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Bridging the Transparency Gap:
Catalyzing Meaningful U.S.- China Participation in the Extractive Industries
Transparency Initiative for Energy Security

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Abstract

Although possessing vast natural resource wealth, many resource-rich states suffer from the “resource curse,” a phenomenon where these countries fail to benefit from their natural wealth as a result of regressive development and failed government institutions. To combat the “resource curse”, in 2002 a network of public, private, and civil society groups established the Extractive Industries Transparency Initiative (EITI), a multi-stakeholder, voluntary initiative that promotes transparency in taxes and payments, and raises public awareness. While many resource-rich countries have applied to implement EITI, passed domestic EITI laws and produced EITI Compliant reports, another EITI tool includes securities regulation reforms, such as the Dodd-Frank legislation in the United States, that require EI corporations to disclose payments to foreign governments in their securities reports.

Despite the growing success of EITI, Chinese participation has been absent and the U.S. commitment mixed. Since 1993, China has steadily become a growing player in the international extractives market, whereas the U.S. has been involved in the extractive industries for decades. Overall, the project will explore the how EITI relates to energy security; its strengths and weaknesses; investigate the case for Chinese involvement both internationally and domestically; and how involving Chinese stakeholders can improve the effectiveness of EITI. Also, the research includes the U.S. perspective and their involvement in EITI. The goal of this research is to investigate how the EITI will affect Chinese and U.S. extractive industry companies and how to increase U.S. and Chinese involvement for stronger energy security cooperation.

Research Questions

- (1) Primary: How could participation in EITI impact U.S. and Chinese extractive industry companies? How could Chinese Participation be encouraged?
- (2) Secondary: Could EITI help create a new energy security dialogue between the U.S. & China?



1. INTRODUCTION

The United States and China both need access to energy supplies in order to sustain their economies. In the U.S., approximately 9,440 million barrels/day (b/d) of net petroleum products are imported every day, with Saudi Arabia, Nigeria, Iraq, Venezuela, and Canada providing the most supplies.¹ Because the U.S. has had to rely on foreign petroleum imports for many decades, it has had to participate in global petro-politics. Thus, the U.S. had to formulate a foreign policy to stabilize energy supplies, because the State was vulnerable to swings in the international prices and disruptions in volatile oil-producing regions due to political instability or conflict.² The U.S. petroleum sector, mostly consisting of private corporations with shareholders, relies on the U.S. government to maintain foreign relations with countries where they have investments. However, they face increasing competition from China, who has become a player in the global energy market.

On the other hand, China has enjoyed decades of neutrality in the global petro-politics because they were self-sufficient and prices fixed by state central planners.³ Thus, their economy and development did not suffer from the same embargoes, price hikes, and disruption in energy supplies as other importing countries, such as the U.S. China could afford to be a neutral actor without facing the consequences of a volatile Middle East or Africa.⁴ However, China no longer has that same luxury. Currently, China imports 3,995.62 million b/d net petroleum imports,

¹ So far, Canada actually supplies the most petroleum products to the U.S. in 2011.

U.S. Energy Information Administration, accessed 12/12/11.

http://www.eia.gov/energyexplained/index.cfm?page=oil_home#tab2; and

http://www.eia.gov/dnav/pet/pet_move_impcus_a2_nus_ep00_im0_mbb1_m.htm.

² *China and Long-Range Asian Energy Security: An analysis of the political, economic, and technological factors shaping Asian energy markets*, Baker Institute Study. No. 11 (April 1999), at 3, available at

<http://www.bakerinstitute.org/publications/china-and-long-range-asian-energy-security-an-analysis-of-the-political-economic-and-technological-factors-shaping-asian-energy-markets> [*hereinafter* *China and Long-Range Asian Energy Security*].

³ “China and Long-Range Asian Energy Security,” *supra* note 1, 3.

⁴ *Id.*



second only to the United States⁵—from countries such as Saudi Arabia, Angola, Iran, Oman, Russia and Sudan.⁶ Furthermore, the Chinese government has tasked national-oil companies (NOCs)— such as CPNC, CNOOC, Sinopec, PetroChina— with national security and foreign policy objectives by foreign governments.⁷ China’s petroleum consumption is projected to continue to rise significantly over the next few decades. With their economy growing and consuming more extractive resources, China will have to become even more of an international energy player subject international trade rules, petro-politics, energy supply and transportation disruptions, social and environmental issues, energy security problems, as well as increasing scrutiny for their overseas extractive industry investments in resource-rich countries.

1.1. Resource Curse & EITI

A country possessing abundant natural resources should experience a healthy economy with a vibrant manufacturing sector and high-income level populations. However, this positive development has not occurred in many resource-rich countries.⁸ Most resource-rich countries have experienced regressive economic growth, corruption and rent seeking, and internal conflicts, resulting in failed states and/or unstable business environments.

The resource curse phenomenon gained worldwide attention in a paper prepared by Paul Collier and Aneke Hoeffler in 2003 where the authors analyzed 54 large-scale civil wars that occurred between 1965 and 1999.⁹ Their research found that countries with a higher percentage

⁵ Energy Information Administration, *supra* note 1.

⁶ *Id.*

⁷ *The Changing Role of National Oil Companies in International Energy Markets*, Baker Institute Policy Report, No. 35 (April 2007) at 6, available at <http://bakerinstitute.org/events/the-changing-role-of-national-oil-companies-nocs-in-international-energy-markets-implications-for-the-middle-east>.

⁸ The exceptions are Norway, Botswana, and Australia.

⁹ See generally Paul Collier and Anke Hoeffler, *Resource Rents, Governance, and Conflict*, *The Journal of Conflict Resolution*, Vol. 49, No. 4, Paradigm in Distress? Primary Commodities and Civil War (Aug., 2005), at 625-633.



of primary commodity exports comprising their overall GDP significantly and substantially increased the risk of violent conflict.¹⁰ In other words, countries that mostly exported raw natural resources, with the rents comprising a large majority of the central government's revenues, had a higher chance of violent conflict erupting. Since then, the resource curse theory has expanded to include other economic theories (i.e. Dutch disease) but also political considerations, such as poor institutional design for natural resource management.

Importantly, institutional design and good governance come into play when dealing with natural resource management, particularly with the higher-value extractive industries driving the resource curse. Scholars working on the resource curse generally identify two checks and balances that prevent government mismanagement: “(1) those that constrain the ruling elite or chief executive from relying exclusively on the mineral sector and engaging in wasteful spending; and (2) those that enable the government to make sound investment decisions and recover from economic crises.”¹¹ Improper institutional design and lack of accountability often lead to the government to mismanage the resource rents in resource-rich states. The resource-rich states' mismanagement drives the lack of development and poor functioning of state institutions, where the population cannot hold their government accountable for their failures.¹²

1.2. ENERGY SECURITY

¹⁰ Id.

¹¹ Pauline Jones Luong and Erika Weinthal, **OIL IS NOT A CURSE: OWNERSHIP STRUCTURE AND INSTITUTIONS IN SOVIET SUCCESSOR STATES** (2011), at 3.

¹² Matthew Genasci and Sarah Pray, *Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice*, 11 Yale Hum. Rts. & Dev. L.J. 37; 38 (2008).



The International Energy Agency¹³ defines energy security as “the uninterrupted physical availability [of energy] at a price which is affordable, while respecting environment concerns”.¹⁴ The concept of Energy Security contains broad concepts for ensuring economies have uninterrupted access to energy while not causing grievances in the energy supplies country of origin. But that definition fails to capture other nuances that go into play when securing energy sources. Moreover, scholars in the United States and China agree that “the establishment of successful cooperation in the oil and gas sector in the short term can lead to broader long-term cooperation in other energy sectors and also on environmental issues.”¹⁵ Energy security leads resource-lacking countries to invest abroad, in sometimes-volatile regions or countries with weak natural resource governance regimes. Thus, energy security and the resource curse often become linked, as resource rich countries often exhibit these traits. To combat the resource curse and improve energy security for importing countries, the Extractive Industries Transparency Initiative (EITI) intends to improve natural resource governance in resource-rich states through domestic and international implementation.

Studies of the “resource curse” phenomenon contain three major components- two economic and one political- the effect on political conditions needs to be understood better. EITI addresses political concerns of natural resource management, particularly government institutions. The EITI aims to combat the political failings of natural resource management.

¹³ The IEA works towards improving energy security by: promoting diversity, efficiency and flexibility within the energy sectors of the IEA member countries; remaining prepared collectively to respond to energy emergencies; and expanding international co-operation with all global players in the energy markets.

¹⁴ International Energy Administration, *supra* note 1.

¹⁵ Dr. Steven W. Lewis, *Energy Security in Northeast Asia: The Potential for Cooperation Among the Major Energy Consuming Economies of China, Japan and the United States*, Baker Institute for Public Policy, Rice University (Jul. 18 2005) at 9, available at http://www.bakerinstitute.org/publications/SIIS_SWLEWIS_chinajapanUScooperation_071805.pdf [hereinafter *D I*].



2. EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE

Generally, the EITI is a multi-stakeholder, voluntary initiative comprising of governments, civil society organizations, corporations, investors, industry associations, and international organizations.¹⁶ The EITI aims to tackle corruption in natural resource-rich states by promoting transparency and accountability, strengthening civil society participation, and enhancing good governance through publically publishing extractive industry payments by mineral companies to governments. A unique aspect of the EITI involves the participation of civil society groups within each implementing country, as well as business and industry trade associations.

2.1. EITI & Good Governance Theory

The UN defines good governance having eight major characteristics: participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law.”¹⁷ Also, good governance “assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making” and is “responsive to the present and future needs of society.”¹⁸ In particular, the U.N. also defines “transparency” as governance “follows rules and regulations” and “that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement” while in a format easy to understand for the general populace.¹⁹

¹⁶ *Our Activities*, Publish What You Pay, USA. <http://www.pwypusa.org/our-activities/eiti> [hereinafter PWYP].

¹⁷ *What Is Good Governance?* United Nations, Econ. and Social Comm. for Asia Pacific, (accessed 12/14/11), available at <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp>.

¹⁸ *Id.*

¹⁹ *Id.*



EITI supports good governance in several ways. First, EITI promotes the transparency of financial information relating to the extractive industries, which can result in greater accountability for political elites and how these institutions manage natural resource revenues; stabilize the investment climate of a country, good for foreign direct investment.²⁰ Also, EITI helps improve relations with extractive industries, the government, and the communities in which they operate by increasing the interactions between the stakeholders and improving information sharing. Ultimately, mineral rich states are “cursed” not by their wealth but how they decide to manage that wealth and the structure of ownership to manage that wealth.²¹

2.2. The Journey to EITI

Beginning as a civil society campaign²² to combat the resource curse,²³ the EITI commenced in 2002 with an announcement from former U.K. Prime Minister Tony Blair at the World Summit for Sustainable Development in Johannesburg, South Africa.²⁴ By 2007, the EITI created an Advisory Board and established an international secretariat in Oslo, Norway. Initially, 15 States signed up to be the first EITI candidate countries, which have since increased to 35 countries. So far, 12 countries—Azerbaijan, Mongolia, Central African Republic, Niger, Ghana, Nigeria, Kyrgyz Republic, Norway, Liberia, Timor-Leste, and Mali— have achieved “EITI Country Compliant” status, through the completion of the EITI Validation process and filing reports by an independent auditor that matches company payments with government revenues.²⁵

²⁰ Genasci et al, *supra* note 12, at 38.

