H.R. 6066, THE EXTRACTIVE INDUSTRIES TRANSPARENCY DISCLOSURE ACT

HEARING

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H.R. 6066, THE EXTRACTIVE INDUSTRIES TRANSPARENCY DISCLOSURE ACT

Thursday, June 26, 2008

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The committee met, pursuant to notice, at 10:08 a.m., in room 2128, Rayburn House Office Building, Hon. Barney Frank [chairman of the committee] presiding.

Members present: Representatives Frank, Waters, Gutierrez, Sherman, Moore of Kansas, Scott, Green, Cleaver, Moore of Wisconsin, Carson; Paul, Roskam, and Heller.

The CHAIRMAN. The hearing today is on a very important issue: the impact that the presence of valuable resources has in poorer countries. Obviously, the question of mineral resources and others is particularly important right now because of the pricing impact. But this is a very important aspect of it, and we have the paradoxical situation where the discovery of wealth that should be very helpful to the people of particular countries has often had a somewhat negative effect.

As I was saying this morning, for people who think this was purely about value or ethics, the question of the corruption that sadly sometimes accompanies the ability to get at a resource can have very important implications. There are a lot of arguments about what is causing the price of oil to be so much higher than we would like, but everybody agrees that the problems in Nigeria are an important part of this.

So if anyone wants to see what the broader implications on a global basis can be for everybody, they can look in Nigeria, because it is clear the dispute over how much money is being paid and where it is going and how it is being distributed for oil in Nigeria contribute greatly to the turmoil that is one of the upward pressures on price. And it also was an argument to me about why people in industry ought to be supported.

I know many are an involuntary transaction and I believe it is often the case that the dissatisfaction that exists in various countries is based on a few of the things worse than they are. That is, I think it is not a case where if these things were made public, people would learn all these terrible things, exclusively. In some cases, if people trusted us, it would not be as bad as they think. But it seems to me that it is in everybody's interest to do this. And, as I said, the Nigeria situation, I think, is an example of why this has broader implications.

We in this committee have reached a consensus on a couple of bills: one on the funding for the International Development Association; and another one on the question of debt relief. We talk about conditionality. And we generally had a bipartisan agreement that the international institution shouldn't be dictating specific economic policy choices, but that it is reasonable, indeed necessary, to dictate or to make as a condition certain procedural issues such as openness and democracy.

I really believe that what we are talking about today is part of that set of concerns. We aren't telling anybody how to spend the money. We aren't telling anybody in this legislation how much money they should or shouldn't pay. We are saying that the processes of democracy in these countries, and, even if we are not quite a democracy, openness, are very important. And so it is in line with this sort of procedural conditionality.

We have rejected substantive conditionality, but we have argued for the procedural conditionality and that is what is here today. I look forward to the testimony. And, particularly, I would say there was the one issue that we would have to address, which is, and we will be told, we have heard about the problems with unilateral disarmament, I guess. It is a part of unilateral disclosure, and does that put American companies at a disadvantage vis-a-vis others?

It is one of the things we have to address: Are there governments so interested in concealing from their own people that they would reject American companies if they were to be subjected to this rule? To take others would be less scrupulous, and that is a legitimate concern that will have to be addressed if we are to be able to go forward here.

With this, I will now recognize the ranking member of the Subcommittee on Domestic and International Monetary Policy, Trade, and Technology, the gentleman from Texas.

Dr. PAUL. Thank you, Mr. Chairman. You know, when we deal with problems like we are talking about today, and trying to solve them through more regulation, I am always concerned about what might happen because too often there are unintended consequences. If we regulate personal behavior to improve people's lifestyles, there is always an attack on their personal liberties and unintended consequences.

When we deal in economics, the same thing occurs, so the intentions are always good, whether it is dealing with personal behavior or economic behavior. I understand the concerns that are expressed here. And I think we can all agree that greater transparency regarding the deal between companies listed on American stock exchanges and foreign governments regarding giving those companies rights to extract that country's natural resources are a good thing.

However, there are legitimate questions about the legislation, H.R. 6066 is the proper way to achieve this goal and the legislation may well have consequences that were intended. This is what happened with Sarbanes-Oxley. Everybody was very excited about Sarbanes-Oxley and there were a total of three of us who voted against it, and it was the fear of what happened with Enron. And yet Enron was taken care of by the market as well as fraud laws, and it was settled. We didn't need more regulation. So this idea that we just have to have more regulation doesn't solve these problems.

One thing that happened after Sarbanes-Oxley, there was delisting from American capital markets which continues, and that really doesn't help us. I think delisting from capital markets puts pressure on a dollar, pressure on a dollar. It is another reason why they need more dollars to buy euros, and why oil prices go up, and why gasoline is up, one of the reasons, as well as the problem in Nigeria.

In addition, since many of the extractive industries are authoritarian governments, I doubt simply requiring transparency will result in the type of political reform of those countries desired by the supporters of this legislation. It won't solve that problem.

Probably a much more effective way of dealing with that subject is to break the resources curse, at least in the oil nations, by making or encouraging more competition by expending our domestic production encouraging greater development of alternative fuels and even nuclear power, plus ending those foreign policies that prompt these regimes up, which is frequently the case too.

We always help the people, send over food, programs which end up as weapons in these authoritarian regimes. It has happened numerous times, and I think this approach lends itself to misallocating resources and ending up having unintended consequences, but I look forward to the testimony today, and I yield back.

The CHAIRMAN. The gentleman from California.

Mr. SHERMAN. Thank you, Mr. Chairman. And thank you for having this hearing. With good governance, exploitation of natural resources can generate large revenues to foster growth and reduce poverty in some of the world's poorest countries. Right now, we have two problems: one is corruption; and the other is a lack of information and suspicion of corruption.

Even where there is no corruption, suspicion itself is corrosive. But, apparently, in many places, there is corruption. For example, the Democratic Republic of the Congo claims to have received a mere $86,000 in mineral royalties, despite having 80 percent of the world's colton, which is used in cell phones and DVD players, etc.

We see poverty in Africa's largest oil producer; poverty in Sierra Leone in spite of large exports of diamonds. Now, maybe there isn't corruption in Nigeria and Sierra Leone, but the people of those countries certainly don't have access to all the information to allay their suspicions, suspicions that I think are probably grounded.

The extractive industry's transparency initiative announced that the world summit for sustainable development in Johannesburg offers a real way to deal with this. The Bush Administration announced its support in June of 2004. Last year, we were able to pass through the House the Overseas Private Investment Corporation Reauthorization Act, through the subcommittee that I chair, on the Foreign Affairs Committee. This bill passed overwhelmingly, and on a bipartisan basis, both committees and the House, and passed in substantially the same form through the relevant Senate committee.

It is, I believe the first piece of legislation to get that far that requires that those who benefit from a government program, in this case OPIC, adhere to EITI principles. It makes perfect sense to require that those who seek capital in our capital markets and dis-

close what's relevant to shareholders, will also disclose what is relevant to the citizens of those countries from which they extract natural resources.

That information may also be relevant to shareholders who may decide how to invest, based in part on whether they think the regimes getting money from the corporation are regimes from which they think a company they own stock in should be getting money. So this bill will help investors, which is the primary purpose of the SEC. It will help the countries receiving this money through a reduction in suspicion and a reduction in corruption.

Finally, and perhaps most important to my constituents, is that the corruption and the suspicion of corruption is undermining oil production around the world. One need only look at the Niger River Delta in Nigeria. There should be a lot more oil production there.

If we could go to the people of that region and say, this is the amount of money your government is getting, and here your government will account to you for how that money was being spent—if we could allay the suspicions—if we could reduce the corruption, we might very well see peace in that region of Nigeria and in many other places.

And we might see an increase in the production of oil and some of the other commodities whose world price endangers our economy. So this is important for American consumers, for the residents of our individual districts, as well as the effort to eliminate poverty in the countries that are blessed with these natural resources.

I yield back.

The CHAIRMAN. The gentleman from Georgia.

Mr. SCOTT. Thank you, Mr. Chairman.

I want to thank you and the ranking member for holding this hearing. This is a very important hearing, because we are dealing with precious natural resources being extracted from the ground, which means you're not going to be replenished. And as we move on into the future, they are going to become scarcer and scarcer, and the need becomes greater and greater.

And, of course, what is even more troubling is the fact that so many of these scarce vital resources are coming from very troubled nations, developing nations, where we do have an unfortunate amount of corruption and civil wars.

So this is a very important, timely, and fascinating issue. Our bill, H.R. 6066, serves as an important tool. It offers initiatives in order to build more stable economies and address security issues that are very important around the world. Just as an example, take the continent of Africa. What could be more startling in the opposites? There we have a continent that is just overwhelmingly rich in oil and gas and diamonds, all of these resources. One need only view the film "Blood Diamond" to see a more realistic picture of why this bill is so important and why this whole effort is so important. And at the same time that Africa has this abundance, it probably has the most ravaging situations of poverty and hunger than any other place in the world. So it is very, very important that we ensure prudent management of resources, that we promote accountability and openness, and that we allow vital information to be put in the hands of the citizens. I am very interested, and I

would be very interested for the committee to know the progress that the extractive industries transparency initiative is making towards reforms, especially in improving transparency and payment and management of the country's resources, because it is one thing to enact an initiative, but it is yet another thing to follow through with the implementation, and, it is my understanding that neither a single candidate country nor a potential candidate has fully implemented EITI.

I would be very interested to hear your comments on that, and with many conflicts as a result of a country's extractive industry, as I mentioned before, we also have, as my good friend from California, Mr. Sherman mentioned, look into the corruption, the level of corruption behind a country's extractive industries and how we might be able to remedy that; and, again, that turning into a crisis where poverty increases and social investments are put by the wayside, funds that are put there, misappropriated, and misused.

Greater accountability for large revenues coming from these industries, working to generate economic growth from these revenues in reducing poverty, are all important aspects of the EITI that we should focus on. So I look forward to this distinguished panel, your thoughts and your opinions on this important legislation and on what is happening around the world in some of these developing countries and how we can move forward.

This is a very, very critical, critical issue. Unfortunately or fortunately, depending on which way you look at it, so much of the resources that the world needs today, unfortunately or fortunately, is coming from some of these most troubled regions where today's discussion is most topical, and, so, I am looking forward to a very, very important hearing, a very informative one.

Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. The gentleman from Missouri.

Mr. CLEAVER. Thank you, Mr. Chairman.

I appreciate the opportunity to have an exchange and to come to our panel today. I am just in the beginning stages of a new book called, "Banana Republic." It is very interesting, and while the banana industry is not an extracted industry, I think the parallels are very similar. I didn't know, for example, that bananas are not indigenous to South America. They were brought in and exploitive corporations actually put governments in place to help the banana industry. And so they became known as "banana republics."

And essentially major corporations, some are still in existence, I won't call their names now, just came in and kind of ripped off the people in that country, planting these vast banana plantations all over South America. And that same kind of thing is happening here with extracted industries. I was very, very interested in and conversant with the panel that appeared here back in October.

It was, I think, a very interesting meeting because we found out, I think, that to some degree exploitation and exploration are parallel in resource-rich countries like Nigeria and like Tanzania where I have family members. And when you look at the enormous wealth generated in those countries, and the enormous poverty that exists in those countries, something seems to have gone awry.

A worse deal that we end up seeing in many of these countries is greater armed conflict, mass murder, corruption, and weakened

economic development. And my concern is the devastating impact of these conflicts and the resulting chronic underinvestment and the national economies and the health and education investments of the citizens of those countries. I think the United States can be better than we have been. We can become a shining light.

I do have one disagreement with the legislation. The legislation does not put in place criminal or civil penalties. I am concerned that corporations may not think twice about ignoring this Act, if in fact it is put in place. I agree with everything in the legislation, except that part of it. I am having some difficulty with that, but I would like to have an exchange with you about it.

I yield back the balance of my time, Mr. Chairman. Thank you.

The CHAIRMAN. Without any further opening statements being requested, we will proceed with the testimony.

I will explain in advance that in about 15 minutes, I have to leave the hearing. The chairman of the Subcommittee on Domestic and International Monetary Policy, Trade, and Technology, Mr. Gutierrez, will preside from then on. But let's begin with a returning witness here, Karin Lissakers, who is the director of the Revenue Watch Institute.

Ms. Lissakers.

STATEMENT OF KARIN LISSAKERS, DIRECTOR, REVENUE WATCH INSTITUTE

Ms. LISSAKERS. Thank you very much. Mr. Chairman, and members of the committee, last October, when you explored the so-called resource curse phenomenon and the paradox of plenty and its implications for both resource-rich countries and for the United States and other consuming countries, you, Mr. Chairman, asked the question. You said, what can the United States do to encourage policies that would help make extractive resources a positive rather than a negative for resource-rich countries.

I believe that this bill provides a strong answer. There are two reasons. First, secrecy is a big part of the problem in these countries. The lack of public insight and public oversight over the natural resources creates huge opportunities for misappropriation and increases the risk of conflict over control over these highly valuable resources.

The disclosure of extractor payments that will be mandated by this bill will give citizens in producing countries a very powerful tool with which to hold their own governments accountable for how the money is managed. We already have seen that when people know how much money is coming in from extractive resources, they begin to demand to know where the money is going. And this is the first step to changing the country's policies for the better.

