.⁵⁴ The further revisions in 2016 take additional steps to make extractive industry transparency an integral part of how governments manage the sector in their respective contexts.⁵⁵

To date, the focus on human rights has been on the government participants in the EITI, rather than on extractive sector companies. In 2013, Human Rights Watch, which is not a civil society participant in the EITI,⁵⁶ highlighted government constraints on civil society activities in some EITI participating countries, which was seen as putting at risk the legitimacy of the initiative's multi-stakeholder implementation processes at the national level. The report argued that EITI should incorporate human rights in order to improve governance and that "transparency alone does not improve governance". It recommended that the EITI expand its consideration of country contexts to include issues such as the environment for freedom of information, expression, association and assembly, in addition to assessing the degree to which civil society can operate freely within a given country.

48 Ibid, p. 4.

49 See: <http://progrep.eiti.org/2016/social-and-economic-contribution/social-payments-cameroon>

50 <https://eiti.org/news/panama-files-and-eiti-ground-breaking-rules-ownership-reporting>

51 Scanteam, "Achievements and Strategic Options: Evaluation of the Extractive Industries Transparency Initiative", Final Report, Oslo, May 2011, <http://eiti.org/files/2011-EITI-evaluation-report.pdf>.

52 Ibid.

53 This report appears to be the next step after the evaluation: <https://eiti.org/files/Board%20Paper%2021-2-A%20Building%20on%20achievement%20-%20w%20B-F.pdf>. The EITI website does usefully hosts a wide range of research about the initiative that can help stakeholders understand the impacts – expected and unexpected, and deficiencies

54 <https://eiti.org/blog/new-lease-life-eiti>

55 <https://eiti.org/blog/improved-standard-improved-sector-governance>

56 See Human Rights Watch, "A New Accountability Agenda" p.11

While the EITI did not accept all the findings of the report,⁵⁷ more recent decisions, such as the downgrading of Azerbaijan in April 2015 from “compliant” to candidate status⁵⁸ by the EITI Board was based on “deep concern” with respect to the ability of civil society groups to engage critically in the EITI process at country level. In addition, the 2016 revisions include a strengthened EITI Civil Society Protocol,⁵⁹ aimed at improving mechanisms to assess civic space issues that will require monitoring to help ensure the initiative can deliver on its commitments.⁶⁰ Ironically, the same meeting adopting the 2016 Standard involved a walk-out from civil society, highlighting the on-going challenges that all MSIs face of maintaining a balance of power and participation among all the participants.⁶¹

2.2 The Voluntary Principles on Security and Human Rights

2.2.1 Overview and Government Participation

Growing concerns about the responsibilities of major oil and mining companies operating in conflict or weak governance zones were at the heart of the developments that led to the establishment of the Voluntary Principles on Security and Human Rights (the Voluntary Principles).⁶² The two governments that kick-started the initiative shared a concern over the risk to the operations and reputations of their flag companies, their own economic and political stake in ensuring that those companies could continue to extract and export key resources from conflict-affected states, and a common commitment to the protection and promotion of human rights.⁶³

The Voluntary Principles seek to support companies in addressing the challenge of providing security in complex environments in a manner that respects human rights⁶⁴ by guiding companies in their engagement with public and private security providers to ensure human rights are respected in the protection of company facilities and premises. Although the Voluntary Principles were adopted long before the UN Guiding Principles, the initiative today specifically recognises that the UN Guiding Principles “provide a commonly accepted framework of normative principles and policy guidance, which informs the implementation

57 See the EITI response here: <https://eiti.org/blog/open-letter-new-hrw-report-jonas-moberg-writes-human-rights-watch>

58 EITI, ‘Azerbaijan Downgraded to Candidate Country’, 15 April 2015, <https://eiti.org/news/azerbaijan-downgraded-candidate-country>

59 <https://eiti.org/document/civil-society-protocol>

60 http://www.publishwhatyoupay.org/wp-content/uploads/2016/03/Our-Eyes-on-the-EITI-Future_ENGLISH_WEB.pdf

61 Natural Resource Governance Institute <http://www.resourcegovernance.org/blog/what-you-didnt-hear-about-eiti-last-week-six-new-elements-2016-standard-and-their-potential>

62 For the text of the Voluntary Principles see <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>.

63 Bennett Freeman, Maria B. Pica, and Christopher N. Camponovo, ‘A new approach to corporate responsibility: the Voluntary Principles on Security and Human Rights’, in *Hastings International & Comparative Law Review*, Vol. 24, 2000-01, p. 427

64 http://www.voluntaryprinciples.org/wp-content/uploads/2016/06/VPs_-_Fact_Sheet_-_May_2016.pdf

and development of the Voluntary Principles Initiative”.⁶⁵ It also recognises that the Voluntary Principles can play a role in meeting the corporate responsibility to respect under the UN Guiding Principles, by helping companies identify human rights risks and take meaningful steps to address those risks in a manner that helps ensure respect for human rights in their operations.⁶⁶ Extractive companies join the Voluntary Principles mainly to mitigate reputational risks while operating in complex environments, to have a set of principles as a leverage point in negotiating with host governments, as a framework to address human rights risks in the pursuit of legitimate security objectives and to exchange lessons learned with peers and the other stakeholders.