²¹ Jones, *supra* note 11, at 6.

²² For a background on the history of EITI, see Publish What You Pay Coalition at <http://www.publishwhatyoupay.org/about/history>. See also *History*, EITI, available at <http://eiti.org/eiti/history>.

²³ *EITI Rules- 2011 Edition including the Validation Guide*, the **EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE** (2011), at 10, available at http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf [hereinafter *EITI Validation Guide*].

²⁴ *Id.*

²⁵ EITI Compliant Country, Extractive Industries Transparency Initiative (2012), <http://eiti.org/countries/compliant>.



2.3. How EITI Works

2.3.1. State-level

A unique feature of EITI is that it remains a voluntary initiative at the State level, where governments can support the initiative without participating in it. To initiate EITI implementation, a government has to declare their intention to implement EITI within their State. This announcement then triggers the EITI process.

Then, in order to become an EITI candidate country, governments must meet the five sign-up requirements. As part of the requirements, civil society, government and industry will create a country work plan to develop and strengthen revenue transparency. Once the EITI board approves the work plan and determines the sign-up requirements satisfied, the country becomes an EITI Candidate country.²⁶ During this stage, a country has fixed time to fulfill the preparation requirements. After earning EITI Candidate status, a country has 18 months to publish a country report and two and a half years to submit a final Validation report.²⁷ Then, the country becomes EITI Compliant, but the country must adhere to all the twenty EITI Candidate requirements in order to maintain compliant status.²⁸ If a country cannot meet these timelines, they will either be granted an extension under some circumstances or a country will be delisted.²⁹

2.3.2. Country-level

Implementing countries agree to participate by EITI, either through a domestic law or a de facto requirement, and require mandatory reporting of extractive industry activities.³⁰

Reporting country requirements may differ from country to country, but must comply with the

²⁶ *EITI Validation Guide*, supra note 23, at 15.

²⁷ *Id.*

²⁸ *Id.*, at 14.

²⁹ *Id.*, at 32.

³⁰ Genasci, supra note 12, at 51.



basic EITI rules. For example, a foreign investor who wants to bid on a project in an EITI implementing country must legally bind themselves to the EITI law, such as submitting reports with the revenue disclosure.

2.4. EITI Implementation laws

While EITI is a voluntary, international mechanism, several countries have implemented so-called “EITI laws” within their respective countries to provide a legal foundation, such as Liberia, Iraq, and Norway.³¹ Currently, 35 countries implement the EITI, with 29 countries having published resource revenue payments by corporations to governments.³² However, country compliance is only one piece of the puzzle to solve the resource curse.

2.5. EITI Country Reporting Requirements

Another “tool” in the EITI box includes reporting requirements on stock exchanges in major markets, such as the United States. Recently, the U.S., U.K., Hong Kong, and the E.U. have either passed or will pass reporting requirements so corporations will have to report their payments to governments for natural resources. Within the U.S., the EITI reporting requirement exists within the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).³³

In addition, the Hong Kong stock exchange (HKEx) recently passed a similar rule, called

³¹ For example, on the 10th of February 2009, President Sirleaf Johnson signed into law the Liberia EITI Act (LEITI), which requires all extractive industry companies operating in mining, forestry, agriculture, and mineral production to register and produce EITI reports; promote civil society participation; requires transparency in payments by EI companies; and provide a platform for civil society, the Government of Liberia, and private corporations to implement EITI and enforce good governance. LEITI §§ 3.0- 3.2 (a-h). It also enables the government to conduct company audits to ensure accurate reporting. LEITI §3.2 (g), § 4.1 (d) (i-ii), § 4.1 (g-h). Interestingly, the scope of the Act not only includes revenue transparency, but also contract transparency. *An Act Establishing the Liberia Extractive Industries Transparency Initiative (LEITI)*, Approved 10 July 2009. Ministry of Foreign Affairs, (Liberia) §5.1 (at 8), www.leiti.org.lr/doc/act.pdf [hereinafter LEITI].

³² *President Obama: The US will implement the EITI, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE*, Press Release (2011), available at <http://eiti.org/news-events/president-obama-us-will-implement-eiti>.

³³ The final Securities and Exchange Commission Regulations have not been published as of May 11, 2012. *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 15 U.S.C.A. § 78m (q)(1-3), PL 111-203 § 1504, 111th Congress, also known as the *Disclosure of payments by resource extraction issuers*, www.sec.gov/about/laws/wallstreetreform-cpa.pdf [hereinafter *Dodd-Frank*, Section 1504].



“Disclaimer for the Consolidated Main Board Listing Rules, Disclaimer for the Consolidated GEM Listing Rules.”³⁴ Specifically, Section 18A.05(6)(c) provides that a Mineral Company must include in its listing document information among which is its “compliance with host country laws, regulations and permits, and payments made to host country governments in respect of tax, royalties and other significant payments on a country by country basis.”³⁵ The London Stock Exchange has a similar law and recently, the European Union announced that they would also implement an EITI securities disclosure law.³⁶

3. EITI’S RELATIONS WITH OTHER GLOBAL INITIATIVES

3.1. UN Global Compact

The UN Global Compact is an international, voluntary code of conduct lunched by the United Nations in 2000.³⁷ Originally, the UN Global Compact contained nine principles covering the areas of human rights, labor, and the environment. With the adoption of the United Nations Convention against Corruption in Merida, Mexico in December 2003, a tenth principle of anti-corruption was adopted by Global Compact and entered into force on 14 December 2005.³⁸

³⁴ *Consultation Conclusions on New Listing Rules for Mineral Companies*, Hong Kong, Exchanges and Clearing Limited (promulgated May 2010, effective June 3, 2010), available at <http://www.hkex.com.hk/eng/newsconsul/mktconsul/documents/cp200909mcc.pdf>, at p. 390.

³⁵ *Id.*

³⁶ *European Commission proposes disclosure requirements to strengthen the EITI*, Extractive Industries Transparency Initiative, Press Release (Oct. 25, 2011), available at <http://eti.org/news-events/proposed-eu-disclosure-requirements-strengthen-eiti>. See also *Proposal for Directive on transparency requirements for listed companies and proposals on country by country reporting – frequently asked questions*, European Union (Oct. 25, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/734&format=HTML&aged=0&language=EN&guiLanguage=en>.

³⁷ UN Global Compact was reaffirmed by the U.N. General Assembly in 2012. *Towards Global Partnerships*, G.A. Res. 66/223, 66th Session, U.N. Doc. A/RES/66/223 (Mar. 28, 2012). See also G.A. Res. 55/215, 55th Session, U.N. Doc. A/RES/55/215, A/55/PV.88 (Dec. 21, 2000), <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/55/215&Lang=E>.

³⁸ *Global Compact Principle 10*, UN Global Compact, available at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle10.html>.



Transparency International defines corruption as "the abuse of entrusted power for private gain."³⁹

The main requirement for participation is that companies provide a brief report once a year on concrete actions they have taken that have been inspired by one or more of the ten principles as well any lessons they have learned from doing so.⁴⁰ Before the adoption of Principle 10, the areas of Global Compact did not address transparency directly, but they did have implicit relevance for resource revenues.⁴¹ For example, the Transparency Working Group, which was convened as part of Global Compact's policy dialogue, recommended that home governments, multilateral institutions and business to take actions to strength transparency.⁴² Specifically, Principle 10 of the UN Global Compact specifically asks the participants of Global Compact to act against corruption and thus promotes transparency.⁴³ Currently, more than 200 companies from China participate in the UN Global Compact including companies, NGOs, business associations, an academy, and six cities.⁴⁴ For the U.S., approximately 448 corporations and institutions participate in the UN Global Compact.⁴⁵

3.2. Equator Principles

³⁹ Id.

⁴⁰ Philip Swanson, Mai Oldgard and Leiv Lunde, *Who Gets the Money? Reporting Resource Revenues*, **NATURAL RESOURCES AND VIOLENT CONFLICT** (Eds. Ian Bannon et al, The International Bank for Reconstruction and Development/ The World Bank, 2003) 43-96; 68.

⁴¹ Id.

⁴² *Global Compact Policy Dialogue: Recommendations on Transparency*, **UN GLOBAL COMPACT**, available at http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Transparency.pdf, at 2.

⁴³ *Guidance Document: Implementation of the 10th principle against Corruption*, **The Global Compact**, **UN GLOBAL COMPACT** (Dec. 2004), http://www.unglobalcompact.org/docs/issues_doc/7.7/guid_a-corr_081204.pdf.

⁴⁴ Mr. Fu Chengyu, chairman of Sinopec Group, China, and Mr. Li Decheng, Standing Vice President and Director General, China Enterprise Confederation/China Enterprise Directors Association, are board members of the UN Global Compact. The website also shows the supporting corporations by country.

The UN Global Compact Board Members, **UN Global Compact**, available at http://www.unglobalcompact.org/AboutTheGC/The_Global_Compact_Board/bios.html.

⁴⁵ *Participants and Stakeholders*, **UN GLOBAL COMPACT**, available at [http://www.unglobalcompact.org/participants/search?commit=Search&keyword=&country\[\]=209&joined_after=&joined_before=&business_type=all§or_id=all&listing_status_id=all&cop_status=all&organization_type_id=&commit=Search](http://www.unglobalcompact.org/participants/search?commit=Search&keyword=&country[]=209&joined_after=&joined_before=&business_type=all§or_id=all&listing_status_id=all&cop_status=all&organization_type_id=&commit=Search)



With increasing Foreign Direct Investment (FDI) having adverse impacts on the environmental and social structures, banks and credit agencies determined that they needed to design a set of standards to mitigate credit risk. Beginning in 2002, nine international banks, along with the World Bank, created a set of principles to mitigate environmental and social risks in project finance transactions across multiple sectors.⁴⁶ The resulting financial transactions framework, called the Equator Principles (EPs), determine, assess and manage environmental and social risk factors for project with \$10 million in capital costs.⁴⁷ International financial institutions (IFIs) adopt the EPs voluntarily and provide a basis for due diligence. Moreover, the EPs financial institutions pledge to not issue loans to borrowers who fail or refuse to comply with the environmental and social policies that implement the EPs.⁴⁸ Currently, 72 international financial institutions located in 27 countries adopted the EPs, which include 70 percent of international project finance debt in emerging markets.⁴⁹ Additionally, the Equator Principles relate to transparency and anti-corruption through the *Illustrative List Of Potential Social And Environmental Issues To Be Addressed In The Social And Environmental Assessment Documentation*.⁵⁰ Specifically, item C requires that investor abide by host country laws and regulations, applicable international treaties and agreements; as well as item L, where socio-economic impacts may be relevant to resource revenues.⁵¹ In Oct 2008, the Industrial Bank CO.,

⁴⁶ *History of the Equator Principles*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/index.php/history> (last visited Dec. 11, 2011).

⁴⁷ *About the Equator Principles*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/index.php/about-ep/about> (last visited Dec. 11, 2011).