The second reason I think this law is excellent is that it is fully consistent with what companies and countries are already beginning to do. The law will in fact codify what is becoming widely accepted best practice disclosure in extractive industries. For the last 6 years, companies like BP, Shell, Exxon, Chevron, Petrobras, Rio Tinto, and Anglo American, have joined with governments, investors, and civil society to develop a voluntary disclosure process.

The so-called extractive industry's transparency initiative, EITI—23 countries are now implementing EITI, which requires the

dual disclosure and reconciliation of company payments and government receipts from the extractive sector.

Similarly, along the same lines, the World Bank's investment arm now requires each company participating within an oil, gas, or mining project to publish the company's payments to the government in question, broken down by type of payment. The OPIC bill still pending before Congress includes similar language. And, sometimes, companies just go ahead on their own, particularly where political or social tensions run high.

Conoco-Philips regularly reports its payments in Timor-Leste. BP decided to publish its payments in Azerbaijan in relation to a controversial pipeline. When Bolivia threatened to expropriate gas properties, Petrobras went out of its way to tell investors how much it was paying in taxes to Bolivia.

Mining giant Newmont publishes its government payments around the world, as does Talisman Energy, which works in non-EITI countries like Algeria, Colombia, Malaysia, and Vietnam. And Lukoil, one of the biggest taxpayers in Russia, makes a point to regularly publish what it pays at home.

As we know, the Russian government has been using charges of underpayment of taxes to pressure oil and gas ventures to make concessions and yield more control to the state or state-related interests. It appears that many companies believe that disclosure improves their public standing and builds trust and better relations in the countries where they had vital, billion-dollar, long-term investments.

H.R. 6066 will bring 27 of the 30 major international oil and gas companies, plus the major international mining companies, under one disclosure standard. With such broad coverage, it is hard to believe that American companies would be put at a competitive disadvantage if they comply with the law. Indeed, I believe that once the law is passed, the companies that won't be reporting their payments will stand out like a sore thumb.

There is limited risk of the law creating a conflict with confidentiality provisions in EI contracts, as these clauses typically, specifically exempt disclosure to stock exchanges or offer a general exemption for compliance with law. Columbia University Law School has done an exhaustive examination of extractive contracts and these are their findings.

Further, this aggregation of payments for major types mirrors the reporting companies are already doing under EITI and in some countries, and in IFC-linked investments, and this is vital to achieving the transparency objectives of H.R. 6066. Investors will have better insight into the company's risks.

The companies will have great reputational protection, and most importantly, citizens will be able to differentiate the payment streams that are collected by different agencies and their governments and this break-out will give them greater powers of demanding accountability of their government.

Mr. Chairman, international lending agencies aid donors, investors, and the extractive industry majors have all recognized the value of transparency of payments and revenues as a means to promote better government stability and development in resource-rich

countries. This bill is not a full cure for the resource curse. Neither is EITI, but together they will make a very significant advance.

Today's commodity boon should by all rights produce a development windfall for resource-rich countries. Passage of H.R. 6066 into law will make that much more likely. Thank you, Mr. Chairman. I would like to submit my full remarks for the record.

[The prepared statement of Ms. Lissakers can be found on page 35 of the appendix.]

The CHAIRMAN. Yes, without objection, all of the remarks and the supporting material of the witnesses will be made a part of the record.

Next, we will hear from Professor Faith Stevelman from the New York Law School.

STATEMENT OF FAITH STEVELMAN, PROFESSOR OF LAW, NEW YORK LAW SCHOOL

Ms. STEVELMAN. Thank you, Chairman Frank, and members of the committee. I have now spent 15 years teaching and writing about corporate and securities law and my remarks reflect my interest in and appreciation for Congress' role in protecting U.S. investors and building strong U.S. capital and securities markets. In my view, this bill advances both of these important goals, while it would also produce broader social and anti-corruption benefits for resource-rich developing countries.

First, the bill fits neatly into the broader, crucially important work already done by Congress in enacting the Federal securities laws' reporting requirements and overseeing the SEC's implementation of them. The bill is effectively an industry-specific, more precise application of already existing but more general disclosure mandates operating in the Federal securities laws, for example, risk factor analysis, management's and discussion and analysis, and standards of qualitative materiality acknowledged by the SEC. The bill would enhance shareholder protections in covered firms. It would foster shareholders' ability to make more informed judgments about their firm's business practices, the scope and costs of the natural resource rights their firms have purchased, and the potential legal and financial risks these firms face. On this basis, shareholders could analyze their best interests in terms of holding, buying, or selling securities in international extractive enterprises.

The bill would benefit covered companies by fostering confidence that such companies are doing business internationally in ways that respect free-market principles and build long-term corporate wealth. In particular, extractive enterprises that are conducting business in a fair, professional manner should derive a benefit from the bill's reporting requirements. Companies that are conducting legitimate market-based negotiations with host nations and are paying fair prices for the resource rights and contracts they receive and are committed to honest recordkeeping are building corporate wealth. Hence, they should benefit from the bill's mandatory disclosure requirement, which would make this more apparent.

Extractive enterprises that are doing the right thing in these respects will develop a record and reputation for honesty and fair dealings, which is in itself a commercially valuable asset. Such a positive record and reputation would be a meaningful asset, for ex-

ample, if the firm were subject to unfair criticism from foreign governments or citizens.

Also, enhanced transparency regarding business practices can help companies fend off intrusive conduct-based regulations. This leads me to point out that apart from disclosure, this bill does not create any conduct-based requirements for this industry. Nor does it make any conduct unlawful that is presently lawful.

Also, companies can capture full value for reporting that they have dealt fairly and paid fair value for their natural resource rights only if such disclosures are backed by legal mandates. In this sense, this bill complements voluntary disclosure, but would make such disclosures more beneficial for companies.

Furthermore, companies should be able to obtain these benefits from increased transparency at little administrative cost, because they should already have this information readily at hand, assuming they are well-run. Moreover, in companies where the bill's reporting requirements did indeed flesh out problematic business practices, shareholders would be able to agitate for change early on, before the risks accumulated to the point of endangering their own and their company's financial welfare.

In addition, the bill's required disclosures should help executives in these extractive enterprises be maximally diligent and attentive to their fiduciary duties, because it is only human nature that we more diligently attend to what we must account for publicly. This is another way that the bill would help build corporate value in this industry.

Finally, the bill would contribute to enhancing the efficient functioning of the U.S. securities market in this sector of industry. That is, investing is most attractive, so that investment capital is more available at a better cost of capital, and markets more liquid and less volatile, where investors have confidence that they are being kept fully informed. This is consistent with the bill's objective of allowing investors in international extractive enterprises to see more information about their firm's transactions and payments, its claims to natural resource rights and assets, and hence the soundness of its executives' business judgment.

Furthermore, with respect to reducing market volatility in this sector of the securities markets, especially because other forces are putting pressure on securities prices in this area and adding uncertainty, there is a strong motive for Congress to support greater transparency regarding the legitimacy of these extractive businesses' claims to fair dealings with foreign governments and the credibility of their having durable claims on natural resource rights.

Thank you very much.

[The prepared statement of Professor Stevelman can be found on page 44 of the appendix.]

The CHAIRMAN. Next, Mr. Robert Jenkins, who is chairman of the F&C Asset Management.

STATEMENT OF ROBERT JENKINS, CHAIRMAN, F&C ASSET MANAGEMENT

Mr. JENKINS. Thank you. You have my background in the written statement. I am addressing you primarily today in my capacity

as an investment professional and chairman of a major investment management group.

Mr. Chairman, I have four key points to make today: Number one, that the investment management industry welcomes transparency; number two, that the transparency approach enshrined in the EITI remains our ultimate goal; number three, I believe that this particular bill will increase transparency in a very important area; and number four, that this bill is therefore both in the spirit of and complementary to the broader goals of the EITI.

Mr. Chairman, before investing, every professional weighs or should weigh his potential risk versus his potential reward. The greater the uncertainty of the risk, the greater the reward required. Information and transparency shape this calculation. The more transparent the information, the easier it is to quantify the downside and the more understandable the downside, the more confident one can be in pursuing the upside; and thus can transparency breed confidence, confidence reputation, and reputation at lower cost of capital. This is true for individual companies, but it also and equally true for nations, to which investors might wish to direct capital.

Now it happens that the extractive industries operate in some of the world's riskier places. Transparency at the company and country level can lower the risk, stimulate investment flows, and expand investment opportunities more generally. And this is precisely why many of the world's leading investors support the EITI.

Disclosure of what is paid together with transparency in what is received promises a payoff of a different kind. Political accountability and resource rich, but often the standard of living poor nations.

The view is that these two pillars plus civil society monitoring hold the key to reduced corruption, increased political stability, and ultimately greater national prosperity.

This in turn translates into less risk for a company's foreign operations, and more and better risk return opportunities for investors. This is the ultimate goal.

The bill targets only one side of the equation, but it is a side that is extremely well worth targeting. Pitched at the level of the company, the bill will help investors better understand and get greater comfort with key details of the industry.

But perhaps more importantly, the bill should reduce the operational and political risks run locally by the extraction industries. Detailed transparency in reporting will give host nation critics little room for accusations of non-payment of tax and less room generally for claims of wrongdoing. Disclosure of payments to the authorities should therefore help to shift the public spotlight away from the company and onto the host government.

Now some will no doubt label this initiative as unnecessary interference, interference in company matters and interference in the affairs of other nations. As a full-time capitalist and a part-time lobbyist, I can certainly sympathize. I rarely endorse, much less ask for, additional rules.

But increased transparency is a positive, and on this all parties can agree. A number of competitors already embrace its essence, and what harm then in raising to a global standard what is for

many already industry as practiced? In the arena of corruption, real and implied, volunteerism does not always do the trick.

As for the charge of international interference, this is a tough one. It can certainly be misconstrued as such. It is an accusation that will have little substance, but it is one which you can be sure will be made.

In summary, the investment world benefits from transparency. We seek transparency wherever possible, not out of moral goodness, but in hard-nosed pursuit of better risk-adjusted returns. The riskier the arena, the greater the craving for transparency. Extractive industries operate in risky arenas. And though the bill does not and cannot achieve all of the aims of the EITI, it is complementary to it, and should prove supportive of it.

As an investment professional and industry spokesman, I therefore view the bill as a very positive step.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Jenkins can be found on page 29 of the appendix.]

Mr. GUTIERREZ. [presiding] Thank you.

Next, we have Mr. Alan Detheridge, former vice president for external affairs, Royal Dutch Shell Group.

STATEMENT OF ALAN DETHERIDGE, FORMER VICE PRESIDENT FOR EXTERNAL AFFAIRS, ROYAL DUTCH SHELL GROUP

Mr. DETHERIDGE. Thank you, Mr. Chairman, and members of the committee, for the opportunity to speak in support of this bill. I retired from Shell about a year ago and now work on a voluntary basis with the not-for-profit organizations.

During my time at Shell, I was, along with a small group of industry and NGO colleagues, one of the instigators and early supporters of the Extractive Industries Transparency Initiative. And it is that background that I bring to this hearing. I speak, of course, only in a personal capacity and don't claim to represent my former employer or the industry.

I support this bill because I believe that transparency of payments made by companies to host governments is in the companies' own best interests. Too often companies are exclusively blamed for the lack of economic and social development in many parts of the world where they work. What is often not known by citizens of those countries is the significant sums of money paid by companies to host governments in the form of taxes, royalties, and signature bonuses.

For example, in Nigeria some 95 percent of the revenues from on-shore oil after costs go to the Federal Government. Making those revenues transparent, as Nigeria now does under its EITI initiative, helps put the accountability for development where it belongs and that, in my opinion, is in the long-term best interest of both companies and the citizens of oil-producing countries.

Having said that, let me comment on three arguments that I understand are being made against this bill. The first is that the proposed bill would undo the good work being done by the Extractive Industry's Transparency Initiative and that it would lead to that initiative's demise.

Personally, as one of the instigators of EITI, I do not believe that to be the case. Otherwise, I wouldn't be testifying here today.

EITI is a country-led and owned initiative, and it does lead to worthwhile discussion between in-country stakeholders on extractive industry revenues, not least the use to which those revenues are put.

In my view, this bill is compatible with EITI's in-country approach. But more importantly, having raised the matter with Peter Eigen, the chairman of EITI's international board, he told me that EITI was following this bill with interest. He went on to say that he welcomes efforts to improve resource revenue transparency that are consistent with the goals of EITI, and that he also welcomes any legislation that reinforces these efforts. And if necessary, Dr. Eigen will be happy to issue a statement to that effect.

A second argument against the bill is that companies would need to make significant accounting and reporting modifications in order to disclosure the required information. In other words, it would cost too much. I don't disagree that some disclosure cost would be incurred by companies. But I don't see how companies that support EITI, which includes, of course, all the major U.S. and European oil and mining companies, can reasonably claim that these costs would be prohibitive.

In supporting EITI, companies implicitly accepted that they were prepared to assume the costs of disclosure wherever and whenever the initiative was implemented. Since this bill's requirements are in line with those called for by EITI, it is difficult for me, at least, to see how it places an undue and indeed unforeseen burden on companies.

