Response

Paul Collier, *Laws and Codes for the 'Resource Curse'*

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I. INTRODUCTION

Paul Collier’s proposition that current commodity booms are the single most important issue for the bottom billion is compelling. His framework for a regime of international law and codes to govern commodity booms is worthy of careful consideration by the international community, a community in a season of change in leadership, vision, and potentially direction. With leadership change and transition at the World Bank and the United Nations, and in the United Kingdom, Europe, and the United States, Collier’s examination of the potential to use commodity booms to transform the developing world is instructive and persuasive in guiding us to look to the past for lessons and to the future with a vision embracing greater roles for international law and voluntary codes.

Paul Collier’s *Laws and Codes for the "Resource Curse"* argues that, in the face of current commodity booms, the international community should look to international codes and legal mechanisms to raise standards of economic governance and capture the economic potential of these booms. Collier’s analysis is persuasive in terms of making voluntary codes and international mores central to dealing with the resource curse. Indeed, voluntary codes have been effective in other high-stakes realms, including the Basel banking standards¹ and the Kimberley Process² for diamonds. It

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is difficult, however, to see how these examples of effective voluntary codes are perfectly analogous to other commodity markets. Oil producers, in particular, do not have the same incentives that banks have to reduce uncertainty and risk in the financial system. Nor do oil manufacturers face the discriminating tastes of diamond consumers, many of whom are now refusing to purchase “blood” or “conflict” diamonds. Gas consumers are most interested in price at the pump and are typically unaware of where their oil comes from and what conditions and transactions are involved in the process of getting the gas from the ground to their cars.

Getting oil companies and exporters to abide by voluntary codes seems to be more of an uphill battle than Collier suggests. The key is to find a way to make the experience of successful voluntary codes relevant to the oil commodity market, and to ensure that state economies are given the freedom to make local decisions about their oil markets that fit their country-specific employment needs and context while complying with international standards. There also needs to be sharper enforcement mechanisms and bolder anticorruption and governance strategies to create an environment in which the voluntary codes Collier suggests have a greater chance of mitigating the resource curse and allowing countries to capture the potential of resource booms. This response identifies why voluntary codes have worked in other instances, and how those instances are similar to or different from the situations in various other natural resource markets, particularly the oil industry. I then suggest other possible legal remedies which are useful in dealing with resource curse problems, with a particular focus on anti-corruption and governance efforts, and the burgeoning international regime on anti-money laundering, which could well be instructive for the legal regulation of oil and mining.

II. COLLIER’S VOLUNTARY CODE RECOMMENDATIONS

Collier’s recommendations for intervention of voluntary codes have the potential to benefit oil-producing states and the citizens of those states. Collier suggests that, as in the banking industry where voluntary international standards are already well developed, international voluntary codes can play a key role in addressing the resource curse and harnessing commodity booms. Just as the Basel Standards, generated under the auspices of the Bank for International Settlements and periodically revised by agreement, guide the international banking industry as to prudential standards, international voluntary codes can in the resource curse crisis

4. Governments of countries where diamonds are mined likewise have the incentive to regulate the diamond industry so that the diamond profits do not reach the hands of anti-establishment rebel groups.
5. Collier, supra note 3, at 22.
help with problems of coordination and with providing a norm for coordination of external pressure.\(^6\) "Perhaps most importantly," Collier notes, "codes separate the sheep from the goats."\(^7\) Codes help to reveal those governments that are willing to comply with a set of standards and those that are not. The codes serve an informational function, and also help create norms.

The codes, Collier suggests, would cover design and conduct of auctions; the specification of the time horizon of any extraction rights and some parameters for the tax regimes; the savings rate out of resource revenues; and the procedures for public investment. Collier argues that what is needed is guidance rather than legislation and mandate and, further, that countries need a place to go for resources and wisdom about how to respond to their commodity booms. The voluntary codes could well answer to the misalignments that Collier identifies and contribute to good governance, but difficulties and questions remain. How are these codes codified? Will there be any enforcement mechanisms? What about problems of implementation?

Collier answers some of these questions, and argues that an entity needs to be responsible for these codes, and that it would be more effective and practical to house new codes in existing agencies rather than attempt to create new ones.\(^8\) Collier notes that the International Monetary Fund’s annual Article IV consultation process, in which all of its member governments participate, and the Kimberley Process, which is a public-private partnership between the diamond industry, NGOs, and diamond-producing governments, are possible models. The first pair of codes he suggests, which govern auctions and specification of mineral rights, both concern transparency in revenue resources and would most naturally be lodged at the EITI. The second two pairs of codes, on the savings decision and the processes of public investment, both concern the conduct of budgets and belong most naturally within the IMF and the World Bank. One question for Collier is to what extent the efforts of the EITI and the Bretton Woods institutions will need to be coordinated in order to be successful in housing the codes. If a coordinated approach is not required, then each institution should house codes that fall within the ambit of their competitive advantage. If not, there will have to much more thought given to coordination of efforts.

