THE RESOURCE CURSE IN THE WAKE OF THE ARAB SPRING

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I. INTRODUCTION

The great irony of oil, gas, and mineral resource wealth is that poverty, corruption, and social unrest often accompany the blessing of mineral resources.[1] This phenomenon is known as the "resource curse" (the Resource Curse).[2] The International Monetary Fund (IMF) maintains that the Resource Curse is not inevitable[3]—countries that promote "prudent and transparent management practices" have flourished *in spite of* their resource wealth.[4] In an attempt to mitigate corruption and poverty, arguably sourced from mineral resource revenues, there has been an international effort to enable citizens of resource-rich developing nations through the publication and disclosure of mineral resource payments and revenues.[5] Emboldened with

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1. *See* Horst Kohler, *Foreward* to FISCAL POLICY FORMULATION AND IMPLEMENTATION IN OIL-PRODUCING COUNTRIES v, v (J.M. Davis, R. Ossowski & A. Fedelino eds., Int'l Monetary Fund 2003) ("[T]he growth performance of many oil produc[ing nations] has been disappointing; despite their huge natural resources, many of these countries still face widespread poverty; and the volatility of oil prices has often been associated with a stop-go pattern of expenditures that has proved costly in economic and social terms.").

2. INT'L MONETARY FUND, GUIDE ON RESOURCE REVENUE TRANSPARENCY 1 (2007). Some scholars agree that there is a significant relationship between resource wealth and "economic performance." *Id.* at 1 n.4 (citing Richard M. Auty, *Natural Resource Endowment, The State and Development Strategy*, 9 J. INT'L DEV. 651, 651–63 (1997); Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth*, *in* LEADING ISSUES IN ECONOMIC DEVELOPMENT (Gerald M. Meier & James E. Rauch eds., 7th ed. 2000)). Other scholars contend that the relationship between oil wealth and political and economic turmoil is not inevitable, noting "that oil-rich countries performed well economically in the 1980s when oil was doing well—contrary to what would be expected under the 'Dutch Disease' hypothesis." *Id.* (citing Ricardo Hausmann & Roberto Rigobon, *An Alternative Interpretation of the 'Resource Curse': Theory and Policy Implications* (Nat'l Bureau Econ. Res., Working Paper No. 9424, 2003)). A third group argues that research regarding the implications of the resource curse is not "robust," and that it is possible that "resource wealth combined with appropriate policies and institutions can contribute significantly to long-term growth." *Id.* (citing Daniel Lederman & William F. Maloney, *Trade Structure and Growth* (World Bank Policy Research, Working Paper No. 3025, 2003); NATURAL RESOURCES: NEITHER CURSE NOR DESTINY (Daniel Lederman & William F. Maloney eds., 2007)).

3. INT'L MONETARY FUND, *supra* note 2, at 1.

4. *Id.* (naming Botswana, Canada, Chile, and Norway as examples of prosperous, resource-rich nations).

5. *See History of EITI*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://www.eiti.org/eiti/history (last visited Feb.11, 2014) (explaining the creation and

this information, citizens are empowered to hold their governments accountable for the mismanagement of mineral resource revenues.[6]

The effort to cure the Resource Curse begins with the publication of payments made by mineral extraction companies to resource-rich host-countries and the publication of revenues received by the host-countries, in a format easily accessible to citizens.[7] When payment and revenue information is published, it is more difficult for the leaders of resource-rich nations to conceal revenues made from mineral development exports, and subsequently more difficult to hide government waste and corruption.[8] The Extractive Industries Transparency Initiative (EITI) was one of the first efforts to formalize a payment disclosure and publication process.[9] A call to arms by several non-governmental organizations (NGOs) prompted the creation of this voluntary initiative.[10]

During the late 2000s financial reform in the United States, Congress added a provision, termed the "Cardin-Lugar Amendment," to the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) in order to apply the principles of the EITI to resource extraction companies

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development of the Extractive Industries Transparency Initiative); PUBLISH WHAT YOU PAY, A GLOBAL CIVIL SOCIETY COALITION CAMPAIGNING FOR TRANSPARENCY IN THE EXTRACTIVE INDUSTRIES (2009), *available at* http://www.publishwhatyoupay.org/sites/pwypdev.gn.apc.org/files/PWYP%20brochure%20EN.pdf.

6. *See* PUBLISH WHAT YOU PAY, *supra* note 5 (contending that citizens armed with information regarding "terms and conditions of the deals signed between extractive companies and their governments," as well as the revenues received, can hold their governments accountable).

7. *See History of EITI*, *supra* note 5 (discussing the need of easy to use disclosures); *see also* PUBLISH WHAT YOU PAY, *supra* note 5 (noting that "mismanagement of revenues and corruption thrive in . . . circumstances [which lack transparency,]" furthermore, "the resource wealth of many nations is linked to poverty, poor governance and even conflict").

8. Michael L. Ross, *Will Oil Drown the Arab Spring?: Democracy and the Resource Curse*, FOREIGN AFF., Sept.–Oct. 2011, at 2, 6.

9. *See* Paul Collier, *Laws and Codes for the Resource Curse*, 11 YALE HUM. RTS. & DEV. L. J. 9, 17 (2008) ("Until the Extractive Industry Transparency Initiative (EITI), . . . revenues paid to governments by resource extraction companies were usually confidential.").

10. *History of EITI, supra* note 5.

operating within the United States.[11] The Cardin-Lugar Amendment added Section 1504 to Dodd-Frank and delegated authority to the Securities and Exchange Commission (SEC) to draft detailed payment disclosure regulations for mineral extraction companies already disclosing earnings to the SEC.[12]

The vast majority of the extractive industry did not welcome the initial SEC regulation (the Rule)—amidst great division between investors, former industry players, and extractive companies, the SEC implemented the administrative regulations on August 22, 2012.[13] NGOs and the legislators who initially sponsored Section 1504 praised the SEC action.[14] Some critics, however, immediately claimed that the SEC went too far in its requirements and argued that the provisions would place mineral extraction companies in the United States at a material disadvantage to state-owned and foreign-listed companies.[15]

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11. *The Cardin-Lugar Amendment (Dodd-Frank 1504)*, PUBLISH WHAT YOU PAY, http://www.publishwhatyoupay.org/about/stock-listings/cardin-lugar-amendment-dodd-frank-1504 (last visited Feb. 11, 2014); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2220–22 (2010) (codified as amended at 15 U.S.C. § 78m(q) (2012)).

12. *The Cardin-Lugar Amendment (Dodd-Frank 1504)*, *supra* note 11; 15 U.S.C. § 78m(q).

13. Daniel Kaufmann, *SEC's Day of Reckoning on Transparency: Dodd-Frank Section 1504 on Disclosure of Natural Resource Revenues*, BROOKINGS INST. (Aug. 21, 2012), http://www.brookings.edu/research/opinions/2012/08/21-dodd-frank-kaufmann; Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, Facilitating Transparency of Resource Revenue Payments to Protect Investors (Aug. 22, 2012), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1365171490958#.UmaVDPmiR8G.

14. *See, e.g.*, Press Release, ONE, Bono and ONE Praise SEC Ruling, Call Transparency 'the Best Vaccine Against Corruption (Aug. 22, 2012) [hereinafter ONE Press Release], *available at* http://www.one.org/us/press/bono-and-one-praise-sec-ruling-call-transparency-the-best-vaccine-against-corruption ("ONE warmly welcomes the Securities and Exchange Commission's (SEC) historic adoption of regulations to implement the Cardin-Lugar Amendment to the Dodd-Frank Wall Street and Consumer Protection Act of 2010."); Press Release, Sen. Patrick Leahy, Cardin, Lugar, Leahy Welcome SEC Approval of Transparency Rules (Aug. 22, 2012), *available at* http://www.leahy.senate.gov/press/cardin-lugar-leahy-welcome-sec-approval-of-transparency-rules.

15. *See, e.g.*, Sarah N. Lynch, *Business Groups Sue SEC Over Dodd-Frank Anti-Bribery Rule*, REUTERS (Oct. 10, 2012), http://www.reuters.com/article/2012/10/11/us-sec-lawsuit-idUSBRE8991NL20121011 [hereinafter Lynch, *Business Groups Sue SEC*]; Jack Gerard, *The Dodd-Frank Threat to U.S. Energy*, WALL ST. J., Aug. 17, 2012, at A9. There

Representatives of the petroleum industry, including the American Petroleum Institute (API), promptly filed suit against the SEC.[16] The lawsuit alleged the SEC acted arbitrarily and capriciously in enacting the Rule.[17] The same parties also petitioned the District of Columbia Circuit Court to review the Rule.[18] The Circuit Court found that it had no jurisdiction over the matter and dismissed the case.[19] In July 2013, the District Court for the District of Columbia ultimately vacated the Rule, sending it back to the SEC "for further proceedings."[20] The SEC declined to appeal the ruling, opting instead to redraft the Rule.[21]

The United States set a new standard in the passage of Section 1504.[22] The European Union followed suit, proposing a

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were also concerns that companies would be unable to comply with both the United States and host-country laws. *See* Sarah N. Lynch, *SEC Won't Appeal Ruling vs Disclosing Payments Abroad*, REUTERS (Sept. 3, 2013), http://www.reuters.com/article/2013/09/03/us-sec-resource-extraction-idUSBRE9820Z820130903 [hereinafter Lynch, *SEC Won't Appeal*] ("The industry groups also argued the SEC failed to include common-sense exemptions by forcing disclosure of payments to countries like China and Angola, where such disclosures are illegal.").

16. Jessica Holzer, *Oil Industry Sues to Block Rule on Payments Abroad*, WALL ST. J., Oct. 11, 2012, at B2; Lynch, *Business Groups Sue SEC*, *supra* note 15; *see* discussion *infra* Part II.D.3. *See generally* Complaint, Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5 (D.D.C. 2013) (No. 12-1668), 2012 WL 4803691 [hereinafter District Court Complaint].

17. Holzer, *supra* note 16, at B2; District Court Complaint, *supra* note 16, at 7.

18. Brief for Petitioner at 1, Am. Petroleum Inst. v. SEC, 714 F.3d 1329 (D.C. Cir. 2013) (No. 12-1398), 2012 WL 6018786 [hereinafter API Brief]. The parties sought a review of Section 1504 claiming that it was in violation of the First Amendment. *Id.* at 2–3.

19. Am. Petroleum Inst. v. SEC, 714 F.3d 1329, 1337 (D.C. Cir. 2013).

20. Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5, 11, 25 (D.D.C. 2013) ("[T]wo substantial errors require vacatur: the [SEC] misread the statute to mandate public disclosure of the reports, and its decision to deny any exemption was, given the limited explanation provided, arbitrary and capricious.").

21. Lynch, *SEC Won't Appeal, supra* note 15.

22. *Country-by-Country Reporting*, PUBLISH WHAT YOU PAY, http://www.publishwhatyoupay.org/about/advocacy/country-country-reporting (last visited Feb. 11, 2014). Encouraging disclosure throughout the extractive industry has become the global trend. Suzanne Ito, *The Future Global Norm: License and Contract Disclosure in Resource Extraction*, REVENUE WATCH INST. (Feb. 5, 2013), http://www.revenuewatch.org/news/blog/future-global-norm-license-and-contract-disclosure-resource-extraction (discussing the future of extractive industry contract and license disclosure requirements).

similar law.[23] The EU Accounting and Transparency Directives (the Directives) went into effect in June 2013, following the course set by the United States.[24] Now the SEC must restart the rulemaking process, following the adoption of other international legislation.[25]

In this Comment, I will argue that despite attacks on Section 1504, it is imperative that the congressional intent is supported; any changes that the SEC makes to the Rule should be consistent with both the EITI and the EU Directives, lest the United States will be responsible for creating a disjointed disclosure process. If the SEC promulgates a new Rule that is consistent with the new global standard, the citizens of Resource Cursed nations will benefit from the stable production of data and the companies required to disclose will benefit from a unified approach to compliance. The United States may be the first nation to confront this issue, but it will be far from the last. Payment disclosure will benefit the citizens of host-countries.[26] Today, the potential impact of disclosed information, in the hands of citizens who are ready, willing, and able to utilize and "disseminate information of government atrocities," is at its height in the wake of the Arab Spring.[27]

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23. Mark Tran, *EU Legislators Aim for Tougher Law on Oil, Gas and Mining Payments*, GUARDIAN (Sept. 19, 2012), http://www.guardian.co.uk/global-development/2012/sep/19/eu-tougher-transparency-law-extractive; *Europe's Oil, Gas and Mining Transparency Plan Could Help Millions*, GLOBAL WITNESS (Oct. 25, 2011), http://www.globalwitness.org/library/europe's-oil-gas-and-mining-transparency-plan-could-help-millions.