The final argument that I would like to begin to address is that of U.S. competitiveness, which some believe would be adversely affected. Those against the bill contend that many of the largest global competitors would not be subject to this bill, and that these entities could benefit from the disclosure of payments to host governments by their U.S. competitors.

Firstly, I think it's worth making the point that this proposed bill would in fact apply to a very high percentage of those companies listed on stock exchanges around the world. According to figures from "Publish What You Pay," 90 percent of the top 30 companies buy reserves of oil and gas.

Secondly, this bill mandates only the disclosure of payments made to governments, and not more commercially sensitive information, such as costs, profits, or contracts. I don't believe that there is a competitive disadvantage in disclosing payments to governments.

But even if there is, should this outweigh the benefit of legislators and citizens of a country having access to that information? Mr. Chairman, in my view, it should not.

Thank you very much for the opportunity to testify.

[The prepared statement of Mr. Detheridge can be found on page 27 of the appendix.]

Mr. GUTIERREZ. Thank you very much, Mr. Detheridge.

The Congresswoman from Los Angeles, Congresswoman Waters?

Ms. WATERS. Thank you very much, Mr. Chairman, for being here today and for providing the leadership, along with Chairman

Frank, so that we can learn more about extractive industries and try and get more transparency in this Act that we are putting together. There is so much that we don't understand about what really is taking place in many of the countries who are very rich in minerals and other kinds of resources, yet they are so very, very poor.

And the people are suffering so much. It is hard to understand as you look at some of the African countries, Liberia for example, that is endowed with the wealth of diamonds. And you would think that these diamonds would be a blessing for Liberia's impoverished people. Instead, they fueled a civil war which lasted 14 years and took the lives of 270,000 liberians. Seventy-five percent of Liberia's population lives on less than $1 per day, and Liberia owes $3.7 billion to foreign countries and multilateral financial institutions.

So all of this is very hard to understand, and we hope that as we move on with transparency, we can better understand this.

I would like to ask a question of Mr. Alan Detheridge, is it?

Mr. DETHERIDGE. That's right.

Ms. WATERS. You know and understand how Shell, for example, works with these African countries and how the payments are made, how the contracts are put together, etc. My number one question is: When you are in countries where you have dictators or very corrupt leaders who obviously are taking the money, the proceeds, the profits, and they are cutting deals, not on behalf of the people, but instead, the money is going in their pockets. How do you work with this? What do you say and what do you do?

Mr. DETHERIDGE. Thank you very much for the question. In truth, I'm tempted to say, "Well, I no longer work for Shell, so I shouldn't answer that question." But let me nevertheless try to do so.

Let me take the example of Nigeria, which as you know for many years was ruled by corrupt dictators. In fact, I think that's the reason why my former company was so very supportive of the Extractive Industries Transparency Initiative, and why, along with a number of other people, they lobbied the then-Nigerian government of President Obasanjo to undertake that initiative in Nigeria.

Our thought, Shell's thought at the time, was that making payments to governments transparent was a very necessary part of reforming Nigeria. It wasn't the only thing that needed to be done, but it was something that was definitely required.

Nigeria did indeed implement the Extractive Industries Transparency Initiative, and it hasn't solved all of Nigeria's problems, that is true. But what it has done is make it very apparent as to who is getting what money, because Nigeria publishes not only what the federal government receives, it publishes what state governments receive, and what each local government area receives.

That has led in Nigeria to a lot of questioning of local elected representatives from people saying, "Look, you get all this money, and I don't see the results of that in my back yard." That's a very healthy debate. It's also a debate, I should say, that has led to three state governments being put on trial and some of them going to prison for stealing money.

So the answer to your question, I think it is difficult for companies to deal with countries that are repressive and corrupt. Trans-

parency is a help in that respect. This bill promotes transparency, and that is why I am supportive of it. Thank you.

Ms. WATERS. Thank you very much. I suppose, Mr. Chairman, a lot more could be raised about this, but, you know, we don't have the time to talk about it much, and your past companies' relationship with Abacha and what occurred in Nigeria.

But Angola is another prime example of a country that is very, very rich, and a country that was at war for a long time. And I guess while I think that transparency is very, very necessary, there are some other things that I think we need to do. But I'm going to yield back the balance of my time, so that the chairman can get to some other people, and perhaps we will have another round and I can ask another question.

Thank you.

Mr. GUTIERREZ. I will be here for it.

Mr. Cleaver, for 5 minutes.

Mr. CLEAVER. Thank you, Mr. Chairman.

Ms. Stevelman, I was reading in your prepared remarks on page 7, I thought we were closing in as really good friends with regard to when you began to address the enforcement mechanisms. If there is no penalty provision, why should corporations comply?

Ms. STEVELMAN. Thank you for that question. I think I may have overstated that there is no punitive provision. I meant to emphasize that this would not create a basis for private investor litigation, because I know that there is significant popular sentiment against private investor suits.

I also do agree with you that it would be the exception for there to be highly aggressive enforcement by the SEC. What usually happens is that the SEC allows companies a little bit of time to adjust to these new disclosure provisions. It puts out some interpretive releases, it brings an injunctive action where it slaps a company on the wrist. Maybe another one of those. Then the penalties start to escalate gradually.

The initial fine in Federal court that it might win would be consistent with that small $50,000 amount, but if a company was found to be culpable of repeat violations, or if subsequent companies made the same mistakes that had already come to light in an earlier enforcement action, at that point the penalties do rise significantly.

So for example, there is a famous case of MD&A non-reporting by the Caterpillar Company, where I believe the result was just a civil injunction, a slap on the wrist that says, "Don't do this again." But a year later, there was an MD&A enforcement action—I forget the company—but the fine at that point went up to $1 million. So there is the possibility for a gradual escalation in civil monetary fines that would be brought by the SEC and awarded as a result of process in the Federal courts.

Mr. CLEAVER. Thank you.

Mr. Detheridge, as a former executive with Shell, in listening to Ms. Stevelman's comments, do you believe that major corporations would comply to the law in an attempt to escape a private cause of action?

Mr. DETHERIDGE. Thank you for the question, Mr. Cleaver. My personal belief is that certainly 40 U.S. companies would comply

with this legislation, and all European companies would comply with this legislation. And I think other companies would do so as well, because the reputational damage that would fall out from not complying with this legislation would far outweigh any advantage I think that would be gained by them. Companies list on stock exchanges to raise capital. And not complying with the regulations imposed by those exchanges is a very serious matter, which I'm sure—Mr. Jenkins could comment on this—would be looked at very seriously by the investing community.

Mr. CLEAVER. Of course, a company out of China is not going to be publicly traded; in all likelihood, you're right; publicly-traded companies here in the United States and London, in the EU, they would. But if you look at what's going on right now in Darfur, where China is deeply involved in an extractive industry, we can't even count on China to try to discourage the genocide that's taking place there.

It's a little frustrating to me, because I just simply do not believe that we would have worldwide compliance. And in the case of the Sudan, China is the 800-pound gorilla, in that China is the industry in that country.

I don't know what the answer is. You know, we need a professor in law like Ms. Stevelman, to come up with the solution.

Ms. STEVELMAN. Can I make one remark relevant to what you said?

Mr. GUTIERREZ. Briefly, if you please.

Ms. STEVELMAN. There are pieces of these Chinese enterprises that are listed, and Darfur would be accessible to U.S. law enforcement.

Mr. CLEAVER. Yes.

Mr. GUTIERREZ. I'm going to try to get everyone in. Apparently, there's a vote coming up, and so, we will see if we can get one round, and then I will be happy to come back for a second one.

Congresswoman Moore?

Ms. MOORE OF WISCONSIN. Thank you so much, Mr. Chairman.

I guess I would like to start with Mr. Detheridge. This bill obviously is a great first step in transparency. The voluntary Extractive Industries Transparency Initiative has been partially implemented by 23 countries already. I guess there are countries prospectively and currently that would like us to go a little bit further, and I want your comments on that. That there be some—and since you brought up this up, Mr. Detheridge—some mandatory revenue disclosure. And because it's one thing to say, "This is how much we have paid a government," but we still don't know what the volume of the extraction was or the mass of the extraction was, what profits were involved. You know, we need some contract transparency.

So I guess I would like to hear your comments on more contract transparency.

Mr. DETHERIDGE. As I said earlier, I can only speak in a personal capacity. In answer to your question about transparency of contracts, that is actually something that I fully believe in. I think contracts, that the parliaments, legislators should have access to those contracts. It is something that I personally support. As you can imagine, that is not a universally held opinion within the oil industry.

Ms. MOORE OF WISCONSIN. Mr. Jenkins? Ms. Stevelman? Others? Ms. Lissakers?

Ms. LISSAKERS. Yes. Certainly the Revenue Watch Institute and the civil society groups that we work with, both internationally and especially in the producing countries, are very strongly in favor of contract transparency. In almost every country in question, the resources that we are discussing are public assets. They are not private property. They are public assets by law in most countries. And therefore, contracts between the state and an operating company should be made public. That would greatly enhance the accountability aspects as well as help to ensure that the country itself is getting a good deal from the extractive sector, a fair deal from the industry.

A number of countries have changed their approach and are now submitting large extractive concessions to their own parliaments for review before the contracts are consummated, and that of course makes them public. We think that is a very healthy, strong move in increasing accountability.

Ms. MOORE OF WISCONSIN. Thank you. You know, the chairman has heard the cry about regulation and, you know, many observers or critics have said that there are already many onerous reporting requirements, as in Sarbanes-Oxley. Can you please just reassure us or explain how this EITD Act would not risk exacerbating this difference. In other words, the U.S.-listed companies, there wouldn't be an incentive for them to de-list because of these provisions.

Yes?

Mr. DETHERIDGE. I don't think that companies can reasonably say that these reporting requirements are onerous. And the reason I say that is simply because most of the major oil and gas companies—certainly all of the major U.S. companies and all of the major European companies—supportive the Extractive Industries Transparency Initiative.

And the Extractive Industries Transparency Initiative is very much—or I should say this bill—is very much in line with the reporting requirements of EITI.

Now in supporting EITI, companies implicitly have accepted that they will bear the costs of making those numbers available wherever and whenever the initiative is implemented, hopefully worldwide.

And so I don't see how they can reasonably claim that, you know, this is too costly; they have already implicitly admitted that they are prepared to bear those costs. I mean this information is, of course, known to the companies. It is in their books.

Now I don't doubt that there is going to be some additional cost in extracting that information from the books; they will probably need to have it vetted in each country by external auditors just to make absolutely certain that they are putting forward the right numbers.

But as I say, I don't think it can be reasonably claimed to be a prohibitive cost; so the argument on cost, to me personally, doesn't stand up.

Ms. MOORE OF WISCONSIN. That is great information for the record. I yield back.

Mr. GUTIERREZ. Thank you very much. Thank you.

My colleague from Illinois, Congressman Roskam, for 5 minutes.

Mr. ROSKAM. Thank you, Mr. Chairman.

Mr. Detheridge, you mentioned in your opening that it is in the company's best interest to make these disclosures. If that is the case, why don't they all do it?

[Laughter]

Mr. DETHERIDGE. You will have to ask them. I—

Mr. ROSKAM. I mean, you can appreciate the nature of the question. It's one thing for somebody who was previously employed to say, "This was a great idea and I have had this revelation since I have left the company." Do you know what I mean? Or—and I'm not criticizing you personally—but my question is, you said that it is in the company's best interest to do it.

Mr. DETHERIDGE. Yes.

Mr. ROSKAM. Why don't they?

Mr. DETHERIDGE. Let me explain why I think that. And that is not a revelation I had when I left.

Mr. ROSKAM. I understand that; you mentioned that.

Mr. DETHERIDGE. But it is one that came to me when I was working for the company, which led to me helping to instigate and support the Extractive Industries Transparency Initiative.

Let me just explain for a second why I think it's good for companies. And it's not just an argument that it shifts the blame for the lack of development to where it belongs, you know, to the governments and away from the companies; it's also that the oil and gas business is a very long-term business. You make an investment this year; you're not going to get a payback from that investment for several years to come, possibly 7 years, possibly 10 years.

The places where you want to work are places where people are happy, healthy, there is a thriving economy, and they have jobs. Too often, that is not the case.

Mr. ROSKAM. Let me, just because time is short, let me redirect your question. My question is: Why don't they do it, if it is a good idea and good for them? What are the arguments that you have heard? What is the reluctance when you are advocating this, and their eyes began to glaze over. What was behind the glaze?

Mr. DETHERIDGE. I think part of the reason behind the glaze is by putting more information into the public domain, more questions will be asked by investors, querying why, you know, you're investing in this particular country, by non-governmental organizations, possibly by people like yourselves. So more information leads to more questions, and there is a natural reluctance against that. That has been, in sum, the argument that I have heard.

Mr. ROSKAM. Thank you. Mr. Jenkins?

Mr. JENKINS. Thank you.

If I may just turn it around, do you think that—

Mr. ROSKAM. Oh, no, I'm not in the question-answering business. Let's just make that clear.

Mr. JENKINS. Right. Well, would companies have wholeheartedly volunteered to disclose their executive compensation, had there not been outside pressure to do so? Is there any company today that would say that disclosing such information is bad for that com-

pany? And I think you have in that a parallel with this particular problem.

There are companies of great stature who already fully disclose. Numont Mining is not a lightweight. They are not stupid, they generate a good shareholder return, and they believe that they are at no competitive disadvantage in disclosing.