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ *Principle 2 of the Equator Principles*, EQUATOR PRINCIPLES (June 2006), www.equator-principles.com/resources/equator_principles.pdf.

⁵¹ Equator Principles, http://www.equator-principles.com/resources/equator_principles.pdf.



Ltd adopted the Equator Principles.⁵² Additionally, in March 2011, the U.S. Export-Import Bank in the U.S. adopted the EPs.⁵³ Thus, any corporations seeking financing from these banks must meet these requirements when operating abroad. In a similar vein, China has its own guidelines issued by EXIM bank of China which encourage companies investing overseas to promote national strategies for “sustainable development, promote economic, social and environmental development...” through project assessments for both environmental and social impacts.⁵⁴

3.3. Corporate Social Responsibility

Corporate Social Responsibility is often defined as “a process to integrate social, environmental, ethical and human rights concerns into their business operations and core strategy in close collaboration with their stakeholders.”⁵⁵ Moreover, Genasci and Pray argue that any CSR initiative “must address the institutional issues at the heart of the resource curse, regardless of what other issues are on the CSR agenda.”⁵⁶ Importantly, extractive industries’ activities can both directly and indirectly impact a local community.⁵⁷ Without strong government institutions,

⁵² *Members & Reporting*, EQUATOR PRINCIPLES (2011) <http://www.equator-principles.com/index.php/members-reporting>.

⁵³ *Ex-Im Bank Adopts The Equator Principles To Facilitate Project Finance Application And Review*, Equator Principles (Mar. 31, 2011), <http://equator-principles.com/index.php/all-adoption/adoption-news-by-year/84-adoption-news-2011/210-ex-im-bank-adopts-the-equator-principles-to-facilitate-project-finance-application-and-review> (last visited Dec. 11, 2011).

See also Ex-IM Bank, *Environmental Procedures and Guidelines* (China), <http://www.exim.gov/products/policies/environment/envproc.cfm#overview> (last visited Dec. 12, 2011).

⁵⁴ The official translation of the EXIM Guidelines cannot be found on Chinese official websites, so the only public resource remains an unofficial translation.

Guidelines for Environmental and Social Impact Assessments of the China Export and Import Bank’s Loan Projects (Aug. 28, 2007)(China), available at Global Witness, www.globalwitness.org/sites/.../Chinese%20guidelines%20EN.pdf, Articles 1, 5, 6.

⁵⁵ Sustainable and responsible business: Corporate Social Responsibility (CSR)

European Commission, Enterprise and Industry (Oct. 2011), http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm (last visited Dec. 14, 2011). See also *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility*. Brussels (October 2011), http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf.

⁵⁶ Genasci, *supra* note 12, at 49.

⁵⁷ Genasci, *supra* note 12, at 50-51.



any CSR attempts will be for naught because any positive impacts will be negated by state failures.

In relation to the extractive industries, their activities impact a host country both directly and indirectly. Direct impacts would include drilling activities near the community, such as environmental degradation of water resources. Indirect impacts include influencing the social contract between civil society and the State through their interactions with the government. Also, CSR reports provide a tool for communities to actually feel the impacts of CSR. Even if the EI builds a hospital or school, the lack of capacity to run the institution due to a lack of government investment in education or healthcare.

Currently, CSR reports include ways EI corporations comply with EITI. For instance, Exxon-Mobil stated how they complied with transparency and accountability within host countries in Angola, EG, Azerbaijan, Kazakhstan, and Nigeria.⁵⁸ Often companies will use the opportunity within CSR reports to either state support of EITI or list their compliance in EITI countries. However, one drawback to CSR is that transparency remains unapparent in CSR programs, whereas building a school or hospital for communities constitutes a tangible milestone easily reported.⁵⁹ Also, CSR cannot address the fundamental economic relationship between extractive companies and host governments— via taxes and royalties— as complying with the host country's laws.⁶⁰ Any CSR reports should include disclosure and transparency of corporate relations with the State. Because EIs remain responsible to either shareholders or the public, CSR reports should share with shareholders or government entities how much money is being used by the host government for social spending or is actually disappearing. CSR would help create a

⁵⁸ Genasci and Pray, *supra* note 12, at 58.

⁵⁹ *Id.*, at 55.

⁶⁰ *Id.*, at 56.



culture where corporations would help foster good governance and use of the EIs funding. However, CSR lacks the “teeth” for enforcement, to hold corporations and government to higher standards for revenue transparency due to its voluntary and “soft” nature. While the UN Global Compact remains voluntary, the UN Global Compact and the EITI both promote ways to combat corruption. Mainly, under the UN Global Compact, several principles correlate with EITI - Principle 7, Principle 10. While both international schemes remain voluntary, EITI has more “teeth” to hold corporations and governments responsible by the public for the mismanagement of the energy sector.

4. US & CHINA COOPERATION WITHIN EITI’S FRAMEWORK: AN ENERGY SECURITY PERSPECTIVE

Public perceptions, at least in the United States, view that China suddenly controls the worlds’ extractive industries, between their deals in Africa and Asia and Latin America. However, the data tells a different story. In 2011, Chinese buyers purchased only 9.3 per cent in value of international extractive industry deals, contrasted to companies from the U.S. that purchased 17.1 percent, the UK 17.8 percent, Australia 13.3 per cent of global deals.⁶¹ On the other hand, these statistics only showcase one aspect of the extractive industry story. Currently, state-owned enterprises established themselves as the top 10 reserve holders. NOCs control 77% of total proven global reserves 1,148 billion barrels; partially owned, public-private Russian companies own another 6%; and western oil companies (IOCs) control less than 10% of world’s natural gas and oil resource bases.⁶²

⁶¹ Pan Kwan Yuk. *Top dog in energy M&A? It isn’t China*, **FINANCIAL TIMES**, (Oct. 12, 2011), <http://blogs.ft.com/beyond-brics/2011/10/12/us-not-china-is-top-dog-in-energy-ma-dont-publish-yet/#>.

⁶² *The Changing Role of National Oil Companies in International Energy Markets*, **BAKER INSTITUTE POLICY REPORT**, No. 35 (April 2007) (ISSN 19416466) at 1, available at www.bakerinstitute.org/publications/BI_PolicyReport_35.pdf.



4.1. China: “The American elements” and China’s energy security

Recently, China has become a worldwide player on the energy market, entering a field dominated by Western energy companies. After the Cultural Revolution, the government promoted the production of domestic oil production as key to industrialization to as well as “expand the international influence of China’s large enterprises overseas (*guangda zhongguo daqiye zai guojishang de yingxiang*)” to “compete and struggle to let socialist enterprises get a foothold in the highly-competitive international market.”⁶³ Furthermore, the government wants China’s extractive industries known as successful global enterprises, “within and outside China (*chiming zhongwai*).”⁶⁴ China’s integration into the global economy accelerated during the 1970s and 1980s, and then dramatically increased after entering the World Trade Organization (WTO).⁶⁵

For several decades, the main recipient of China’s exported oil was Japan, who in turn provided China with Overseas Development Assistance (ODA) from the 1980s until the early 1990s.⁶⁶ Beginning in the 1990s, Chinese demand outstripped domestic supply, so the SOEs began to search for natural resource supplies. Thus, China had to shift to a new energy security strategy from one supporting domestic production and consumption, to one that could compete on the global market.⁶⁷ China’s Eleventh 5-year plan highlighted this priority, recognizing that “competition for market, natural resources, human resources, technology, standards and other

⁶³ Lim Tai Wei, **OIL IN CHINA: FROM SELF-RELIANCE TO INTERNATIONALIZATION**, Series on Contemporary China, Vol. 18 (Aug 2009), at 156 (Original citation omitted).

⁶⁴ Lim Tai Wei, at 157.

⁶⁵ Lewis I, *supra* note 15, at 2-3.

⁶⁶ Japan was the first non-socialist country to provide China with development loans, totaling approximately U.S. \$9 billion from the periods 1979 to 1995.

Lim Tai Wei, *supra* note 63, at 157.

⁶⁷ “In essence, market competition, not imperialism, war or ideology, became the main driving force for the adaptation of science and technology” so China’s extractive industries could be competitive with the multinational corporations on the global market. *Id.*, at 159.



things is fiercer than before. Global issues such as climate change, energy and resource security and food safety also become more prominent. Various kinds of protectionism are gaining power. As a result, the outer situation for China's development is more complex than before."⁶⁸ China understands its growing role in the global marketplace and need to secure energy resources to "gain a high ground in the competition." Thus, energy security factors significantly for China to access these resources for their SOEs.

In China, Energy security is defined as "an ability to rapidly adjust to its new dependency on global markets and engage in energy diplomacy, shifting from its former commitments to self-reliance and sufficiency ("*zili gensheng*") to a new desire to build a well-off society ("*Xiaokang Shehui*")"⁶⁹ and become open to the outside world ("*duiwai kaifang*").⁷⁰ As Chairman Hu Jintao of PRC stated at the G8 conference held in St. Petersburg, July 17th, 2006: "to ensure global energy security, we need to develop and implement a new energy security concept that calls for mutually beneficial cooperation, diversified forms of development and common energy security through coordination."⁷¹

According to Chinese scholar Lei Wu, the concept of energy security is "guaranteeing a sufficient and reliable energy supply at a reasonable price without impairing the country's main value and goal, which includes sovereignty and normal operation of economy. Therefore, there are at least four scales of analysis. First, whether the energy supplies is reliable. Energy analysts

⁶⁸ "Therefore we should observe and tackle with the reality both international and domestic with a broader sight and understand China's new position in world economic so as to take a better part in international economic cooperation and gain a high ground in the competition."

China's 11th Five-year Plan, People's Republic of China, at 1, item (2),
http://english.gov.cn/special/115y_index.htm.

⁶⁹ Benjamin Sovacool and Marilyn A. Brown, *Competing Dimensions of Energy Security: An International Perspective*, **ANN. REV. ENVIRON. RESOURC.** 2010.35:77-108, 80 (20120), available at
<http://www.environ.annualreviews.org>.

⁷⁰ Lim Tai Wei, *supra* note 63, at 158.

⁷¹ *President Hu urges efforts to ensure global energy security*, Xinhua (Jul. 17, 2006),
http://news.xinhuanet.com/english/2006-07/17/content_4845287.htm, also available at www.chinaview.cn.



predict that China's demand for petroleum will require the import of 3 and 4 million barrels per day (b/d), so supplying reliable energy resources will be paramount for development.⁷² Second, whether the supply is sufficient. Third, whether the price is reasonable. Fourth, whether the consuming pattern of energy is in harmony with the environment. China is faced with a series of significant problems and challenges in her energy situation.⁷³ Furthermore, China's energy security also includes purchasing stakes in extractive industries; bidding for concessions or contracts in resource-rich regions, such as in Afghanistan; deploying the military to protect shipping lanes and extractive fields; and embarking on an "energy scramble" for the last remaining energy reserves.⁷⁴

Similar to other natural resource importing countries, China remains vulnerable to potential supply disruption of energy resources from regions like Middle East. And over 70% of China's overseas oil supply comes from Middle East or Africa, for which the source and transportation security is largely affected and controlled by the U.S. thus China does not have a very reliable energy security.⁷⁵

4.2. U.S. & Energy Security Perspective

Energy Security in the U.S. has developed along different paths. The U.S. Government (USG) adopted the Carter Doctrine. Originating in the 1970s Oil Crisis, the Carter Doctrine determines that national security and energy supply are deeply intertwined.⁷⁶ Since then, presidents from Carter to Bush II have used the threat of military to protect energy supplies.