24. Press Release, European Comm'n, New Disclosure Requirements for the Extractive Industry and Loggers of Primary Forests in the Accounting (and Transparency) Directives (June 12, 2013), *available at* http://www.europa.eu/rapid/press-release_MEMO-13-541_en.htm. *See generally* Council Directive 2013/34, 2013 O.J. (L 182) 19 [hereinafter EU Directives].

25. *See* Letter from Steve Berexa et al. to Mary Jo White, Chairman, SEC (Aug. 28, 2013), *available at* http://www.revenuewatch.org/sites/default/files/Investor%20Statement%20to%20SEC%20regarding%20API%20vs%20SEC%20PUBLIC.PDF (arguing the SEC should adopt payment disclosure rules which are "as uniform as possible" with those in other jurisdictions, including the EU).

26. *See* discussion *infra* Part II.B.1.

27. *See Chapter Preface to What Caused the Arab Spring*, *in* THE ARAB SPRING 18, 20–21 (Margaret Haerens & Lynn M. Zott eds., 2013) (discussing the various factors present today, which can lead to successful social movements, including "the rise of

While resource-rich developing nations are calling for change and democracy, the United States has the potential to shape the world's extractive industry.[28] Much like the way the Foreign Corrupt Practices Act (FCPA) transformed the global economy, so too will the U.S. approach to resource revenue disclosures.[29] If the United States and other market leaders move in tandem towards transparency, disclosure will become the global norm and non-subscribing foreign nations will feel pressured to follow suit.[30]

In Part II, this Comment will discuss: (A) the cause and effect of the Resource Curse; (B) how nations benefit from fuller disclosure; (C) a brief history of the FCPA and how the United States has historically promoted social goals through regulation; (D) the legislative development of Dodd-Frank, the initial SEC Rule, and the current state of flux; and (E) the global environment following the Arab Spring. Part III will analyze: (A) the domestic move for international disclosure; and (B) how the Arab Spring makes the issue of disclosure more relevant today. Finally, Part IV will conclude.

information technology, especially social media."); *see also* Ross, *supra* note 8, at 5 ("The spread of the Internet could make it harder for autocrats to conceal government waste and corruption."). Beginning in December 2010, a series of revolts and protests erupted across Northern Africa and the Middle East in an effort to "overthrow ruling regimes" in non-democratic nations. Donald J. Kochan, *You Say You Want A (Nonviolent) Revolution, Well Then What? Translating Western Thought, Strategic Ideological Cooptation, and Institution Building for Freedom for Governments Emerging Out of Peaceful Chaos*, 114 W. VA. L. REV. 897, 898 n.1 (2012). The series of events, and the toppled governments that followed, were coined the "Arab Spring." *Id.*; *Chapter Preface to What Caused the Arab Spring*, *supra*, at 898.

28. *See* Ross, *supra* note 8, at 2, 6 (noting the United States, as the world's largest petroleum consumer, can have a great impact in ending the Resource Curse).

29. *See* discussion *infra* Part II.C.

30. *See* Terra Lawson-Remer, *Beating the Resource Curse in Africa: A Global Effort*, COUNCIL ON FOREIGN RELATIONS (Aug. 2012), http://www.cfr.org/africa/beating-resource-curse-africa-global-effort/p28780 (arguing that certain countries, such as the United States, United Kingdom, Japan, and India, should apply more rigorous transparency and reporting standards).

II. BACKGROUND

A. The Resource Curse

> *"'[T]he irony of oil wealth': those countries with the most urgent needs are also the least likely to benefit from their own geological endowment."*
>
> —MICHAEL L. ROSS[31]

Payment disclosure provisions are necessary because of the political and economic phenomenon that accompanies resource wealth. In the developing world, oil, gas, and mineral resource blessings are paradoxically a socioeconomic and political curse.[32] Compared to resource-poor developing nations, developing nations rich with mineral resources are "[fifty] percent more likely to be ruled by autocrats,"[33] the possibility of civil war is more than doubled,[34] and the governments are fifty percent larger in size.[35] These states tend to be "more secretive, more financially volatile, and provide women with fewer economic and political opportunities."[36]

When mineral resources are discovered in a non-democratic nation, government income and expenditures tend to grow astronomically.[37] On the contrary, developed nations, rich with mineral resources, tend to be protected from the Resource Curse because their governments are funded by taxes and are therefore more accountable to their citizens; oil-funded

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31. MICHAEL L. ROSS, THE OIL CURSE: HOW PETROLEUM WEALTH SHAPES THE DEVELOPMENT OF NATIONS 2 (2012). Michael L. Ross is a political science professor at the University of California, Los Angeles. *U.S. EITI Moves Forward with Advisory Committee*, REVENUE WATCH INSTITUTE BLOG (Dec. 21, 2012, 4:16 PM), http://www.revenuewatch.org/news/blog/us-eiti-moves-forward-advisory-committee. He is a member of the Revenue Watch Institute advisory board and serves as a civil society representative to the U.S. EITI advisory committee. *Id.*

32. ROSS, *supra* note 31, at 1–2 (noting Norway, Canada, Great Britain, and the United States have not been plagued by the Resource Curse because they have strong democratic governments and are economically diverse).

33. *Id.* at 1.

34. *Id.*

35. *Id.* at 5.

36. *Id.* at 1–2.

37. *Id.* at 5. "For example, from 2001 to 2009, total government expenditures rose by 600 percent in Azerbaijan and 800 percent in Equatorial Guinea." *Id.*

governments receive income through the sale of state-owned mineral resource assets.[38] The turmoil attributed to resource wealth and the relative peacefulness of resource-poor countries is most visible in Africa.[39] Resource-rich countries like "[t]he Congo, Angola, and Sudan have been torn by civil strife, and Nigeria suffers from endemic corruption, while resource-poor countries such as Burkina Faso and Ghana are equally poor but more peaceful and democratic."[40]

The economic phenomenon of the Resource Curse has been thoroughly studied.[41] Political and economic scholars find that three processes come into play following the discovery of mineral wealth, creating the perfect storm, aptly named the Resource Curse: (1) the "Dutch Disease," (2) an economy that tracks the fluctuation of oil prices, and (3) political unrest.[42]

1. Economic Impacts and the Dutch Disease

The Dutch Disease has oft been named as one of the culprits for a resource-rich state's decline.[43] The Dutch Disease was coined when, during the 1960s, the Netherlands experienced an economic boom after "large natural gas deposits [were discovered] in the North Sea."[44] Exports not related to natural

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38. *Id.* at 5–6.

39. George Soros, *Foreword* to ESCAPING THE RESOURCE CURSE xi (Macartan Humphreys, Jeffrey D. Sachs, & Joseph E. Stinglitz eds., Columbia Univ. Press 2007).

40. *Id.* (naming Burkina Faso and Ghana as examples of peaceful, democratic, resource poor African nations). *But see* Eric Lukas, *Africa's Resource Curse: Ghana Edition*, FOREIGN POL'Y (Aug. 5, 2010, 11:55 AM), http://www.oilandglory.foreignpolicy.com/posts/2010/08/05/africas_resource_curse_ghana_edition (explaining that mineral resources were discovered in Ghana in 2007, which has increased political tension). In 2012, President Obama stated: "Ghana has proven, I think, to be a model for Africa in terms of its democratic practices. And I very much appreciate the efforts President Mills has taken not only to ensure fair and free elections, but to root out corruption, increase transparency, [and] make sure that government is working for the people of Ghana and not just for the few." Megan Slack, *From the Archives: President Obama's Trip to Ghana*, WHITE HOUSE BLOG (June 14, 2012, 12:00 PM), http://www.whitehouse.gov/blog/2012/06/14/archives-president-obamas-trip-ghana.

41. Soros, *supra* note 39, at xi.

42. *Id.*

43. *See id.* (naming the Dutch Disease as one factor of the Resource Curse).

44. Christine Ebrahim-zadeh, *Dutch Disease: Too Much Wealth Managed Unwisely*, FIN. & DEV. (Mar. 2003), *available at* http://www.imf.org/external/pubs/ft/

gas fell from demand as the value of the Dutch guilder grew.[45] When the value of natural gas exports spiked, the exchange rate for the Dutch guilder appreciated.[46] It subsequently became more expensive to produce goods domestically than it was to import them.[47] As the Dutch began to rely on imports and the Dutch currency continued to rise in value, domestic industries outside of the mineral resource sector became less and less competitive.[48] This process came to be known as the "spending effect"—it "ma[de] exporting non-natural resources commodities more difficult and competing with imports across a wide range of commodities almost impossible . . . ."[49]

Coupled with the "spending effect" was the "resource pull effect"[50]—when labor and capital began to shift from other, non-natural resource production industries towards the production of minerals.[51] When an economy experiences a boom in the production of oil and gas resources, domestic demand grows for "all goods including nontradeables, which cannot be imported . . . ."[52] Thus, the economy responds by shifting resources that cannot be imported, namely service-based resources, away from non-mineral resource production to the production of oil and gas.[53]

As mineral resource production demands more domestic labor and materials, it causes the price of labor and materials to rise, and producers outside the mineral production sector to struggle to produce as their expenses increase.[54] Land, labor,

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fandd/2003/03/ebra.htm.

45. *Id.*

46. Macartan Humphreys, Jeffrey D. Sachs, & Joseph E. Stiglitz, *What is the Problem with Natural Resource Wealth?*, *in* ESCAPING THE RESOURCE CURSE 1, 5 (Macartan Humphreys, Jeffrey D. Sachs, & Joseph E. Stinglitz eds., 2007).

47. ROSS, *supra* note 31, at 48.

48. *Id.*

49. Humphreys, Sachs, & Stiglitz, *supra* note 46, at 5.

50. *Id.*

51. *Id.*; ROSS, *supra* note 31, at 48.

52. Ricardo Haussmann & Roberto Rigobon, *An Alternative Interpretation of the "Resource Curse," in* FISCAL POLICY FORMULATION AND IMPLEMENTATION IN OIL-PRODUCING COUNTRIES 13, 16 (J.M. Davis et al. eds., 2003).

53. *Id.*

54. Humphreys, Sachs, & Stiglitz, *supra* note 46, at 5.

and capital are then crowded out by a dominant commodity export industry.[55] The ultimate result is a significant decline in production within the domestic manufacturing and agriculture sectors.[56]

The Dutch Disease, as with other factors contributing to the Resource Curse, does not necessarily result in a detrimental outcome.[57] In some countries where the Dutch Disease phenomenon has been seen, so long as the market share lost in agriculture and manufacturing exports is counterbalanced with oil exports, the country remains economically viable.[58] However, as the economy shifts towards mineral development, domestic agriculture and manufacturing industries will inevitably suffer.[59] The government will expand, as the mineral resources are generally government owned, and the private sector will shrink.[60]

2. *Economic Volatility*

The second element of the Resource Curse is great economic volatility.[61] There are three causes of this volatility: (1) the inconsistency of "rates of [mineral] extraction"; (2) the variable nature of the timing of payments by mineral extraction companies; and (3) the "fluctuations in the value of the natural resources produced."[62] The variation in extraction rates is

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55. STAFF OF COMM. ON FOREIGN REL., 110TH CONG., THE PETROLEUM AND POVERTY PARADOX: ASSESSING U.S. AND INTERNATIONAL COMMUNITY EFFORTS TO FIGHT THE RESOURCE CURSE 10 (Comm. Print 2008).

56. ROSS, *supra* note 31, at 48 (counting Algeria, Columbia, Ecuador, Nigeria, Trinidad, and Venezuela as countries whose agriculture and manufacturing sectors suffered following resource production growth in the 1970s); *see* RICHARD M. AUTY, RESOURCE-BASED INDUSTRIALIZATION: SOWING THE OIL IN EIGHT DEVELOPING COUNTRIES 199–225 (1990) (discussing the impact resource-based industrialization has on economic growth and structural changes).

57. *See* ROSS, *supra* note 31, at 48–49 ("[A] rise in oil and gas exports *should* crowd out other types of exports, since it connotes a shift in a country's comparative advantage. If the income generated by the oil sector is greater than the income lost in manufacturing and agriculture . . . the country should still be better off.").

58. *Id*.

59. *Id*. at 49.