The Voluntary Principles initiative comprises states as well as businesses and NGOs. In order to become a participating government, a country must submit a national plan to the Steering Committee of the Voluntary Principles which explains how the government is going to implement the Voluntary Principles in the extractive sector, “both domestically and overseas”.⁶⁷ Of the 14 countries reviewed, six are currently part of the Voluntary Principles initiative: Australia, Canada, the Netherlands, Norway, the United Kingdom and the United States. There is a predominance of OECD countries participating in the Voluntary Principles even though the outreach objectives focus on expanding membership in the Initiative, particularly in the Government Pillar, to the countries where resource extraction occurs.⁶⁸ None of the BRICs countries surveyed participate in the initiative.

2.2.2 Implementation

More than any of the other MSIs, the Voluntary Principles lay out explicit roles for home states. These roles are aligned with the state duty to protect human rights affirmed in the UN Guiding Principles as both derive from the underlying state obligations to protect human rights, enshrined in international human rights law. The initiative is another tool in the toolbox to address broader security objectives, conflict prevention, and reducing the costs of insecurity.

According to the text of the Voluntary Principles themselves, home states are a source of information for the risk assessment conducted by companies⁶⁹ and assistance to companies (together with host governments) in identifying risks of violence.⁷⁰ The “Guidance on Certain Roles and Responsibilities of Governments” more specifically notes that “Governments should be guided by the UN Guiding Principles on Business and Human Rights” and the state duty to protect human rights. More significantly, “[w]ithin the context of the Voluntary Principles and in accordance with national and international law,” the Guidance highlights the duty of: “Government Participants ...to take appropriate steps to prevent, investigate, punish

65 The Voluntary Principles, ‘Voluntary Principles Strategy 2014-2016’ (2013) p. 2. Available at: <http://www.voluntaryprinciples.org/wp-content/uploads/2014/05/Voluntary_Principles_Strategy_-_2014-2016.pdf.

66 http://www.voluntaryprinciples.org/wp-content/uploads/2016/06/VPs_-_Fact_Sheet_-_May_2016.pdf See the implementation tools here: <http://www.securityhumanrightshub.org/content/guidance-related-voluntary-principles>

67 The Voluntary Principles, ‘Framework for Admission of New Governments’ (n 3). Annex B – Elements of the National Plan. Available at: <http://www.voluntaryprinciples.org/wp-content/uploads/2016/04/VPI-Government-Pillar-Entry-Framework-April-2016.pdf>

68 The Voluntary Principles, ‘Voluntary Principles Strategy 2014-2016’ (2013) 2 <http://www.voluntaryprinciples.org/wp-content/uploads/2014/05/Voluntary_Principles_Strategy_-_2014-2016.pdf

69 The Voluntary Principles, Risk Assessment <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>

70 http://www.voluntaryprinciples.org/wp-content/uploads/2014/10/VPs_-_Roles_and_Responsibilities_-_Government_Pillar.pdf

and redress human rights abuses within their territories and/or jurisdiction by third parties, including extractive companies and public and private security service providers, through policies, legislation, regulations, and adjudication, as well as take appropriate action to prevent recurrence.”⁷¹

Recognising the role of home states, Voluntary Principles participants have also recommended embassy level actions including: identifying and building relationships with host government officials, using bilateral engagements with host states to encourage cooperation by government entities responsible for security, licensing/concessions, oversight, and other potentially relevant issues with extractive companies, NGOs and other relevant stakeholders; supporting company risk assessment processes, for example, through conversation with host government on risks, promoting greater awareness of the Voluntary Principles, and convening multi-stakeholder meetings with in-country Voluntary Principles participants to raise awareness.⁷²

Government participants (as well as companies and CSOs participants) must submit annual reports and can choose to make their reports public, but are not required to do so. Government pillar reports range from the quite general to more specific with respect to outreach activities, however, few provide a clear picture of engagement with Voluntary Principles participating companies and the messages conveyed.

2.2.3 Critical Perspectives

The withdrawal of Oxfam⁷³ and Amnesty international⁷⁴ (two founding NGOs of the Voluntary Principles) in 2013 highlighted the frustration of some participants with the initiative’s lack of progress in developing “robust accountability systems for member companies”,⁷⁵ which brought the credibility and effectiveness of the initiative into question. The Voluntary Principles initiative has also been criticised for its untransparent complaint mechanisms.⁷⁶ In response, the governance rules for the initiative have been updated to reflect a number of expected actions for all actors including: publicly promoting the Voluntary Principles and proactively implementing or assisting in their implementation; participating in dialogue with other participants, providing timely responses to reasonable requests for information from other participants and participating in the verification process.⁷⁷ Whether this has resulted in the robust accountability mechanism sought remains to be seen. Oxfam and Amnesty International have not re-joined the initiative.

Unlike the other MSIs discussed here, the Voluntary Principles are not implemented through legislation and the verification of implementation is of a different scale altogether than the

71 Ibid.

72 Ibid.

73 See Business & Human Rights Resource Centre, “Oxfam Leaves Voluntary Principles for Security and Human Rights Multi- Stakeholder Initiative”, 17 April 2013, <http://business-humanrights.org/en/oxfam-leavesvoluntary-principles-for-security-and-human-rights-multi-stakeholder-initiative>

74 Amnesty International, “Amnesty International Withdrawal from the Voluntary Principles on Security and Human Rights”, public statement, 3 June 2013, <www.amnesty.org/en/library/asset/IOR40/003/2013/en/20db4_d7c-ee09-4a98-aab0-1016f2ebac42/ior400032013en.pdf>accessed on 27 June 2016.