After the terrorist attacks on September 11, 2001, the U.S.'s oil consumption has become a major

⁷² Lewis I, *supra* note 15, at 2.

⁷³ Wu Lei, **ENERGY SECURITY AND SINO-U.S. RELATIONS: COMPETITION, CONFLICT AND COOPERATION** (Beijing: China Social Sciences Press 1st ed. March 2009)(2009), 33.

⁷⁴ Sovacool, *supra* note 69, at 80.

⁷⁵ Wu Lei, *supra* note 73, at 40-41.

⁷⁶ Sovacool, *supra* note 69, at 78.



factor in both domestic politics and in foreign policy debates. The focus remains on U.S. dependence on the Middle East's oil resources and the role of U.S. military intervention in the region to maintain the flow of oil.

On the domestic front, the U.S. has concerns with its limited supply of natural resources to meet energy demands. While the U.S. has plentiful sources of coal and natural gas for electricity, it remains under stocked in oil resources to meet domestic demand. Also, the U.S. government and population have concerns over China increasing its share of the energy market within the domestic U.S., not just globally. Domestic politics and public pressure can play a major role in determining energy security decisions for both the government and corporations. For example, in 2005, China National Offshore Oil Corporation (CNOOC) submitted an \$18.5 billion dollar bid for Unocal, a U.S. corporation that owns strategic assets in Southeast Asia as well as in the U.S.⁷⁷ Unocal had already accepted a bid from Chevron at a much lower price, but decided to explore the Chinese option. When CNOOC failed to move quickly enough in a fast-paced market and refused to pay Chevron a "break up fee," Congress had already heard about the deal.⁷⁸ The significant political backlash of selling a U.S. company to CNOOC, which is 70% owned by the Chinese government, embarrassed and shocked the Chinese. Basically, the failed deal showcased their inability to react quickly to public pressures, either due to bad advice or as a result of their bureaucracy, and the power of domestic U.S. politics for opposing CNOOC from

⁷⁷ Unocal also owns the only operational rare earth mine in the U.S., the Mountain Pass Mine. The latter part of the paper will address this point in more detail.

Cindy Hurst. *China's Rare Earth Elements Industry: What Can the West Learn?* Institute for the Analysis of Global Security (IAGS)(March 2010) at 13, available at www.uscc.gov/researchpapers/.../RareEarthsBackgroundunderFINAL.pdf.

⁷⁸ Id.



acquiring a U.S. energy company.⁷⁹ As a result, CNOOC dropped its \$67 share bid for Unocal, making way for Chevron to acquire the company at the lesser price of \$64 per share.⁸⁰ Part of U.S. energy security, on the domestic front, includes ensuring that not too many foreign companies control domestic natural resources.

4.3. U.S. & China Dialogues on Energy Security

For now, China and the U.S cooperation over energy security remain limited.⁸¹ The U.S. and China realize that much of their foreign relations center around energy security, and how they will compete with each other in the global extractives market. Several dialogues between the two nations continue, such as “US-China Energy Policy Dialogue”, “US-China Oil & Gas Industry Forum” and “China-U.S. Strategic Economic Dialogue.”⁸² Foundations for the U.S and China remain in place to cooperate in energy security. Yet, contradictions, competition and conflict between the two nations still divide the U.S. and China. Basically, these aspects limit the opportunities for the two nations to cooperate. The two nations need to understand each other better. The U.S should understand the importance of energy security to China and the sense of energy insecurity of Chinese decision-makers. China should also understand the U.S’s attention to China’s energy security and respect the U.S’s stance as the only superpower with a long history of energy security and regional interests, especially in the Middle East. However, these dialogues lack of substantiality. The main challenges include finding an energy policy security

⁷⁹ “One of those critics reacted quickly to CNOOC's surrender, calling it ‘good news for the free market.’ House Resources Committee Chairman Richard Pombo (R.-Calif.) added that ‘CNOOC's Communist government ownership and promise of virtually interest-free loans are not consistent with these principles.’”

Why China’s Unocal Bid Ran Out of Gas. **BUSINESSWEEK** (Aug. 4, 2005), http://www.businessweek.com/bwdaily/dnflash/aug2005/nf2005084_5032_db016.ht.

⁸⁰ *Id.*

⁸¹ Wu Lei, *supra* note 73, at 235.

⁸² *Id.*, at 242



policy that can cross borders between multinational corporations and state-owned oil, natural gas, and mineral enterprises.

5. US & CHINA INVOLVEMENT IN EITI

5.1. Overall Compliance in Foreign Activities

Both U.S. and Chinese operations have to comply with host countries that have implemented EITI laws or in the process of validation. Part of the compliance involves filing reports with the host governments containing data on mineral extraction. U.S. and China corporations operate in countries with EITI laws, such as in Liberia, Nigeria and Mongolia.

5.2. China & EITI

Overall, the Chinese government abides by a non-interventionist policy of not interfering with internal affairs of host countries. While the NOCs have a fair amount of responsibility with foreign policy, they remain separate from the government in their day-to-day operations.⁸³ The State-owned Assets Supervision and Administration Commission of the State Council (SASAC) is the government shareholder in the government-owned companies.⁸⁴ The institution acts as an investor on behalf of state as well as supervises local state-owned assets. The SASAC pressures Chinese state-owned entities to be competitive on the world market.⁸⁵ Additionally, the Chinese government task the nationally owned Chinese companies (CPNC, CNOOC, Sinopec) with national security and foreign policy objectives by foreign governments.⁸⁶

5.2.1. China & EITI in Resource Rich Countries

⁸³ Bo Kong, *CHINA'S INTERNATIONAL PETROLEUM POLICY* (Praeger Press)(Dec. 22, 2009), 27.

⁸⁴ Jill Shankleman, *GOING GLOBAL: CHINESE OIL AND MINING COMPANIES AND THE GOVERNANCE OF RESOURCE WEALTH* (Woodrow Wilson Cent. for Int'l Scholars)(2009) at 20, available at www.wilsoncenter.org/sites/.../Shankleman_Going%20Global.pdf.

⁸⁵ *Id.*, at 21.

⁸⁶ *The Changing Role of National Oil Companies in International Energy Markets*, supra note 7, at 9.



China's corporations, especially the state-owned ones, have become important players in resource rich countries such as those in Africa and in West Asia. On the one hand, host countries welcome China's investment and development of their infrastructure. Yet on the other hand, "when it comes to China's relations with Africa, international views, especially in the US, whether scholarly or journalistic, seem to regard China as a 'bad influence.'"⁸⁷ China's failing to insist on standards like EITI falls under criticism by the western world.⁸⁸ This may become a future problem for China.

5.2.2. China & EITI in China's Resource Rich Regions

Some scholars acknowledge that many resource rich regions in China are less developed than their coastal counterparts.⁸⁹ Therefore, the Chinese corporations acting in these resource-rich yet developmentally poor regions need to fulfill their social responsibilities to profit the local communities as well as the whole nation. It is argued that China should promote the transparency of extractive industries in domestic regions.⁹⁰ Besides, China is also rich in several kinds of crucial resources— such as rare earth metals and raw materials— critical for global sustainable development. Thus, China is faced with a same problem in regulating these natural resources (i.e. rare earth metals) as other resource-rich countries.

5.3. China's Current Regulations on Corruption & Transparency

⁸⁷ Maxi Schoeman, *China in Africa: the Rise of a Hegemony?* **CHINA AND AFRICA: PARTNERS IN DEVELOPMENT AND SECURITY?** Danish Institute of International Affairs, Copenhagen (Aug. 23, 2007), available at www.diiis.dk/graphics/_io.../forsvars_og.../maxi%20schoeman.pdf, at 1.

⁸⁸ Barry Sautman and Yan Hairong, *Trade, Investment, Power and the China-in-Africa Discourse* (2010), <http://www.japanfocus.org/-Barry-Sautman/3278>.

⁸⁹ Xu Kangning and Wang Jian, *A Empirical Study of Linkage Between Natural Resource Abundance and Economic Development*, *Economy Research* (Issue 1, 2006).

⁹⁰ Che Er, *Transparency in Extractive Industries: A Chinese Paradox* (unofficial translation), **WORLD AFFAIRS** (Issue 5, 2011).



Although China has not become an EITI candidate country, China already implements a variety of laws and other kinds of regulations relevant to the themes of EITI. First, China is party to several international law or initiatives that contain commonalities with EITI, such as the UN Convention Against Corruption in 2005.⁹¹ Over 200 Chinese participants joined in the UN Global Compact, including companies, NGOs, business associations, an academy and six cities.⁹² Furthermore, in Oct 2008, the Industrial Bank CO., Ltd adopted the Equator Principles.⁹³

In addition to signing onto international initiatives, domestic Chinese laws contain a variety of legal mechanisms that parallels EITI. First, in China's Criminal Law, several articles prohibit corruption, such as Article 164, and Article 389 prohibits bribery by Chinese companies.⁹⁴ After China's ratification of the UNCAC, Article 164 is expanded by the 8th revision of Criminal Law as to including bribery to foreign staffs in public sector and officials of international organizations.⁹⁵ However, these amendments, while progressive, only punish the actual crime of bribery or corruption and not the intent (*mens rea*). Second, in 2008, an *Administrative Regulation on Contracting Foreign Projects* was made by the State Council of China, ordering "[a] foreign project contractor shall abide by the law of the country or region where the construction project is located."⁹⁶ Chinese companies have to abide by the host

⁹¹ Although China stated their reservation on Section 2, Article 66.

⁹² UN Global Compact, *supra* note 45.

⁹³ Shankleman, *supra* note 84, at 79; See also Equator Principles for member reports, available at <http://www.equator-principles.com/index.php/members-reporting>.

⁹⁴ 中华人民共和国刑法修正案(八) Amendment (VIII) to the Criminal Law of the People's Republic of China, (promulgated on Feb. 25, 2011, effective May 1, 2011, Stand. Comm. of Nat'l People's Cong.) (PKU Law), www.pkulaw.en.cn.

⁹⁵ *Id.*

⁹⁶ The State Council of China passed the *Administrative Regulation on Contracting Foreign Projects*, which contains the relevant Article 4.

商务部、外交部、国务院国有资产监督管理委员会关于进一步规范我国企业对外投资合作的通知 [Notice of the Ministry of Commerce, the Ministry of Foreign Affairs and the State-owned Assets Supervision and Administration Commission of the State Council on Further Regulating the Foreign Investment Cooperation of



country laws. Third, a Notice of the Ministry of Commerce, the Ministry of Foreign Affairs and the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) on *Further Regulating the Foreign Investment Cooperation of Chinese Enterprises* ordered the companies “delve into and abide by laws and regulations of the host country, especially the provisions on environmental protection, labor and employment, exit-entry administration, production safety, bidding and so on.”⁹⁷ Thus, Chinese companies operating abroad have to abide by host country regulations, such as for protecting the environment. The criticism of Chinese FDI, however, is that the host countries’ laws protecting the environment or prohibiting corruption are often weak, and China should hold their SOEs to a higher standard.