60. *Id*.

61. Soros, *supra* note 39, at xi; Humphreys, Sachs, & Stiglitz, *supra* note 46, at 6.

62. Humphreys, Sachs, & Stiglitz, *supra* note 46, at 6.

attributed to high oil production in the first few years of development—a rate that will eventually taper off.[63] Payments from mineral extraction companies to host nations may vary in timing as a result of the agreement structures between the two parties.[64] However, volatility is also caused by the fluctuating nature of mineral prices.[65] The net effect of these fluctuations is a continuous cycle of economic booms and downturns that plague the host-country's economy.[66]

3. Political Corruption

The third element of the Resource Curse, the element most relevant to disclosure efforts, is the growth of and corruption in host-country governments.[67] Because mineral resources are largely government-owned in developing nations, any increase in oil wealth will subsequently grow the size of the government.[68] Developing nation governments often do not have the time, funds, or infrastructure to extract minerals themselves; hence, they contract with mineral extraction companies.[69]

Two principal players in this final factor are mineral extraction companies and the governments of resource-rich nations.[70] Philanthropist George Soros, founder of the Publish What You Pay transparency initiative,[71] explains the delicate political situation that subsequently unfolds:

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63. *Id.*

64. *Id.*

65. *Id.* at 7.

66. *Id.* at 8.

67. Humphreys, Sachs, & Stiglitz, *supra* note 46, at 12 ("The adverse political effects associated with high levels of corruption and weak states ultimately have consequences for the political system itself . . . . [A]ccess to oil wealth can allow leaders to successfully repress or co-opt their oppositions, and thus avoid having to relinquish power through electoral competition.").

68. ROSS, *supra* note 31, at 67–68.

69. Collier, *supra* note 9, at 14.

70. *See* Soros, *supra* note 39, at xi (noting the Resource Curse has "four sets of players: international oil companies, national oil companies, and the governments and the people of the countries concerned.").

71. DOUGLAS A. YATES, THE SCRAMBLE FOR AFRICAN OIL: OPPRESSION, CORRUPTION AND WAR FOR CONTROL OF AFRICA'S NATURAL RESOURCES 62 (2012).

> Foreign oil and mining companies need to obtain concessions to exploit natural resources. They can obtain them only from the rulers of the countries, but the rulers are not the principals. They are agents of the people. The rulers get their rewards from the companies, not from the people whose interests they are supposed to safeguard. [Hence, the rulers of resource-rich countries] have much greater incentives to remain in power than the rulers of resource-poor countries and they have greater financial means at their disposal. That is why resource-rich countries are less democratic and often fall into the hands of repressive leaders.[72]

Secrecy in how oil revenues are spent further inflames potential political corruption.[73] For example, during Saddam Hussein's reign over Iraq, over fifty percent of "his government's expenditures were channeled through the Iraqi National Oil Company, whose budget was closely guarded."[74] It is this latter problem—the political corruption that accompanies oil booms—that the call for disclosure hopes to amend.

B. Disclosure and Accountability

> *"The problem is that the good Lord didn't see fit to put oil and gas reserves where there are democratic governments."*
>
> —DICK CHENEY[75]

1. Benefits from fuller disclosure

For disclosure to mitigate the Resource Curse, both mineral extraction companies and host nations are called to participate.[76] When companies "publish what they pay" and

72. Soros, *supra* note 39, at xii.

73. *See* ROSS, *supra* note 31, at 6 ("Secrecy is a key reason why oil revenues are so commonly squandered, [and] why oil-fueled dictators can remain in power, since they can conceal evidence of their greed and incompetence . . . .").

74. *Id.*

75. *Id.* at 63.

76. *Publish What You Pay (PWYP)*, REVENUE WATCH INST., http://www.revenuewatch.org/training/resource_center/backgrounders/publish-what-you-pay-pwyp (last visited Feb. 11, 2014).

host-countries "publish what they earn," citizens are empowered to compare the two and ensure that their leaders are effectively utilizing mineral resource assets.[77] The vast funds poured into resource-rich countries could be used, as NGOs insist, to combat poverty and promote economic development.[78] There is a tendency, however, for resource-rich countries to rely on resource extraction companies to provide "public services that are traditionally the responsibility of the government."[79]

Before there was any call to disclose payments made or received, mineral resource payments were largely confidential, encouraging abuse.[80] One concern of corruption is the diversion of funds received from mineral resource assets to the pockets of government officials.[81] The IMF once produced evidence that Angola misplaced $2 billion in oil revenues.[82] This single event was a "key impetus for the [development of] EITI."[83]

The biggest concern with using disclosures to combat the Resource Curse is whether transparency will actually heal the Resource Cursed nation; the effectiveness of disclosure is arguably unproven.[84] In its 2008 report on the Resource Curse, the Senate Committee on Foreign Relations conceded, "there is not yet a compelling body of evidence to prove the case that improved transparency will bring improved governance and economic development."[85] Despite these criticisms, disclosure of

77. *Id.*

78. *Id.*

79. *Id.*

80. Collier, *supra* note 9, at 17.

81. *Id.* at 17–18.

82. *Id.* at 18.

83. *Id.*

84. *See* Daniel M. Firger, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010,* 41 GEO. J. INT'L L. 1043, 1048–49 (2010) ("[T]he idea . . . that disclosure . . . will impede the attempts of corrupt officials to misappropriate their nations' oil or mineral wealth, while at the same time strengthening domestic institutions by arming citizens with information that can enable them to hold their leaders accountable . . . remains largely unproven, and such a disclosure-based approach, taken alone, suffers from misaligned incentives and policing problems that make it less likely to achieve its objectives.").

85. STAFF OF COMM. ON FOREIGN REL., *supra* note 55, at 5.

payment practices has been effective on a smaller scale.[86] The international community is still in the early stages of seeing the effectiveness of disclosure; yet, to date, more good has been done than harm.[87] It is undeniable that the reverse situation—the lack of transparency—leads to corruption and the "ineffectual usage of funds."[88]

2. The Extractive Industries Transparency Initiative (EITI)

In 2002, Tony Blair launched the EITI at the World Summit on Sustainable Development in Johannesburg.[89] The EITI is a "voluntary initiative" promulgated by a recognition that "[i]n many countries, money from oil, gas and mining is associated with poverty, conflict and corruption."[90] The EITI seeks to abolish the Resource Curse.[91]

Host-countries publish mineral resource revenues to the EITI.[92] The EITI reconciles the financials by compiling revenue information received from the host-countries and payment information received by mineral extraction companies.[93] Individual countries must meet a series of criteria to become an EITI Candidate country and further requirements to become

86. *See* Collier, *supra* note 9, at 18 (describing how Nigerian citizens acted immediately to hold the Nigerian Federal Government accountable following the disclosure of oil revenues in a local newspaper).

87. *See* STAFF OF COMM. ON FOREIGN REL., *supra* note 55, at 5 (discussing the lack of a compelling body of evidence proving the benefits of transparency, but noting that it shows promise).

88. *Id.*

89. Jenik Radon, *How to Negotiate an Oil Agreement*, *in* ESCAPING THE RESOURCE CURSE 89, 97 (Macartan Humphreys, Jeffrey D. Sachs, & Joseph E. Stinglitz eds., Columbia Univ. Press 2007). The EITI was endorsed by George W. Bush at the 2004 G8 World Summit. YATES, *supra* note 71, at 63.

90. EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, SOURCE BOOK 2 (Mar. 2005), *available at* http://www.eiti.org/files/document/sourcebookmarch05.pdf.

91. *Id.* at 2; Firger, *supra* note 84, at 1064.

92. *EITI Fact Sheet*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE (May 2013), http://www.eiti.org/files/EITI-fact-sheet-English.pdf.

93. *Id.* EITI calls governments to publish revenues received from mineral extraction companies, and calls for mineral extraction companies to publish payments to governments, in a manner that is publically accessible. YATES, *supra* note 71, at 63.

EITI Compliant.[94] Forty-one countries are currently implementing the initiative.[95] Every major U.S.-listed oil company voluntarily follows the EITI and is considered a stakeholder.[96] All disclosures must be subject to audit and a host-country's "[c]ivil society [must be] actively engaged as a participant in the design, monitoring and evaluation of [the disclosure] process and contribute[] towards public debate."[97]

When Senator Cardin introduced the Energy Security Through Transparency Act of 2009, the predecessor of Section 1504, one impetus was a means by which the United States could "[l]ead[] by example" and "encourage other countries to sign on to the [EITI] initiative."[98] This was not the first time the

94. *EITI Fact Sheet*, *supra* note 92.

95. *Frequently Asked Questions for Countries Considering to Implement the EITI*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://www.eiti.org/eiti/faq-countries-considering-eiti (last visited Feb. 11, 2014). As of February 2014, EITI Complaint Countries include: Albania, Azerbaijan, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Ghana, Iraq, Kazakhstan, Kyrgyz Republic, Liberia, Mali, Mauritania, Mongolia, Mozambique, Niger, Nigeria, Norway, Peru, Republic of the Congo, Tanzania, Timor-Leste, Togo, Yemen, and Zambia. *EITI Countries*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://www.eiti.org/countries (last visited Feb. 9, 2014). EITI Candidate Countries include: Afghanistan, Guatemala, Guinea, Honduras, Indonesia, São Tomé and Príncipe, Senegal, Solomon Islands, Tajikistan, The Philippines, Trinidad and Tobago, and Ukraine. *Id*. The EITI has temporarily suspended Compliant/Candidate status from: Central African Republic, Democratic Republic of Congo, Madagascar, and Sierra Leone. *Id*. The list of countries accepting and adopting EITI continues to grow. "Of the G20 countries, Indonesia is currently an EITI implementing country, while Australia is running an EITI pilot." *G20 Reaffirms Support for EITI*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE (Sept. 9, 2013, 2:51 PM), http://www.eiti.org/news/g20-reaffirms-support-eiti. France, Italy, the United Kingdom, and the United States have all agreed to implement EITI. *Id*. Germany has committed to a pilot program and Mexico has begun considering EITI implementation. *Id*. The United States submitted its Candidacy Application to the EITI International Board on December 19, 2013. *U.S. Extractive Industries Transparency Initiative*, U.S. DEP'T OF INTERIOR, http://www.doi.gov/eiti/ (last visited Feb. 9, 2014).

96. *Stakeholders: Companies*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://www.eiti.org/supporters/companies. The list of stakeholder companies includes over eighty of the world's largest extractive companies, including: BHP Billiton, BP, Chevron Corporation, De Beers, Eni, ExxonMobil, GDP Suez, Hess Corporation, Maersk Oil, Marathon, Noble Energy, Pemex, Petrobas, Qatar Petroleum, Shell, Statoil, and Total. *Id*.

97. *The EITI Criteria*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://www.eiti.org/eiti/criteria (last visited Jan. 9, 2014).

98. 155 CONG. REC. S9866, S9867 (daily ed. Sept. 25, 2009) (statement of Sen.

United States has passed legislation with the intent of setting the standard in the global economy; the Foreign Corrupt Practices Act (FCPA) was enacted to do just that.[99]

C. The Foreign Corrupt Practices Act (FCPA)

> *"Since the passage of the Foreign Corrupt Practices Act, transparency in the dealings of U.S. businesses abroad has been seen to be aligned with long-term U.S. national security and economic interest. Likewise, transparency in extractive industries abroad is in our interests because mineral wealth breeds corruption, which dulls the effects of U.S. foreign assistance; inequitable distribution of mineral revenues creates civil unrest, threatening political and energy instability and adding a price premium to commodities such as oil and gas; and energy rich countries can become emboldened militarily."*
>
> —REPORT TO THE MEMBERS OF THE COMMITTEE ON FOREIGN RELATIONS, U.S. SENATE[100]

The United States has a history of policing the actions of domestic corporations in their international dealings.[101] Forty years ago, prior to the passage of the FCPA, it was widely known that many businesses engaged in international trade used "illicit payments to bribe officials of foreign countries," despite the understanding that this practice "proliferat[ed] . . . corruption[,] threaten[ed] the proper

Cardin); *see* discussion *infra* Part D.1.

99. *See* U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 3 (Nov. 14, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf ("By enacting a strong foreign bribery statute, Congress sought to minimize these destructive effects and help companies resist corrupt demands, while addressing the destructive foreign policy ramifications of transnational bribery."). *See generally* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m, 78o, 78dd-1 to -3, 78ff (2012)).