75 Ibid.

76 Penelope Simons, “The governance gap: multistakeholder and intergovernmental initiatives” in Penelope Simons and Audrey Macklin, “The Governance Gap: Extractive industries, human rights, and the home state advantage” (Routledge 2014) 122-123.

77 <http://www.voluntaryprinciples.org/resources/>

other MSIs reviewed in this Report. Participant implementation of the Voluntary Principles should be considered light-touch verification given the absence of independent or public review. The Voluntary Principles verification process involves presentations, brief peer reviews and annual reports.⁷⁸ The process is both a strength of the initiative, through sharing experiences and lessons learned, and a weakness, given the lack of criteria for the verification, independent or public review and a lack of consequences for performance not consistent with the Principles. As for home governments, the Voluntary Principles have been criticised for “rather vague standards for the participation of government members. It is not clear whether they are expected to actively intervene or use influence to improve the implementation of the initiative in other countries, or to enact particular policies or laws relevant to conduct either within their own borders or abroad.”⁷⁹

2.3 The International Code of Conduct for Private Security Service Providers

2.3.1 Overview and Government Participation

The Voluntary Principles are addressed to extractive companies that use private and public security providers to protect their operations. The International Code of Conduct for Private Security Providers (ICoC) addresses private security companies themselves. Many companies in the extractive sector contract with private security providers and many of the corporate observers in the association (ICoCA) are extractive sector companies.⁸⁰

The increasing activities of private military and security companies led to adoption in 2008 of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict.⁸¹ While addressed to states and setting out state obligations, the document also directly but briefly addresses private military and security companies (PMSCs) as well.⁸² This led to a call for the development of more detailed guidance for PMSCs directly and specifically for companies operating in difficult contexts,⁸³ resulting in the ICoC⁸⁴ and its association.⁸⁵

78 See verification framework for companies: http://www.voluntaryprinciples.org/wp-content/uploads/2015/05/Corporate-Pillar-Verification_Framework-May-2015.pdf, governments: <http://www.voluntaryprinciples.org/wp-content/uploads/2016/04/VPI-Government-Pillar-Entry-Framework-April-2016.pdf> and CSO: <http://www.voluntaryprinciples.org/wp-content/uploads/2016/04/VPI-NGO-Entry-Framework-April-2016.pdf>.

79 EarthRights International & The Centre for Environment, Human Rights and Development, “Assessing and Improving the Voluntary Principles on Security & Human Rights: Lessons from the Nigerian Experience,” (2013), p. 3. Available at: <https://www.earthrights.org/sites/default/files/documents/assessing-and-improving-voluntary-principles.pdf>

80 <http://icoca.ch/en/membership/observers>

81 The Montreux Document is supported by 53 states and three international organizations: the EU, the OSCE and NATO. See: <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-document.html>

82 See Geneva Academy of International Humanitarian Law and Human Rights, “The International Code of Conduct with Private Security Providers”, (2013), pp. 5-7. Available at: http://www.geneva-academy.ch/docs/publications/briefing4_web_final.pdf

83 Id., p. 7.

84 http://icoca.ch/en/the_icoc

85 See: <http://icoca.ch/en/history>

ICoCA is an MSI that oversees implementation of the ICoC and more generally, promotes the responsible provision of security services and respect for human rights and national and international law in accordance with the ICoC.⁸⁶ While the initiative is multi-stakeholder, the Code itself and the system of implementation applies to the private security service providers only. The ICoC has specific requirements on respect for human rights and therefore provides a direct mechanism for companies in the private security sector to implement the corporate responsibility to respect for human rights.⁸⁷

The Association has three main functions: certification of private security service providers, monitoring their activities, and maintaining a complaints process for alleged victims of ICoC violations. As of the writing of this Report, the ICoCA Board of Directors was still developing its more detailed procedures for reporting, monitoring and assessing performance and its remedy function.

By joining the ICoCA, home states emphasise their commitment to effective private security sector governance, as well as their support for international human rights and humanitarian law. Participation by states also contributes to effective regulation of private security services in accordance with good practices identified in the Montreux Document.⁸⁸ Where there is no effective national regulation of security providers, the ICoCA can still apply, thus offering a facility through which companies can be held accountable through the ICoCA's functions of reporting, monitoring and assessing performance with the ICoC based on established human rights methodologies, and handling complaints on alleged violations of the Code, including allegations that a company grievance mechanism is not accessible, fair, or that it is not contributing as appropriate to ensuring access to effective remedies.⁸⁹

One significant challenge faced by ICoCA is the lack of diversity of members, particularly in the government pillar that has a membership of European and North American governments only. Of the States covered in this Report, Norway, the UK and the US are members. None of the BRICS governments are part of ICoCA, but China is one the original governments participating in the Montreux Document initiative.

2.3.2 Implementation

The Montreux Document contains a compilation of relevant international legal obligations of states, including homes states related to private military and security companies. The ICoC is targeted to providing guidance for companies, but includes a few limited obligations for "competent authorities" defined as "any state or intergovernmental organisation which has jurisdiction over the activities and/or persons in question."⁹⁰ Home governments of security service provider companies are the competent authority for official records about the

86 See: <http://icoca.ch/en/mandate>

87 Given the complementarities in objectives between the VPs and ICoCA, co-operation between the two initiatives is being explored. The ICoCA has become an observer in the VPs.