As for transparency, the State Council released the *Regulation of the People's Republic of China on the Disclosure of Government Information* in 2007.⁹⁸ Finally, the State-owned Assets Supervision and Administration Commission of State Council (SASAC) issued the Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities.⁹⁹ These regulations attempt to control SOE behavior through more accurate reporting to the government and indirectly the Chinese people.

5.4. China as an EITI candidate country

To date, only a few Chinese scholars have written on EITI. From their research, Chinese scholars’ attitudes toward EITI fall into three groups. The first group includes those who welcome EITI as a method to manage the revenues and an embodiment of CSR. For example,

Chinese Enterprises](promulgated by the Ministry of Commerce, Ministry of Foreign Affairs, State Asset Supervision and Administration Commission Jun. 6, 2008, effective Jun. 6, 2008)(PKU Law)(China).

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ *Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities*, State-owned Assets Supervision and Administration Council, <http://www.sasac.gov.cn/n2963340/n2964712/4891623.html> (last accessed May 5, 2012).



Mr. Che Er argues that China should promote domestic transparency in extractive industries to protect and preserve its environment and natural resources.¹⁰⁰ Professor Che Er stresses that very few Chinese know about EITI. However, he states that EITI could help build transparency within China, to ensure these companies operating domestically follow the rules.¹⁰¹ He believes that other developing countries, such as Tanzania, Guinea, Liberia, and those in East Asia can help influence the Chinese government to embrace EITI. Chinese companies follow the rules of transparency abroad (good student), but treat domestic transparency as an afterthought (bad-student).¹⁰²

The second group holds a neutral position. They acknowledge the fact that host countries have implemented EITI and admit that the corporations need to comply with these rules. So they write essays introduce EITI to the staffs of the corporation.¹⁰³ The third group includes those who don't like EITI. For example, Mr. Zhang Hongming regards EITI as one of the instruments Western World could use to restrict China's development in Africa.¹⁰⁴ Additionally, Mr. Li Anshan argues that it is questionable to presuppose that the resource curse is due to the corruption of African governments and the inappropriate manage of revenue that these countries receive from extractive industries, which is a presupposition of EITI.¹⁰⁵ He argues that this presupposition hides the real factor that leads to resource curse, the inequitable international

¹⁰⁰ Che Er, *supra* note 90.

¹⁰¹ Interview with Che Er, Chief Officer of International Business, CITIC Bank, Professor at Peking University, in Beijing, China. (Dec. 28, 2011).

¹⁰² *Id.*

¹⁰³ Dong Xia and Li Ruimin, *Extractive Industries Transparency Initiative (EITI) and Sustainable Resource Development*, **INTERNATIONAL PETROLEUM ECONOMICS** (Issue 7, 2008).

¹⁰⁴ Zhang Hongming, *Interest Conflict between the West and China in Africa and China's Strategy to Deal with, West Asia and Africa* (Issue 7, 2010).

¹⁰⁵ Li Anshan, *Africa in the Perspective of Globalization—Development, Assistance and Cooperation*, **West Asia and Africa** (Issue 7, 2007) [hereinafter Li 2007a].



trade order.¹⁰⁶ Others scholars think China should delay joining EITI.¹⁰⁷ However, domestic NGOs are encouraging China to join EITI as part of their goal to work towards sustainable development.¹⁰⁸

An interesting development is that the Chinese government remains silent on the EITI issue. In other words, they have not officially spoken for or against EITI. However, their SOE still comply with EITI rules in host countries where they have invested, such as in Africa. The Chinese government also supports EITI in other indirect ways, such supporting the G-20's endorsement of EITI through the Pittsburgh conference in 2009.¹⁰⁹

According to the findings of a discussion paper by Dylan Sutherland and Glen Whelan, Chinese business groups (its largest trans-national corporations) tend to adopt those International CSR initiatives/programs that are “technical” by nature, and not so closely related to issues of “politics.”¹¹⁰ When they do engage with some sort of “political” CSR initiative, they choose those that are developed by institutions in which nation-states are a major player and they are less likely to choose “coalition” initiatives involving a diversity of actors such as EITI; they are

¹⁰⁶ Id.

¹⁰⁷ Maya Forstater, Dr. Simon Zadek, Professor Yang Guang, Kelly Yu, Chen Xiao Hong and Mark George, *AFRICAN DEVELOPMENT: Insights from an Emerging Dialogue*, The Institute Of West-Asian and African Studies Of The Chinese Academy Of Social Sciences and Harvard University, Working Paper No. 60 (Oct. 2010), at 34 and 40, available at www.hks.harvard.edu/m-rcbg/CSRI/.../workingpaper_60.pdf.

¹⁰⁸ See *Africa & China: Cooperation For Sustainability*, **BRIEFING NOTE**, World Wildlife Fund-China (Mar. 9, 2012), http://awsassets.panda.org/downloads/wwf_briefing_note_africa_china_cooperation_for_sustainability_en_1.pdf (encouraging the Chinese government to join EITI as part of their 12th 5th year plan to promote sustainable development and reduce corruption).

¹⁰⁹ Dyveke Rogan, *G20 leaders express their support of participation in the EITI*, Extractive Industries Transparency Initiative (Sept. 29, 2009), <http://eiti.org/news-events/g20-leaders-express-their-support-participation-eiti>.

¹¹⁰ Dylan Sutherland and Glen Whelan, **CORPORATE SOCIAL RESPONSIBILITY IN CHINA'S LARGEST TNCs**, University of Nottingham (Jul. 2009), at 18.



continuing to refrain from getting involved with those voluntary regimes that are most “political” such as EITI and the *Voluntary Principles on Security and Human Rights*.¹¹¹

Yet a research in Gabon and DRC shows that among the Chinese companies working there, “there is considerable support for EITI among Chinese company representatives in Gabon”¹¹² and in DRC, “there seem to be little difference per se between Chinese and other companies active in the DRC”¹¹³ and “Medium and large Chinese companies with a long-term strategy for their presence in the DRC are more likely to be open to CSR issues including transparency.”¹¹⁴ But all the respondents in the DRC survey said that there are no short-term remedies for the corruption and the lack of overall transparency in DRC.¹¹⁵ What has happened, however, is the good-student abroad and bad-student behavior at home, where China’s SOEs follow the rules in host countries, but violate them at home.¹¹⁶

5.5. Incentives For China To Adopt Or Not Adopt EITI

Several factors can be considered as potential incentives for China to adopt or not adopt EITI, such as the OECD background of the initiative, China’s care for state image and China’s need to tackle with her domestic or foreign problems. Above all, China’s attitude toward EITI may be influenced by her view of energy security and energy policy. In this part, these factors will be examined to see whether they will affect China’s attitude toward EITI and to what extent may they function.

¹¹¹ Id.

¹¹² Johanna Jansson, Christopher Burke and Wenran Jiang, **CHINESE COMPANIES IN THE EXTRACTIVE INDUSTRIES OF GABON & THE DRC: PERCEPTIONS OF TRANSPARENCY**, University of Stellenbosch (Aug 2009) at 22.

¹¹³ Id., at 42.

¹¹⁴ Id.

¹¹⁵ Id.

¹¹⁶ Interview with Che Er, Chief Officer of International Business, CITIC Bank, Professor at Peking University, in Beijing, China. (Dec. 28, 2011).



Chinese corporations' preference to CSR initiatives that are more "technical" and even when the initiatives are "political" Chinese corporations will choose those in which Nation-States have significant input, indicating the close relationship between CSR and state sovereignty in China.¹¹⁷ China's foreign policy of "noninterference" in the internal affairs of other sovereign countries also emphasizes sovereignty as the common denominator among all nations regardless of other factors. China believes that all countries should be equal and no country has the right to dictate the sovereign affairs of others, thus promoting the non-interference policy.¹¹⁸ However, EITI is an embodiment of the good governance and global governance concept, which somewhat contradicts sovereignty.

Another reason why China is unwilling to support EITI may be that China *per se* has some problems with transparency. As Prof. Li Anshan stated, "China has its own problems of human rights and corruption and therefore feels it does not have the right to criticize others."¹¹⁹ The Chinese have called for the reduction in corruption, particularly by government officials and heads of SOEs, because it has hindered development.¹²⁰

Also, China's energy security plays into their involvement with EITI and accessing reliable energy sources. The failure of CNOOC's Unocal acquisition deepened China and its corporations' sense of insecurity in energy and their disbelief in world market. This may in part explain why China is so vehement in establishing bilateral relations with resource rich countries in Africa and China's current unwillingness to adopt initiatives like EITI. Yet on the other hand,

¹¹⁷ Sutherland and Whelan, *supra* note 108, at 19.

¹¹⁸ Li Anshan, *China and Africa: Policy and Challenges*, **CHINA SECURITY**, Vol.3 No.3; 69-93, 75 (World Security Inst., Summer 2007) [hereinafter Li 2007b].

¹¹⁹ *Id.*, at 84.

¹²⁰ Mr. Chen Tonghai, the former chairman of Chinese oil giant Sinopec Corporation, was found guilty of bribery and corruption by Chinese courts. Initially, he was sentenced to death but the sentence was changed to life in prison. *Zhu Zhe and Cui Xiaohuo, Corrupt Sinopec ex-chairman convicted*, **CHINA DAILY** (Updated: 2009-07-16) http://www.chinadaily.com.cn/bizchina/2009-07/16/content_8436271.htm



there are also incentives that may help promote China's adoption of EITI. China and many of its companies have already adopted initiatives like Global Compact or Global Report Initiative, and some Chinese corporations have already met the requirements of EITI in host countries that have implemented this initiative. Thus, adopting EITI will not be a great burden on Chinese corporations.

The concern on energy security may also become an incentive for China to adopt EITI. As Paul Collier points out, taking a long-term perspective and avoiding disorder is China's tradition and high priority. "Chinese government is most surely concerned to avoid resource extraction increasing the risk of future insecurity since this would jeopardize future supplies."¹²¹ If potential violence could drastically reduce China's oil supplies, then there is a reason that China might want to support initiatives such as EITI that could help prevent conflicts. Still, EITI will need to find ways to improve itself, especially if it really wants to involve emerging markets, such as Brazil and India.

5.6. What can China add to the framework

Collier also highlights that as a result of the financial crash dated back to 2008, the balance of international power has irrevocably shifted. So, future international architectures will evolve to become a synthesis of Chinese and existing approaches rather than merely incorporating China. This is also true for EITI. Furthermore, Collier values Chinese business model: the package deal. He suggests that the EITI should not to resist China's packaging but to embrace it, "and thereby introduce competition: competition reveals value and thereby generates

¹²¹ Paul Collier, **IMPLICATIONS OF CHANGED INTERNATIONAL CONDITIONS FOR EITI**, Oxford University, (Oct. 2008).



transparency as a by-product.”¹²² Thus, China’s foreign policy of “Resources for Infrastructure” redefines the development model. Instead of foreign aid, countries receive infrastructure projects, which avoids politicization of traditional “soft” aid and produces “hard” aid in the form of roads, bridges, railways, hospitals, etc. EITI could include the value of these infrastructure projects within their reports to help the public realize the value of the package deal.