100. STAFF OF COMM. ON FOREIGN REL., *supra* note 55, at 12.

101. *See* STUART H. DEMING, FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS xvii (Am. Bar Ass'n ed., 2d ed. 2010) ("For many years, [the FCPA] made the United States the only country to implement and actively enforce measures to prohibit its citizens, nationals, businesses, and, in some circumstances, foreign companies that enter its capital markets from bribing foreign officials.").

functioning of democratic institutions and market economies, lead[] to serious misallocations of resources, and jeopardize[d] relations among nations."[102] Until the passage of the FCPA, these payments and bribes were deemed permissible, legitimate business expenses.[103] In 1977, following the Watergate scandal and SEC investigations that uncovered over $300 million in payments made to foreign officials, by over four hundred companies, the FCPA was passed.[104]

Congress considered the broad impact that foreign corrupt business practices had on foreign and economic policy when drafting the FCPA legislation.[105] A primary concern was the potential impact that corrupt practices would have on foreign relations.[106] But to address an even greater concern, Congress held American businesses to a higher standard.[107] Congress noted that corruption and bribery ran "counter to the moral expectations and values of the American public."[108]

The United States was the first country to implement and enforce this type of regulation, setting a standard for the rest of the world to follow.[109] The FCPA prohibited U.S. citizens, nationals, businesses, and foreign corporations that report to the SEC "from bribing foreign officials."[110] The new regulation was

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102. *Id*.

103. *Id*. These expenditures were also tax deductible. *Id*.

104. *Id*.; H.R. Rep. No. 95-640, at 4 (1977); U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT (FCPA): LAY PERSON'S GUIDE, *available at* http://www.insct.syr.edu/wp-content/uploads/2013/02/lay-persons-guide.pdf; *see also* Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 307 (2012) ("The FCPA arose in the wake of corruption scandals in the 1970s, the most notorious of which was Lockheed Martin's bribery of public officials in Japan, the Netherlands, and Italy in order to obtain government contracts.").

105. H.R. Rep. No. 95-640, *supra* note 104, at 4–5.

106. *Id*. at 5. For example, "payments by Lockheed, Exxon, Mobil Oil, and other corporations to officials of the Italian government eroded public support for that Government and jeopardized U.S. foreign policy, not only with respect to Italy and the Mediterranean area, but with respect to the entire NATO alliance as well." *Id*.

107. *See id*. at 4 (assailing complicit organizations as responsible for "erod[ing] public confidence in the integrity of the free market system").

108. *Id*.

109. DEMING, *supra* note 101, at xvii.

110. *Id*.

not welcomed by American businesses.[111] Concern grew after its passage that American companies, now burdened with stringent regulations, would be put at a competitive disadvantage to foreign competitors, unrestricted by anti-bribery laws.[112]

The FCPA consists of two parts: (1) "anti-bribery provisions" and (2) "recordkeeping and internal controls provisions."[113] The anti-bribery regulations prohibit "corrupt payments" used to "obtain[] or retain[] business or secur[e] any improper advantage."[114] The internal controls provisions "impose certain obligations" on companies who disclose earnings to the SEC.[115] The Department of Justice enforces FCPA provisions in a coordinative effort with the SEC.[116] Over the past thirty-five years, there have been efforts to expand the FCPA; however, payment disclosure and anti-corruption measures remain mostly voluntary today.[117]

The effort to regulate social responsibility through securities

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111. Christopher M. Matthews, *The FCPA 'Bad For Business' Argument*, WALL ST. J. BLOG (Jan. 27, 2012, 5:32 PM), http://www.blogs.wsj.com/corruption-currents/2012/01/27/the-fcpa-bad-for-business-argument ("Since its enactment in 1977, the FCPA has been assailed by some as a competitive disadvantage to U.S. companies that operate in countries where bribery is 'the way business is done.'").

112. U.S. DEP'T OF JUSTICE, *supra* note 104 ("Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes . . . . Accordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA.").

113. ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS 1 (Am. Bar Ass'n, 2d ed. 2012); DEMING, *supra* note 101, at 3–4.

114. TARUN, *supra* note 113, at 1; *see* DEMING, *supra* note 101, at 3–4 (stating the FCPA is "designed to deter improper inducements to foreign officials in connection with business activities").

115. TARUN, *supra* note 113, at 1.

116. U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 99, at 4. The SEC may enforce the FCPA against companies listed on the U.S. exchanges ("issuers") with civil penalties and the Department of Justice may enforce criminal sanctions against issuers and non-issuers. Susan Rose-Ackerman & Sinéad Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U. ANN. SURV. AM. L. 433, 437 (2012).

117. Klaw, *supra* note 104, at 319.

law is not a novel concept.[118] The Securities Act of 1933 and the Securities Exchange Act of 1934 were created to require more thorough disclosure provisions for U.S. securities and to provide investors better information following the 1929 stock market crash.[119] The SEC may require disclosures in line with social responsibility goals.[120]

The FCPA changed the world economy and made the once commonplace bribery and corruption illegal in international business transactions.[121] As a result, the previous "cost of doing business in the international market" is now condemned.[122] While it took years for the rest of the world to follow suit, the United States was a catalyst in making international business more socially responsible.[123] Congress took another step in the direction of setting an example internationally with the passage of the Cardin-Lugar Amendment.[124]

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118. *See* Celia R. Taylor, *Conflict Minerals and SEC Disclosure Regulation*, 2 HARV. BUS. L. REV. ONLINE 105, 113 (2012), http://www.hblr.org/wp-content/uploads/2012/01/Taylor-Conflict-Minerals.pdf ("The SEC is capable of promoting non-strictly financial disclosure."); *see also* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 Harv. L. Rev. 1197, 1199 (1999) ("[I]ncreasing corporate accountability to shareholders and to the public was a central goal of Congress in 1933 and 1934, as was constraining the exercise of corporate power and inculcating a greater sense of public responsibility into corporate managers.").

119. Taylor, *supra* note 118, at 110–11.

120. *Id*. at 112–13. The SEC recently began to require disclosures related to climate change. *Id*. at 113 (citing Commission Guidance Regarding Climate Change, Exchange Act Release Nos. 33-9106, 34-61469, 75 Fed. Reg. 6290 (Feb. 8, 2010) (interpreting 17 C.F.R. pts. 211, 231, 241)).

121. Frontline, *Spotlight: History of the FCPA*, PBS (Feb. 13, 2009), http://www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html.

122. *Id*.

123. *Id*.

124. *Our Activities-U.S.*, PUBLISH WHAT YOU PAY, http://www.pwypusa.org/our-activities/us (last visited Jan. 9, 2014).

D. *"Leading by Example": The Cardin-Lugar Amendment and the SEC*[125]

> *"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."*
> — LOUIS D. BRANDEIS[126]

1. *The Energy Security Through Transparency Act, Dodd-Frank, and the Cardin-Lugar Amendment*

The Publish What You Pay (PWYP) NGO worked with the House of Representatives to introduce the Extractive Industries Transparency Act in 2008.[127] The Act did not pass, however, it led to the development of the Energy Security Through Transparency Act (ESTTA), introduced in 2009 with bipartisan support, which was expected to "set a new international standard for corporate and State behavior."[128] The bill was proposed as a means to encourage "greater stability" in resource-rich nations and as a way of "lessen[ing] volatility in the global energy market."[129]

The ESTTA did not pass in that form.[130] During the "late

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125. 155 CONG. REC. S9866-67 (daily ed. Sept. 25, 2009) (statement of Sen. Benjamin Cardin) (introducing the Energy Security Through Transparency Act as a means of the United States "[l]eading by example" and "encourage[ing] other countries to sign on to the [EITI] initiative").

126. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT 92 (1914); *see* ONE Press Release, *supra* note 14 ("Bono, the co-founder of ONE, said [in response to the SEC's adoption of the Cardin-Lugar Amendment] . . . '[a]s Justice Brandeis said long ago, sunlight truly is a disinfectant, to which I'd add that transparency is the best vaccine against corruption.'").

127. *Our Activities-U.S.*, *supra* note 124. Barney Frank, Chairman of the House Financial Services Committee and Senator Charles Schumer of the Senate Banking Committee introduced the Extractive Industries Transparency Act. *Id.*

128. *Id.* ("[T]he Energy Security Through Transparency Act . . . was introduced in September 2009 by Senators Richard Lugar, Ben Cardin, Charles Schumer, Roger Wicker and Russ Feingold."); 155 CONG. REC. S9866, S9866-67 (daily ed. Sept. 25, 2009) (statement of Sen. Benjamin Cardin); *see* Firger, *supra* note 84, at 1048–49 (stating that the ESTTA is modeled after the Extractive Industries Transparency Initiative).

129. 155 CONG. REC. S9866, S9867 (daily ed. Sept. 25, 2009) (statement of Sen. Benjamin Cardin).

130. *See* Branden Carl Berns, *Will Oil and Gas Issuers Leave U.S. Equity Markets in Response to Section 1504 of the Dodd-Frank Act? Can They Afford Not To?*, 2011

stages of conference negotiations" of Dodd-Frank, Senators Lugar and Cardin added Section 1504 to the bill, based largely on the ESTTA.[131] Section 1504 became known as the Cardin-Lugar Amendment[132] and added Section 13(q) to the Securities Exchange Act of 1934.[133]

Section 1504 delegated rulemaking authority to the SEC, requiring guidelines "consistent" with, but not identical to, the EITI, defining "payment" as one that is:

> made to further the commercial development of oil, natural gas, or minerals; and . . . not de minimis; and . . . includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals; . . . .[134]

Section 1504 only applies to those "resource extraction issuers" that file annual reports with the SEC and "engage[] in the commercial development of oil, natural gas, or minerals."[135]

COLUMB. BUS. L. REV. 758, 773 (2011) (noting the late inclusion of Section 1504 in the Dodd-Frank Act).

131. *Id.* at 773 (citing 155 CONG. REC. S9866, S9867 (daily ed. Sept. 25, 2009) (statement of Sen. Christopher Dodd)). PWYP explained its involvement in the construction of the bill and lobbying efforts:

> PWYP . . . worked closely with [the Senators who sponsored the bill] to build support for the ESTT[A] . . . , holding hundreds of meetings with Congressional offices both in state and on Capitol Hill, organizing events and grassroots action. As the financial reform bill was opened for debate in Senate, Senators Lugar and Cardin then worked with Senator Patrick Leahy to include the payment reporting requirements in the Dodd-Frank Act as Section 1504.

Our Activities-U.S., *supra* note 124.

132. Rose-Ackerman & Hunt, *supra* note 116, at 441–42.

133. Berns, *supra* note 130, at 773; Disclosure of Payments by Resource Extraction Issuers, Exchange Act Release No. 34-67717, 77 Fed. Reg. 56,365, 56,365 (Sept. 12, 2012) [hereinafter SEC Final Rule] (adding new rules and amending 17 C.F.R. pts. 240, 249).

134. 15 U.S.C. § 78m(q)(1)(C) (2012).

135. *Id.* § 78m(q)(1)(D).

2. The Rule

Congress granted the SEC only 270 days, after July 21, 2010, to draft the new regulation.[136] The SEC adopted the final Rule on August 22, 2012.[137] Under the Rule, extractive companies needed to disclose any payment made to foreign governments in excess of $100,000.[138] The SEC stated that the disclosures would "help empower citizens of those resource-rich countries to hold their governments accountable for the wealth generated by those resources."[139]

The Rule lacked exemptions for either "situations in which foreign law [would] prohibit the required disclosure" or "when an issuer ha[d] a confidentiality provision" in place.[140] Regardless, the Rule went into effect on November 13, 2012, and required resource extraction issuers to be in compliance for all fiscal years beginning after September 30, 2013.[141]

The Rule did not define the word "project."[142] Yet, Section 1504 instructs the SEC to draft regulations requiring issuers: (1) to disclose "the type and total amount of . . . payments made for each *project* of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;" and (2) to publish data with electronic tags that identify "the project . . . to which the payments relate."[143] The SEC did explain that the "reference to 'project' was intended to elicit disclosure at a more granular level than country-level

136. *Id.* § 78m(q)(2).

137. SEC Final Rule, *supra* note 133, at 56,365, 56,419. The Rule was issued in the Federal Register on September 12, 2012. *Id.*

138. *Id.* at 56,382, 56,419; Ben DiPietro & Samuel Rubenfeld, *Statoil Won't Back Extractive Rule Lawsuit*, WALL ST. J. BLOG (Feb. 8, 2013, 2:28 PM), http://www.blogs.wsj.com/corruption-currents/2013/02/08/statoil-wont-back-extractive-rule-lawsuit/?mod=google_news_blog.