There are many companies who simply don't want to give away information that they don't have to.

Mr. ROSKAM. Fair enough.

Let me ask a question for the whole panel—Mr. Detheridge kind of touched on this a little bit—and that is, could you speak to the challenge that is out there? Limited resources worldwide. Let's say you have a nefarious head of a country who controls the natural resources in that country, but makes a decision, and he says, "Look, if I do business with this company that's listed, this information is going to be disclosed. If I do business with the Chinese, if I do business with one of these other entities, I'm not going to have to disclose this; therefore, I'm going to do business with the non-disclosing entity." How does this bill drive towards the unlocking of resources worldwide at a time when we need to do that more and more? Can you speak to that challenge, anybody?

Yes, ma'am?

Ms. LISSAKERS. Let's take Angola. Congresswoman Waters mentioned Angola. And it goes to both your first question and then this one. In Angola, British Petroleum proposed unilaterally to disclose its payments to the government, and the government then threatened to kick them out, so BP withdrew and became an active supporter of EITI. And Angola has not signed on to the EITI.

On the other hand, the Norwegian State Oil Company, StatOil—

Mr. ROSKAM. Can I just stop you there? And we will get back to that. One, did anybody come in the intervening period of time and take the place of BP in Angola?

Ms. LISSAKERS. No, they were not kicked out. They did not disclose the payments, and they remained, their contract remained.

Mr. ROSKAM. Oh, I see. I misunderstood.

Ms. LISSAKERS. Angola is one of the few countries where the production sharing agreements stipulate that an approved disclosure could be grounds for termination. However, StatOil, the Norwegian oil company, is also operating in Angola, and has been for a long time. They publish their payments to the state of Angola, because they are required by Norwegian law to do so, and the Angolan authorities have not said "boo" about it. They haven't protested, they haven't pushed them to get out. They have not interfered with their business.

So the existence of law provides protection for the companies that want to operate transparently and properly.

Mr. GUTIERREZ. The time of the gentleman has expired.

I'm going to return for a second run to the gentlelady from California, Congresswoman Waters.

Ms. WATERS. Thank you very much. This transparency issue is very important and it is somewhat complicated. And as we just heard testimony that said some do, some don't—in the case of Angola the threat was not followed up on—I'm wondering what actions could be taken to make certain that the disclosures are accu-

rate? How could SEC and law enforcement determine if they're not accurate?

Because as I believe that the oil companies in particular that are operating in many of these so-called third-world countries don't just have transparency and contracts that are above-board. I think they're paying underneath the table to the leadership of those countries. And I don't think that's ever going to be disclosed. Am I wrong? Am I too suspicious? Am I too distrusting? I'd like anybody to respond to that. How can we make sure it's accurate?

Ms. STEVELMAN. I would like to say something about that. I think that is where this bill fits in nicely with certain other securities laws and other criminal laws. I think that is where you get a really good yield from Sarbanes-Oxley, where Congress has worked hard to make sure that companies that access the U.S. capital markets are subject to stringent internal controls. And before that, in the Foreign Corrupt Practices Act of 1977, prohibiting bribery and requiring companies to maintain books and records that are accurate and systematic. These things need to be audited, if these companies are going to access the securities markets. Where auditing failures come to light, there is tremendously bad publicity. There is the potential of criminal enforcement.

And so while I believe that there would be soft enforcement at the beginning with respect to this law, there is the opportunity for much harder enforcement under other laws, for example, the Foreign Corrupt Practices Act, where under-the-table payments were discovered.

Ms. WATERS. Also, many of these governments do not disclose to their people how the money that they're receiving is being allocated or being spent. Is there ever any conversation from the oil companies, for example, with the government about their government processes? Now I know it's probably unreasonable to ask our companies to try and enforce good government on the countries that they are doing business with.

But I'm wondering if there's any kind of conversation that takes place about that, because as was indicated here, by Mr. Detheridge, many of the people in the people in those countries believe that the oil companies are in bed with the corrupt dictators, that they're not paying the amount of money they should be paying, that they support that government's attempt to protect the oil fields for the companies with their military or paramilitary.

So what kind of discussion goes on? I know you're not with them any more, Mr. Detheridge, and perhaps we're putting too much attention on you. But what we really want to know is what goes on behind the scenes?

Mr. DETHERIDGE. You're asking some very good questions. Such conversations, of course, are very delicate. But let me just give you one example which comes back again to Nigeria, and I do that because I'm familiar with the case. And indeed, in discussions with the Nigerian federal government about implementing EITI, which I have to say President Obasanjo was very enthusiastic about, as was his finance minister.

Ms. WATERS. Then why did he have so much disruption of the pipelines? I know him too, and I think he certainly was better than Abacha—

Mr. DETHERIDGE. Sure—

Ms. WATERS. And you know, but why was there so much disruption?

Mr. DETHERIDGE. Well—

Ms. WATERS. To the point where people lost their lives?

Mr. DETHERIDGE. Let me get to that point, if I may.

Ms. WATERS. Okay.

Mr. DETHERIDGE. And there was a conversation about: Well, look, if we just publish the numbers at the federal level, that is very helpful, it is very good, it is a step in the right direction; but wouldn't it be much better if you published how much money went to the state and the local level? And that indeed is done; as I said before, it has led to some state governors and others being arrested on corruption charges.

Now, it's a reasonable question to ask, well, since this is all now in the public domain: Why haven't things changed more quickly in the Niger Delta? And my answer to that is that things take time. You cannot expect a citizenry in a country that, as you say, has been ruled by dictators, is unused to holding its public officials to account for the money which they have spent.

You can't expect that to change overnight. I've been following Niger for a number of years now, and I can tell you things are beginning to change in Nigeria. I mean before it was unheard of that state governors would be arrested and put in jail. That is happening now.

It's going to take time, and in my view, this bill is a step in the right direction. It enables those kind of conversations to take place.

Thank you.

Ms. WATERS. Thank you.

Ms. LISSAKERS. Could I just add something?

Mr. GUTIERREZ. Sure.

Ms. LISSAKERS. We are working now actively in the Niger Delta with a very large coalition of NGOs based in the Niger Delta, and with a governor in one of the big oil-producing states. In the most recent election, every single person who ran for governor in the oil states in the Niger Delta campaigned on transparency because they were feeling pressure from the grass roots.

And the governor we are working with—remains to be seen—has committed to implement what he is calling the Bayelsa State Transparency Initiative, in cooperation with the civil society activists and trying to get at least eight local government authorities to cooperate as well.

The fact is that between the capital and the governors and the local government authorities, all of the oil money disappears. And virtually nothing hits the ground. The schools, health clinics, roads, water, or anything else. And the only way you're going to change that is work down at that level where the public services should be delivered, and that's what's beginning to happen now, and it's beginning to happen, it started with Minister Ngozi's decision to publish every month in the newspapers the amount of money that was being transferred to the states and to the local government authorities.

And the civil societies we worked with said, "You know, we used to say the companies aren't paying enough. Abuja isn't paying

enough." And now when we saw the numbers, we said, "My God, there's a lot of money coming into our regions. Why aren't we seeing any public services?"

And that's what is the beginning of real change that changes people's lives. But information was the first opening.

Mr. GUTIERREZ. If any of the panelists would like to comment, there's an argument made that mandatory revenue disclosures would force companies to breech their contracts if they included nondisclosure provisions. Would anybody like to comment on that?

Ms. LISSAKERS. I'm happy to. This has been a big issue in the transparency issue debate. And the Revenue Watch Institute commissioned a study from the Columbia University Law School, which has access to a very large database of oil and mining contracts. They have now reviewed more than 100 major contracts, specifically looking at the confidentiality requirements. And the standard clauses in these contracts, which say that information may not be released without the permission of the counterparty—those clauses typically either explicitly exempt disclosures required by stock exchanges, or give a broad exemption for "compliance with law." In other words, this bill would in no way put U.S.-listed companies in conflict with their contractual obligations as far as we have been able to determine.

Mr. GUTIERREZ. I would like to thank the panel. It seems to me that we should continue to work on this legislation, Congresswoman Waters. I think it has great public benefit, not only for us here, but around the world.

And we work here a lot on transparency, because we think transparency just leads to better consumers. It allows them to make decisions. And it allows companies to change. Because once the public knows, they move their assets around, or they buy—you know, they buy differently, and they acquire goods from different places, once there is transparency.

So I think transparency—especially as I've learned that let me see if I want to overthrow a dictatorship, it's pretty good for me to know what assets the dictatorship has, so that I can say what I would do differently. And thereby not allow the dictatorship maybe to put the onus on the company that's extracting, but on me that's already receiving the money. Not that we shouldn't—there are some good politicians out there who probably do both, but they wouldn't be blinded on the one side by saying the company—because you know, I do kind of come from, it's the company. Some of us come from that point of view. But maybe they could have another point of view, and then they could say what they do better with the resources, or whether or not they made a good deal. I mean, because as we get transparency, maybe they're not paying enough for the barrel of oil or for the ton of magnesium. And it would be interesting to see how much money the same company would be paying different countries for the same natural resource.

I mean all of that knowledge is going to allow countries to develop their natural resources and to be more competitive, as they take those natural resources.

So I think it's something we should sit down and talk some more about with our colleagues. I am happy that the chairman has proposed this legislation.

And Congresswoman, would you like to close?

Ms. WATERS. Yes. If the gentleman would yield?

Mr. GUTIERREZ. Sure.

Ms. WATERS. Just for a minute.

As you said, we have always looked with a jaundiced eye at the companies, and we have always wanted more scrutiny on the companies, and felt that perhaps they were exploiting, they were not paying enough, that they were in bed with the dictators, and they didn't really care about the people. And I think as you said and as I'm saying, we're willing to look closer at the governments also.

Mr. GUTIERREZ. Sure.

Ms. WATERS. And not only do we want transparency from the companies and what they're paying, we need to find ways to leverage whatever power or relationships we have to get more transparency from the governments about how they spend their money. I worked on debt relief for Nigeria, and I kept asking myself, "Why am I working on debt relief for Nigeria?" They are rich in all this oil, and these resources. And so I'm convinced that I cannot credibly continue to talk about how poor these countries are, when they are so very rich. And we are not doing enough to put the pressure on the leadership of those governments. So I want to get them both, the companies and the governments.

Mr. GUTIERREZ. Well, I think this will help us all.

I thank all of the panelists so much for their time and their energy and their enthusiasm for this issue. Thank you so much.

This hearing is adjourned.

[Whereupon, at 11:30 a.m., the hearing was adjourned.]

A P P E N D I X

June 26, 2008

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Financial Services Committee
Full Committee Hearing: "H.R. 6066, the Extractive Industries Transparency Disclosure Act"
Opening Statement for Congressman André Carson
June 26, 2008

Thank you, Chairman Frank and Ranking Member Bachus for holding this hearing today regarding the Extractive Industries Transparency Disclosure Act. Discussion of this legislation today is extremely important and timely.

On June 19th, militants in Nigeria attacked the Royal Dutch Shell oil vessel and are still occupying the facility. These kinds of attacks happen frequently in Nigeria as citizens in this oil-rich country have long been denied an adequate share of the vast petroleum wealth, fueling chronic political corruption and violence. Sadly, this is not a unique case, but one that plagues many countries especially throughout Africa and South America.

I support the Chairman's bill, H.R. 6606 which significantly strengthens the efforts of the voluntary Extractive Industries Transparency Initiative. This bill represents an important step in empowering citizens in countries that have struggled under corrupt regimes. These regimes have hoarded resources and distributed them to the politically elite without clear documentation of their transactions. This has created a terrible paradox of extreme poverty in countries that have incredible natural resources.

It is important that the United States plays a role in helping these citizens not only because we are a global leader, but also because we rely a great deal on these industries, especially foreign oil companies. In fact, the United States imports 1.1 million barrels of crude oil per day from Nigeria alone, according the U.S. Energy Information Administration.

Further, it is important that shareholders are able to more accurately weigh concerns over investing in these companies in terms of financial risk and extractive costs to political and moral concerns over the operations of these industries within specific countries.

I am glad we have the opportunity to discuss this important legislation and I thank the witnesses for participating. I look forward to your testimony.

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House Committee on Financial Services
Opening Remarks
By Rep. Maxine Waters

Hearing on "H.R. 6066, the Extractive Industries Transparency Disclosure Act"

Thursday, June 25, 2008
2128 Rayburn, 10:00AM

I would like to thank Chairman Barney Frank for organizing this hearing and for introducing H.R. 6066, the Extractive Industries Transparency Disclosure Act.

Throughout my career, I have taken an active interest in the countries and peoples of Africa. I have always noted with dismay that many African countries are desperately poor countries despite being rich in natural resources. The tendency for countries that are rich in oil, gas, and mineral resources to experience slower growth, higher levels of poverty, and more civil strife than countries that are not resource-rich has come to be known as the "resource curse."

Liberia is a good example. Liberia is endowed with a wealth of diamonds. These diamonds should have been a blessing for Liberia's impoverished people. Instead, they fueled a civil war that lasted fourteen years, took the lives of 270,000 Liberians, and displaced almost one million more. The civil war finally ended less than three years ago with the election of Liberian President Ellen Johnson Sirleaf, the first woman head of state in Africa.