88 For a detailed discussion of this, see: N. Van Amstel, T. Rodenhäuser, (DCAF), "The Montreux Document and the International Code Of Conduct - Understanding the relationship between international initiatives to regulate the global private security industry," (2016). Available at: <http://www.dcaf.ch/Publications/The-Montreux-Documents-and-the-International-Code-of-Conduct-Understanding-the-relationship-between-international-initiatives-to-regulate-the-global-private-security-industry>

89 <http://icoca.ch/en/mandate>

90 ICoC - Definitions, Available at: http://www.icoca.ch/en/the_icoc.

activities of these companies wherever they operate.⁹¹ They are also a possible recipient for a signatory company's report on known or reasonable suspicions of commissions of national or international crimes defined in paragraph 22 of the ICoC.⁹²

More generally, home state governments can encourage private security providers to join, and more significantly, can use their market power to incentivise membership and compliance. As a certification initiative, the prime driving force behind the uptake of the ICoCA is market forces, rather than legislation. Several home state governments, and extractive sector companies, have already linked participation in the initiative to their procurement of security services, specifically excluding private security providers not members of ICoCA from providing security services. The US has committed to incorporating membership in the ICoCA as a requirement in the bidding process for its global protection services.⁹³ This provides a powerful incentive for compliance with the Code, well beyond the soft enforcement mechanisms available to the MSI itself.

2.3.3 Critical Perspectives

ICoCA is the newest of the MSIs in the human rights field relevant to extractives and is still in the process of finalising its processes as noted above. A key challenge, common to many MSIs, is ensuring a strong and equal participation from each stakeholder group. In the case of the ICoCA, the number of civil society and government members is dwarfed by industry participation. While it is encouraging that so many industry actors are participating in the ICoCA, the limited representation of other stakeholders potentially threatens the natural "checks and balances" among all participant groups that is viewed as being critical to the success of the MSI model. The International Corporate Accountability Roundtable (ICAR), an NGO participant in the ICoCA publicly flagged this concern, encouraging the temporary steering committee initially guiding the establishment of the initiative to guarantee the ICoCA's continued credibility by maintaining the governance system's independence and balanced stakeholder representation.

2.4 The Kimberley Process Certification Scheme

2.4.1 Overview and Government Participation

The Kimberley Process (KP) is an initiative that seeks to stem the flow of conflict diamonds – defined as "rough diamonds used by rebel movements to finance wars against legitimate governments."⁹⁴ The Kimberley Process Certification Scheme (KPCS) imposes requirements on its members to enable them to certify shipments of rough diamonds as 'conflict-free' and prevent conflict diamonds from entering the legitimate trade. Under the terms of the KPCS,

91 Ibid, paragraph 53.

92 Under the condition that the perpetrator is based in this country as well; see paragraph 24 and 37 of the ICoC.

93 See: <http://www.state.gov/r/pa/prs/ps/2013/08/213212.htm>

94 KPCS Core Document, Section I. Available at: <https://www.kimberleyprocess.com/en/kpcs-core-document>

participating governments agree to issue a certificate to accompany rough diamonds being exported from its territory, certifying that the diamonds are conflict-free which means it must be able to track the diamonds being offered for export back to the place where they were mined, or to the point of import, and must meet a set of standards for these internal controls. All importing countries agree not to allow any rough diamonds into their territory without an approved KPCS certificate. It is forbidden to trade diamonds with any non-KP member countries.

States are participants and industry and civil society are involved in the Kimberley Process initiative as observers.⁹⁵ It involves a multi-layered system that draws on the benefits of multi-stakeholder approaches and mutual learning. In addition to the requirements on states, the initiative also includes provisions for industry self-regulation based on a system of warranties and verification by independent auditors of individual companies as well as internal penalties set by industry. This system was developed with the participation and expertise of NGOs and companies as well as number governments, but its implementation would not occur without governments acting in a variety of their traditional roles.⁹⁶

The KPCS is open to all countries that wish to participate and are able to implement the stipulated requirements. Of the 14 countries reviewed for this Report, all are participating in the KPCS.⁹⁷ The 28 EU member states participate in the Kimberley Process (KP) under the umbrella of the EU as a single KP participant, and EU legislation is in place to implement KPCS minimum requirements.⁹⁸ This stands in contrast to the other MSIs reviewed in this Report and may be attributed to a number of factors. The very specific link that is and can be drawn between the commodity and the prevention of conflict fits with the foreign policy objectives of the home states reviewed. The narrow focus of the initiative permits more targeted measures that may make the implementation of the initiative more palatable to a number of participant governments. With respect to monitoring compliance, whereas under the EITI where an independent, third-party independent validator is involved, the Kimberley Process instead utilises a peer review system.⁹⁹ In addition, the focus is on trade rather than on the government's performance in governing the sector, making it more "palatable" to a wider range of states.

For companies, the susceptibility of the sector to reputational damage and loss of market share has brought the larger players to the table¹⁰⁰ and eventually to developing purpose-built industry association and system.