139. SEC Final Rule, *supra* note 133, at 56,366.

140. *Id.* at 56,368.

141. *Id.* at 56,365.

142. *Id.* at 56,385 ("We continue to believe that not adopting a definition of 'project' has the benefit of giving issuers flexibility in applying the term to different business contexts depending on factors such as the particular industry or business in which the issuer operates, or the issuer's size.").

143. 15 U.S.C. § 78m(q)(2)(A)(i), (q)(2)(D)(ii)(VI) (emphasis added).

reporting."[144]

3. The Petroleum Industry's Response

On October 10, 2012, the API, the Chamber of Commerce of the United States, the Independent Petroleum Association of America, and the National Foreign Trade Council filed suit against the SEC alleging, among other things, that the Commission misinterpreted Section 1504 of Dodd-Frank and created a far more "onerous rule" than Congress intended.[145] The complaint, filed in the U.S. District Court for the District of Columbia, asserted that the Rule would infringe upon issuers' First Amendment rights by "forc[ing] U.S. public companies to engage in speech they do not wish to make, in violation of their contractual and legal commitments."[146] The complainants also alleged that the SEC acted arbitrarily and capriciously in: refusing to allow companies to make confidential disclosures;[147] requiring disclosures by country, instead of by basin;[148] failing to allow exemptions when companies would be in violation of host-country laws;[149] and imposing a burden on mineral extraction companies' ability to compete,[150] amongst other allegations.[151]

The parties also filed a petition for a review of the Rule in the U.S. Circuit Court for the District of Columbia.[152] The District Court proceedings were initially stayed, pending resolution of the matter in the Circuit Court.[153] Oxfam joined the SEC as intervener to defend the Rule.[154] The Circuit Court

144. SEC Final Rule, *supra* note 133, at 56,386.

145. District Court Complaint, *supra* note 16, at 1–3.

146. *Id.* at 4.

147. *Id.* at 30.

148. *Id.* at 31.

149. *Id.* at 32.

150. *Id.* at 34.

151. *Id.* at 35–36.

152. API Brief, *supra* note 18, at 1.

153. Minute Order (D.D.C. Dec. 5, 2012) (granting the stay).

154. Press Release, Oxfam Am., Oil, Gas and Mining Law Strongly Defended by Oxfam in Court (June 7, 2013), *available at* http://www.oxfamamerica.org/press/pressreleases/oil-gas-and-mining-law-strongly-defended-by-oxfam-in-court.

ultimately dismissed the petition for lack of jurisdiction.[155] Supporters immediately praised the action as a victory for disclosure.[156] The victory, however, was short-lived—the Rule did not fare as well in the District Court.[157]

On July 2, 2013, the U.S. District Court for the District of Columbia granted the plaintiffs' motion for summary judgment, finding that the SEC was arbitrary and capricious in disallowing exemptions when foreign law prohibits disclosure.[158] The court vacated the Rule and remanded the issue to the SEC.[159] The District Court noted that the SEC, while drafting the Rule, disregarded industry requests that the disclosure of payments be made confidentially for compilation.[160] The District Court also highlighted the fact that the SEC declined to waive disclosure requirements for China, Qatar, Angola, and Cameroon where disclosure of payment information is prohibited by law.[161] The District Court did not weigh in on the First Amendment argument, or others arguments made, instead it found that the SEC (1) "misread the statute to mandate public disclosure of the reports," and (2) "was arbitrary and capricious" in "deci[ding] to deny any exemption."[162]

While Section 1504 was not struck down by litigation, the future of disclosure provisions is currently in flux. The EITI Head of Secretariat, Jonas Moberg, predicted that the legal setbacks are temporary.[163] He stated, "'[t]he G8 stance and

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Oral arguments took place in front of the District of Columbia Circuit Court on March 22, 2013. Docket at 49, Am. Petroleum Inst. v. SEC, 714 F.3d 1329 (D.C. Cir. 2013) (No. 12-1398).

155. Am. Petroleum Inst. v. SEC, 714 F.3d 1329, 1330–31 (D.C. Cir. 2013).

156. Press Release, *supra* note 154 (quoting Ian Gary, Oxfam America's senior policy manager for oil, gas, and mining as saying, "[t]he court's decision to dismiss the case on jurisdictional grounds is a victory for transparency supporters, investors and citizens in resource-rich countries").

157. Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5, 25 (D.D.C. 2013).

158. *Id.*

159. *Id.*

160. *Id.* at 9–10 (citing SEC Final Rule, *supra* note 133, at 56,365, 56,391, 56,418).

161. *Id.* (citing SEC Final Rule, *supra* note 133, at 56,370, 56,372–73).

162. *Id.* at 11.

163. Michael Kavanagh, *Legal Delay to Mineral Wealth Transparency*, FIN. TIMES (Sept. 8, 2013, 4:00 PM), http://www.ft.com/intl/cms/s/0/9cf63778-13ce-11e3-9289-

commitments to EITI standards by France, the UK and Italy is huge . . . . We want to encourage transparency on a global scale, including the Bric economies, but we can only do this if we practice what we preach.'"[164] At the time of this Comment's submission, the SEC has not yet amended the Rule.

E. The Global Environment Following the Arab Spring

In December 2010, financial reform was well underway in the United States; at the same time, democratic activism erupted in the Middle East and North Africa, through a series of popular protests.[165] The movement began in Tunisia when citizens ousted their long-ruling president from power.[166] The Tunisian uprising prompted "grassroots movements" throughout countries in the region "seeking democracy and greater respect for human rights."[167] Once the Arab Spring revolution caught fire, the Tunisian, Libyan, and Egyptian rulers fell.[168] However, the leaders of resource-rich countries tended to be more successful at "fending off attempts to unseat them."[169]

III. ANALYSIS

The role of Section 1504 will continue to change in the

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164. *Id.*; *see* Satyajit Das, *Emerging Markets are Crumbling like BRICs: Commentary: Slow Growth, Capital Flight Foreshadow a Crisis*, WALL ST. J. MARKET WATCH (Sept. 4, 2013, 6:32 AM), http://www.marketwatch.com/story/emerging-markets-are-crumbling-like-brics-2013-09-04 (noting the acronym "BRIC" stands for Brazil, Russia, India, and China).

165. Kochan, *supra* note 27, at 898 n.1; Adrien K. Wing, *The "Arab Fall": The Future of Women's Rights*, 18 U.C. DAVIS J. INT'L L. & POL'Y 445, 446–47 (2012).

166. Kochan, *supra* note 27, at 898 n.1; Wing, *supra* note 165, at 446.

167. Wing, *supra* note 165, at 446–47.

168. *See* Ross, *supra* note 8, at 2 (discussing the reasons why certain countries fell while others did not); Lisa Anderson, *Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt, and Libya*, FOREIGN AFF., May–June 2011, at 2, 3–6; Brian Whitaker, *Gaddafi's Fall Unlikely to Alarm Arab Leaders*, GUARDIAN (Aug. 22, 2011, 2:19 PM), http://www.guardian.co.uk/world/2011/aug/22/muammar-gaddafi-arab-leaders-analysis ("[Following Egypt and Tunisia,] protests broke out in Yemen, Bahrain and Syria, plus others on a smaller scale in Morocco, Jordan, Algeria and Oman.").

169. Ross, *supra* note 8, at 2. Although Qaddafi was an "oil-funded ruler," his ouster was assisted by NATO intervention. *Id.*

coming months. This Comment seeks to address the policy implications of the law considering the current state of the Rule and the necessity of the SEC to find an amenable approach to ensure global acceptance of a revised Rule.

A. The United States' Role in the Future of Disclosure

> *"Instead of preaching to poor countries . . . the idea now is . . . to put [our] own house in order . . . . The days of 'do as we say and not as we do' are over."*
>
> — PAUL COLLIER, Oxford University[170]

The United States is the world's largest petroleum consumer.[171] Thus, it is incumbent upon this country to lead the way and make responsible changes in cleaning up corruption in resource-rich nations, particularly when such nations impact the security of and energy markets in the United States.[172] The United States has taken the reins of social responsibility once before—in the passage of the FCPA.[173]

Senators Cardin, Levin, and former Senator Lugar petitioned the U.S. Court of Appeals for the District of Columbia as Amici Curiae in the API suit against the SEC.[174] Within their

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170. *The Transparency Summit: The G8 Agenda*, ECONOMIST, June 15, 2013, at 60, 61, *available at* http://www.economist.com/news/international/21579452-britains-leader-envisages-world-tax-compliance-and-clear-corporate-ownership (commenting on the upcoming agenda for the June 2013 G8 summit).

171. Ross, *supra* note 8, at 6.

172. *See* Thomas I. Palley, *Lifting the Natural Resource Curse*, FOREIGN SERVICE J., Dec. 2003, at 54, 55, *available at* http://www.afsa.org/FSJ/1203/index.html#/57 ("[P]utting a stop to the national [R]esource [C]urse would serve U.S. national security interests, both by reducing strife around the globe and by addressing the poverty and political instability caused by this tragic pattern."); *see also* David L. Goldwyn, *Making an Energy Boom Work for the U.S.*, N.Y. TIMES, (Nov. 12, 2012), http://www.nytimes.com/2012/11/13/business/energy-environment/making-an-energy-boom-work-for-us.html (explaining that oil and gas prices in the United States are based on global prices and a political or social upheaval in a producing country can disrupt energy supply in the United States). The "stability and prosperity" of resource-producing nations will continue to influence the interests of the United States. *See* Goldwyn, *supra*. The Organization of the Petroleum Exporting Countries (OPEC) has concluded that oil will continue to dominate the energy market and that by 2035, the world will consume more oil than it does today. *Id.*

173. *See* discussion *supra* Part II.C.

174. Brief of U.S. Senator Cardin et al. as Amici Curiae in Support of Respondent,

brief, the senators argued that "[t]he Cardin-Lugar amendment addresses a major threat to U.S. interests: that the abundance of natural resources in developing countries has frequently led to poverty and instability . . . and, as a result, jeopardizes the national and energy security of the United States."[175] One example of such corruption was when $1 billion in "signature bonuses" went unaccounted for in Angolan budgetary reports, which emboldened "'anti-reform elements' opposed to U.S. interests."[176] The effect of disclosure on American interests is tangible; yet the concern for public companies' ability to compete in the global market remained one of the key concerns of the energy industry following the SEC's issuance of the Rule.[177]

Though, the economic impact and competitive disadvantage of issuers subject to SEC disclosures may not be as detrimental

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Am. Petroleum Inst. v. SEC, 714 F.3d 1329 (D.C. Cir. 2013) (No. 12-1398), 2013 WL 205934.

175. *Id.* at 4. The brief recalls Senator Lugar's comments in a 2008 report issued for the Foreign Relations Senate Committee: "'This '[R]esource [C]urse' . . . exacerbates global poverty which can be a seedbed for terrorism, it dulls the effect of our foreign assistance, [and] it empowers autocrats and dictators.'" *Id.* (quoting STAFF OF COMM. ON FOREIGN REL., *supra* note 55, at v).

176. Brief of Intervenor Oxfam America at 1, Inc., Am. Petroleum Inst. v. SEC, 714 F.3d 1329 (D.C. Cir. 2013) (No. 12-1398), 2013 WL 179899 (quoting STAFF OF COMM. ON FOREIGN REL., *supra* note 55, at 30–31).