I am hopeful that the restoration of democracy will lead to a brighter future for the people of Liberia. However, 75 percent of Liberia's population still lives on less than $1 per day, and Liberia owes $3.7 billion to foreign countries and multilateral financial institutions. It is not hard to understand why the Liberian people might think they have been cursed with diamonds.

Other resource-rich countries have also experienced poverty, authoritarian rule, and civil strife. The government of Sudan has exported billions of dollars worth of oil to China and purchased over $80 million in arms, ammunition, and aircraft equipment from China, while committing genocide against its own people. Angola is rich in oil, and Sierra Leone is rich in diamonds, and both are recovering from civil wars. South Africa is rich in gold, platinum, and coal, and it is recovering from decades of oppression under the brutal system of apartheid.

Transparency is essential to free countries from the resource curse. Oil, gas, and mining companies should be required to report all of the revenues they pay to resource-rich developing countries. Such reports should include all payments made to government agencies and national and local elites, including bribes and other payments to individual politicians.

These reports should be made available to company shareholders, government regulators, the American people, and the people of the resource-rich developing countries themselves. Revenue transparency would allow the people of these countries to hold their governments accountable for the use of public revenues, just as other populations hold their governments accountable for the use of public tax funds.

The Extractive Industries Transparency Disclosure Act requires all extractive industry companies that are listed on U.S. exchanges or required to file reports with the Securities and Exchange Commission (SEC) to file an annual report disclosing payments made to foreign governments for natural resources or the right to extract such resources. I am proud to cosponsor this important bill.

I look forward to the testimony of the witnesses on the Extractive Industries Transparency Disclosure Act, and I yield back the balance of my time.

Extractive Industries Transparency Disclosure Act

Opening Statement – Alan Detheridge

Good morning.

My name is Alan Detheridge and I am a former oil company employee. I spent 30 years with the Royal Dutch Shell Group, retiring just over a year ago as the Group's Vice President for External Affairs.

I now work on a voluntary basis in the not for profit world. I am associate director of the Partnering Initiative – which is a joint venture between the Prince of Wales International Business Leaders Forum and Cambridge University. Its aim is to foster collaboration between governments, civil society and business to tackle pressing issues facing the developing world.

I am also a board member of a number of non governmental organisations – including Africare, the Synergos Institute, Management Sciences for Health and the International Foundation for Education and Self-Help (founded by the late Reverend Leon Sullivan). In addition, I am a member of the advisory board of the Revenue Watch Institute.

During my time at Shell, I was – along with a small group of industry and NGO colleagues – one of the instigators and initial supporters of the Extractive Industries Transparency Initiative (EITI) that was subsequently launched by UK Prime Minister Tony Blair at the 2002 World Summit on Sustainable Development. And it is that background that I bring to this hearing. I no longer work for Shell, so I speak only in a personal capacity – and do not claim to represent either my former employer or the oil and gas industry.

Let me begin by making it clear that I speak in favour of this proposed bill.

In part, that is because I agree with many of the arguments of those who have spoken before me. But it is also because I believe that transparency of payments made by companies to host governments is in companies own best interests.

Too often, companies are exclusively blamed for the lack of economic and social development in many of the poorer regions and countries where they work. What is often not known by the citizens of such countries is the significant sums of money paid by companies to host governments in the form of taxes, royalties and signature bonuses. For example, in Nigeria some 95 per cent of the revenues from onshore oil, after costs, go to the Federal Government. Making those revenues transparent, as indeed Nigeria now does in line with the EITI initiative, helps put the accountability for development where it belongs. And that, in my opinion, is in the long term best interest of both companies and the citizens of oil producing countries.

Having said that, I should like to use the remainder of my time addressing three arguments that I understand have been made against this bill.

The first is that the proposed bill would undo the good work being done by the Extractive Industries Transparency Initiative (EITI) and that it would very likely lead to that initiative's demise. Personally, as one of the instigators of EITI, I do not believe that to be the case – otherwise I would not have agreed to testify today.

The EITI is a country led and owned initiative that is supported at the international level by the EITI secretariat, along with G8 Governments, the World Bank and other institutions and organisations. It is being implemented in 23 candidate countries and, in each case, it leads to worthwhile discussion between in-country stakeholders on those revenues – not least the use to which they are put.

In my view, this bill is compatible with EITI's in-country approach that focuses on payments made and revenues received. But more importantly, having raised the matter with Dr. Peter Eigen, the Chairman of EITI's International Board, he told me that the EITI was following the discussions regarding this bill with interest. He went on to say that he welcomes efforts to improve resource revenue transparency that are consistent with the goals of EITI and that he also welcomes any legislation that reinforces these efforts. And, if necessary, he would be happy to issue a statement to that effect.

A second argument against the bill is that companies would need to make significant accounting and reporting modifications in order to disclose the required information. In other words, it would cost too much to implement.

I don't disagree with the argument that, despite the required information being available within company records, companies would incur some disclosure costs. But I do not see how companies that support EITI (which includes all of the major U.S. and European oil and mining companies) can reasonably claim that these costs would be prohibitive. In supporting EITI, companies implicitly accepted that they were prepared to assume the costs of disclosure wherever and whenever the initiative was implemented. So, since this bill's disclosure requirements are in line with those called for by EITI, it is difficult for me at least to see how it places an undue, and indeed unforeseen, burden on companies.

The third and final argument against the bill that I should like to address is that of U.S. competiveness, which some believe would be adversely affected. Those against the bill contend that many of the largest global competitors would not be subject to the bill and that these entities could benefit from the disclosure of payments made to host governments by their U.S. competitors.

Firstly, I think it is worth making the point that the proposed bill would in fact apply to a very high percentage of those companies listed on stock exchanges around the world. If you take the top 30 such companies (as measured by their reserves of oil and gas), then 90 per cent of them would be covered by this bill. The bill would not, of course, impact National Oil Companies (such as the National Iranian Oil Company, the Saudi Arabian Oil Company or the Iraq National Oil Company) that are not listed on any stock exchange. But the majority of such unlisted companies operate solely within their own countries.

Secondly, this bill mandates only the disclosure of aggregate payments made to governments – and not more commercially sensitive figures, such as costs or profit. If indeed there is some competitive disadvantage to disclosing payments to governments, which I personally doubt, should this outweigh the benefit of citizens of a country having access to that information? In my view, it should not.

Thank you.

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Congressional Testimony – Jenkins Statement

June 25, 2008

Mr. Chairman, [Ranking Member Bachus,] members of the Committee, Ladies and Gentlemen, good morning:

My name is Robert Jenkins. I am an American national presently based in London. I currently serve as Chairman of the Investment Management Association of the United Kingdom. The IMA is the trade body representing over 170 investment management firms operating in the United Kingdom.

I also chair F&C Asset Management plc. F&C is perhaps the oldest and certainly one of the largest asset management companies in Europe. We are London-headquartered and London Stock Exchange-listed. Finally, I am an Executive Fellow at the London Business School and Honorary Visiting Professor of Investment Management at City University London CASS Business School.

I am addressing you today primarily in my capacity as both an investment professional and as Chairman of a major investment management group.

I have four key points:

1. The investment management industry welcomes transparency
2. The transparency approach enshrined in the EITI remains the goal
3. We believe that the EITD Act will increase transparency in an important area
4. The EITD Act is in the spirit of, and complementary to, the broader EITI.

Before investing, every professional weighs (or should weigh) his potential risk versus his potential reward. The greater the uncertainty of risk, the greater the reward required. Information and transparency shape this calculation. The more transparent the information, the easier to quantify the downside. The more understandable the downside, the more confident one can be in pursuing the upside. Thus can transparency breed confidence, confidence reputation and reputation a lower cost of capital. This is true for individual companies; it is equally true for nations to which investors might wish to direct capital.

Now it happens that the extractive industries often operate in the world's riskier places. Transparency at company and country level can lower the risk, stimulate investment flows and expand opportunities generally. This is why many of the world's leading investors support the Extractive Industries Transparency Initiative. At last count, 79 pension funds, asset managers, banks and insurance companies who collectively manage in excess of $14 trillion - have signed up. Disclosure of what is paid together with transparency in what is received, promises a payoff of another kind: political accountability in resource-rich, but often standard-of-living-poor, nations. My

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view is that these two pillars, plus Civil Society monitoring, hold the key to reduced corruption, increased political stability and ultimately, greater national prosperity. This, in turn, translates into less risk for a company's foreign operations, and more and better risk / return opportunities for investors. This is the ultimate goal.

The EITD Act targets one side of the equation - but it is one worth targeting. Pitched at the level of the company, the Act will help investors better understand, and get greater comfort with, key details of the industry. But perhaps more importantly, the Act should reduce the operational and political risks run locally by the mining and extraction industries. Detailed transparency in reporting will give host nation critics little room for accusations of non-payment of tax and less room generally for claims of wrongdoing. Disclosure of payments to the authorities should therefore help shift the public spotlight away from the company and onto the host government.

Some will no doubt label this initiative as unnecessary interference: interference in company matters and interference in other nations' affairs. As a full-time capitalist and part-time lobbyist, I can sympathize. I rarely endorse, much less ask for, additional rules. No doubt the Act, as drafted, could be improved by further consultation with the industries concerned. Nevertheless, transparency is a positive. On this all parties agree. A number of competitors already embrace its essence. What harm, then, in raising to a global standard what is already for many, industry best practice. In the arena of corruption, real and implied, voluntarism does not always do the trick.

As for the charge of international interference, this is a tough one. It can certainly be misconstrued as such. It is an accusation that will have little substance, but one which you can be sure will be made. It has little substance because the simple fact is that the proposed legislation will apply to companies, both American and foreign, that are registered in this country. There is nothing extra-territorial about that. These companies have come to the US to benefit from our capital markets and financial expertise. It is perfectly reasonable for them to comply with the law of the land.

In summary, the investment world benefits from transparency. We seek transparency wherever possible - not out of moral goodness but in hard-nosed pursuit of better risk-adjusted returns. The riskier the arena, the greater the craving for transparency. Extractive industries operate in a risky arena. Though the EITD Act does not, and cannot, achieve all of the aims of the EITI, it is complementary to it and should prove supportive of it. As an investment professional and an industry spokesman, I therefore view the Act as a positive step

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Congressional Testimony – Jenkins Statement
Addendum

June 25, 2008

1. ***The Investor Case for transparency in the extractives sector[1]:***
   - Transparency is the necessary first step for building political accountability in resource-rich developing countries. By constraining opportunities for corrupt or wasteful government behaviour, transparency helps to defuse conflict and promote economic efficiency.
   - Defusing conflict reduces operating risk for extractive companies: this benefits equity investors, by lowering risk and expanding the pool of attractive investment opportunities.
   - Curbing corruption strips inefficiency out of the system and raises profitability for companies, thereby benefiting investors.
   - Cutting conflict and corruption reduces country and political risk: this can benefit sovereign debt holders by reducing risk and broadening the range of attractive Emerging Market investment opportunities.
   - Expanding range of lower-risk investment opportunities will stabilize commodities markets, helping to reduce volatility in global financial system.
   - Reducing civil conflict and corruption builds prosperity across Emerging Market economies, broadening opportunities for cross-border investment, boosting global trade and bringing down inflation.

2. ***What if companies suffer commercial disadvantage relative to competitors that are not covered by the Act?***
   - The argument that US-listed companies stand to be disadvantaged is highly speculative and at best unproven.
   - In any case, investors have a direct interest in the commercial success of the companies in which they are shareholders.
   - However, investment institutions also typically have exposure to large numbers of companies and a wide range of asset classes. They are therefore less directly exposed to the fortunes of any one particular extractive company, and can afford to take a more balanced and longer-term view regarding the effects of legislative action.
   - As a result, they are also sensitive to broader macroeconomic impacts across the extractive sector and global financial system. In particular, they understand that

[1] See the *Investors' Statement on Transparency in the Extractives Sector* – attached.

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- action to curb corruption will bring real benefits to overall investment performance by stripping out inefficiency, reducing the risk of conflict, and improving the investment climate.
- Overall, investors can appreciate that actions that may put pressure on one company in the short term can, on balance, be very good for the market as a whole and ultimately be of net benefit to investors.

3. ***As a strong supporter of the EITI, how does F&C defend the Act in light of claims that it will antagonize resource-rich countries and prompt them to withdraw from the EITI?***
   - We do not share the view that countries that are already EITI supporters will abandon the Initiative, and would suggest that this view is largely a matter of speculation. In fact, it is firmly rejected by many well-informed observers, including extractive companies, who argue that few countries will allow US law to determine whether they embrace or reject the EITI.
   - Our view is that more good will come from the Act through the momentum it will give to transparency than will be lost by upsetting some of the worst performers.
   - There is no doubt that the Act is no substitute for the EITI, as it only captures one side of the ledger, whereas both payments and revenues are needed along with active civil society engagement, to achieve the full aims of EITI. But the Act intends to complement and augment rather than replace the EITI.

