TRANSPARENCY AND THE NATURAL RESOURCE CURSE: EXAMINING THE NEW EXTRATERRITORIAL INFORMATION FORCING RULES IN THE DODD-FRANK WALL STREET REFORM ACT OF 2010

Daniel M. Firger*

This Article analyzes the Energy Security Through Transparency Act (ESTTA), which was introduced in the U.S. Senate on September 23, 2009 and passed on July 15, 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The legislation will amend the Securities Exchange Act of 1934 to impose new disclosure and reporting obligations on securities issuers that engage in natural resource extraction projects in foreign countries. These requirements are of particular interest to development and anti-corruption advocates because they represent a novel strategy – based on extraterritorial information-forcing – to combat the "resource curse," which describes the paradoxical inverse relationship between natural resource abundance on the one hand and economic growth, good governance, and political stability on the other. Beginning with an introduction to the resource curse phenomenon, this Article discusses the ESTTA in light of its antecedents, notably the voluntary, multi-stakeholder Extractive Industries Transparency Initiative, Section 13 of the Securities Exchange Act of 1934, and the anti-bribery provisions of the Foreign Corrupt Practices Act. Informed by this background, the Article identifies two related types of limitations that, if left unaddressed over the long term, may prevent the statute from achieving all of its objectives. Written prior to final passage of the Dodd-Frank bill in the spring of 2010, the Article concludes with several proposals to improve the effectiveness of the ESTTA, as introduced. These suggestions remain relevant as the SEC works to implement the law and civil society groups begin to grapple with a new source of detailed information about the relationship between natural resource wealth, corruption, and development.

* J.D., 2010, New York University School of Law; M.P.A., 2010, Woodrow Wilson School of Public & International Affairs, Princeton University. I am deeply indebted to Professor Richard B. Stewart for his invaluable guidance and feedback, and to Professors Eyal Benvenisti and Kevin Davis for their insightful commentary. I am also grateful to Christen Broecker, Sambo Dul, Rosalia Gitau, Rachel Goodman, Amy Lehr, Clay Kaminsky, Sarah Pray, Nikki Reisch and Nina Robertson for their support and encouragement, and to Ashley Waddell, Lily Chen and the editors and staff of the Georgetown Journal of International Law. © 2010 Daniel M. Firger.

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I. INTRODUCTION

On Sunday, November 29, 2009, the citizens of Equatorial Guinea cast their ballots in the country's most recent presidential election. The next morning, President Teodoro Obiang Nguema Mbasogo claimed victory with 95.8 percent of the votes in what was widely condemned as a massively fraudulent election.[1] Obiang's triumph at the polls capped a year of good news for him and his family,[2] and another year of very bad news for his countrymen, who continue to suffer from a confounding assortment of hardships. Perhaps nowhere else in the world is the

1. Central Intelligence Agency (CIA), World Factbook: Equatorial Guinea, https://www.cia.gov/library/publications/the-world-factbook/geos/ek.html (last visited July 17, 2010) ("[2009] elections marred by widespread fraud."); Mark Tran, *President Nguema of Equatorial Guinea on Course to Extend Three-Decade Rule*, THE GUARDIAN (U.K.), Nov. 30, 2009, http://www.guardian.co.uk/world/2009/nov/30/president-equatorial-guinea-extends-rule.

2. For a discussion of recent events regarding Equatorial Guinea and the Obiang family, *see infra* notes 8–16 and accompanying text. President Obiang Nguema Mbasogo is variously referred to in the popular media as "Obiang" or "Nguema." *See* Tran, *supra* note 1. This Article follows the convention of referring to him as "Obiang."

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peculiar relationship between natural resource abundance, brazen corruption, and poverty as evident as it is in this small West African state.