177. *See* Ben German, *Sens. Cardin, Lugar Slam Oil Industry's Dodd-Frank Lawsuit*, E[2]-WIRE: THE HILL'S ENERGY & ENV'T BLOG (Oct. 11, 2012, 11:53 AM), http://www.thehill.com/blogs/e2-wire/e2-wire/261495-sens-cardin-lugar-slam-oil-industry-dodd-frank-lawsuit ("API, along with the U.S. Chamber of Commerce and other groups, challenged the SEC in federal court . . . in an effort to overturn rules they argue will put U.S. companies at a competitive disadvantage. The groups say the economic analysis behind the [R]ule is deficient, and that the regulators illegally excluded industry-sought provisions that would provide companies leeway under the mandate."). The API, a lobbying group for the petroleum industry, argues that requiring detailed disclosures from oil companies based in the United States will encourage resource-rich nations to choose mineral resource extraction companies based in other countries and, therefore, not required to disclose their payment practice. Rose-Ackerman & Hunt, *supra* note 116, at 435. The API also raised concerns that mineral extraction companies who do not have to report to the SEC will use the information reported by American companies to their competitive "'advantage in future bidding and contract negotiations.'" *Id.* (quoting Letter from Kyle Isakower, Vice President of Regulatory & Econ. Policy, Am. Petroleum Inst., & Patrick T. Mulva, Chairman of the Fin. Comm., Am. Petroleum Inst., to Div. of Corp. Fin., SEC (Oct. 12, 2010), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-27.pdf).

as many claim.[178] The technological superiority of companies listed on U.S. exchanges will continue to give them an edge over those companies not required to disclose.[179] Statoil, a major petroleum producer with operations in China, Angola, and the United States, declined to support the legal challenges to the Rule, despite being a member of the API.[180] The Vice President of Corporate Social Responsibility at Statoil wrote a letter to Global Witness explaining Statoil's choice not to support the API suit:

> Since 2007, Statoil has accordingly, on a voluntary basis, publicly reported payments [made to foreign governments] on a country-by-country basis. We believe that such reporting is not an impediment for doing business, but has been a competitive advantage for Statoil.[181]

While many energy companies have "publically supported anti-corruption and transparency measures in the past," Statoil was the only oil company to oppose the API lawsuit publicly.[182]

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178. *See* Kavanagh, *supra* note 163 ("Deal-hungry Chinese companies have been singled out as likely beneficiaries if tighter rules were to be imposed on rival western oil and mining groups. But the EITI argues that they would have no particular advantage in those mineral-rich countries that commit to its transparency program[] in their own right.").

179. Rose-Ackerman & Hunt, *supra* note 116, at 450 ("The comparative advantage that U.S. oil companies and other SEC-registrants enjoy in terms of expertise and experience in the new frontiers of oil exploration will likely mitigate any disadvantages that section 1504 imposes . . . . As global oil reserves decrease, oil exploration will be pushed to new limits, and the same factors that mitigate the potentially disadvantageous effects of 1504 can be expected to hold true in other oil markets. As oil exploration continues into riskier environments, technological capacity will remain a critical factor in winning bids.").

180. Press Release, Oxfam Am., Global Oil Company Distances Itself from Oil Transparency Fight (Feb. 8, 2013), *available at* http://www.oxfamamerica.org/press/pressreleases/global-oil-company-distances-itself-from-oil-transparency-fight; DiPietro & Rubenfeld, *supra* note 138. Notably, Statoil has voluntarily disclosed payments made to resource-rich nation governments for years. *Id*.

181. Letter from Baiba A. Rubesa, Vice President, Corporate Social Responsibility, Statoil, to Simon Taylor, Global Witness (Feb. 5, 2013), *available at* http://www.globalwitness.org/sites/default/files/library/Statoil%20Letter%20to%20Global%20Witness.pdf.

182. Press Release, *supra* note 180 (noting that Statoil, Chevron, BP, and ConocoPhilips have previously supported anti-corruption and transparency efforts).

Despite its opposition to the litigation, Statoil will be subject to any revised Rule as it is listed on the New York Stock Exchange.[183]

The SEC requirements are a drop in the bucket compared to the international scale of oil and gas production. Seventy-eight percent of global oil and natural gas reserves are state-owned and sixteen of the largest oil companies are not under the jurisdiction of the SEC.[184] However, the tables have gradually turned as other non-U.S. capital markets are well on their way to forming their own disclosure requirements.[185]

The Hong Kong Stock Exchange adopted a country-by-country disclosure requirement in 2010; mineral companies on the exchange will be required to report taxes, royalties, and payments made to host-countries.[186] Further, mineral extraction companies on the London Stock Exchange's Alternative Investment Market are required to disclose any payment of £10,000 or greater made for "'the acquisition of, or maintenance of, its assets.'"[187] The United States "became the third securities regulator . . . to require extractive companies to disclose their payments to investors and the public."[188]

While litigation against the Rule was ongoing, the European Union adopted its own disclosure requirements.[189] Much like the

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183. *See* Press Release, Revenue Watch Inst., Statoil Withholds Support from Lawsuit against Transparency; Dutch Government Pledges Support for EU Transparency, Resisting Pressure from Shell (Feb. 8, 2013), *available at* http://www.revenuewatch.org/news/press_releases/statoil-withholds-support-lawsuit-against-transparency-dutch-government-pledges- ("Statoil is a member of the API and listed on the New York Stock Exchange").

184. Gerard, *supra* note 15, at A9.

185. Berns, *supra* note 130, at 771.

186. *Id.* (citing H.K. STOCK EXCH., AMENDMENTS TO THE GEM LISTING RULES, Ch. 18A.05(6)(c) (2010), *available at* http://www.hkex.com.hk/eng/rulesreg/listrules/gemrulesup/Documents/gem34_miner.pdf; *Hong Kong: Stock Exchange to Require Greater Transparency*, REVENUE WATCH INST. (May 28, 2010), http://www.revenuewatch.org/news/hong-kong-stock-exchange-require-greater-transparency).

187. *Id.* at 771–72 (quoting LONDON STOCK EXCH., NOTE FOR MINING AND OIL & GAS COMPANIES 4 (2009), *available at* http://www.londonstockexchange.com/companies-and-advisors/aim/advisers/rules/guidance-note.pdf).

188. Brief of Intervenor Oxfam America, *supra* note 176, at 4 (citing SEC Final Rule, *supra* note 133, at 56,367 n.15).

189. *See* Tran, *supra* note 23 (discussing a European parliamentary committee vote

United States' guiding light with the developments in the FCPA,[190] the United States helped to establish a new international standard of mandatory disclosure here.[191] If the global trend continues to head in the direction of disclosure, emerging markets may eventually be pressured to enact similar provisions if they wish to remain true competitors in the global market.[192]

On June 12, 2013, the European Union passed new legislation (the Directives) requiring extractive companies listed on EU-regulated markets to report payments on a project-by-project basis.[193] The European Union cited Section 1504

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to require companies in the European Union to publish payments to foreign governments); Brief of U.S. Senator Cardin et al. as Amici Curiae in Support of Respondent, *supra* note 174, at 8 ("The European Union is now following the U.S. lead in mandatory disclosures and is expected to soon finalize rules similar to the Cardin-Lugar Amendment.").

190. *See* discussion *supra* Part II.C.

191. In the wake of the FCPA and later amendments, some U.S. companies were concerned that they would lose business to competitors in emerging markets who still engaged in bribery and corruption. Rose-Ackerman & Hunt, *supra* note 116, at 438, 443. The United States gave full-fledged support to the Organisation for Economic Co-operation and Development's (OECD) Anti-Bribery Convention to protect U.S. companies from unfair competition. *Id.* at 443. But this should not be a concern regarding the Dodd-Frank disclosure requirements. While the United States was the first country to outlaw bribery, it was not the last and the trend towards disclosure is currently gaining momentum internationally. *See* Frontline, *supra* note 121 (noting that other countries followed the United States' lead in outlawing bribery of foreign officials for business purposes). It was, however, twenty years after the FCPA that the OECD created its Anti-Bribery Convention, which thirty-four OECD member countries and six non-member countries have ratified to date. *Id.*; *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, http://www.oecd.org/corruption/oecdantibriberyconvention.htm (last visited Jan. 9, 2014).

192. *See* Rose-Ackerman & Hunt, *supra* note 116, at 452 ("[A]s emerging economies like China begin to participate more strongly in international markets, they may seek to maintain high standards of transparency to attract foreign capital.").

193. Press Release, *supra* note 24; *The Benefits for Uganda of Joining the Emerging Global Transparency Standard for Extractive Industry Revenues*, GLOBAL WITNESS 2–3 (Aug. 16, 2013), http://www.globalwitness.org/sites/default/files/library/Global%20Witness%20briefing%20%20benefits%20of%20revenue%20transparency%20for%20Uganda%20August%202013.pdf [hereinafter *Benefits for Uganda*]. The provisions are exercised through the EU Accounting and Transparency Directives. George Soros, *The Netherlands Must Support Strong Oil Transparency Laws*, OPEN SOC'Y FOUNDS. (Feb. 6, 2013); http://www.opensocietyfoundations.org/voices/netherlands-must-support-strong-oil-transparency-laws. *See generally* EU Directives, *supra* note 24.

provisions as the impetus for the legislation.[194] The Directives set a threshold of €100,000 in payment expenditures per fiscal year before disclosure is required.[195] While Section 1504 was the push for EU action, the Directives expand upon the Dodd-Frank provision in two ways: (1) the scope of the Directives incorporate the logging industry as well as mining, oil, and natural gas; and (2) large *unlisted* companies will be required to comply with the Directives, in addition to listed extractive companies.[196] By July 2015, each EU Member State must adopt the Directives into national law.[197] Payment data is expected for publication by 2016.[198]

Another notable aspect of the Directives is an "equivalence clause." [199] If a company is required to disclosure reports in another country, such as the United States, the Directives will allow that company to "publish a report on the basis of the mandatory requirements of a third country, provided that these are considered equivalent to the EU requirement."[200] Taken in combination, Section 1504 and the EU Directives will require "90 per cent of the world's major international extractive companies" to disclose payment practices.[201] The two laws will require disclosure of "65 per cent of the value of the global extractive markets, including most international oil, gas and mining majors, as well as Chinese, Russian, Brazilian and other state-owned companies . . . ."[202]

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194. Press Release, *supra* note 24.

195. *Id.*; EU Directives, *supra* note 24, at 25, 52.

196. Press Release, *supra* note 24; EU Directives, *supra* note 24, at 52.

197. *Benefits for Uganda*, *supra* note 193, at 3.

198. *Id.*

199. Press Release, *supra* note 24; EU Directives, *supra* note 24, at 53–54.

200. Press Release, *supra* note 24.

201. Press Release, Transparency Int'l, Natural Resource Corruption Dealt a Blow by New EU Transparency Rules (Apr. 9, 2013), *available at* http://www.transparency.org/news/pressrelease/09042013_natural_resource_corruption_dealt_a_blow_by_new_eu_transparency_ru; Alessandro Torello & Tom Fairless, *EU Agrees on Rules for Oil, Mining Companies*, WALL ST. J. (Apr. 9, 2013, 4:13 PM), http://www.online.wsj.com/news/articles/SB10001424127887323550604578412942191474054.

202. Press Release, Publish What You Pay, Publish What You Pay Applauds Historic EU Parliament Transparency Vote as Canada Announces Similar Plans (June 12, 2013), *available at* http://publishwhatyoupay.org/sites/publishwhatyoupay.org/

Around the time the Directives were adopted, two non-EU member states announced their own plans to adopt reporting for extractive companies.[203] In May 2013, Norway announced that it planned to propose mandatory reporting requirements for extractive companies based on the Directive.[204] In June 2013, Canadian Prime Minister Stephen Harper announced that Canada would join the growing number of countries and unions requiring disclosure.[205] The potential Canadian provision will apply to over 2,000 extractive companies and will capture an additional nine percent of the extractive market.[206]

While market regulation laws expanded internationally over the summer of 2013, the voluntary compliance program, EITI, the foundation of the securities disclosure laws, made several strong gains. On May 22, 2013, the United Kingdom and France committed to seek EITI candidacy status, joining the United States.[207] The United States initiated the process to become EITI compliant in 2011.[208] The White House pledged continued support of transparency related to natural resource extraction and EITI.[209] In July 2013, the U.K. Government began the EITI

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files/EU%20Transparency%20vote.pdf.

203. *Benefits for Uganda*, *supra* note 193, at 3–4.

204. *Id*. at 4.

205. *Id*. at 3; *Canada Commits to Reporting Requirements*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE (June 13, 2013, 2:20 PM), http://www.eiti.org/news/canada-commits-reporting-requirements.

206. *Benefits for Uganda*, *supra* note 193, at 3; Press Release, *supra* note 202.

207. *G8 Transparency: UK and France Join the Extractive Industries Transparency Initiative*, GOV.UK (May 23, 2013), https://www.gov.uk/government/news/g8-transparency-uk-and-france-join-the-extractive-industries-transparency-initiative; *see France and United Kingdom Commit to Global Transparency Standard*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE (May 22, 2013), http://www.eiti.org/news/france-and-united-kingdom-commit-global-transparency-standard (describing the joint press conference where Prime Minister David Cameron and President Francois Hollande announced plans to implement EITI). One week before the announcement, David Cameron wrote, "[t]he G8 must move toward a global standard for resource-extracting companies to report all payments to governments, and in turn for governments to report those revenues. This will encourage more investment in resource-rich countries and level the playing field for business." David Cameron, Op-Ed., *A British-American Tax and Trade Agenda*, WALL ST. J., May 13, 2013, at A15.