4. ***Investors have backed anti-corruption initiatives, including the EITI, because they improve economic efficiency, lower risk and raise returns. Yet by applying only to US-listed companies, this legislation will also introduce unequal treatment for different companies. Isn't that inefficient?***
   - It is quite true that the Act captures some, but not all, major extractive companies. In particular, it omits all the National Oil Companies (NOCs) that operate strictly within their home countries and account for an enormous share of world production (e.g. Nigerian, Angolan, Saudi state companies), as well as some of the NOCs that operate outside their borders (e.g. CNOOC, Gazprom), and who pose a competitive threat to Western companies. It is also true that this incomplete coverage could create an un-level playing field by forcing US-listed companies to disclose information that their rivals can keep confidential.
   - To the extent that this information is genuinely commercially sensitive, it should not be released unless all companies are covered equally, and therefore all reasonable efforts should be made to ensure that the Act requires disclosures that enhance transparency without revealing compromising information. However, insofar as many companies already voluntarily release this information with no apparent difficulty, the argument that no disclosure should be required unless all companies are covered seems excessive and unnecessary.

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- To the extent that some countries may be antagonized by this legislation, it is conceivable that US-listed countries may be excluded from choice new assets, and therefore be competitively disadvantaged.
- However, there is an important distinction between NOCs with global aspirations and technical expertise, who legitimately do pose a competitive threat to US-listed IOCs, and the purely domestic, poorly-capitalized and technically weak NOCs. The latter's payments to government will not be captured by the Act, and will therefore be missing from the transparency effort, but they will not harm the commercial interests of US-listed companies.
- The NOCs with global competitive ambitions who can dodge this disclosure by not listing in the US may indeed gain an edge – ***provided host countries really do discriminate in their favor, which is a matter of dispute.*** To the extent that these companies deliberately continue to avoid a US listing with a view to courting corrupt governments and edging out US-listed companies, they may benefit commercially, and US-listed companies could suffer. This is a legitimate concern on the part of US-listed companies – though not, on its own, a reason not to back the Act, given the overwhelming benefits it presents to markets and the momentum it builds for transparency.

5. ***Why is this Act necessary when the EITI is progressing so well? With 23 countries that have achieved Candidate status, why not give the project some time?***
   - The EITI remains the standard we all seek to achieve, precisely because it achieves transparency on both sides of the ledger – payments and revenues – and even more importantly, because it actively involves civil society. Our aim is therefore to preserve and reinforce the EITI, not for this Act to substitute for it.
   - However, with $135-oil, there is a strong temptation for the many resource-rich countries that are *not* amongst the 23 Candidates to avoid engaging with the EITI – and even for some of the 23 to drag their feet and merely go through the motions.
   - Moreover, civil society pressure is becoming more effective as police states struggle to suppress debate in the age of internet. Releasing payments information can enable home-grown civil society movements to press for political accountability where foreign pressure is both politically unwelcome and ineffectual. The EITD Act enables this vital information to reach the public and stimulate further demands for fiscal transparency and political accountability.
   - Finally, all stakeholders have explicitly called for the EITI to be "mainstreamed", i.e. phased out as a stand-alone initiative and folded into standard global practice. One important way to achieve this is by integrating it into regulatory standards.

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6. ***US stock markets have already lost market share to overseas stock markets, and many observers have attributed this to the already onerous reporting provisions of Sarbanes Oxley. Wouldn't the Act risk exacerbating this differential, and prompt US-listed companies to de-list, or at the very least deter future IPOs from listing in the US?***
    - There are many factors that go into choosing a listing venue, and while the Sarbanes Oxley Act is undoubtedly one of them, it is reasonable to expect that if foreign companies are prepared to meet the SOX standards – and many companies based in countries with weak financial systems regard SOX as the gold standard – then they are unlikely to be deterred by this Act. This is especially true if, as we believe, concerns about a host-country backlash are overblown.
    - Despite the vociferous complaints about SOX, there have been extremely few de-listings, and they have all been from companies that had a very small investor base in the US, and therefore were not benefiting from the added liquidity provided by a US listing.
    - The fact is that the UK's Alternative Investment Market (AIM) has had a payments disclosure rule for extractive companies since early 2006, though it applies only at IPO time rather than being an annual requirement. This has been driven by reputational concerns following a series of unsavoury incidents with AIM-listed extractive companies.
    - While we welcome the leadership stance taken by US legislators, we would welcome similar initiatives in other key international financial markets, and expect to see these develop in due course.

7. ***Gas prices for US consumers are already at all-time highs. By putting at risk US companies' access to choice new assets, might this Act have the effect of reducing the nation's energy security and further driving up prices at the pump?***
    - These concerns are dramatically overblown: US imports are already overwhelmingly made up of oil extracted by non-US companies, and trade flows do not depend on the nationality of the producing company.
    - The best thing the US can do to improve energy security and calm overheated commodities markets (besides reducing its dependence on foreign oil by driving down demand) is to support transparency and help introduce more democratic accountability and political in the countries that hold most of the world's resources.

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Statement by Karin Lissakers
Director, Revenue Watch Institute

Concerning H.R. 6066, the Extractive Industries Transparency Disclosure Act
before the
Committee on Financial Services
House of Representatives

Washington D.C.
June 26, 2008

Mr. Chairman and Members of the Committee,

I welcome the opportunity to testify in support of H.R. 6066, the Extractive Industries Transparency Disclosure Act. The Revenue Watch Institute is an independent not for profit organization that promotes effective, transparent and accountable management of extractive revenues in producing countries. We are active participants in the Publish What You Pay (PWYP) campaign, a coalition of civil society groups from around the world and particularly from oil, gas and mineral exporting countries. PWYP strongly supports the legislation we are discussing today.

Information is the lifeblood of healthy markets and the lifeblood of healthy political societies. H.R. 6066 will contribute to both by enhancing and standardizing the public availability of vital information concerning the flow of payments from oil and gas extraction and mining to governments in producing countries.

Last October, this Committee heard expert testimony on the special role of extractive industries in countries receiving a significant share of government income and foreign exchange earnings from oil, gas and mineral extraction. There are at least 50 countries in that category, with more joining the list as new discoveries are being made in countries like Tanzania and Mozambique. Witnesses at October's hearing discussed the so-called "resource curse" or "paradox of plenty," – the fact that great natural resource wealth too often is associated with internal and cross-border conflict, deep-seated poverty and corruption. The phenomenon is widespread and not limited to one region or continent. Examples range from Myanmar to Turkmenistan, from the Congo DRC and Liberia to Bolivia and Peru. Scholars like Oxford University economist Paul Collier and UCLA political scientist Michael Ross have documented and analyzed the link between civil wars and natural resources. Ross notes that the number of civil wars has declined since the end of the Cold War—except in resource rich countries.

The United States is increasingly dependent on oil and other minerals imports from unstable, or potentially unstable, countries. In today's tight supply/demand situation, each time Shell has to shut in production in Nigeria because of attacks on its Niger Delta facilities, American consumers feel the effects in their pocket books. Shell's investors feel it, too. Arizona-based Freeport McMoRan and its partners are investing nearly a billion dollars in a copper and cobalt mine in another conflict-prone country, the Democratic Republic of Congo. The risk of conflict

or other forms of disruption of their investments are high. It is not that payments to foreign governments *per se* pose a risk to investors, but rather that the diversion of such payments—and the general lack of accountability and public access to payment information—in the countries where a company is drilling or mining creates a high risk of political blow-back, unrest, expropriation, shakedowns, extortion, and damage to company reputations.

Secrecy is a big part of the problem. In most countries, sub-soil minerals belong to the state—that is, they are public assets. But in too many cases, deals are cut behind closed doors between companies and the people in power, and neither the contracts nor the payments that flow from them are made public. In countries where institutions of government accountability are weak, the lack of public information makes it almost impossible for citizens to insist that the revenues are spent for their benefit.

An unintended consequence of the secrecy is that mounting public frustration and resentment over the absence of schools, teachers, clinics, clean water or decent roads is often directed at the foreign companies rather than the government, where the blame rightly belongs. Extractive companies may try to defend themselves by providing social services themselves, at least to the communities where they operate. This in turn takes the government off the hook and keeps the public focus on the companies. In the meantime, the closed-door dealings and lack of accountability invite new power figures to try to seize control of the valuable assets for their own benefit. This is not a model for successful development.

The US government and other OECD donors provide billions in economic assistance to countries that, with good contracts and proper revenue management, have the potential to finance their development. Today's commodity boom should by all rights produce a development windfall for resource-rich countries. Unfortunately, if past patterns persist, the boom is likely to bypass the majority of people living in many of those countries

Mr. Chairman, in October you asked how the Congress could encourage policies that would make sure these resources are a positive rather than a negative. I believe the EITD Act is one very important step. The US cannot dictate development policies for resource rich countries, but we can make it easier for the people in those countries to demand that their own governments spend the proceeds of minerals extraction for their benefit and not just for an elite few. Information is the key.

International lending agencies, aid donors, investors and the extractive industry majors themselves have all recognized the value of transparency of payments to governments as a means to promote better governance, stability and development in resource rich countries. For the last six years, companies like BP, Shell, Exxon Chevron, Petrobras and members of the International Council on Mining and Minerals have joined forces with investors, governments and civil society to develop a voluntary disclosure initiative, the Extractive Industries Transparency Initiative (EITI). Twenty-three countries and most of the extractive companies operating in them are implementing the provisions of EITI requiring the dual disclosure of company payments and government receipts from the extractive sector. The International Financial Institutions have adopted policies on extractive payments and revenue transparency. The World Bank's investment arm, the IFC, requires each company participating with the IFC in an extractive

project to publish its payments to the government in question, broken down by type of payment. Congress has included similar provisions in the 2008 OPIC re-authorization legislation awaiting final passage.

Even where payment disclosure is not required, some companies unilaterally have chosen to disclose their payments to governments, particularly where political or social tensions run high. Conoco-Phillips regularly reports its payments in Timor Leste, including payments to local governments. BP decided to publish its payments in Azerbaijan from the outset of its controversial BTC pipeline. When Bolivia threatened to expropriate gas properties, Petrobras went out of its way to tell investors how much it was paying in taxes to Bolivia. Mining giant Newmont publishes its government payments around the world, as does the smaller Talisman Energy. Talisman works in non-EITI countries like Algeria, Colombia, Malaysia and Vietnam. Lukoil, one of the biggest tax payers in Russia, makes a point to regularly disclose what it pays the state in taxes. The Russian government has used charges of underpayment of taxes to pressure oil and gas ventures to make concessions and yield more control to the state or state-related interests. It appears that many companies believe that payments disclosure helps build public trust and improve their standing in the countries where they operate.

The IMF Guide on Resource Revenue Transparency lists among its core good practices that "Reports on government receipts of company resource revenue payments should be made publicly available as part of the government budget and accounting process." The Guide adds that reconciliation with companies reporting their payments "will help give assurance that revenue receipts from natural resources are fully accounted for."

In short, the EITD Act will simply codify what has become widely accepted best practice.

Some in the industry have raised concerns about the bill. One such concern is that it will undermine EITI. My Institute and I personally have been involved with EITI since the beginning and remain fully committed to its success, as does the PWYP coalition. In considering the interaction of this legislation and EITI, it is important to note that, at the urging of industry and the US department of State, among others, the EITI includes a sunset provision. The EITI Board, on which I served for many years, agreed that the EITI secretariat should only be funded until 2010. . The multi-stakeholder board made this decision not because transparency would no longer be needed, but because it expected that by the end of the decade disclosure of company payments and government extractive revenues would have become "mainstreamed" – routine practice and a global standard. The EITD Act, which will cover 90% of major oil companies, and most of the major mining companies, including state owned companies, will be a major step toward that mainstreaming.

Another concern been expressed is that the EITD Act would force U.S. listed companies to violate their contractual obligations – specifically confidentiality clauses prohibiting the release of certain information without the written consent of the other party. Unsanctioned disclosure could even lead to termination of contracts, it is argued. We do not believe that these concerns are well founded. The Revenue Watch Institute has been working with the Columbia University School of Law on a study of confidentiality clauses in extractive contracts. The law school has access to a large data base, and researchers have reviewed the confidentiality provisions of more

than 100 major oil, gas and mining contracts. The clauses typically either explicitly exempt disclosure to stock exchanges or offer a general exemption for compliance with law. The EITD Act, if passed, certainly qualifies as law and would be a permissible exception in either case.

The researchers found only one case where unauthorized disclosure was linked to termination of a contract: the Angolan Production Sharing Agreements. Some years ago when BP wanted to voluntarily disclose its payments to that government, the Angola regime threatened to kick them out. Norway's Statoil, on the other hand, publishes its payments to the government of Angola because Norwegian law requires it. There have been no protests from the government and Statoil's contract has not been terminated

The EITD Act's disclosure rules would cover such a large percent of the industry leaders that a country would put itself at a significant competitive disadvantage in attracting EI investment if it were to terminate a PSA because a company complied with SEC regulations and US law. That country would also damage to its reputation. We have seen that even governments with a history of corruption and authoritarian rule are becoming mindful of their governance reputation. That is undoubtedly one of the motivations for the growing uptake of EITI. Even Angola, which has so far rejected EITI, has significantly increased the transparency of its petroleum sector and touts that fact internationally. Manuel Vicente, Chairman of the state oil company, Sonangol, declared recently that the company would like to list on the New York Stock Exchange.

Rather than hurt companies, we believe that the EITD Act will offer protection for those that prefer to be transparent and believe that disclosing payments builds better relations and long-term stability with their host communities. And with its wide coverage the law will help to level the playing field between companies that are already disclosing payments and participating in EITI and those that are not.