Equatorial Guinea emerged from two centuries of Spanish colonial rule in 1968 with one of the highest per capita incomes in Africa.[3] But within a few short years of independence, the country's first president, Francisco Macías, abrogated the newly approved constitution, declared himself "President-for-Life," and initiated a reign of terror that led to the death or exile of up to one third of the population.[4] Over the ensuing decade, Macías presided over the near-total collapse of the Equatoguinean economy. He was arrested, tried, and executed following a 1979 military coup led by Obiang, who has ruled the country as his personal fiefdom ever since.[5]

A "destitute pariah state," Equatorial Guinea remained poor, isolated, and largely overlooked by the international community in the early years of the Obiang presidency.[6] All this changed when huge offshore oil deposits were discovered in the early 1990's. With practically no oil infrastructure at the start of the decade, annual government oil revenues increased more than a thousand-fold between 1993 and 2007, skyrocketing from $2.1 million to $3.9 billion.[7] During this period, hundreds of millions—if not billions—of these dollars were siphoned offshore, into the Obiang family's private bank accounts. A substantial portion of these funds were deposited directly by U.S. oil companies.[8] As a consequence, Equatorial Guinea now is a nation of

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3. As a Spanish colony, the country's economy was based significantly on large-scale cocoa cultivation and export. Bureau of African Affairs, U.S. Department of State, Background Note: Equatorial Guinea, http://www.state.gov/r/pa/ei/bgn/7221.htm#history (last visited July 17, 2010).

4. *Id.*

5. *See id.*

6. Global Witness, *The Secret Life of a Shopaholic: How an African Dictator's Playboy Son Went on a Multi-Million Dollar Shopping Spree in the U.S.* 4 (2009), *available at* http://www.globalwitness.org/media_library_get.php/1146/1262812456/gw_obiang_low.pdf (hereinafter *Shopaholic Report*).

7. Int'l Monetary Fund [IMF], *Equatorial Guinea*: *Statistical Appendix*, at 23, IMF Country Report No. 98/33 (April 1998); IMF, REPUBLIC OF EQUATORIAL GUINEA: 2008 ARTICLE IV CONSULTATION, IMF COUNTRY REPORT NO. 09/102 25 (2009), *available at* http://www.imf.org/external/pubs/ft/ scr/2009/cr09102.pdf. Over roughly the same period, oil production rose from 5,000 barrels per day to approximately 360,000 barrels per day. Today, the hydrocarbon sector represents over 95 per cent of government revenue and 99 per cent of export earnings. U.S. Energy Information Administration, Equatorial Guinea: Background, http://www.eia.doe.gov/emeu/cabs/Equatorial_Guinea/Background.html (last visited July 17, 2010).

8. *See* MINORITY STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SECURITY AND GOV'T AFFAIRS, 108TH CONG., REPORT ON MONEY LAUNDERING AND FOREIGN CORRUP-

grotesque contrasts. With the highest per capita GDP in Africa and the 30th highest in the world,[9] the vast majority of Equatoguineans still live in severe poverty,[10] subject to the whims of one of the world's most repressive dictators.[11] Meanwhile, in 2006, President Obiang's son Teodorin bought himself a $35 million California mansion while earning an official monthly salary of just $5,000 as Minister of Agriculture and Forestry.[12]

The Obiang regime's many abuses within Equatorial Guinea have not gone without notice; nor have the family's ostentatious spending habits abroad.[13] But despite U.S. congressional hearings on the sub-

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TION: ENFORCEMENT AND EFFECTIVENESS OF THE PATRIOT ACT: CASE STUDY INVOLVING RIGGS BANK 37-67, 98-112 (Comm. Print 2004), *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=52AD7316-F7CA-4031-BF49-75FB5B6BDF88 (hereinafter RIGGS BANK REPORT); Terence O'Hara & Kathleen Day, *Riggs Bank Hid Assets Of Pinochet, Report Says; Senate Probe Cites Former U.S. Examiner*, WASH. POST, July 15, 2004, at A1, *available at* http://www.washingtonpost.com/wp-dyn/articles/A50222-2004Jul14.html ("The subcommittee report also laid out new details . . . of transfers into the accounts controlled by the country's dictator of millions of dollars of deposits made by U.S. oil companies."). The report recommended, inter alia, that U.S. oil companies be required to publicly disclose their payments to foreign governments, as under the Extractive Industries Transparency Initiative (EITI). Justin Blum, *U.S. Oil Firms Entwined in Equatorial Guinea Deals: Riggs Probe Led to SEC Inquiry on Corruption, Profiteering*, WASH. POST, Sept. 7, 2004, at E01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A1101-2004Sep6.html. For a fuller discussion of the EITI, *see infra* Part III.B.