2.4.2 Implementation

The KPCS principal method of operation is acting as a gateway to the legitimate diamond trade. The process is intended to prevent conflict diamonds from entering that trade. The

95 <https://www.kimberleyprocess.com/en/faq>

96 Amy Lehr, "Old and new governance approaches to conflict minerals: all are better than one", in Harvard International Law Journal Online, Vol. 52, Article Series: November 2010, p. 159, < http://www.harvardilj.org/2010/11/online_52_lehr/.

97 <https://www.kimberleyprocess.com/en/2016-kp-participants-list>

98 <https://www.kimberleyprocess.com/en/european-union>.

99 Dam-de-Jong, Daniella, "International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations," Cambridge University Press, (2015), p.413.

100 Avant, Deborah and Westerwinter, Oliver, "The New Power Politics: Networks and Transnational Security Governance," OUP USA, (2016), p.240.

KPCS does not directly oblige home states to set incentives for extractive sector companies to act responsibly, but defines trade conditions which the participating countries must adopt to regulate the behavior of companies active in the diamond trade business. The legislation to be implemented is not linked to the fact that the regulating state is the home state of the companies active in the sector. Instead, the implementation of the legislation is related solely to fact that diamonds enter the country's territory.

The KPCS was designed to reduce the opportunities for diamonds to be used to fuel conflicts in which gross human rights violations are often rife – provided the conflict comes within the definition used in the initiative (see below).¹⁰¹ However, the initiative does not otherwise address human rights or RBC issues around diamond mining, such as the conditions in which such diamonds are mined.

2.4.3 Critical Perspectives

Global Witness commissioned an independent three-year review evaluating the effectiveness of the KPCS in 2006.¹⁰² The report stated that conflict diamonds may have represented as much as 15% of total global trade in the mid-1990s, declining to 4% by the beginning of the new decade and declining further to under 1% by 2006. While pointing out a range of shortcomings that needed to be addressed to ensure a robust initiative, and noting that quantifying the value of the KPCS is difficult, the report affirmed that, “quite simply, Kimberley is driving the illicit part of the diamond industry above ground”.¹⁰³

The successful launch of the KPCS smartly juxtaposed the reputational exposure of market actors dealing with a highly valuable and personal commodity with both the language and images of conflict and associated gross human rights violations. As the initiative has grown, so too have the complexities and politics in dealing with the far wider set of circumstances beyond the violent conflict in West Africa that was the impetus of the initiative. Criticism has focused on the initiative losing sight of the groundbreaking mission it played in putting human rights concerns at the forefront, and in the active undermining of the initiative through corruption and leakage.¹⁰⁴ Despite the initial success, Global Witness, one of the initial drivers withdrew from the KPCS in 2011¹⁰⁵ because of a decision by the KPCS to authorise exports from two companies operating in the Marange diamond fields in Zimbabwe.¹⁰⁶ KPCS participants decided that the Marange fields' diamonds were not “conflict diamonds” within the narrow KPCS definition.¹⁰⁷ While several governments supported a more expansive definition for

101 See: <http://www.un.org/press/en/2009/ga10903.doc.htm>. Whether the initiative succeeds in its mission as comprehensively and effectively as the system is designed to is subject to sharp debate. Global Witness, a well-respected NGO working on the hidden links between demand for natural resources, corruption, armed conflict and environmental destruction and one of the founders of the KPCS, withdrew from the initiative as an official observer in 2011. <https://www.globalwitness.org/en-gb/campaigns/conflict-diamonds/kimberley-process/>

102 Global Witness, An Independent Commissioned Review Evaluating the Effectiveness of the Kimberley Process (2006) p. 4, www.globalpolicy.org/images/pdfs/04globalwitness.pdf.

103 Ibid, p.4

104 V. Haufler, 'Orchestrating Peace? Civil War, Conflict Minerals and the United Nations Security Council' in K. Abbott et al. (eds), *International Organizations as Orchestrators* (Cambridge: Cambridge University Press, 2015).

105 Global Witness, 'Why We Are Leaving the Kimberley Process: A Message from Global Witness Founding Director Charmian Gooch', 5 December 2011, www.globalwitness.org/library/why-we-are-leaving-kimberley-processmessage-globalwitnessfounding-director-charmian-gooch.

106 an area of widespread small-scale diamond production in Chiadzwa in Zimbabwe

107 The term in KPCS refers to “rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments.” A. Krawitz, 'Kimberley Process Chair Proposes New Conflict Diamond Definition', *Diamonds.Net*, 14 May 2012, www.diamonds.net/News/NewsItem.aspx?ArticleID=40092.

the term “conflict diamond” that better matches the evolving use of conflict diamonds in a wider array of conflict situations and to specifically refer to human rights, no consensus was found.¹⁰⁸

With respect to its role in the “new governance” space where home states can play important roles, as noted by one commentator:

“[a]lthough the strong role of states in the Kimberley Process is key to its success, the fact that governments hold much of the decision-making power in the Kimberley Process potentially limits the organization’s ability to act nimbly and effectively and respond to new challenges, which are assumed benefits of new governance structures. This is because the Kimberley Process is arguably overly politicized.”¹⁰⁹

108 Ibid. Or according to some, consensus was not sought. See: Rough & Polished, “Kimberley Process and Human Rights Protection: Not a Matter of Definitions” (31 March 2014). Available at: <http://rough-polished.com/en/analitics/89209.htm>

109 Amy Lehr, “Old and new governance approaches to conflict minerals: all are better than one”, in Harvard International Law Journal Online, Vol. 52, Article Series: November 2010, p. 160, < http://www.harvardilj.org/2010/11/online_52_lehr/.