208. *U.S. Extractive Industries Transparency Initiative*, U.S. DEP'T OF INTERIOR, http://www.doi.gov/eiti/ (last visited Feb. 10, 2014).

209. Joint Statement by the Kingdom of Denmark, Republic of Finland, Republic of

implementation process.[210]

Immediately after the announcement from the United Kingdom and France, the EITI Global Conference took place in Sydney, Australia in May 2013.[211] The EITI Rules were replaced at the conference with the EITI Standard, aligning the EITI requirements with Section 1504 and the Directives.[212]

In tandem with international strides to make transparency consistent, the G8 summit pledged their support of one standard. At the June 2013 G8 Summit in Lough Erne, Northern Ireland,[213] the G8 committed to "take action to raise global standards for extractives transparency and [to] make progress towards common global reporting standards, both for countries with significant domestic extractive industries and the

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Iceland, Kingdom of Norway, Kingdom of Sweden, and the United States of America, 2013 Daily Comp. Pres. Doc. 201300602 (Sept. 4, 2013).

210. *UK Launches EITI Process,* EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://www.eiti.org/news/uk-launches-eiti-process (last visited Jan. 9, 2014); *see also* Press Release, GOV.UK, New Transparency Rules Launched for Extractive Industry Payments (July 9, 2013), https://www.gov.uk/government/news/new-transparency-rules-launched-for-extractive-industry-payments (explaining that before becoming an EITI candidate, the United Kingdom will need to issue a public statement of intent, make a commitment to collaborate with companies and civil society, appoint a leader, and establish a multi-stakeholder group).

211. *France and United Kingdom Commit to Global Transparency Standard*, *supra* note 207.

212. *EITI Rules*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://www.eiti.org/document/rules (last visited Jan. 9, 2014); Isabel Munilla, *G8 Extractive Partnerships Put Transparency Rhetoric to the Test*, OXFAM AM. (June 26, 2013), http://politicsofpoverty.oxfamamerica.org/2013/06/26/g8-extractive-partnerships-put-transparency-rhetoric-to-the-test/. EITI report data is now required by "individual payment type, company and government agency and by project. . . . consistent with the requirements in the US and EU." *Charting the Next Steps for Transparency in Extractives*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE (May 10, 2013, 4:06 PM), http://www.eiti.org/blog/charting-next-steps-transparency-extractives#. In addition, companies must disclose social contributions required by law or contract. *Id*. At the conference, many countries provided EITI updates and announced intentions to apply for EITI candidacy. *Country Leaders to Pledge to EITI*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE (June 6, 2013, 2:17 PM), http://www.eiti.org/news/country-leaders-pledge-eiti (describing country commitments and progress announcements at the 6th EITI Global Conference in Sydney, Australia).

213. *EITI in Focus at G8 Summit 2013*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE (June 17, 2013, 3:45 PM), http://www.eiti.org/news/eiti-focus-g8-summit-2013.

home countries of large multinational corporations."[214] The summit "welcome[d] the new EITI rules adopted in May [2013], which aim to increase the coverage and accessibility of data."[215]

The G8 also "encourage[d] other countries to sign up to the EITI"[216] and each G8 country individually pledged support of the initiative.[217] In addition to the commitments made by the United States, United Kingdom, France, and Canada, Italy agreed to seek candidacy status and Germany agreed to implement an EITI pilot program.[218] Russia and Japan announced their "support [of] the goal of EITI" and committed to "encourage[ing] national companies to become supporters."[219]

Prior to developing the process to adopt EITI in the United States, foreign officials asked why the United States had not joined a disclosure initiative.[220] Despite not being considered a resource-rich nation, U.S. congressional staff reported that some countries felt as if EITI was "being imposed upon them by the West, which d[idn]'t follow the same rules,"[221] particularly when the United States "holds top-three international rankings in natural gas, coal, and oil production."[222]

Following the U.S. government's commitment to the EITI, the U.S. Department of Interior's Office of Natural Resource Revenue (ONRR) spearheaded the U.S. EITI initiative.[223] In an effort to become an EITI compliant country, the United States formed a Multi-Stakeholder Group Advisory Committee (MSG)

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214. *Lough Erne G8 Leaders' Communiqué*, GOV.UK 9 (June 18, 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207771/Lough_Erne_2013_G8_Leaders_Communique.pdf.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. STAFF OF COMM. ON FOREIGN REL., *supra* note 55, at 19.

221. *Id.*

222. CONSENSUS BLDG. INST., STAKEHOLDER ASSESSMENT FOR THE UNITED STATES EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (USEITI) IMPLEMENTATION AND FORMATION OF A MULTI-STAKEHOLDER GROUP (MSG) 8 (2012), *available at* www.doi.gov/eiti/upload/stakeholderassessment.pdf.

223. *Id.* at 8–9, 26.

and began to work on the U.S. EITI Candidacy Application.[224] The MSG is comprised of members from government, industry, and civil society.[225] The MSG approved the U.S. EITI Candidacy Application on December 11, 2013 and the application was submitted to the International Board on December 19, 2013.[226] The United States is well on the way towards becoming EITI compliant.[227]

The world stance on disclosure has changed significantly since the initial passage of Section 1504 and the SEC's introduction of the Rule. Although the SEC must redraft the Rule, following the District Court's ruling, the SEC should not pull back the reigns too far on what it was originally trying to accomplish. As the SEC reviews the Rule, it should address several important "deficiencies" with its first attempt.[228] The SEC should also apply an "equivalence clause" modeled after the one adopted by the European Union, in order to allow for more efficient reporting by companies that are required to disclose payments in several jurisdictions.[229] Finally, as many supporters of transparency insist, the SEC should promptly publish a new Rule that is consistent with the EITI and the EU Directives.[230]

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224. *U.S. Extractive Industries Transparency Initiative*, *supra* note 208. The Candidacy Application was open for public comment until November 18, 2013. *Id*.

225. *Id*. The industry sector representatives include: Shell Oil Co., Peabody Energy, Independent Petroleum Assoc. of America, ExxonMobil Corp., National Mining Assoc., BP America, ConocoPhillips, Rio Tinto, Freeport-McMoRan Copper & Gold Inc., Newmont Mining, Walter Energy Inc., Chevron Corp., American Petroleum Institute, Noble Energy Inc., Ultra Petroleum Corp. and Council of Petroleum Accountants Societies, Inc. *Committee Members*, U.S. DEP'T OF INTERIOR, http://www.doi.gov/eiti/upload/List-of-Members_09-18-13.pdf (last visited Jan. 9, 2014).

226. *U.S. Extractive Industries Transparency Initiative*, *supra* note 208.

227. *See generally Candidacy Application Overview*, U.S. DEP'T OF INTERIOR, http://www.doi.gov/eiti/upload/C-A-Overview_09-25-13.pdf (last visited Feb. 10, 2014) (noting the U.S. EITI MSG's steps taken, next steps, and outcomes).

228. *See* Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5, 24 (D.D.C. 2013) (noting several "deficiencies" with the Rule, such as a miscalculated scope and deviation from the EITI, before vacating and remanding it to the SEC for further proceedings).

229. *See* Press Release, *supra* note 24 (discussing briefly the structure and aim of the EU equivalence clause).

230. *See, e.g.*, *Benefits for Uganda*, *supra* note 193, at 6 (arguing the global community should either match or exceed the reporting requirements of the Dodd-Frank

In an August 2013 letter to the Chairman of the SEC, a group of thirty-seven investors who represent over $5.6 trillion in assets under management, urged the SEC to "maintain continuity with regulations" across jurisdictions.[231] The same month, Senators Cardin, Leahy, Levin, Markey, and former Senator Lugar drafted a letter to the SEC regarding the SEC's re-issuance of the Rule.[232] The Senators urged the SEC to promptly revise the Rule considering the imminent implementation of the disclosure laws in Europe and not to waver on the key issues.[233]

EITI must maintain a "truly global standard" to ensure effectiveness.[234] One inherent challenge to obtaining such consistency is the "resistance from companies operating in the extractive" sector.[235] A representative from Publish What You Pay pleaded:

> 'Transparency is now the global standard, and if the US is to maintain its role as a leader in this movement the SEC must not cave to industry pressure . . . . It is imperative that the SEC issue a strong rule that gives citizens all over the world information critical for holding their governments to account for the use of their natural resource wealth.'[236]

But caving to industry pressure may not be the issue. Extractive industry companies have been key participants in the EITI,

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Act and the EU Accounting and Transparency Directives to present a consistent global approach).

231. Letter from Steve Berexa et al. to Mary Jo White, *supra* note 25.

232. Letter from Senator Benjamin L. Cardin et al., to Mary Jo White, SEC Chair (Aug. 2, 2013), *available at* http://www.pwypusa.org/Senate_SECLetter_Re-Issue_Rules_Aug2013.

233. *Id.*

234. Antonio Suarez-Martinez & Nicole Gow, *Transparency in Extractives: A Mixed Bag as US and UK Seek to Lead by Example*, ANTI-CORRUPTION & ASSET RECOVERY BLOG (July 17, 2013, 10:03 AM), http://www.anticorruptionlaw.com/blog.aspx?entry=4997.

235. *Id.*

236. Press Release, Publish What You Pay, Investors & Congress Call on the SEC to Swiftly Deliver Strong Rules (Sept. 3, 2013), *available at* http://www.publishwhatyoupay.org/resources/investors-congress-call-sec-swiftly-deliver-strong-rules (quoting Jana Morgan, National Coordinator for Publish What You Pay US).

particularly in the U.S. EITI effort. The SEC must hold strong to the original intent of the bill, but it must come to an amenable solution with the extractive industry.[237]

A piecemeal approach to disclosure will not arm citizens with the information they need to hold their governments accountable.[238] World markets need to provide full disclosure of payments made by extraction companies to every country. It is within the United States' best interests to encourage the passage of provisions that may be implemented across the globe.[239] While the SEC is drafting new regulations, the United States should continue to encourage and support other countries to come to the table and pass similar disclosure requirements. This unified approach will counter the concerns for competitiveness held by mineral extraction companies during the promulgation of the original Rule.[240]

The proliferation of resource revenue information published to developing nations could not come at a better time, particularly in the wake of the Arab Spring.

B. *The Necessity of Disclosure in the Years Following the Arab Spring*

> *"EITI is the essence of democracy, having to show the numbers, having to consult with your people . . . it was*

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237. *See e.g.*, Letter from Patrick T. Mulva et al. to Mary Jo White, SEC Chair (Nov. 7, 2013), *available at* http://www.api.org/news-and-media/news/newsitems/2013/nov-2013/~/media/Files/News/2013/13-November/API-comment-letter-13q-rulemaking-11-7-13.pdf. Patrick T. Mulva, Chairman of the API General Finance Committee and Stephen Comstock, the API Director Tax & Accounting Policy, submitted a letter to the SEC, on behalf of the API, discussing a recent meeting between the API and SEC and outlining the API's suggestions for the new Rule. *Id.* The group noted that its "member companies are committed to a collaborative approach to this effort and are happy to dedicate staff resources to help make it happen." *Id.* at 10.

238. *See* Press Release, *supra* note 236 (arguing exceptions to disclosure in the EU Directive should not be permitted or else citizens of Resource Cursed nations will not receive the information they need).

239. *See* Soros, *supra* note 193 (writing before the passage of the Directive, that "[i]f the number of countries with these progressive laws went from one to twenty-eight, a new global standard of transparency would be achieved").

240. *See supra* notes 177–79 and accompanying text; *see also* Ross, *supra* note 8, at 6 ("[O]ther oil-consuming regions should follow the United States' lead and require all companies to disclose payments to foreign governments for access to natural resources.").

good [for East Timor], as a young nation to take on EITI ten years ago."

