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About OGEL

OGEL (Oil, Gas & Energy Law Intelligence): Focussing on recent developments in the area of oil-gas-energy law, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting, including the oil-gas-energy geopolitics.

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Open to all to read and to contribute

Our aim is for OGEL to become the hub of a global professional and academic network. Therefore we invite all those with an interest in oil-gas-energy law and regulation to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

Please contact **Editor-in-Chief** Thomas Wälde at twwalde@aol.com if you would like to participate in this global network: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an OGEL-focused republication), but rather concise comments from the author's professional 'workshop'.

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Remarks on the “coming clean” debate

Miguel Schloss

Much has been written about corruption in general and the way the problem reflects itself in the oil and mining industry in particular. A number of articles on the subject have been published in the OGEL edition of last December.

While much of the debate extols the moral and legal sides of the issue, most debates end up with confrontational private sector-, government- or NGO-bashing. However, in the end, such focus does little to address the problems. The reason for this is that at the end of the day, we have human beings (with all their imperfections) on all the sides of the equation. Corruption is, when all is said and done, a crime of opportunity, not of passion: people (whether in private companies, governments or NGOs) tend to respond to incentives, vested interests, and therefore solutions cannot be found in mutual recriminations or pontification on the sins of corruption. Bribery occurs when economic opportunities for it prevail and political will to combat it is lacking. Corruption is a symptom of fundamental economic and political dysfunction.

In essence, it is hardly a coincidence that those countries blessed with the greatest natural resources, are also seen to have the highest levels of corruption. With few exceptions, such as Namibia or Chile, where mining exceeds 7% of their GDP or where oil constitutes the bulk of their exports have scores of 5 or less in TI's Corruption Perception Index, (where 10 is clean and 0 is totally corrupt), and are in the lowest percentile categories of governance ratings and various economic performance indicators. It thus should not be surprising that mining and oil industries have a poor connotation, and seen as contributing to this poor state of affairs. Certainly, the answer is not to avoid such industries, which constitute often times principal, if not the sole hope for generating resources for development purposes.

Whatever is done, addressing corruption requires dealing with the underlying economic, political and institutional causes. Such root problems vary from country to country, but more often than not, they find themselves in excessive and unchecked discretionary powers, and absence of transparency. Effective solutions thus tend to concentrate on doing away with monopolies (be they private or public), liberalization policies such as reduction in trade (including procurement) restrictions, price controls, directed resource allocations, build-up of checks-and-balances, disclosure arrangements – as the old proverb goes: “sunlight is the best disinfectant”.

Seen in this light, greater disclosure of payment to governments is, as various NGOs suggest, a useful instrument in enhancing accountability to track resources generated by surplus generating sectors, such as many extractive industries. Of course, there are important practical questions that need to be resolved:

- The first is who will “bell the cat” and require companies to disclose such payments. It would be indeed convenient, as someone suggested in our discussion, that regulatory agencies require such disclosures for market access to major stock exchanges, such as

in, say the US. However, this is a rather unlikely route since regulatory agencies, whose mandate is to serve the interests of shareholders of countries in their jurisdiction, may be reluctant to establish rules for particular issues that supercede in-country agreements. This may open themselves up to jurisdictional disputes and pressures to regulate other interests of the sort (such as human rights, environmentalist, women rights, etc.), which may end up overloading their institutional capacity. Under these conditions, it appears that disclosure may have to be sought on a country-by-country basis – a long and arduous road to get a wide enough effect.

- Second, as far as I know, no knowledgeable party claims that there is a silver bullet solution (such as simply declaring payments) that will resolve corruption extractive industries, just as it is impossible to clap with one hand. There are important issues concerning price and cost transfers, which can easily evade controls, as well as institutional and governance issues to ensure that resources are properly accounted for, and their disposition adequately tracked. In poor countries, with weak institutions, this build-up is more easily said than done. Here again, there is no substitute for the hard road of institutional build-up and policy reforms, to strengthen governance and facilitate countries holding their Authorities accountable for the good management of resources generated by extractive industries.
- Third, if all this sounds complex, particularly in view of the deep stakes that get affected, the short answer is yes. As much as we would like to see an easy solution, the fact remains that the issue of “coming clean” has been one of the most elusive, both in developing and developed countries. This strongly suggests that there is still a considerable gap for moving between words and deeds, and that there is a need to provide better intellectual contributions to tackle the issue. There are fortunately a number of experiences (most of them built over many years) that are worth understanding to give better answers on the policies and associated institutions required to enhance the resource management generated by oil, gas and mining activities.
- Finally, concerning the criticism regarding NGOs – their transparency, sense of responsibility, who they represent, etc. are, in a way, a mirror image of the same criticisms against enterprises and governments. There are good and bad NGOs, and since a large number of them are rather new, many would benefit from vigilant oversight arrangements, including: (i) strong Boards with independent, outside Directors; (ii) diversified sources of funding, independent from the institutions they monitor; (iii) clear and transparent feedback arrangements on the institutions' performance, etc. The same as in the case of the oil industry income tracking, I would not put my entire luck on focusing just on their sources of revenues, since many of them receive funds that do not go through their books. Examples of this include invitations to meetings, contributions in kind, resources received by their Chapters or units in various countries that are not tracked centrally. If anything, I would put an equally, if not stronger focus on their governance arrangements, such as the ones suggested above. However, since they are difficult to go into in each case, perhaps a monitoring and raking system of NGOs that would go into these aspects might be a helpful device for funding agencies of NGOs (thereby encouraging greater

transparency and disclosure), such as there are credit rating agencies that provide a measure of discipline to assess enterprises and countries.

Having now brought out all the complexities, and pointed towards admittedly partial (though practical) ways of overcoming current shortcomings, it is time to stress that all the complexity should not detract us from the substance of the issues raised. Denial of the issues associated with corruption in the extractive industries will only undermine the legitimacy and thus "license to operate" of the sector. More than most other industries, oil and mining rely on high level of public consent in order to be able to continue their activities since the States or their citizenry tend exercise a significant degree of control over access to, and exploitation of, mineral and oil resources. The era of enclave projects has long gone. Solutions have to be found through better governance structures to help track and manage the resources generated by the sector, improved standards to enhance the transparency in such sectors' operations, and strengthened company action to enable them to enforce standards at all levels. In all, it is better to tackle the issues, even with the partial answers we have. There is no point in deflecting attention to the weaknesses of one party or the other. Let us deal with all the governance problems in tandem (in NGOs, enterprises and governments), and we will all be better off.

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