New codes, Collier notes, would require two distinct systems of verification, one concerning the conduct of auctions and the other the conduct of public investment.\(^9\) Indeed, the codes, if followed, as in the case of international banking law, would go far in developing new norms for resource-rich countries. However, it is difficult to see how countries with poor governance standards would feel compelled to abide by non-

\(^6\) Id.
\(^7\) Id. at 23.
\(^8\) Id. at 26.
\(^9\) Id.
enforceable norms. Collier argues that citizens and the market would demand compliance, but the question is how and why haven’t they thus far. It is important to realize that we are dealing with two publics in the oil market. The first public is the oil consuming public in developed nations. To date, they are most concerned with the price of gas at the pump. The second public is the public in oil producing nations. In the case of Nigeria, the public has shown a great deal of interest in how the state is distributing oil revenue. Why haven’t oil consumers demanded that oil companies deal fairly with oil producing nations? In oil producing countries, why hasn’t citizens’ rage at their country’s corruption resulted in governments with more integrity?

III. How Voluntary Are Voluntary Codes?

The difficulty of consensus and compliance is revealed in Collier’s discussion of international law. He notes that it is more difficult to enact international law and it should thus be used sparingly. Indeed, international law is difficult to enact as countries do not want to be beholden to international standards and sanctions. Voluntary codes are thus intrinsically less frightening, but that leaves unanswered the question of how successful they can be in bringing about compliance.

Collier notes one example of a place where a new law would be highly desirable: the reinforcement of the voluntary code on auctions by requiring those resource extraction companies based in the OECD to enter into new contracts only through certified auctions of extraction rights. He notes that a close analogy is anti-bribery laws adopted across the OECD in a coordinated process orchestrated by that body. Indeed, it will be important to look to the anti-bribery laws as well as to areas where voluntary codes have been tried. In addition, Collier cites both the EITI and the Kimberley Process (KP) as examples of how voluntary codes can improve resource extraction.

A. EITI, the Kimberley Process, and Basel standards

In October 2002, Tony Blair announced the EITI at the World Summit for Sustainable Development in Johannesburg. Until 2002, revenues paid to governments by resource extraction companies were usually confidential, which led to abuses both by companies and governments. EITI aims to increase transparency over payments between companies and governments, verifying and providing a full publication of company payments and government revenues from oil, gas, and mining. Collier

10. Id.
notes that when Nigeria published the EITI results in the newspaper, the newspaper circulation jumped overnight, with citizens clearly wanting to hold officials accountable. EITI is becoming an increasingly powerful institution, but the onus remains on individual countries to disclose what they pay and receive from companies.

The Kimberley Process, though voluntary, has attracted every diamond producing country in the world.\textsuperscript{13} It is a project led jointly by governments, industry and civil society initiative to stem the flow of "conflict diamonds," rough diamonds used by rebel movements to finance wars against legitimate governments, in countries such as Angola, Cote d'Ivoire, the Democratic Republic of the Congo and Sierra Leone.\textsuperscript{14} The Kimberley Process Certification Scheme imposes extensive requirements on its members to enable them to certify shipments of rough diamonds as "conflict-free."\textsuperscript{15} As of September 2007, the Kimberley Process has 48 members, representing 74 countries.\textsuperscript{16}

Collier further cites the Basel standards, generated under the auspices of the Bank for International Settlements (BIS) and which guide the international banking industry as to prudential standards, as an example of how voluntary codes work. The BIS is an international organization which fosters international monetary and financial cooperation and serves as a bank for central banks. The BIS aims to fulfill this mandate by acting as a forum to promote discussion and policy analysis among central banks and within the international financial community, a center for economic and monetary research, a prime counterparty for central banks in their financial transactions, and an agent or trustee in connection with international financial institutions.\textsuperscript{17}

While the Kimberley Process and Basel standards have both proven effective as voluntary codes, their success may be explained by variables that do not exist in an extractive non-metal or non-precious stone markets. The Kimberley Process has been supported in its efforts by a civil society movement against conflict diamonds; grassroots activism has sprung up around protests of these diamonds making consumers of these luxury goods aware that they have conflict and non-conflict options when purchasing a diamond. For goods that are usually given as gifts, and often to symbolize love and affection, it makes sense that consumers have not wanted these goods to come with the stigma of conflict. While a voluntary code has been effective with this set of facts, it is unclear how there is a parallel to extractive industries such as the oil industry where oil retailers are perfect competitors. Unlike diamond customers, oil customers at the

\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
pump tend not to know from where their oil has originated. The oil market would have to be restructured in order for there to be consumer demand for oil that has come from a particular country and through a process where voluntary codes have been obeyed.

While the Kimberley Process and the Basel standards provide models of voluntary codes, they do not in and of themselves make a convincing argument that the oil and gas industries will abide by similar voluntary codes. There will have to be significantly more thought about how to incentivize companies' and governments' compliance with voluntary standards. Transparency in the processes of extraction, contracting, and transactions will go a long way towards empowering citizens and consumers (if they live in a democracy that is responsive), but it is difficult to see how transparency will evolve without some kind of international law or non-voluntary regulation.