Of the top 30 internationally operating oil and gas companies, as measured by reserves, 27 would be covered by the EITD Act. The most important mining companies will also be covered. The broad coverage of the major industry players, foreign as well as US-based, means that there is little risk of compliance putting American companies at a significant competitive disadvantage. In fact, it could be just the opposite. EITI and the transparency movement have already given unprecedented scope for citizen activists in producing countries to demand more accountability from their governments. Once the EITD Act is in place and the most important international operators are compliant, governments will have a hard time defending deals with the minority of extractive companies that are not reporting their payments, including deals with domestic companies that often serve as cover for illicit transfers to influential figures.

An important aspect of the EITD Act is that it requires that companies disclose separate figures for their natural resource revenue payments within each of the following categories: host government production entitlements, profits taxes, royalties, dividends, bonuses, fees, and other substantial payments as determined by the SEC. This so-called "disaggregation" of payments mirrors the reporting required by EITI and is vital to achieving the stated objectives of the EITD Act. Aggregated reporting, which I understand has been proposed by some industry actors as a way to soften the impact of the EITD Act, would miss the mark. First, lump sum payment disclosure would make it easier for illegitimate payments to be hidden among legitimate

payments—and harder for a company hoping to counter claims that it is underpaying to point to supporting evidence; disaggregating payments allows investors greater confidence that a company's reputation cannot be unfairly (or fairly) questioned. Moreover, different payment streams are often collected by different institutions within a producing state, and this can have great significance in the effort to increase the level of accountability of the government. For instance, under a production sharing agreement, production entitlement could go directly to a state oil company while taxes go to the revenue collection agency. The position and level of accountability of these institutions within a country can vary widely making it important not to simply lump them together as a collector of state revenues.

The EITI reporting templates, the IFC, and Talisman, to cite just a few examples, all break down extractive payments by type for these reasons. A lump sum disclosure standard in the EITD Act would be a step backward rather than an advance in the global push for extractive industry transparency.

We have already seen how the Extractive Industries Transparency Initiative has emboldened citizens to begin to question their governments. Once people know how much money is coming in, they demand to know where it is going. H.R. 6066 can give citizens in many more countries around the world a powerful tool to hold their own governments to account and greatly increase the likelihood that oil, gas and mining resources will be a benefit and not a curse.

END

June 2008

Who will be covered by the Extractive Industries Transparency Disclosure Act?

The Extractive Industries Transparency Disclosure (EITD) Act requires that all oil, gas and mining companies registered with the Securities and Exchange Commission (SEC) publish their natural resource revenue payments to foreign governments as part of their annual filing.

Some industry representatives have stated that they fear the regulation will put American firms at a competitive disadvantage. This is simply not true. The EITD Act will apply to all entities registered with the Securities and Exchange Commission that have oil, gas and mining operations. Those covered include American and foreign companies, and would apply to the vast majority of major extractive companies.

Oil and Gas Companies

For purposes of illustration, below is a list of the top 50 largest oil and gas companies by reserves. Of these, twenty are national oil companies that do not operate internationally. These companies are not registered with the SEC or any other exchange, only operate within their own country, and as such, **they do not compete with American companies.** (i.e. Saudi Arabian Oil Company, Iraq National Oil Company, etc.). To suggest that it is a disadvantage to American firms that these companies are not covered by the regulation is disingenuous. Their operations are usually limited to their home country, where their operations are often not subject to open market competition.

Of the remaining 30 *internationally* operating companies, 27 would be covered by the proposed legislation. This includes Canadian, European, Russian, Chinese, Brazilian and other international companies. The three companies not covered are Gazprom (London); Petronas (Kuala Lumpur) and the Romanian National oil company (Bucharest). **Therefore, 90% of the major internationally operating oil companies would be covered by the EITD Act.**

CHART 1: 50 Largest Oil and Gas Companies by Reserves
N/A = National company only (not operating internationally)

Rank	Company	Stock Exchange Listing	Listed Entities
1	National Iranian Oil Company (Iran)	N/A	
2	Saudi Arabian Oil Company (Saudi Arabia)	N/A	
3	Iraq National Oil Company (Iraq)	N/A	
4	Qatar General Petroleum Corporation (Qatar)	N/A	
5	Abu Dhabi National Oil Company (UAE)	N/A	
6	Kuwait Petroleum Corporation (Kuwait)	N/A	
7	Petroleos de Venezuela.S.A. (Venezuela)	N/A	
8	Nigerian National Petroleum Corporation (Nigeria)	N/A	
9	National Oil Company (Libya)	N/A	
10	Sonatrach (Algeria)	N/A	

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11	Gazprom (Russia)	LSE	Gazprom OAO
12	PetroChina Co. Ltd. (China)	SEC	PetroChina Co Ltd
		NYSE	PetroChina Company Ltd
13	OAO Rosneft (Russia)	N/A	
14	Petronas (Malaysia)	KLSE	
15	OAO Lukoil (Russia)	SEC	Lukoil Americas Corp, Lukoil Oil Corp/FI, Lukoil Overseas Holding Ltd.
		LSE	Lukoil OAO
16	Petroleos Mexicanos (Mexico)	N/A	
17	ExxonMobil Corporation (U.S.)	SEC	Exxon Mobil Corp
		NYSE	Exxon Mobil Corporation
		LSE	Exxon Mobil Corp
18	BP Corporation (U.K.)	SEC	BP America Inc, BP Amoco Co, BP Canada Finance Co, BP Capital Markets America, Inc, BP Capital Markets PLC, PB Corp North America Inc, BP PLC
		LSE	BP
19	Egyptian General Petroleum Corp. (Egypt)	N/A	
20	Chevron Corporation (U.S.)	SEC	Chevron Capital USA Inc, Chevron Corp, Chevron USA Inc
		NYSE	Chevron Corporation
21	ConocoPhillips (U.S.)	SEC	ConocoPhillips, ConocoPhillips Australia Funding Co, ConocoPhillips Co, Conoco Phillips Holding Co
		NYSE	ConocoPhillips
22	Total (France)	SEC	Total Petroleum North America Ltd, Total SA
		NYSE	Total S.A.
		LSE	Total S.A.
23	Petroleum Development Oman LLC (Oman)	N/A	
24	Petroleo Brasilerio S.A. (Brazil)	SEC	Petrobras Energia Participaciones SA, Petrobras International Finance Co
		NYSE	Petrobras - Petroleo Brasileiro S.A. (PBR & PBRA), Petrobras Energia Participaciones S.A.
25	Royal Dutch/Shell (Netherlands)	SEC	Royal Dutch Shell plc, Royal Dutch Petroleum Co
		NYSE	Royal Dutch Shell plc (RDS.A and RDS.B)
		LSE	Royal Dutch Shell
26	Sonangol (Angola)	N/A	
27	ENI (Italy)	SEC	ENI SPA
		NYSE	ENI S.p.A.
28	Dubai Petroleum Company (UAE)	N/A	
29	Petroleos de Ecuador (Ecuador)	N/A	
30	Pertamina (Indonesia)	N/A	
31	Statoil (Norway)	SEC	Statoil Hydro ASA
		NYSE	Statoil Hydro ASA
32	EnCana Corp. (Canada)	SEC	EnCana Corp
33	Anadarko Petroleum Corporation (U.S.)	SEC	Anadarko Finance Co, Anadarko Petroleum Corp
34	Occidental Petroleum Corporation (U.S.)	SEC	Occidental Oil and Gas Holding Corp, Occidental Petroleum Corp, Occidental Petroleum Corp /DE/, Occidental Petroleum Investment Corp
35	China National Offshore Oil Corp. (China)	SEC	CNOOC Ltd
		NYSE	CNOOC
36	Repsol YPF (Spain)	SEC	Repsol YPF SA
		NYSE	Repsol YPF, S.A.
37	Devon Energy Corporation (U.S.)	NYSE	Devon Energy Corporation
		SEC	Devon Energy Corp /DE, Devon Energy Corp /OK/, Devon Financing Trust
38	Apache Corp. (U.S.)	SEC	Apache Corp, Apache Finance Canada Corp, Apache Finance Pty Ltd, Apache Offshore Investment Partnership
39	Ecopetrol (Columbia)	N/A	
40	Canadian Natural Resources (Canada)	SEC	Canadian Natural Resources Ltd.
		NYSE	Canadian Natural Resources Ltd.
41	Norsk Hyrdo ASA (Norway)	SEC	Norsk Hydro A S A
42	Talisman Energy Ltd. (Canada)	NYSE	Talisman Energy Inc.
		SEC	Talisman Energy Inc, Talisman Energy Sweden AB
43	Romanian National Oil Co. (PETROM) (Romania)	BSE	
44	BG Group PLC (U.K.)	SEC	BG Group PLC
		LSE	BG Group
45	BHP Billiton Ltd (Australia)	SEC	BHP Billiton Finance USA Ltd
		LSE	BHP Billiton (but listed as a UK company)

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46	Petro-Canada (Canada)	SEC	Petro-Canada
		NYSE	Petro-Canada
47	Hess Corp. (U.S.)	SEC	Hess Corp
		NYSE	Hess Corporation
48	Nexen Inc. (Canada)	NYSE	Nexen, Inc
		SEC	Nexen Inc
49	Shell Canada Ltd. (Canada)	SEC	Shell Canada Ltd
50	Canadian Oil Sands Trust (Canada)	SEC	Canadian Oil Sands Ltd, Canadian Oil Sands Trust /FI, Canadian Oil Sands Trust /NEW/FI
Source:	PetroStrategies, Inc.		
Notes:	Ranked in order of 2006 worldwide oil equivalent reserves as reported in "OGJ 200/100", Oil & Gas Journal, September 17, 2007.		
Statistics:	Percent of top 50 companies operating internationally		

Of the 15 top oil and gas companies with international operations, ranked by Fortune magazine according to their total sales in 2007, all but one of them are listed with the SEC. Only four of these are American companies. The listed companies together accounted for nearly $2.2 trillion dollars in sales and $200 billion in profits.

CHART 2: Top 15 Fortune Global 500 Oil and Gas Companies with International Operations

Fortune 500 Ranking	Company	Country	Sales (billions USD)	Profits (billions USD)	SEC-listed?
2	ExxonMobil	USA	347.3	39.5	yes
3	Royal Dutch Shell	Netherlands	318.8	25.4	yes
4	BP	UK	274.3	22.0	yes
7	ChevronTexaco	USA	200.6	17.1	yes
9	ConocoPhillips	USA	172.5	15.6	yes
10	Total	France	168.4	14.8	yes
17	CPCC (Sinopec)	China	131.6	3.7	yes
24	Petrochina (CNPC)	China	110.5	13.3	yes
26	ENI (AGIP)	Italy	109.0	11.6	yes
65	Petrobras	Brazil	72.3	12.8	yes
78	Statoil	Norway	66.3	6.3	yes
90	Repsol YPF	Spain	60.9	3.9	yes
92	Marathon Oil	USA	60.6	5.2	yes
98	SK	South Korea	59.0	1.5	no
110	Lukoil	Russia	54.5	7.5	yes
		Totals	**2206.7**	**200.2**	

Mining Companies

The coverage of companies in the mining industry is also comprehensive. Of the ten most successful companies, as ranked in the 2007 Forbes Global 2000, eight are listed with the SEC. Only two of those are American companies. Together, these eight companies accounted for over $300 billion in sales and $55 billion in profits in 2007.

CHART 3: Mining companies as per Forbes Rating

Forbes 2000 Ranking	Company	Country	Sales (billions USD)	Profits (billions USD)	SEC-listed?
38	ArcelorMittal	Luxembourg	105.22	10.37	yes
76	Vale	Brazil	33.23	10.26	yes
77	Rio Tinto	UK/Australia	29.7	7.31	yes
83	BHP Billiton	Australia/UK	39.5	13.42	yes
124	Xstrata	Switzerland	28.21	5.5	no
147	Anglo American	UK	25.47	5.29	yes
185	Nippon Steel	Japan	36.61	2.99	no
190	Posco	South Korea	27.91	3.58	yes
211	Alcoa	USA	30.75	2.56	yes
221	Freeport-McMoran	USA	16.94	2.98	yes
		Totals	**373.54**	**64.26**	

Conclusion

Given the fact nearly all internationally competitive oil, gas and mining companies are registered with the Securities and Exchange Commission, and therefore subject to the same regulations as American companies, it is clear that there is little merit to the argument that this regulation would be a disadvantage to American firms. Rather the EITD Act represents an important step forward in creating a global standard for transparency benefiting investors and industry alike.

For more information, please visit www.openthebooks.org or contact Sarah Pray, Coordinator of Publish What You Pay United States at spray@pwypusa.org or (202) 721-5623.

Prepared Testimony before the United States House of Representatives Committee on Financial Services
Faith Stevelman, Professor of Law, New York Law School
June 26, 2008

Members of Congress, Ladies and Gentleman, I am honored you have invited me to express my views on H.R. 6066, the Extractive Industries Transparency Disclosure Act (the EITDA). I am eager to answer any questions you may ask me as a Professor of Law specializing in corporate governance and securities regulation.