9. In 2009, Equatorial Guinea's per capita GDP stood at $36,600. By comparison, the statistics for Denmark, the United Kingdom and Germany were $36,000, $35,200 and $34,100 respectively. Central Intelligence Agency, World Factbook: Country Comparison: GDP, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html (last visited July 17, 2010).

10. According to the 2009 Human Poverty Index compiled by the United Nations Development Program as part of its annual Human Development Report, Equatorial Guinea ranks 98th among 135 countries for which the index was calculated. A newborn Equatoguinean has a 34.5% probability of dying before her 40th birthday. UNDP, HUMAN DEVELOPMENT REPORT: COUNTRY FACT SHEETS: EQUATORIAL GUINEA (2009), http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_GNQ.html (last visited July 17, 2010).

11. *See* PETER MAASS, CRUDE WORLD: THE VIOLENT TWILIGHT OF OIL 26-52 (2009) (detailing the decades-long history of atrocities carried out by President Obiang and his predecessors following independence and recounting the author's 2004 visit to the country, culminating in his forced expulsion). *See also* Press Release, Human Rights Watch, Equatorial Guinea: Human Rights Concerns Taint Election (Nov. 25, 2009), *available at* http://www.hrw.org/en/news/2009/11/24/equatorial-guinea-human-rights-concerns-taint-election (describing the government of Equatorial Guinea as "one of the most corrupt and abusive in the world.").

12. Press Release, Global Witness, African Minister buys Multi-Million Dollar California Mansion (Nov. 8. 2006), *available at* http://www.globalwitness.org/media_library_detail.php/468/en/african_minister_buys_multi_million_dollar_califor. *See also* Shopaholic Report, *supra* note 6.

13. *See* Shopaholic Report , *supra* note 6 (detailing President Obiang's son's extensive purchases in the U.S., including a $35 million Malibu, California mansion). The Obiang family's

ject,[14] the publication of highly critical human rights reports,[15] and the initiation of several lawsuits seeking to recover misappropriated sovereign wealth,[16] the international community seems to have little political influence over the kleptocratic regime, and even less legal lever-

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extensive ties and frequent visits to the U.S. have generated significant controversy. *See* Ian Urbina, *Taint of Corruption is No Barrier to U.S. Visa*, N.Y. TIMES, at A1 (Nov. 17, 2009) *available at* http://www.nytimes.com/2009/11/17/us/17visa.html. *See also* RIGGS BANK REPORT, *supra* note 8 at 37–67. Continued visits to the U.S. by members of the Obiang family are especially problematic in light of President Bush's 2004 proclamation suspending entry to the United States for foreign officials and their family members "whose misappropriation of public funds" has had adverse affects on U.S. businesses or national security interests. Proclamation No. 7750, 69 Fed. Reg. 2287 (Jan. 14, 2004).

14. *See, e.g.*, *Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the PATRIOT Act: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 108th Cong. 37-66 (2004) (detailing Washington-based Riggs Bank's extensive relationships with the Obiang family and finding that the bank "managed more than 60 accounts and certificates of deposit for Equatorial Guinea, its officials, and their family members, with little or no attention to the bank's anti-money laundering obligations, turned a blind eye to evidence suggesting the bank was handling the proceeds of foreign corruption, and allowed numerous suspicious transactions to take place without notifying law enforcement."); *Risk Management and Regulatory Failures at Riggs Bank and UBS: Lessons Learned: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Services*, 108th Cong. 26 (2004) (testimony of Daniel Stipano, Deputy Chief Counsel, Office of the Comptroller of the Currency).

15. *See, e.g.*, Shopaholic Report, *supra* note 6; HUMAN RIGHTS WATCH, WELL OILED: OIL AND HUMAN RIGHTS IN EQUATORIAL GUINEA (2009), *available at* http://www.hrw.org/en/reports/2009/07/09/well-oiled; GLOBAL WITNESS, UNDUE DILIGENCE: HOW BANKS DO BUSINESS WITH CORRUPT REGIMES (2009), *available at* http://www.globalwitness.org/media_library_get.php/843/en/undue_diligence_lowres.pdf.