Annex: MSI Requirements



The Extractive Industries Transparency Initiative (EITI)				
	Candidate Country	Compliant Country	Supporting Country	Other Statement of Endorsement
Australia	No	No	Yes ¹	Yes ²
Brazil	No ³	No	No	Other ⁴
Canada	No	No	Yes ⁵	Other ⁶
China	No	No	Yes ⁷	Other ⁸
EU	-	-	Yes ⁹	Yes ¹⁰
France	No	No	Yes ¹¹	Yes ¹²
Germany	Other ¹³	No	Yes ¹⁴	Yes ¹⁵
India	No	No	No	No ¹⁶
Netherlands	No	No	Yes ¹⁷	No
Norway	No	Yes ¹⁸	Yes ¹⁹	Yes ²⁰
Russia	No	No	No	Other ²¹
South Africa	No ²²	No	No	No
United Kingdom	Yes ²³	No	Yes ²⁴	Yes ²⁵
United States	Yes ²⁶	No	Yes	Yes ²⁷

	Voluntary Principles on Security and Human Rights Member ²⁸	The International Code of Conduct for Private Security Service Providers	Kimberley Process Member ²⁹
Australia	Yes ³⁰	Yes ³¹	Yes ³²
Brazil	No	No	Yes ³³
Canada	Yes ³⁴	No	Yes ³⁵
China	No	No	Yes ³⁶
EU	No ³⁷	No	Yes ³⁸
France	No	No	Yes ³⁹
Germany	No	No	Yes ⁴⁰
India	No	No	Yes ⁴¹
Netherlands	Yes ⁴²	No	Yes ⁴³
Norway	Yes ⁴⁴	Yes ⁴⁵	Yes ⁴⁶
Russia	No	No	Yes ⁴⁷
South Africa	No	No	Yes ⁴⁸
United Kingdom	Yes ⁴⁹	Yes ⁵⁰	Yes ⁵¹
United States	Yes ⁵²	Yes ⁵³	Yes ⁵⁴

Table footnotes

1 Australia contributes to EITI through financial and technical support, see <<https://eiti.org/supporters/countries/australia>> accessed 26 February 2016. For details on the financial support see EITI International Secretariat '2014 EITI Annual Accounts and Q1 2015 forecast' (30 March 2015) 4 <https://eiti.org/files/BP-29-8_2014-EITI-Annual-Accounts-2015-Forecast.pdf> accessed 26 February 2016

2 Australia is not yet a formal EITI candidate but conducted an EITI pilot. The findings of the Australian Multi-Stakeholder Group from the pilot are available in the report delivered in June 2015, 'Extractive Industries Transparency Initiative: Multi Stakeholder Group Report to Government' (2015) <http://www.industry.gov.au/resource/Programs/ExtractiveIndustriesTransparencyInitiative/Documents/EITI_MSG_ReportToGovt.pdf> accessed 27 January 2016. The report recommended implementing the EITI rules and procedures, adapted to suit the Australian conditions, and the government is currently considering the recommendations. Australian Government Department of Industry, Innovation and Science, 'The Australian Extractive Industries Transparency Initiative Pilot Multi Stakeholder Group report: About the initiative' <<http://www.industry.gov.au/resource/Programs/ExtractiveIndustriesTransparencyInitiative/Pages/default.aspx>> accessed 27 January 2016

3 Brazil has not yet implemented the EITI and is not listed among the supporting countries.

4 However, Brazil has been part of the EITI International Advisory Group since 2005. The Brazilian company Petrobras has joined the EITI International Board in 2006 and has committed itself to the initiative. Petrobras is majority owned by the Federal Government of Brazil < <http://www.investidorpetrobras.com.br/en/corporate-governance/capital-ownership>> accessed 24 February 2016

5 Canada is an EITI supporting country. Canada supports the EITI by providing policy guidance and technological assistance to host states in order to encourage better resource revenue management. <https://eiti.org/files/page/canada_eiti_brochure.pdf> accessed 23 February 2016. For details on the financial support see EITI International Secretariat '2014 EITI Annual Accounts and Q1 2015 forecast' (30 March 2015) 4 <https://eiti.org/files/BP-29-8_2014-EITI-Annual-Accounts-2015-Forecast.pdf> accessed 26 February 2016

6 Canada's Prime Minister Harper following a G8 initiative announced in June 2013 to establish new mandatory reporting requirements on payments to the government. See < <https://eiti.org/news/canada-commits-reporting-requirements>> accessed on February 2016. In 2014 the Extractive Sector Transparency Measures Act was introduced as an answer to this commitment.

7 Political support by support in international fora such as the UN or the G20, see: EITI International Secretariat 'Chinese Companies Reporting in EITI Countries' (March 2015) 6 < https://eiti.org/files/EITI-Brief_Chinese-companies-reporting.pdf> accessed 24 February 2016

8 The Chinese 'Guidelines for Social Responsible Outbound Mining Investments' from October 2014 (n 365) recommends disclosure in line with international transparency standards including EITI. Also, in a joint G8 statement dating from 2008 China welcomed the implementation of EITI (19 June 2008) <<https://eiti.org/news-events/china-india-korea-g8-energy-ministers-welcome-eiti-implementation>> accessed 25 February 2016

9 The EU supports EITI financially, politically and technically. < <https://eiti.org/supporters/organisations/european-commission>> accessed 23 February 2016

10 The EU's Transparency and Accountability Directives have been largely inspired by EITI standards. Even though the EU is not officially an EITI implementing entity in itself, it is considered to be a quasi EITI member.