As you know, the Act you are vetting today would require enhanced informational disclosure by international extractive enterprises having a sufficient U.S. presence so that they or their affiliates fall under the SEC's periodic reporting requirements. In particular, the Act calls for such firms to make annual, publicly searchable reports to the SEC of all payments they've made to foreign governments for natural resources and extraction rights, with the exception of payments less than $100,000.

Such enhanced informational reporting would allow current and prospective investors in covered companies better to evaluate the natural resources and rights which their firms have obtained, as well as the costs and potential risks, legal as well as economic, incurred in obtaining them. In this manner, the Extractive Industries Transparency Disclosure Act would empower individual shareholders and the securities market in general better to evaluate the risk/reward profile of individual extractive projects, and better to compare different projects within and among companies covered by the Act. In addition, the Act would enhance covered companies' incentives to comply with the existing legal prohibitions against off-the book payments and bribes, and would enhance law abiding covered companies' ability to attest to the legitimate, genuinely negotiated, market-based terms of the natural resource rights in foreign countries.

The Act is consistent with Congress' broader objectives in regulating interstate commerce and overseeing the system of public reporting to investors – *viz.* enhancing market efficiency, sustaining current levels of market liquidity and empowering and protecting U.S. investors. As would the Act, the SEC's periodic reporting requirements extend to U.S. and also foreign corporations which have raised capital in SEC-registered public offerings, have listed securities on any U.S. exchange or have surpassed minimum numbers of record shareholders and asset values in the U.S. In regard to the Act's substance, the disclosures it would require are, in effect, precise applications of already existing, more generalized disclosure mandates arising under the headings of "Risk Factors" and "Management's Discussion and Analysis of Financial Condition and Results of Operations," as well standards of "quantitative materiality" endorsed by the SEC (as defined in SEC Staff Accounting Bulletin No. 99 (dated August 12, 1999)).

The Act would benefit investors by facilitating their ability to value the covered companies' natural resources rights and contracts, and the financial and legal risks attaching to them. In addition, increasing investors' confidence that they have the information reasonably necessary to price such natural resource rights and contracts should help lower covered companies' costs of capital. As it would foster U.S. investors' confidence in investing in international extractive industries, Congress' enactment of the EITDA would help to sustain the valuable liquidity present in this area of the U.S. securities markets. And the additional disclosures contemplated in the EITDA would contribute to the markets' ability more rationally to price the securities of covered companies.

Furthermore, the Act would help to reinforce corporate senior executive officers' fulfillment of their duties of care, loyalty and good faith – that is, their fiduciary obligations arising under state corporation law. To clarify, by enacting the EITDA into law, Congress would encourage senior corporate executives to exercise

their utmost diligence, loyalty and good faith in negotiating for and capitalizing on the value of their companies' natural resources rights -- since it's logical that managers most efficiently and faithfully manage resources which they are obliged to account for publicly.

The disclosure which would be mandated by the Act would enhance investors' ability to judge whether a covered companies' executives have endeavored to hide or obscure legal and financial risks related to their foreign natural resource rights. In cases where evidence of some questionable transactions or questionable reporting practices was evident, investors could make informed judgments about their risk tolerance, and the securities markets would (consistent with the concept of efficient markets) impound such new information into the price of the covered companies' securities. Investors who concluded that their securities were overpriced or vulnerable to future losses could resolve to sell and "cut their losses." In addition, by fostering early detection of questionable natural resource related payments or transactions, the Act would allow shareholders to agitate for corporate reform early on -- before the company's overall reputation and financial health was impaired. Furthermore, the disclosures mandated by the Act would help investors to evaluate the overall quality of the business judgment and professional integrity of covered companies' senior executive officers – which should be a material factor influencing investors' decisions to buy, sell or hold securities.

Recent domestic and international legal developments raise the litigation-related costs for extractive firms implicated in illicit transactions with foreign governments. In this regard, the Act would shed light on a facet of international corporate transacting that increasingly exposes U.S. investors to substantial, difficult to quantify litigation-related financial risk and costs. Faithful reporting under the EITDA would help law abiding covered companies immunize themselves from serious legal claims. By allowing for better verification that covered companies have

obtained their rights to foreign-based natural resources through lawful, market-based negotiations and agreements with the foreign country's officials, the EITDA would enhance investors' confidence about the enforceability of their firms' foreign-based natural resource rights and contracts. To clarify, the reports which would be mandated by the EITDA would help investors better evaluate whether their company's rights are unassailable and safe from expropriation by foreign governments claiming illegality, fraud or other serious abuses. Once again, the disclosure contemplated by the Act would foster investors' opportunities to make informed investment choices. In addition, it would foster law abiding, "market-transacting" firms' ability to profit from the enhanced investor confidence they would foreseeably garner from complying with high ethical standards and legally mandated reporting requirements in regard to their foreign transactions in natural resources rights.

Furthermore, because covered companies' could use good faith reporting under the EITDA to help attest to the propriety of their foreign transactions in natural resource rights, these reports might represent a low cost means of protecting these companies against "globalization backlash" and the wide ranging, heightened conduct-based regulatory requirements it might inspire. Such expanded regulatory requirements would foreseeably exceed the minimal administrative and reporting costs which would arise under the EITDA. By negative comparison with covered, reporting firms, if enacted, the Act would stigmatize extractive companies which refused to or failed to make credible, comprehensive, verifiable disclosures of the data called for thereunder. Again by negative implication, investors would become sensitized to the greater risks associated with investing in firms which refused to or failed to make the disclosures contemplated by the EITDA.

The EITDA is well drafted – it should broadly accomplish its goals at low cost. First, in terms of its efficacy, the Act would be extraordinarily comprehensive in

its coverage. According to data compiled by Publish What You Pay, it would reach at least 90% of the major companies active in international natural resource extraction – that is, very few major extractive enterprises doing business internationally would fall outside of the Act's mandatory disclosure requirements. Hence, only a very small population of major international extractive firms would be in a position even to attempt to garner a comparative advantage from maintaining the confidentiality of their foreign transactions in natural resource rights. (The comparative advantage/disadvantage issue is addressed further below in this Testimony's concluding remarks.)

In regard to the burdens it would impose, most importantly, apart from its newly expanded disclosure requirement, the Act proposes no new conduct requirements or conduct prohibitions on extractive enterprises. Corporate acts and transactions which were already unlawful remain unlawful. And leaving aside (non)disclosure, corporate acts and transactions which were lawful remain lawful.

Nor, even, would the additional mandatory disclosures contemplated by the Act give rise to new information gathering costs for U.S. reporting firms – since any reasonably efficient international business would presumably have the relevant information called for by the Act readily at hand. For the most part, the Act would not even require new oversight or compliance measures or systems of verification. This is because the accurate reporting of transactions and maintenance of internal controls procedures sufficient to produce accurate corporate books and records was made mandatory for SEC reporting companies more than thirty years ago by Congress' enactment of the books and records provisions of the Foreign Corrupt Practices Act (as codified in Section 13(b) of the Securities and Exchange Act). And Congress has consistently reinforced this emphasis on accurate corporate reporting and effective corporate auditing – for example by enacting the Sarbanes-Oxley Act, and the USA PATRIOT Act.

You will undoubtedly consider certain superficially worrisome but ultimately insubstantial critiques of the Act. You may ask why, if disclosure is good for companies and shareholders, we cannot rely on corporate managers voluntarily to provide it to shareholders? The answer -- as we are more mindful after the fall of Enron and WorldCom – is that managers may fail to disclose corporate information for self-serving reasons. They may be inclined to use material nonpublic information to profit from trading on undisclosed or selectively disclosed good or bad news. (The limited budgetary resources of the SEC ensures that not all illicit trading by senior executives will be detected or redressed.)

Even more importantly, corporate senior executives would naturally prefer to minimize and obscure the importance of unfavorable events and transactions which would cast doubt on the quality of their leadership and business judgment. This insight points to the EITDA's relationship to the basic architecture of corporate and securities law. The American corporate governance bargain is that managers and not shareholders get to make business decisions and investors cannot second-guess managers' lawful business judgments made in good faith. The flip side of this bargain however, as enforced by the federal securities laws and regulations, is that shareholders must be afforded detailed, accurate information about the firm's assets, operations and financial condition -- information illustrative of the quality of their managers' decision making and professional integrity -- so that they can make informed choices about buying, selling or holding their securities. In this regard, the informational disclosure contemplated by the EITDA fits neatly into the broader scheme of U.S. corporate and securities laws.

Voluntary disclosure has several other essential defects. First, of course, companies can simply ignore voluntary disclosure mandates. Furthermore, an informational environment filled with spotty, unreliable and incomplete disclosures undermines the usefulness of even reliable reports which investors might voluntarily

receive. Disclosure that is voluntary will inevitably be uneven and ad hoc – in essence, impressionistic. For this reason, it will not allow for meaningful comparability – which is to say will not accomplish meaningful transparency -- among and between extractive companies and projects.

In addition, investors and the marketplace will inevitably discount the credibility and accuracy of disclosures which are merely voluntary in nature. The marketplace cannot adequately distinguish between earnest voluntary disclosure and self-serving, potentially misleading corporate "spin." For this reason, companies cannot use voluntary publicity to garner the full financial benefits which would accrue from their making systematic, legally mandated disclosures. Furthermore, by enacting the EITDA into law, Congress can signal to companies and investors, as well as broader constituencies, the seriousness of the principles at stake in achieving greater transparency in regard to international natural resource transactions.

It is also crucially important to consider the enforcement mechanisms contemplated – and not contemplated – by the Act. In particular, the Act does not contemplate a private cause of action for companies' failure to supply the information mandated thereunder. In this regard it is consonant with recent Acts of Congress which have reflected concern about the costs which may be imposed on businesses by vexatious private suits.

Nor would the broader framework of private remedies for securities fraud afford a basis for suits by investors. In particular, the limits and safeguards which Congress, the SEC and the federal courts have imposed on private investor suits for fraud -- for example, heightened pleading requirements and proof of loss causation and scienter – would effectively preclude investors from using the existing antifraud prohibitions under the federal securities laws to bring claims alleging deficient EITDA reporting.

In the alternative, enforcement of the Act's disclosure requirements would fall to the discretion of the SEC, under the oversight, in most cases, of the federal courts. Most notably (leaving aside cases of notorious, repeated, material disclosure deficiencies, gross financial frauds and instances of market manipulation and insider trading), SEC enforcement actions rarely have resulted in substantial corporate fines or penalties. In responding to perceived shortcomings in the kind of reporting contemplated under EITDA, the SEC has most commonly sought civil injunctions or obtained consent decrees prohibiting future disclosure violations. Moreover, even if the SEC succeeds in proving a claim of materially deficient reporting in federal court (monetary fines against reporting companies are unavailable in administrative actions), Section 21(d) of the Securities Exchange Act of 1934 establishes a three tiered system of fines and penalties which caps the remedies which the SEC may obtain – again, absent egregious facts or fraudulent or repeated reckless disclosure deficiencies – at $50,000 per corporate violation.

One final important critique of the Act should be addressed – that is, the issue of whether the EITDA would confer a comparative advantage on companies falling outside its reach. Certain features of this critique have been addressed previously -- most importantly, that very few major, international extractive enterprises would fall outside of the Act's disclosure requirements. Secondly, the above discussion highlighted how investors – and hence companies seeking to raise capital at efficient prices and the securities markets in general – stand to benefit from the disclosures which would be legally mandated by the Act's passage. Furthermore, that certain firms might fall outside of the EITDA – even that certain firms fall outside of the scope of the U.S. securities laws in general – is a poor rationale for endorsing lax U.S. standards and requirements. That is, the United States has long been a leader in advocating standards of good corporate governance, and systems of accurate corporate reporting – and these standards and requirements have helped keep our

markets strong and stable, have supported capital formation and protected investors' faith in investing.

As it turns out, moreover, the comparative disadvantage argument is inherently shaky. Its fatal flaw is that truly repressive foreign governments are unlikely to make decisions about which businesses to transact with based on the presence or absence of the kind of reporting requirements contemplated by the EITDA. Governments which have histories of high levels of corruption and which are likely to demand off-the-books payments in connection with the sale of resource rights are unlikely to be substantially affected by whether the terms of such transactions are subject to a publicly searchable filing with the SEC.

Second, regarding the issue of comparative disadvantage, if companies subject to U.S. reporting requirements pay bribes to foreign officials or engage in off-the-books transactions in obtaining natural resource rights, they are breaking U.S. federal laws which predate the EITDA. If companies cannot do business in conformity with the limits and standards established by Congress, then they should address this broader issue directly, rather than under cover of opposing the EITDA. Congress' consideration of the EITDA should not become a tacit vehicle for backing away from the anti-bribery, anti-money laundering and anti-corruption/national security laws which it has previously enacted.

This testimony has described how the passage of the EITDA might afford companies who embrace its disclosure mandates a comparative advantage in attracting publicly traded equity capital. Indeed, such companies should be more likely not only to attract public equity capital at favorable rates, but also private equity capital and debt financing, private and public. The reporting requirements contemplated by the Act are consonant with Congress' and the SEC's longstanding commitment to enhancing market efficiency and the rule of law underpinnings of

free markets in general. In conclusion, the enactment of the Extractive Industries' Disclosure and Transparency Act would advance the welfare of U.S. investors and the market for securities of SEC reporting companies involved in international natural resource extraction, while imposing little cost on the firms it governs.

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