16. In late 2008, a Spanish human rights organization filed a criminal complaint before Judge Baltasar Garzón alleging money laundering in connection with the transfer of Obiang-controlled deposits from Riggs Bank in the U.S. to Banco Santander, in Madrid. *See* Criminal Complaint ("*Querella Criminal*"), Asociación Pro Derechos Humanos de España v. Obiang, Oct. 22, 2008, *available at* http://www.soros.org/initiatives/justice/litigation/obiang family/criminal-en_20081022.pdf. In February 2009, Judge Garzón ordered the transfer of the case to the Pre-Trial Investigative Court ("*Juzgado de Instrucción*") in Las Palmas, Spain. Open Society Institute, APDHE v. Obiang Family, http://www.soros.org/initiatives/justice/litigation/obiangfamily (last visited July 17, 2010). In October of 2009, the Las Palmas judge ordered the local prosecutor to launch a formal investigation into funds allegedly controlled by the Obiang family. *See* José María Trujo, *Una juez investiga supuestas cuentas y propiedades de Obiang en España* [A Judge Investigates Alleged Obiang Accounts and Properties in Spain], EL PAÍS (SPAIN), Oct. 11, 2009.

In a related lawsuit also filed in late 2008, Transparence-International (France) filed a civil complaint requesting that the French Public Prosecutor's office initiate an investigation into questionable French real estate holdings by President Obiang, as well as by the presidents of Congo-Brazzaville and Gabon. *See Corruption Campaigners Sue Three African Leaders*, RADIO FRANCE INTERNATIONALE, Dec. 3, 2008, *available at* http://www.rfi.fr/actuen/articles/108/article_2318.asp. In May 2009, a French judge agreed to hear the case, but the Paris Court of Appeal reversed the lower court in October, dismissing the complaint because Transparence-International lacked

age.[17] Why do Equatorial Guinea's troubles seem to be so intractable? Indeed, why are so many resource-rich countries perpetually "cursed" by corruption, civil conflict, and crushing poverty? The answers are anything but obvious, and solutions are, sadly, less than forthcoming.

* * *

This Article examines a relatively new transparency-based regulatory response to the so-called "resource curse" afflicting countries like Equatorial Guinea, where natural resource abundance is inversely correlated with economic growth, good governance, and political stability.[18] Because the institutional failures and governance challenges confronting such states have proven resistant to traditional development strategies, those looking for a tool to help lift the curse have sought out new tactics. A favored approach emphasizes transparency, the idea being that disclosure of royalty payments and concession fees associated with natural resource extraction projects 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.[19] Unfortunately, the efficacy of this strategy

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standing to sue. *See French Court Stops African Corruption Case,* RADIO FRANCE INTERNATIONALE, Oct. 29, 2009, *available at* http://www.rfi.fr/actuen/articles/118/article_5668.asp.

Transnational lawsuits aimed at holding public leaders accountable for corruption, including misappropriation of natural resource wealth, are a relatively new and growing phenomenon. For a comprehensive overview of other pending cases, *see* JAMES L. GOLDSTON, PUBLIC INTEREST LITIGATION AND THE "RESOURCE CURSE" (Oct. 29, 2009), *available at* shttp://www.abanet.org/intlaw/fall09/materials/Goldston_James_Public%20Interest%20Litigation.pdf.

17. International law scholars—rarely at a loss for words when discussing transnational legal cooperation—are dumbfounded by the scale of the country's governance challenges. *See, e.g.*, Roger Alford, *Corruption in My Own Backyard*, OPINIOJURIS.ORG, Nov. 18, 2009, http://opiniojuris.org/2009/11/18/corruption-in-my-own-back-yard (last visited July 17, 2010) ("My question is what could be done to address Obiang's corruption? Go after corporate corruption with Equatorial Guinea under the FCPA and the OECD Convention? Pursue Obiang through litigation as the plaintiffs did with Ferdinand Marcos? Pressure the Obama Administration to take human rights seriously and revoke Obiang's visa? Other ideas?").

18. The phrase "resource curse" was first used by economist Richard M. Auty in his book, SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS (1993). A different, and somewhat more descriptive, phrase for these dynamics is the "paradox of plenty." *See* TERRY LYNN KARL, THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES (1997).