—ALFREDO PIRES, Minister of Petroleum and Mineral Resources, East Timor[241]

The Arab Spring took much of the world by surprise.[242] The Obama administration first urged support of President Mubarak during the early days of Egyptian revolts in Tahrir Square.[243] However, after a few short weeks, President Obama "hail[ed] the Egyptian revolution and . . . democratic aspirations of the Tahrir Square protestors as a manifestation of longstanding American principles and values."[244]

Whether the Arab Spring was beneficial to the United States has been debated.[245] As of the fall of 2013, the hope for democracy that the Arab Spring brought to the region has been muddied—"armed militias" occupy much of Libya, civil war plagues Syria, protests have been suppressed in Bahrain, Egypt continues to encounter political instability, and the Tunisian democracy is struggling, all in all creating much anxiety about the hope for change in the region.[246] But, it has been argued that the international community must recognize that the

241. Luke Balleny, *Has the EITI Global Transparency Drive Made a Difference?*, THOMPSON REUTERS FOUND. (May 26, 2013, 10:09 PM), http://www.trust.org/item/20130526220927-0eaiq/. Extractive mineral revenues make up seventy-five percent of the East Timor GDP. *Id.* East Timor gained independence in 2002. *Id.*

242. Nader Hashemi, *The Arab Spring, U.S. Foreign Policy, and the Question of Democracy in the Middle East*, 41 DENV. J. INT'L L. & POL'Y 31, 32 (2012).

243. *Id.* (citing *U.S. Urges Restraint in Egypt, Says Government Stable*, REUTERS (Jan. 25, 2012, 5:56 PM), http://www.reuters.com/article/2011/01/25/ozatp-egypt-protest-clinton-idAFJOE70O0KF20110125).

244. *Id.* (citing Barack Obama, President of the United States, Remarks by the President on Egypt (Feb. 11, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/02/11/remarks-president-egypt).

245. *See, e.g.*, *Weekend Edition Saturday: A Chill Settles on Arab Spring* (NPR radio broadcast Aug. 17, 2013), *available at* http://www.npr.org/templates/story/story.php?storyId=212872528.

246. *Id.*; Sheri Berman, *The Continuing Promise of the Arab Spring: Why Nostalgia for the Ancient Regime is Misguided*, FOREIGN AFF. (July 17, 2013), http://www.foreignaffairs.com/articles/139586/sheri-berman/the-continuing-promise-of-the-arab-spring; Bruce Stokes, *Is Democracy Dead in the Birthplace of the Arab Spring?*, FOREIGN POL'Y (Oct. 1, 2013), http://www.foreignpolicy.com/articles/2013/10/01/is_democracy_dead_in_the_birthplace_of_the_arab_spring?page=0,0).

transition to democracy in any nation has not come without resistance: "[a]ll of the advanced industrial democracies have troubles in their past that easily rival or surpass what countries such as Tunisia, Egypt, Libya, and even Syria are going through now, and it is sheer ignorance or prejudice to ignore such historical patterns."[247]

The Arab Spring has made the issue of disclosure particularly relevant. Prior to the 1970s, there were, on average, equal proportions of democratic versus non-democratic resource-rich and resource-poor states.[248] Until that time, being resource-rich did not necessarily result in being non-democratic.[249] In the twenty years following, "a wave of democracy swept across the globe, bringing freedom to countries in virtually every region—except the [resource]-rich countries of the Middle East, Africa, and the former Soviet Union."[250] Over the past thirty years, the "democracy gap" has "grown even wider."[251]

This is not to say that a resource-rich nation cannot develop a healthy democratic system.[252] But, in the recent events of the Arab Spring, "it [was] much easier to overthrow rulers in oil-poor countries, like Tunisia and Egypt, than rulers in [resource]-rich states, like Libya, Bahrain, Algeria, and Saudi Arabia."[253] By December 2011, government expenditures in resource-rich Gulf States increased by twenty percent, funding social and government programs that helped to stave off social unrest.[254]

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247. Berman, *supra* note 246.

248. ROSS, *supra* note 31, at 63.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* (noting the successful transitions Mexico and Nigeria made to democracy).

253. ROSS, *supra* note 31, at 63.

254. Elizabeth Dickinson, *Sire, How Much Would You Spend to Stop the Next Arab Spring?* NEW REPUBLIC (Sept. 1, 2013), http://www.newrepublic.com/article/114542/ silent-arab-springs; Asa Fitch & Liam Pleven, *Gulf Splurges on Home Improvement*, WALL ST. J., Apr. 27, 2012, at C1 ("Gulf states are embarking on their biggest spending spree on record as they lavish funds on domestic projects—from new housing and hospitals to mosque restoration and job creation—largely as a defensive response to the Arab Spring uprisings that toppled other Middle East governments last year.").

Due to the United States' heavy dependence on foreign mineral resources, the stability of resource-rich countries should be of primary importance to American foreign policy.[255] Oil wealth does not preclude a nation from transitioning to democracy—Indonesia, Mexico, and Nigeria, all nations with resource wealth, have all effectively installed democratic governments.[256] But these nations had far less petroleum than many nations in the Middle East, and all three countries made the political transition when oil prices had reached a thirty-year low.[257] To help the citizens of resource-rich nations achieve democracy in the current times, a global approach towards transparency is imperative.[258] However, "[t]ransparency can only lead to accountability if there is . . . public debate about how the country's resource wealth should be managed."[259] The disclosures must also be easily digestible by the public, lest the transparent data will go unread or misunderstood.[260]

As political scientist Michael L. Ross explains, oil production increases revenues without raising taxes, thereby allowing

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Spending included "popular domestic measures like government housing, debt relief, and welfare programs." Dickinson, *supra*. King Abdullah of Saudi Arabia announced in early 2011 plans to spend $130 billion on social programs in addition to committing to build more government subsidized housing and creating new jobs. *Id*. In September 2011, Qatar raised the wages of civil servants by a collective $2.75 billion equaling a 60–120% raise. *Id*. Early in 2011, Kuwait granted each citizen approximately $3,500 in food staples amounting to a total $5 billion. *Id*. In March 2012, the Kuwait government raised wages by twenty-five percent for seventy-five percent of the nation's working citizens. *Id*. In August 2011, Bahrain raised wages by fifteen percent for public sector employees. *Id*. The United Arab Emirates has pledged $1.55 billion to develop water and electricity infrastructure since 2011 and committed to paying approximately off $1.36 million in debt accrued by UAE citizens. *Id*. The Oman minimum wage was raised by forty-three percent in February 2011. *Id*. The Sultan of Oman agreed to spend $156 million to offer unemployed citizens small business loans. *Id*.

255. *See* Goldwyn, *supra* note 172 (noting disruptions in oil exportation countries in the region, due to political unrest, could overwhelm recent increases in U.S. production)

256. ROSS, *supra* note 31, at 63; Ross, *supra* note 8, at 4.

257. Ross, *supra* note 8, at 4–5.

258. *See id*. at 6 (arguing that "greater transparency" would "undermine" the efforts of authoritarian governments to hide corruption).

259. *What is EITI?*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://www.eiti.org/eiti (last visited Jan. 9, 2014).

260. *Id*.

governments to provide greater benefits than taxes alone would allow, all without running a budget deficit.[261] As a result, there is less impetus for "democratizing rebellions," especially when resource-rich autocracies can indefinitely provide these increased benefits.[262] However, if citizens are presented with accurate financial information, they will rebel if they feel that they are not receiving benefits that reflect the fruits of their nation's mineral wealth.[263] Indeed, there is generally a sense of ownership of mineral resources by citizens in resource-rich nations—a recognition that resource-rich citizens "have a right to benefit from their nation's mineral wealth."[264]

But again, this assumption relies on perfect information.[265] In reality, there is tremendous misinformation or a lack of information entirely.[266] In non-democratic countries, there is complete reliance on the media and the government to disclose how much revenue is received by the resource-rich state's leaders.[267] When citizens believe that their rulers have a high "spending-to-revenue ratio," they are more likely to keep their autocratic rulers in power.[268] But the autocratic rulers have an incentive to conceal revenues received from mineral resources for the purpose of "increas[ing] their government's *perceived* spending-to-revenue ratio."[269] Thus, there is a natural preponderance by resource-rich autocratic states to resist disclosure: "[g]reater transparency could spark democratic uprisings, if citizens start to notice that the ruler is squandering

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261. ROSS, *supra* note 31, at 69.

262. *Id.*

263. *Id.* at 70 ("In countries without oil, all of the government's revenues come from taxes—hence, its spending-to-revenue ratio is identical to its spending-to-taxation ratio. . . . But citizens in oil-producing countries know that their governments have another source of revenue, and they care about how it is spent. If they believe their government delivers too few services, given the size of its revenues, they will rebel.").

264. *Id.*

265. *Id.*

266. ROSS, *supra* note 31, at 70 ("Citizens know their governments receive *some* petroleum revenues; they do not know *how much*.").

267. *Id.*

268. *Id.* at 70–71.

269. *Id.* at 70.

the nation's petroleum wealth."[270]

Of the EITI compliant countries, only Iraq and Yemen are located in the Middle East North Africa (MENA) region.[271] The region, however, contains "60% of the world's oil reserves."[272] The Arab Spring was promulgated by the proliferation of information.[273] Social media played an important role during the Arab Spring, tracking the progress of events, spreading information, and encouraging discussion.[274] The disclosure of information gives citizens in these nations the opportunity to challenge their governments if they see injustice.[275]

Disclosure is just the first step in remedying corruption stemming from mismanagement of extractive mineral revenues. Nigeria adopted the EITI in 2004, one of the first Resource Cursed countries to do so.[276] Yet, while disclosure provisions have helped to identify and recover $2 billion of taxes owed to the Nigerian government, disclosure has not led to any tangible results in improving the lives of Nigerian citizens.[277] Some

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270. *Id.* at 71.

271. As of February 2014, there are twenty-five EITI compliant countries and twelve candidate countries. *EITI Countries*, *supra* note 95. Countries in the MENA region include Algeria, Bahrain, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Malta, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates, West Bank & Gaza, and Yemen. *Middle East and North Africa*, UNICEF, http://www.unicef.org/infobycountry/northafrica.html (last visited Jan. 9, 2014).

272. Robert Tollast, *Transparency and Oil: An Arab Pipe Dream?*, YOUR MIDDLE EAST (Apr. 29, 2013), http://www.yourmiddleeast.com/features/transparency-and-oil-an-arab-pipe-dream_11852.

273. *See* Johnny West, *Social Media Ignited the Arab Spring*, *in* THE ARAB SPRING 37, 40 (Margaret Haerens & Lynn M. Zott eds., 2013) (arguing that social media and the internet encouraged solidarity amongst oppressed citizens who overthrew non-democratic governments).

274. *Id.*; Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145, 153 (2012).

275. Tollast, *supra* note 272.

276. Luke Balleny, *What Impact Has the EITI Transparency Initiative Had on Nigeria?*, THOMPSON REUTERS FOUND. (May 26, 2013, 11:54 PM), http://www.trust.org/item/20130526235456-nderv.

277. *Id.* The chair of the Nigerian EITI National Stakeholders Working Group recently stated, "[it] is still too early to say we have achieved a lot in the transparency field because there is still a lot to do . . . If we have been able to bring about a transparency increase in the public domain, can we say that it actually has led to an

blame the fact that the Nigerian government has been unwilling to "tackle mismanagement and corruption."[278] But the effectiveness of disclosure in fundamentally changing the political stability of resource-rich nations remains to be seen. At the EITI Global Conference in May of 2013, speakers argued that while transparency is a fundamental piece of the puzzle, taken alone, it cannot reduce poverty and corruption.[279] Rather, "the mobilization of political will [is] 'more important than the EITI standard' for improving governance in resource-rich countries."[280]

Evidence that transparency initiatives have led to better governance and a reduction of corruption is anecdotal, at best.[281] However, there is evidence that countries operating under transparent standards have "better credit ratings" and subsequently "pay lower interest rates."[282] Further evidence may be slow to come, but now is the time, especially in the wake of new democracies around the globe, to encourage disclosures of revenues in an effort to spread democratization through the use of information as opposed to armed forces.

IV. CONCLUSION

Although its initial attempt at formulating the Rule was ultimately defeated in court, the SEC should not make changes to the Rule in a vacuum. The SEC must open a dialogue with the major players of the extractive industry to find a workable solution to maintain consistency while promoting compromise. Not only are international human rights impacted, but also the stability of energy markets in the United States.

The United States is leading by example in beginning the process towards becoming an EITI member state. This is important, as it will contribute to a more unified global participation, without which, disclosure would not be effective.

improvement in the lives of the people? . . . Personally, I would not say that that has happened." *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. STAFF OF COMM. ON FOREIGN REL., *supra* note 55, at 13.

282. *Id.*

The stakes are high in the battle to end the Resource Curse. Now is the time to finalize and encourage these requirements at home—while the citizens of undemocratic resource-rich nations are poised and ready to hold their governments accountable, in the wake of the Arab Spring.