11 France supports EITI in several ways, mainly through financial and technical support to EITI related initiatives. <https://eiti.org/supporters/countries/france>

12 Joint statement of France and the UK in 2013 to implement EITI in the future. <<https://eiti.org/news/france-and-united-kingdom-commit-global-transparency-standard>> accessed 23 Feb 2016. However it is not listed as a formal registered candidate. <https://eiti.org/france>

13 Germany submitted its formal EITI candidature on 22 December 2015, <http://www.d-eiti.de/wp-content/uploads/2016/01/Kandidaturantrag-Deutschland_22-12-2015.pdf> accessed 23 February 2016, but has not yet been formally accepted as EITI candidate country.

14 Germany contributes to EITI through political, technical and financial support, <http://www.bmz.de/en/what_we_do/issues/goodgovernance/EITI/deutscherbeitrag/index.html>, accessed 26 February 2016, and is listed among the supporting countries, <https://eiti.org/supporters/countries>. For details on the financial support see EITI International Secretariat '2014 EITI Annual Accounts and Q1 2015 forecast' (30 March 2015) 4 <https://eiti.org/files/BP-29-8_2014-EITI-Annual-Accounts-2015-Forecast.pdf> accessed 26 February 2016

15 See supra note 82

16 In a joint G8 statement dating from 2008 India welcomed the implementation of EITI (19 June 2008) <<https://eiti.org/news-events/china-india-korea-g8-energy-ministers-welcome-eiti-implementation>> accessed 25 February 2016. However, no other public commitment of the Indian government to EITI can be found. Even though India does not support other transparency initiatives like the Open Government Partnership either, it does fairly well compared with other governments (place 13/58 for reporting practices on the Resource Governance Index (2013) <<http://www.resourcegovernance.org/our-work/country/india>> accessed 25 February 2016)

17 While the Netherlands is not a member of the EITI, the Netherlands stated that stating that they promote "transparency by providing financial support and human resources" to the EITI. The Ministry of Foreign Affairs, Corporate Social Responsibility Pays Off (2014) 14 <<https://www.government.nl/binaries/government/documents/policy-notes/2013/06/28/csr-pays-off/csr-pays-off.pdf>> accessed 1 December 2015. See also: <<https://eiti.org/supporters/countries/netherlands>> accessed 23 February 2016. For details on the financial support see EITI International Secretariat '2014 EITI Annual Accounts and Q1 2015 forecast' (30 March 2015) 4 <https://eiti.org/files/BP-29-8_2014-EITI-Annual-Accounts-2015-Forecast.pdf> accessed 26 February 2016

18 Norway was first validated as an EITI compliant country in March 2011, the next validation period started on the 1st of January 2016 <<https://eiti.org/Norway/implementation>> accessed 26 February 2016

19 Norway gives financial and political support to EITI. For details on the financial support and Norway's core funding for EITI see EITI International Secretariat '2014 EITI Annual Accounts and Q1 2015 forecast' (30 March 2015) 3-4 <https://eiti.org/files/BP-29-8_2014-EITI-Annual-Accounts-2015-Forecast.pdf> accessed 26 February 2016

Other than that it is hosting the EITI Secretariat in Oslo.

20 Norway hosts the EITI Secretariat in Oslo.

21 As part of the G8 Russia welcomed the implementation of EITI in a joint statement dating from 2008 (19 June 2008) <<https://eiti.org/news-events/china-india-korea-g8-energy-ministers-welcome-eiti-implementation>> accessed 25 February 2016

22 South Africa has not yet implemented the EITI and is not listed among the supporting countries.

23 Following a joint statement with France on implementing EITI in the future, UK has been accepted as EITI Candidate in October 2014. <<https://eiti.org/countries>> accessed 23 Feb 2016.

24 Financial support through general and regional funding; see EITI International Secretariat '2014 EITI Annual Accounts and Q1 2015 forecast' (30 March 2015) 4 <https://eiti.org/files/BP-29-8_2014-EITI-Annual-Accounts-2015-Forecast.pdf> accessed 26 February 2016

25 Joint statement of France and the UK in 2013 to implement EITI in the future. <https://eiti.org/news/france-and-united-kingdom-commit-global-transparency-standard>

26 In March 2014, the U.S. was admitted as an EITI candidate. <<https://eiti.org/united-states-america>> accessed 23 February 2016. The US was supposed to submit its first EITI report in December 2015 (not yet available on the EITI homepage though) <<https://eiti.org/united-states-america>> accessed 26 February 2016.

27 In a public announcement of President Obama in 2011, he made a commitment to implement EITI <<https://eiti.org/united-states-america>> accessed 26 February 2016

28 The Voluntary Principles according to the Entry Framework differentiates between Applicant Governments, Engaged Governments and Participating Governments, see The Voluntary Principles, 'Framework for Admission of New Governments' 1-3 <http://www.voluntaryprinciples.org/wp-content/uploads/2013/11/VPs_-_Government_Entry_Framework_FINAL.pdf> accessed 1 March 2016. However, the website of the Voluntary Principles only lists Participating Governments (<<http://www.voluntaryprinciples.org/for-governments/>> accessed 21 March 2016).