19. Although advocates of this transparency-based approach do not always explicitly reference corruption as a root cause of the resource curse, the use of natural resource revenue disclosure as a primary lever of change implicitly depends upon an understanding of the linkages between corruption, institutional failures, and oil and mineral wealth. For instance, in June 2010, the *New York Times* reported that the U.S. Department of Defense, working in conjunction with the U.S. Geological Survey, had discovered vast deposits of valuable oil and minerals in Afghanistan,

remains largely unproven,[20] and such a disclosure-based approach, taken alone, suffers from misaligned incentives and policing problems that make it less likely to achieve its objectives.

In discussing these challenges and proposing solutions, this Article focuses on the Energy Security Through Transparency Act (ESTTA), which was passed by Congress on July 15, 2010, as this Article went to print, as Section 1504 of the historic Dodd-Frank financial regulatory reform bill.[21] The ESTTA, which will require oil, gas and mining companies to disclose key financial data relating to their overseas operations, represents the culmination of years of advocacy by watchdog groups, and largely mirrors the Extractive Industries Transparency Initiative (EITI), a voluntary, multi-stakeholder disclosure scheme supported by governments, corporations, and non-profit organizations.[22] Unlike the EITI, the ESTTA makes its disclosure obligations mandatory by amending Section 13 of the Securities and Exchange Act

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worth an estimated $1 billion. James Risen, *U.S. Identifies Vast Mineral Riches in Afghanistan*, N.Y. TIMES, at A1 (June 14, 2010), *available at* http://www.nytimes.com/2010/06/14/world/asia/14minerals.html. Experts, including mining company executives, were quick to express grave concerns about corruption. *See* James Risen, *World's Mining Companies Covet Afghan Riches*, N.Y. TIMES, at A4 (June 18, 2010), *available at* http://www.nytimes.com/2010/06/18/world/asia/18mines.html ("Mining industry executives, as well as American officials, are also concerned about the corruption in the Afghan government, and are uncertain how to avoid turning the discovery of great mineral wealth into nothing more than a windfall for Kabul's oligarchs."). As this Article was submitted for publication, a vociferous debate was underway regarding the benefits and drawbacks of natural resource development in the context of weak state institutions. *See infra* Part II.B for a more in-depth discussion of these dynamics.

20. *See* Ölcer, *infra* note 112, and accompanying text.

21. Energy Security Through Transparency Act, S. 1700, 111th Cong. (2009) (hereinafter ESTTA). As this Article was being formatted for publication, the Senate on July 15, 2010 adopted a final conference report on the Dodd-Frank bill, H.R. 4173, 111th Cong. (2010), by a vote 60-39. *See* H.R. REP. NO. 111-517 (2010). For a record of the final vote, see http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00208 (last visited July 17, 2010). The ESTTA was included as part of the Dodd-Frank bill in substantially similar form to the bill as introduced in 2009. *See* H.R. 4173 (2010) § 1504 (to be codified at 15 U.S.C. § 78m(q)). President Obama was expected to sign the bill into law within days. Because this Article was completed well before the details of the Dodd-Frank bill became finalized, it necessarily refers to the ESTTA throughout as prospective legislation rather than binding law. Now that Congress has adopted its major provisions, it is my hope that this Article can provide critical perspective on the statute's strengths and limitations, inform the implementation process to be carried out by the SEC, and help strengthen advocacy by civil society groups who will no doubt make use over the coming months and years of a wealth of newly disclosed information related to overseas natural resource revenue payments by oil, gas and mining firms.

22. Extractive Industries Transparency Initiative, http://eiti.org/ (last visited July 17, 2010) [hereinafter EITI].

of 1934 (Exchange Act).[23] Both initiatives, however, share the same primary objective; by shining a spotlight on the shadowy financial arrangements that facilitate corruption, they aim to lift the resource curse, or at least to mitigate its worst effects.

These are lofty and laudable goals, but transparency can go only part of the way toward achieving them. This is because extraterritorial information-forcing measures like the ESTTA do not target corruption directly, as does the Foreign Corrupt Practices Act (FCPA),[24] but rather depend upon stakeholders with the incentives and capacity to utilize disclosed information to police and guard against official misconduct. However, unlike the traditional reporting requirements imposed by the Exchange Act—the effectiveness of which stems from the close fit between investors' motivations and the fiduciary duties owed by firms to shareholders—the ESTTA largely fails to align its objectives with stakeholder incentives. Without actors who are willing or able to use disclosed information to hold corrupt leaders accountable,[25] and with only attenuated impacts on foreign governance outcomes, the ESTTA as currently structured will neither curb corruption nor lift the resource curse.