The EITI process seems to be developing support in many resource-host countries, but it is unclear to what extent EITI will be able to sustain compliance to a set of standards. The EITI as it works now is primarily about disclosure. Disclosure is important for accountability reasons, but accepting the imposition of transparency is far different from internalizing changes based on public reaction. Will there be enough public outrage, civil society campaigning, and moral suasion from other states to ensure that companies and countries involved with commodity production and trade abide by voluntary codes? And will there be economic incentives? That remains to be seen.

Nor is there a perfect parallel between extractive industries and the banking industries. Banks are driven to reach the same standards as their peers with or without regulation, although regulation might demand a higher level of responsibility than they would naturally find in the market. This is quite different from the oil industry where countries and companies are now free to strike deals amongst themselves, and where consumers are much farther removed from the original contracting and transaction.

The Open Society Institute's survey of "legal remedies for the resource cure" focuses, inter alia, on the OECD Guidelines for Multinational Enterprises—nonbinding recommendations on transparency and social responsibility that signatory states pledge to promote among multinationals, and the Publish What you Pay campaign, a nongovernmental initiative to promote transparency in the oil, gas, and mining industries. All of these codes and guidelines taken together provide a patchwork approach taking the place of a more coherent resource surveillance system, but questions remain, notably about how countries with low governance standards will find their way in such a system, when little is directly demanded of them. At the same time, it will

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be important for governments to be empowered to make decisions that benefit their own citizens, and to respond to local economic needs.

B. Other Legal Remedies

Collier notes the difficulty of developing and enforcing international law, but he does not mention areas related to the resource curse where legal enforcement indeed seems to be working, notably in tracking money laundering. The Financial Action Task Force is an example of the successful creation of international norms through codes, an intergovernmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. The anti-money laundering regimes indeed are helping re-align public officials’ interests. Making it harder for corrupt officials to move the proceeds of bribery and embezzlement reduces the incentives for bribery and embezzlement by increasing the transaction costs associated with those crimes.

In 2000, Financial Action Task Force began naming non-cooperative countries and territories, which made it more difficult for financial institutions in those nations to do business with financial institutions in Task Force-member nations, which include the world’s major financial centers. Additionally, after the September 11, 2001 terrorist attacks on the United States, Congress vested the Treasury Secretary with the authority to designate foreign jurisdictions or foreign financial institutions as “primary money laundering concerns.” When designating foreign financial institutions as “primary money laundering concerns,” the Treasury Secretary can insist that U.S. financial institutions enhance their due diligence concerning transactions originating from those nations or that U.S. financial institutions sever ties with those nations. The Treasury Secretary has never used that authority to cut off entire nations from the U.S. banking system absent action from the Task Force, but the United States has made unilateral designations of individual foreign financial institutions to effect change to the banking laws of foreign jurisdictions.

The anti-bribery laws across OECD countries are another successful legal effort to curb corruption. These laws require states to introduce measures “in accordance [with each party’s] legal principles, to establish the liability of legal persons,” but the jurisdiction has not been extended to corporations. The 1997 OECD Convention requires parties, including thirty OECD countries, to prohibit bribery by their citizens of foreign public officials. However, even this limited effort has not been as

comprehensive as intended. A U.S. Commerce Department report in 2004, after a five-year evaluation of the OECD Anti-Bribery Convention, called the enforcement of the Convention uneven. 23

There remains a need for multilateral legal mechanisms. Until the late 1990s, there were no international treaties prohibiting bribery of foreign public officials. While the OECD Convention has made some progress in this area, the Open Society Institute highlights the fact that China and India, where demand for energy is rising, have not signed on to the OECD-based legal mechanisms. Additionally, governments bringing action in their own countries may fear to move first to bring action against their own companies because they will not want to put them at a competitive disadvantage. There is also a variety of corporate liability laws, and statutes of limitations differ from country to country. Media and whistleblowers might also be subject to libel suits. Civil remedies too are difficult to come by, and are discouraged by issues of jurisdiction, standing and forum non conveniens. 24 It is a complicated system, and one where much attention is still needed, notably to the fact that the anti-bribery convention does not have specific provisions for protecting whistleblowers. 25

IV. CONCLUSION

In a January 31, 2008, speech in Indonesia, Dr. Ngozi Okonjo-Iweala noted that, "[i]ntroducing transparency in the way commodity booms are managed helps enormously to win public trust. The transparent, efficient, honest and prudent management of all public finances to ensure both that commodity wealth is used for the good of the country now and in the future and to create a better environment for economic diversification." 26 Indeed, finding new ways to promote transparency and accountability is critical—there needs to be greater thought as to how and why oil companies and host countries would want to abide by voluntary codes and be more transparent. The answer should include increased attention to making the extractive industries the focus of communities and civil society organizations. Furthermore, additional legal mechanisms are necessary in order to curb corruption and ensure an environment where compliance with voluntary codes might be ever more possible.

24. Id. at 15.
25. Many OECD countries do have whistleblower protections, for example, the United Kingdom's Public Interest Disclosure Act of 1998, and the U.S. 2002 Sarbanes-Oxley Act.