29 The Kimberley Process differentiates between candidate countries, that have expressed their commitment to the Kimberley Process but have yet to meet its minimum requirements, and participant countries, that meet these requirements. Industry and Civil Society groups can be listed as observers of the Kimberley Process. See <<http://www.kimberleyprocess.com/en/kp-participants-and-observers>> accessed 7 March 2016.

30 <<http://www.voluntaryprinciples.org/for-governments/>> accessed 26 February 2016. See also Government of Australia, 'Annual Report to the Voluntary Principles on Security and Human Rights' (April 2015) <<http://www.voluntaryprinciples.org/wp-content/uploads/2015/04/Government-of-Australia-Public-Report-April-2015.pdf>> accessed 1 March 2016. According to the Annual Report (p. 1), Australia began drafting its National Action Plan on the Voluntary Principles in 2015 and aimed to finalise it March 2015. However, it is not publicly available.

31 <http://icoca.ch/en/membership?states_governments=states&op=Search&view_type=list&form_id=_search_for_members_filter_form> accessed 2 March 2016

32 Australia has been a participant country of the Kimberley Process since 2003. <<http://www.kimberleyprocess.com/en/australia>> accessed 7 March 2016

33 Brazil has been a participant country of the Kimberley Process since 2003. <<http://www.kimberleyprocess.com/en/brazil>> accessed 7 March 2016

34 <<http://www.voluntaryprinciples.org/for-governments/>> accessed 26 February 2016

35 Canada has been a participant country of the Kimberley Process since 2003. <<http://www.kimberleyprocess.com/en/canada>> accessed 7 March 2016

36 China has been a participant country of the Kimberley Process since 2003. <<http://www.kimberleyprocess.com/en/china>> accessed 7 March 2016

37 The EU CSR Strategy does not build on the Voluntary Principles, see <http://ec.europa.eu/growth/industry/corporate-social-responsibility/index_en.htm> accessed 26 February 2016

38 The EU has been a single participant of the Kimberley Process since 2003. The EU Member States participate in the Kimberley Process under the umbrella of the EU as a single KP participant, and they have a single legislation to implement KPCS minimum requirements. The EU and its Member States are represented in the KP by the European Commission. <<http://www.kimberleyprocess.com/en/european-union>> accessed 7 March 2016

39 France is a member of the Kimberley Process as Member State of the EU (see n 107)

40 Germany is a member of the Kimberley Process as Member State of the EU (see n 107)

41 India has been a participant country of the Kimberley Process since 2003. <<http://www.kimberleyprocess.com/en/india>> accessed 7 March 2016

42 <<http://www.voluntaryprinciples.org/for-governments/>> accessed 26 February 2016. See also Government of Netherlands, '2014 Annual Report' (February 2015) <<http://www.voluntaryprinciples.org/wp-content/uploads/2015/04/Government-of-the-Netherlands-Annual-Report-2014.pdf>> accessed 1 March 2016

3. Multi-Stakeholder Initiatives

How Home Governments Can Incentivise Responsible Business Conduct of Extractives Companies Operating Abroad

- 43 The Netherlands are a member of the Kimberley Process as Member State of the EU (see n 107)
- 44 <<http://www.voluntaryprinciples.org/for-governments/>> accessed 26 February 2016
- 45 <http://icoca.ch/en/membership?states_governments=states&op=Search&view_type=list&form_id=_search_for_members_filter_form> accessed 2 March 2016
- 46 Norway has been a participant country of the Kimberley Process since 2003. <<http://www.kimberleyprocess.com/en/norway>> accessed 7 March 2016
- 47 Russia has been a participant country of the Kimberley Process since 2003. <<http://www.kimberleyprocess.com/en/russian-federation>> accessed 7 March 2016
- 48 South Africa has been a participant country of the Kimberley Process since 2003. <<http://www.kimberleyprocess.com/en/south-africa>> accessed 7 March 2016
- 49 <<http://www.voluntaryprinciples.org/for-governments/>> accessed 26 February 2016. See also Foreign & Commonwealth Office, '2014 UK Annual Report on the Voluntary Principles on Security and Human Rights' (2014) <<http://www.voluntaryprinciples.org/wp-content/uploads/2015/04/Government-of-the-United-Kingdom-Public-Report-April-2015.pdf>> accessed 1 March 2016
- 50 <http://icoca.ch/en/membership?states_governments=states&op=Search&view_type=list&form_id=_search_for_members_filter_form> accessed 2 March 2016
- 51 The UK is a member of the Kimberley Process as Member State of the EU.
- 52 <<http://www.voluntaryprinciples.org/for-governments/>> accessed 26 February 2016. See also Government of the United States, 'Annual report of the Government of the United States of America for the Voluntary Principles on Security and Human Rights Initiative' (2014) <<http://www.voluntaryprinciples.org/wp-content/uploads/2015/04/Government-of-the-United-States-Public-Report-April-2015.pdf>> accessed 1 March 2016
- 53 <http://icoca.ch/en/membership?states_governments=states&op=Search&view_type=list&form_id=_search_for_members_filter_form> accessed 2 March 2016
- 54 The US is a participant country of the Kimberley Process since 2003. <<http://www.kimberleyprocess.com/en/united-states-america>> accessed 7 March 2016