6. UNITED STATES, EITI & ENERGY SECURITY

6.1. U.S. Energy Security and Transparency

As early as 2007, the U.S. government declared that “[i]t is the policy of the United States— (1) to increase energy security by promoting anti-corruption initiatives in oil and natural gas rich countries; and (2) to promote global energy security through promotion of programs such as the Extractive Industries Transparency Initiative that seek to instill transparency and accountability into extractive industries resource payments.”¹²³ The State Department and the Department of Energy are now required to author an annual report on their progress in promoting transparency for extractive industries payments to foreign governments. Additionally, joining EITI would enable the U.S. government to require corporations mining on Federal lands to submit due diligence reports on their taxes, royalties, fees, and other amounts paid to the U.S. Federal government.

6.2. U.S. Corporations Operating Abroad

In the United States, the extractive industries remain private institutions, not public state-owned enterprises, different than in China. US-based extractive corporations remain bound by domestic laws and standards, such as the Foreign Corrupt Practices Act and the Alien Tort

¹²² Id.

¹²³ Transparency In Extractive Industries Resource Payments, Pub. L. 110–140, title IX, § 935, 42 U.S.C.A. § 17374 (b)(1-2)(121 Stat. 1748) (2007).



Statute (or Alien Tort Claims Act), to maintain their “good behavior” and follow the best corporate practices.

U.S. companies operating abroad face several restraints on their corporate practices. The two main statutes controlling corporate behavior abroad remain the Foreign Corrupt Practices Act (FCPA) and the Alien Torts Claim Act (ATCA). Specifically, the FCPA forbids domestic companies registered with the Securities and Exchange Commission (SEC) to offer or give “anything of value... to a foreign official for purposes of...influencing any act or decision of such foreign official in his official capacity.”¹²⁴ Thus, companies who make payments to foreign officials for the purpose of “obtaining or retaining business for or with, or directing with, or directing any business to any person,” could be found liable.¹²⁵ Punishments for violating the FCPA include hefty penalties, such as criminal fines of up to \$2 million, and five years in prison.¹²⁶

The Obama administration has been particularly active in investigating overseas corporate behavior, especially for energy corporations in Africa. Beginning in March 2011, the SEC began an informal investigation of the practices of Cobalt International Energy in Angola and launched the formal investigation in November 2011.¹²⁷ The SEC and the Department of Justice (DoJ) investigation include possible breaches of fiduciary duty under the FCPA during

¹²⁴ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 et seq (2006).

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ *UPDATE 2-Cobalt denies wrongdoing in Angola; shares slide*, **REUTERS** (Apr. 16, 2012), <http://www.reuters.com/article/2012/04/16/cobalt-angola-idUSL2E8FG3VK20120416>.



their business dealings with the Angolan government for lucrative offshore oil contracts.¹²⁸

Angola is the eighth-largest supplier of oil to the U.S.¹²⁹

Furthermore, U.S. companies must abide by the Alien Torts Claim Act (ATCA), which is part of the Judiciary Act of 1789,¹³⁰ where the Federal Courts have original jurisdiction over “any civil action by an alien for a tort claim only, committed in violation of the law of nations or a treaty of the United States.”¹³¹ Currently, two cases granted cert to the U.S. Supreme Court to determine whether or not a corporation can be held liable for a tort under the ATCA.¹³² This decision will further determine the scope of liability for U.S. corporations operating abroad, whether they can be sued for causing harm to another in a foreign country. In addition, U.S. corporations must follow other international and domestic standards: sustainable development, EITI, ISO 14001, and UNEP guidelines. Also, the Ex-IM bank places several due diligence obligations on companies seeking finances, such as “know-your-customer” guidelines.¹³³ While these laws and guidelines shape U.S. corporate behavior and FDI, the EITI legislation and Dodd-Frank provision only encourage U.S. corporations to practice due diligence by knowing their customer, follow the money trail, respect human rights, and not participate in corruption. The

¹²⁸ Tom Burgis, *US to probe Cobalt oil links in Angola*, **FINANCIAL TIMES** (Feb. 21, 2012), <http://www.ft.com/intl/cms/s/0/284a1c78-5cb9-11e1-ac80-00144feabdc0.html#axzz1ufa0vnhE>.

¹²⁹ *Id.*

¹³⁰ Alien’s Action For Tort, 28 U.S.C. § 1350 (2003) [hereinafter Alien Tort Statute].

¹³¹ *Id.*

¹³² The Supreme Court will have to decide whether Companies that blatantly disregard international treaties, customary international law or norms can be found liable. See *KIOBEL, ET AL. v. ROYAL DUTCH PETROLEUM, ET AL.*, The Oyez Project at IIT Chicago-Kent College of Law, http://www.oyez.org/cases/2010-2019/2011/2011_10_1491 (last visited April 27, 2012).

¹³³ United States, Export-Import Bank (Last Updated: July 23, 2010), <http://www.exim.gov/pub/pdf/Due-Diligence-Guidelines.pdf> (last accessed Dec. 11, 2011).



EITI legislation, in conjunction with the Dodd-Frank provision, would also provide many benefits for natural resource extraction within the U.S.¹³⁴

6.3. Foreign Direct Investment in domestic energy

The U.S. has several concerns over FDI from countries with dubious histories and less-political support. First, as mentioned earlier, the failed takeover of Unocal by CNOOC demonstrated the domestic opposition of the Chinese buying a U.S. corporation owning strategic assets. Additionally, Unocal, through their takeover of Molycorp, owned the only operational rare earth mine in the U.S., the Mountain Pass Mine.¹³⁵ Thus, the U.S. has a significant concern over who is buying energy supplies within its own territory. The American public wants to know who invests in their strategic energy resources.¹³⁶

6.4. U.S. Natural Resource Governance

Each year, the U.S. collects approximately \$10 billion in oil, gas, and mineral revenues on Federal lands and offshore sites.¹³⁷ The majority of tax and royalty receipts enter the central government's U.S. Treasury, with the remaining divided between five Federal agencies, 35 states, 41 American Indian tribes, and around 30,000 Indian mineral owners.¹³⁸ In the U.S.

¹³⁴ Under the Dodd-Frank bill, the law would stipulate that resource extraction companies file an annual report disclosing the type and annual amounts of payments for each project relating to oil, natural gas, or minerals as well as the total payments to foreign governments for royalties, fees, and other expenses. U.S. Government, Securities and Exchange Commission. *Disclosure of Payments by Resource Extraction Issuer; Proposed Rule*. **FEDERAL REGISTER**, Vol. 75, No. 246, Thursday, December 23, 2010. 80978-81002. (p. 80989), www.gpo.gov/fdsys/pkg/FR-2010-12-23/pdf/2010-31943.pdf.

¹³⁵ Considering China's 97% control over the rare earth metals export market, the failed Unocal bid enabled Chevron to own the mine instead, preventing a monopoly control over mining operations of rare earth metals. Thus, the U.S. still has a source for rare earth metals, vital components used in a wide variety of industries, including defense (guided missiles) and new energy technologies (wind turbines, electric cars, energy storage batteries). Hurst, *supra* note 77, at 13.

¹³⁶ The attempted takeover of the Molycorp Mine by the Chinese SOE triggered a huge political backlash throughout America.

¹³⁷ The Open Government Partnership, *National Action Plan for the United States of America* (Sept. 20, 2011) at 6, available at www.whitehouse.gov/sites/.../us_national_action_plan_final_2.pdf [hereinafter National Action Plan].

¹³⁸ *Id.*



several federal government agencies govern and coordinate domestic mineral resources and related extractive activities: Department of Energy, Department of Commerce, Department of Transportation, Department of the Interior, and the Environmental Protection Agency. However, the Department of the Interior handles the majority of transactions between energy companies, the exploitation of minerals, and revenue collection.

However, the U.S. has not escaped domestic corruption issues in the extractives industry. First, in 2008, an inspector general's report showed that the Minerals Management Service (within the Department of the Interior) office in Colorado accepted improper gifts from energy companies' representatives, engaged sexual activities, and consumed illegal drugs with them.¹³⁹ Then, in 2012, the former MMS again found themselves embroiled in a corruption scandal, leading to the firing of the Director Elizabeth Birnbaum.¹⁴⁰ The government released a report covering the time period prior to the Deepwater Horizon explosion in the Gulf of Mexico, which revealed federal inspectors accepting meals, tickets to sports events, and negotiating new jobs, while supposed to be monitoring the corporations' activities.¹⁴¹ This continuing problem prompted Mr. Ken Salazar, the head of the Department of the Interior, to take action to rearrange the MMS so the same department for collecting revenues would not also oversee the regulatory process (licenses, inspections, regulation enforcement, etc.).¹⁴² Also, reforms were enacted to decrease the conflicts of interest between public employees and the energy industry, such as a divesting in energy companies operating under their auspices, 2-year time period before

¹³⁹ *Head of Minerals Management Service fired sources say*, CNN (May 27, 2010 11:51 a.m. EDT), <http://www.cnn.com/2010/POLITICS/05/27/mms.director.fired/>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*



accepting a job at an energy company, etc.¹⁴³ Furthermore, the fall out from the Deepwater Horizon tragedy prompted the Obama Administration to completely reorganize the MMS, because of the agency's faulty design to manage the extractive industries.¹⁴⁴

In October 2011, the Obama Administration announced a complete restructuring of the MMS. On the regulatory side, the Obama Administration reorganized the MMS into the Bureau of Safety and Environmental Enforcement (BSEE), the Bureau of Ocean Energy Management (BOEM). On the revenue management side, the new Office of Natural Resource Revenue (ONRR), operating under the Assistant Secretary for Policy, Management, and Budget, would be responsible for the handling of revenues, fees, taxes, royalties, and other charges. The new agency design was in response to the conflicting missions of several of the departments under the old MMS, leading to corruption, lack of oversight, low enforcement of regulations, and mismanagement of the extractive industries. The new ONRR would play an important role in another initiative the Obama Administration announced during the previous month, one that promotes transparency in the extractive industries.

6.5. EITI & Political Developments

Even though the US supported EITI from the beginning, the US government remained inactive domestically for implementing EITI. However, civil society groups still worked on promoting revenue transparency, and corporations had to comply with any EITI laws abroad. Despite a commitment to combating terrorism, corruption and kleptocracy, the Bush era remained very quiet about EITI.¹⁴⁵ During this time, the Bush administration developed the Bush

¹⁴³ Id.

¹⁴⁴ Dept. of the Interior, *The Reorganization of the Former Minerals Management Service*, (Oct. 1, 2011), www.asse.org/professionalsafety/docs/DeepwaterHorizonArticle.pdf, at 1.

¹⁴⁵ The Petroleum And Poverty Paradox: Assessing U.S. And International Community Efforts To Fight The Resource Curse, **REPORT TO THE MEMBERS OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED**



Doctrine, which refers to unilateral military action for perceived or actual threats to the US.¹⁴⁶

Thus, this foreign policy made Arab uncomfortable with U.S. military presence in the region, especially after the Iraq War.¹⁴⁷

On the other hand, the Obama Administration has taken a more pro-active approach to the EITI than his predecessors. On September 20, 2011, President Obama announced that the U.S. would be joining the EITI as part of the Open Government Partnership.¹⁴⁸ In President Obama's National Action Plan for the United States, his policy for more open government includes managing resources more effectively by implementing EITI. "The Administration has already made important strides in reforming the management of our natural resources... Signing onto the EITI initiative will further these objectives by creating additional 'sunshine' for the process of collecting revenues from natural resource extraction... and enhancing the accountability and transparency of our revenue collection efforts."¹⁴⁹

President Obama's plan includes two policies. First, the U.S. Government "commits to implement the EITI to ensure that [American] taxpayers are receiving every dollar due for extraction of [U.S.] natural resources."¹⁵⁰ While U.S. government already requires companies to disclose information, by signing onto the EITI global standard, the U.S. Government leads the

STATES SENATE, 110th Congress 2nd Session (Oct. 16, 2008), <http://www.gpo.gov/fdsys/pkg/CPRT-110SPRT44727/html/CPRT-110SPRT44727.htm>, at 17.

¹⁴⁶ Dr. Mamoun Fandy. *China vs. U.S.: A View from the Arab World*, **ENERGY SECURITY: IMPLICATIONS FOR U.S.- CHINA-MIDDLE EAST RELATIONS**, Prepared in Conjunction with an energy conference sponsored by the Shanghai Institute for International Studies and the James A Baker III Institute for Public Policy, Rice University. (July 18, 2005) 3, available at

http://www.bakerinstitute.org/publications/SIIS_MFANDY_ChinaUSArabWorld_071805.pdf.

¹⁴⁷ *Id.*, at 3.

¹⁴⁸ *U.S. Extractive Industries Transparency Assessment and Multi-Stakeholder Group Options*, 77 **FED. REG.** 86, 26315-26316 (Dept. of the Interior, April 27, 2012), available at <https://www.federalregister.gov/articles/2012/05/03/2012-10663/us-extractive-industries-transparency-initiative-stakeholder-assessment-and-multi-stakeholder-group>, at 26316.

¹⁴⁹ National Action Plan, at 6.

¹⁵⁰ *Id.*



way for other developed nations to follow suit as well as guarantee American taxpayers receive the revenue from the public natural resources. Second, the government wants to “work in partnership with Industry and Citizens to build on recent progress.”¹⁵¹ Specifically, the Federal Government wants to collaborate with industry and civil society to create a 2-year plan for a plan that will include relevant disclosure, information, and “enhancing accountability and transparency of our revenue collection efforts.” As a result, the U.S. is taking a two step approach to improving energy security through the Dodd- Frank bill, specifically Section 1504, and implementing EITI domestically.

6.6. US & EITI Implementation

6.6.1. Dodd-Frank Act: Section 1504

In 2010, the U.S. Congress passed Dodd-Frank Financial Reform bill containing the Cardin-Lugar Amendment.¹⁵² Specifically, Section 1504 requires all extractive industries registered with the SEC to file additional reporting of payments to governments in either in their Form 10-K, Form 20-F, or Form 40-F.¹⁵³ This group includes 90% of all major international oil and gas corporations, 80% of top mining companies and five of the top eight nationally-owned firms.¹⁵⁴ Furthermore, a legal survey revealed that in over 100 countries, none prohibited resource revenue disclosures as required by Dodd-Frank.¹⁵⁵ As of May 10, 2012, the final reporting rules remain unfinished by the SEC.

¹⁵¹ Id.

¹⁵² Publish What You Pay, *The Cardin-Lugar Amendment (Dodd-Frank 1504)*,

<http://www.publishwhatyoupay.org/about/stock-listings/cardin-lugar-amendment-dodd-frank-1504>.

¹⁵³ *Disclosure Of Payments By Resource Extraction Issuers*. 17 C.F.R. §§ 229, 249 (2009) Proposed Rules, 75 Fed. Reg. 246, 80978 (Sec. and Exch. Comm., Dec. 23, 2010), <http://www.sec.gov/rules/proposed/2010/34-63549fr.pdf>

¹⁵⁴ SECURITIES AND EXCHANGE COMM., 2011 WL 1785826 (S.E.C. Misc) Memorandum from the Office of Commissioner Walter regarding an Apr. 13, 2011 meeting with representatives of Publish What You Pay (April 13, 2011)(WestLaw), at 3.

¹⁵⁵ Id., at 5.



6.6.2. US-EITI Stakeholder Process

Even though the Dodd-Frank bill contains an EITI instrument, it does not actually implements the international scheme. With President Obama's announcement to implement EITI in September 2011, the U.S. begins the process of creating an EITI scheme for the U.S.'s domestic extractive industries.¹⁵⁶ On October 25, 2011, President Obama designated Ken Salazar, Secretary of Interior, as head of the U.S. Extractives Industry Transparency Initiative (USEITI).¹⁵⁷ After his appointment, Secretary Salazar committed to collaborate with industry and civil society to implement USEITI. The mineral revenues and rent earned from Federal and Native American Lands would be collected through the newly-formed ONRR, and the agencies of the Office of Management and Budget (OMB), the Environmental Protection Agency (EPA), and the Department of the Treasury (Treasury) would provide support in their respective departments.¹⁵⁸

Currently, the USEITI is in the stakeholder analysis process. On February 24, 2012, Interior published a public notice in the Federal Register seeking public comments on the formation of a multi-stakeholder group to implement USEITI.¹⁵⁹ So far, Interior has held stakeholder sessions in St. Louis, Missouri; Denver, Colorado; Houston, Texas; and Washington, D.C. to gather feedback for the establishment of the multi-stakeholder group. The input will form the backbone of the information to help establish this USEITI multi-stakeholder group, which will be responsible for implementing the scheme. The results of the first stakeholder assessment

¹⁵⁶ U.S. Extractive Industries Transparency Assessment and Multi-Stakeholder Group Options, 77 **FED. REG.** 86, 26315-26316 (Dept. of the Interior, April 27, 2012), <https://www.federalregister.gov/articles/2012/05/03/2012-10663/us-extractive-industries-transparency-initiative-stakeholder-assessment-and-multi-stakeholder-group>.

¹⁵⁷ *Id.*, at 26316.

¹⁵⁸ Interview with Rebecca Morse, Phone call, Advocacy Officer, Revenue Watch Institute (Dec. 19, 2011).

¹⁵⁹ The notice was published in Federal Register No. 74 (page11151) issue. See 77 **FED. REG.** 86, 26315-26316, 26316.



will be available sometime after May 18, 2012.¹⁶⁰ However, USEITI will enter an additional public comment period from May 18-June 29, 2012 to gather feedback on the stakeholder assessment through three public sessions, a public webinar, and a public workshop.¹⁶¹ Finding the right blend of corporations, civil society groups and government officials proves to be challenging, due the diverse interests in the energy sector.¹⁶² The U.S. has until September 2012 to finalize the EITI sign-up requirements.¹⁶³

7. COOPERATION THROUGH EXTRACTIVE INDUSTRIES IN THE NEW ENERGY ECONOMY

7.1. EITI & the Transition to the Low Carbon Economy

Both the U.S.'s and China's legal systems already contain the necessary tools to easily implement EITI: enacted anti-corruption laws, policies and laws to encourage best corporate practices, securities regulations, and auditing requirements for corporations. Furthermore, both U.S. and China seek to transition their carbon-intensive economies to a low carbon economy to mitigate climate change. However, the transition to the Low Carbon Economy requires access to a different set of minerals. Many of these minerals already originate in volatile countries.

While the current energy industry revolves around carbon, the new green energy economy presents its own new challenges for control over energy resources. While green energy attempts to emit zero-carbon, the harnessing of this energy will require a new set of minerals. According to a U.S. study, the main minerals involved in the low carbon economy include

¹⁶⁰ Id.

¹⁶¹ The locations for public sessions and workshops- Anchorage, Alaska; Pittsburgh, Pennsylvania; New Orleans, Louisiana; Washington, DC. Id.

¹⁶² Interview with Rebecca Morse, Phone call, Advocacy Officer, Revenue Watch Institute (Dec. 19, 2011).

¹⁶³ Id.



lithium, manganese, nickel, cobalt, zinc, copper and rare earth metals.¹⁶⁴ Many of these raw materials are used in green technologies for magnets used in wind turbine blades, refrigerators, and traction motors for electric cars; photovoltaic (PV) cells; batteries for electric vehicles and bicycles; automatic catalytic converters; guided missiles, fuel cells and vehicle lightweighting.¹⁶⁵ Specifically, the green technology in Electric Vehicle (EV) batteries requires lanthanum, cerium, praseodymium, neodymium, nickel, manganese, cobalt and lithium.¹⁶⁶ Many electric vehicles and wind turbines require special magnets that originate in the minerals of neodymium, praseodymium, dysprosium, samarium and cobalt, with the rare earth metals comprising the majority of permanent magnets.¹⁶⁷ Energy-efficient lighting currently requires lanthanum, cerium, europium, terbium and yttrium.¹⁶⁸ Solar power uses solar cells that contain indium, gallium and tellurium.¹⁶⁹

Lithium will play a significant part in electric vehicles, batteries, energy storage, and other green technologies for the low carbon economy. The countries with the two largest deposits are Bolivia and Afghanistan. However, Afghanistan possesses approximately \$1 trillion dollars in lithium reserves, becoming the “Saudi Arabia of lithium.”¹⁷⁰ The discovery of the lithium could further inflame a very politically unstable country where corruption runs

¹⁶⁴ The rare earth metals include scandium, yttrium, lanthanum, cerium, praseodymium, neodymium, promethium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium, and lutetium. **OFFICE OF POLICY AND INT’L AFFAIRS, DEPT. OF ENERGY, 2011 Critical Resources Strategy** (Dec. 2011), http://energy.gov/sites/prod/files/DOE_CMS2011_FINAL_Full.pdf, at 14 [hereinafter *2011 Critical Resources Strategy*].

¹⁶⁵ *Id.*, at 14, 19-20.

¹⁶⁶ *Id.*, at 7.

¹⁶⁷ *Id.* See Hurst, *supra* note 75, at 12.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ James Risen, *U.S. Identifies Vast Mineral Riches in Afghanistan*, **NY TIMES** (Jun. 13, 2012), <http://www.nytimes.com/2010/06/14/world/asia/14minerals.html?pagewanted=all>.



rampant.¹⁷¹ While Afghanistan joined EITI in March 2009 and became an EITI candidate country in February 2010, the lithium industry has not gained momentum due to the political instability.¹⁷² Both U.S. and China are already involved and will continue to be involved in Afghanistan to secure not only oil concessions, but lithium and other minerals as well.¹⁷³ In 2011, China became Afghanistan's largest investor with one contract alone worth USD \$3.5 billion (£2.2 billion).¹⁷⁴ Afghanistan's EITI will have to ensure that the mineral industry remains transparency, as poor governance would only lead to energy insecurity for the U.S. and China.

Furthermore, the low carbon economy will require increased access to cobalt and copper, where the Democratic Republic of Congo (DRC) is a leading supplier.¹⁷⁵ Known as the Central African Copperbelt, the DRC has recently emerged from a 20-year civil war but remains politically unstable, especially in the natural resource-rich Kivu provinces.¹⁷⁶ While cobalt and copper are not defined as "conflict minerals," investors within the DRC face a very delicate situation where the government barely controls the country. Furthermore, China has a strong presence in the DRC and has already garnered international attention for their business dealings with the unstable Kabila-regime.¹⁷⁷

¹⁷¹ In 2009, "Afghanistan's minister of mines was accused by American officials of accepting a \$30 million bribe to award China the rights to develop its copper mine," but he has since been replaced. Id.

¹⁷² EITI: Afghanistan, **EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE** (May 2012), <http://eiti.org/Afghanistan>.

¹⁷³ Afghanistan also possesses significant deposits of copper and iron.

Clifford Coonan, *China first to win oil-hunt rights in the scramble for Afghanistan*, **THE INDEPENDENT** (Dec. 28, 2011), <http://www.independent.co.uk/news/world/asia/china-first-to-win-oilhunt-rights-in-the-scramble-for-afghanistan-6282135.html>.

¹⁷⁴ Id.

¹⁷⁵ Natasha Odendaal, *DRC cobalt increase driving technology*, **MINING WEEKLY** (Sept. 2, 2011), <http://www.miningweekly.com/article/drc-cobalt-increase-driving-technology-2011-09-02>.

¹⁷⁶ Sophia Pickles and Anne Dunnebacke, *SEC Delays Risk Undermining Efforts to Curb Congolese Conflict Minerals* (Apr. 19, 2012 2:46 pm EST) http://www.huffingtonpost.com/sophia-pickles/sec-delays-risk-undermini_b_1438364.html.

¹⁷⁷ Peter Lee, *China has a Congo copper headache*, **ASIA TIMES ONLINE** (Mar. 11, 2010), http://www.atimes.com/atimes/China_Business/LC11Cb02.html.



Nuclear energy, while not necessarily a green technology, will be part of the low carbon economy, especially for China.¹⁷⁸ The Chinese government plans to build at as low as fourteen up to seventy-seven new reactors over the next decade.¹⁷⁹ On the other hand, nuclear energy in the U.S. remains a very contentious issue. Nevertheless, nuclear energy requires specific minerals as well, including uranium, plutonium, thorium, deuterium, tritium, gadolinium and zirconium; and fission will use lithium and boron.¹⁸⁰ The type of model and reactor will determine the mineral used; however, uranium comprises the majority of nuclear fuel.

Where does uranium originate? For example, Niger possesses one of the largest deposits of uranium in the world and holds Africa's largest reserves.¹⁸¹ In 2003, uranium deposits accounted for 62% of valued exports alone, contributing 4.3% to government revenues.¹⁸² Niger became EITI compliant in March 2011.¹⁸³ Foreign mining companies already operate there, such as CNPC, where they have extracted 100,000 tones of uranium over the past 36 years with little to show but environmental pollution, poverty and political unrest.¹⁸⁴ Energy security analysts and humanitarians fear a possible war in the Sahel.¹⁸⁵

¹⁷⁸ WORLD NUCLEAR ASSOCIATION, *Nuclear Power in China*, (Updated April 2012), <http://www.world-nuclear.org/info/inf63.html>

¹⁷⁹ Id.

¹⁸⁰ WORLD NUCLEAR ASSOCIATION, *Nuclear Power Reactors* (updated April 2012), <http://www.world-nuclear.org/info/inf32.html>

¹⁸¹ *NIGER: Uranium - blessing or curse?* IRIN (Oct. 10, 2007), <http://www.irinnews.org/Report/74738/NIGER-Uranium-blessing-or-curse>.

¹⁸² *EITI: Niger*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (2012), <http://eiti.org/Niger> [hereinafter EITI: Niger].

¹⁸³ EITI: Niger.

¹⁸⁴ Id.

¹⁸⁵ *NIGER: Uranium - blessing or curse?* supra note 166.



Considering rare earth metals, in 1992, Chinese leader Deng Xiaoping supposedly proclaimed: “There is oil in the Middle East; there is rare earth in China.”¹⁸⁶ Currently, the U.S. relies on China’s rare earth metal supply for the majority of their imports, even though the U.S. has domestic reserves and a closed rare earth mine.¹⁸⁷ Although significant reserves of rare earth metals exist around the globe— including in the US, Canada, Australia and South Africa— China currently produces 95% of the world’s rare earth metals with 35% of known global reserves.¹⁸⁸ Rare earth metals remain in high demand around the globe but in relative scarcity. In addition, China understands it has a governance problem in the rare earth metals industry, including smuggling, illegal mining, local-level corruption, organized crime, environmental pollution, and over-exploitation.¹⁸⁹ China loses millions of dollars a year from smuggling alone.¹⁹⁰ EITI could help China with fighting domestic corruption through the auditing system, where governments and companies will have to track the licenses, fees, and dollars generated from the rare earth metals exploitation. As a result, the Chinese government and the public can hold officials accountable in the fight against corruption for illegal mining and smuggling of rare earth metals.

8. CONCLUSIONS & GOING FORWARD

8.1. Cooperation through EITI

¹⁸⁶ Damien Ma. *China Digs It: How Beijing Cornered the Rare Earths Market*. **FOREIGN AFFAIRS MAGAZINE** (April 25, 2012), http://www.foreignaffairs.com/articles/137602/damien-ma/china-digs-it#cid=soc-twitter-at-snapshot-china_digs_it-000000.

¹⁸⁷ Hurst, *supra* note 77, at 26.

¹⁸⁸ *Id.*, at 3 and 15.

¹⁸⁹ *Id.*, at 20. See also *Several Opinions of the State Council on Promoting the Sustainable and Healthy Development of the Rare Earth Industry* (May 10, 2011), No. 12 State Council. May 10, 2011. PKU Law [hereinafter *Several Opinions- Rare Earth Industry*]

¹⁹⁰ In 2008, almost a third of rare earth metal exports were smuggled out of the country. *China Mulls Plans to Curb Rare Earth Smuggling*, **XINHUA** (Sept. 14, 2009), http://www.china.org.cn/environment/2009-09/14/content_18523309.htm.

See also Tim Folger, *The Secret Ingredients of Everything*. **NATIONAL GEOGRAPHIC** (Jun. 2011), <http://ngm.nationalgeographic.com/2011/06/rare-earth-elements/folger-text>, at 2.



Daniel Yergin writes in *Global Insecurity* that with “the failure of cooperation,” the Western nations cannot cope with pursuing an isolationist or nationalist strategy, for the countries’ energy interests would be harmed.¹⁹¹ The need for reliable and relative inexpensive energy sources highlights the importance of coordinated, joint management of strategic stocks in the current global, mostly deregulated, energy commodity market impacts all actors involved.¹⁹²

The U.S. and China see each other as competitors in the global energy scramble, particularly in Africa and post-conflict countries. The rhetoric in the U.S. often paints a negative picture, whereas China views the U.S. as being greedy. As a result, the two countries have a slight mistrust of each other, especially when dealing with energy resources. Thus, EITI can help bridge the transparency gap between the involvements of the two countries in resource-rich states, as well as promote global energy security.

First, for both U.S. and China, promoting EITI would improve data sharing for market for energy information to help lower transactions costs, and understand actions of other energy market players.¹⁹³ This platform would provide an opportunity to understand the global energy market so that corporations operating abroad will be able to better negotiate with host governments. Both countries want fair competition for energy supplies, so EITI can aid in level the playing field.

Second, EITI will help both the U.S. and China avoid conflict both domestically and abroad due to their foreign relations policies. China wants to avoid social unrest, political protests, and “discontent over its foreign relations, including cooperation and conflict over

¹⁹¹ Daniel Yergin. *Crisis and Adjustment: An Overview*, GLOBAL INSECURITY (Eds. Daniel Yergin and Mattin Hillenbrand), Boston: Houghton Mifflin Co. (1982).

¹⁹² Amy Myers Jaffe. *Energy Security: Oil-Geopolitical and Strategic Implications for China and the United States*, Energy Security: Implications for U.S.-China-Middle East Relations. July 18, 2005, Rice University, at 6, available at http://www.bakerinstitute.org/publications/SIIS_AJAFFE_worldenergy071805.pdf.

¹⁹³ Lewis I, supra note 15, at 6.



energy supplies. ...[the] Chinese do value multilateral cooperation on energy and environmental issues, but [are] also relatively uninformed about the exact nature of their foreign energy ties...”¹⁹⁴ With China, their SOE often operate as a surrogate foreign diplomat, even if they do have greater autonomy than in years past. They still have to abide by Beijing’s foreign policy, thus weighing down on their efficiency and competitiveness. Furthermore, China’s extractive companies are willing to work in very hostile and politically unstable areas, such as Sudan and South Sudan, where killings and kidnappings are not uncommon.¹⁹⁵ EITI would help with the political instability and improve the governance over the mineral resources where the public and companies can hold the managers responsible.

Third, EITI can assist with diplomatic relations, especially over minerals that cross territorial lines. For instance, if China and Japan (or Vietnam, Philippines, etc.) had to resolve their dispute over territorial claims in the East China Sea, the two countries could form a joint venture to develop the natural gas and oil resources, and EITI would publish how much revenue each country receives for the natural resources.¹⁹⁶ That way, citizens and their respective national governments will know how much each country earns. The two governments and citizens can hold China and Japan accountable for any misappropriation of funds. Additionally, for the U.S., EITI could assist with the division over the Arctic circle extractive resources between the Arctic circle nations and tribal groups through transparency of contracts, statistical information of transactions, publication of revenues, and other capacities to ensure smooth diplomatic relations.

¹⁹⁴ Lewis I, *supra* note 15, at 11.

¹⁹⁵ Also, South Sudan announced their intention to join EITI in December, 2011.

Ulf Laessing and Sui-Lee Wee. *Kidnapped Chinese workers freed in Sudan oil state*, **REUTERS** (Feb 7, 2012 11:57am EST), <http://www.reuters.com/article/2012/02/07/us-china-sudan-workers-idUSTRE8160UU20120207>.

¹⁹⁶ Shelly Zhao, *China’s Territorial Disputes in the South China Sea and East China Sea*, **CHINA BRIEFING** (May 31, 2011), <http://www.china-briefing.com/news/2011/05/31/chinas-territorial-disputes-in-the-south-china-sea-and-east-china-sea.html>



Finally, the U.S. and China can spearhead EITI to include minerals required for green technologies within their own EITI reports, and not just traditional carbon minerals. The U.S. and China can help other countries rich in these important low carbon minerals to include the revenues in their own EITI reports, or encourage non-EITI countries to join the initiative. Also, China could lead the way for the other BRIC countries— India, Brazil, and Russia— in declaring support for EITI as a way to improve global energy markets and secure access to current and future energy resources.

Overall, as the two largest energy consumers in the world, both the U.S. and China have much work to do for bridging the transparency gap on EITI knowledge, changing misperceptions about the initiative, and supporting its implementation around the world. U.S.-China cooperation within EITI will help increase global energy security through improving access to market information, empowering the public, increasing community participation, promoting sustainable development, improving government accountability, reducing corruption, minimizing military involvement, and encouraging corporate best practices and due diligence both home and abroad. U.S. and China can work towards trust over energy issues through raising awareness and educating the public about EITI and how it can improve governance in the energy sector. EITI can improve energy relations between the two nations through transparency and accountability, where the public and corporations can have a voice in how their governments manage natural resources for the public good.