The rest of this Article explains why, describing the limitations of the ESTTA while also demonstrating how traditional anti-corruption initiatives such as the FCPA are inapposite to the resource curse. The Article argues that the ESTTA's present incarnation as an amendment to the Exchange Act raises problems related to enforced extraterritorial transparency. It proposes instead a freestanding disclosure and reporting regime for overseas natural resource payments, decoupled from the federal securities laws but linked to a more comprehensive strategy.

23. Securities Exchange Act of 1934, 48 Stat. 881 (1934) (codified at 15 U.S.C. §§ 78a–78kk) [hereinafter Exchange Act]. Section 13 lays out the basic requirements for periodic reporting by securities issuers, 15 U.S.C. § 78m, which would be amended by the ESTTA.

24. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd(1)-(3), 78ff (2000)) (hereinafter FCPA). It should be noted at the outset that the FCPA is designed to address bribe-*making*, not bribe-*taking*—a significant limitation that renders the statute relatively ineffective in countering the purely "foreign" corruption (without a transnational component) at the root of the resource curse. *See generally* Tor Krever, *Curbing Corruption? The Efficacy of the FCPA*, 33 N.C. J. INT'L L. & COM. REG. 83 (2007).

25. The ESTTA cannot rely upon corporate shareholders to make use of disclosed information, as most investors do not consider non-financial factors such as natural resource revenues in deciding to purchase or sell securities. Other stakeholders, such as NGO watchdogs, may have the incentives to act upon disclosed revenue data, but reliance upon such actors is problematic. See *infra* Part V.A for commentary on these and other incentives problems.

Such a strategy will better address the complex governance and development challenges associated with natural resource abundance.

Part II lays a foundation for the subsequent analysis by briefly describing the resource curse phenomenon and its relationship to corruption. Part III analyzes the strengths and weaknesses of the ESTTA, comparing its approach to the voluntary EITI framework, the traditional disclosure and reporting rules of the Exchange Act, and the FCPA's more aggressive criminalization of foreign bribery. Part IV identifies two related limitations of the ESTTA's extraterritorial information-forcing approach—misaligned incentives and policing problems—that make transparency, taken alone, an unlikely solution to the resource curse. While misaligned incentives will tend to inhere in any transparency-based response to the resource curse, the policing problems identified in Part IV are largely the result of the ESTTA's current design, and can therefore be fixed. Part V concludes the Article by identifying several potential improvements to the ESTTA based on provisions of the Congo Conflict Minerals Act, which was also introduced in the U.S. Senate in 2009 (and also passed as part of the Dodd-Frank bill in July 2010),[26] and on a controversial Canadian bill introduced in the Canadian House of Commons around the same time.[27]

II. The Resource Curse

One of the most troubling and intractable problems facing development experts has come to be known as the resource curse, so named

26. Congo Conflict Minerals Act of 2009, S. 891, 111th Cong. (2009) (hereinafter CCMA). Like the ESTTA, the CCMA was included as part of the final Dodd-Frank Wall Street reform bill passed by Congress on July 15, 2010. *See* H.R. 4173 (2010) § 1502 (to be codified at 15 U.S.C. § 78m(p)). While it was too late to substantially modify this Article before going to print, SEC implementation of the parallel and complementary provisions of the CCMA and ESTTA may provide significant opportunities to respond to the some of the critiques and suggestions made below in Part V. Notwithstanding the very different posture of this Article now that these two bills are poised to become law, it is my hope that the analysis presented herein can contribute to a better understanding of how Sections 1502 and 1504 of the Dodd-Frank Act may—or may not—help to lift the resource curse once and for all.

27. Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas Corporations in Developing Countries (2009) [hereinafter Bill C-300]. *See* Press Release, The Honorable John McKay, MP, Corporate Accountability the Focus of John McKay's New Private Members' Bill C-300 (Feb. 12, 2009), *available at* http://www.johnmckaymp.on.ca/newsshow.asp?int_id=80484. The full text of the bill is available at http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3658424&Language=e&Mode=1 (last visited July 17, 2010).

because it describes the persistent inverse relationship between natural resource abundance on the one hand and economic growth, good governance, and political stability on the other. This Part describes recent economic and political science scholarship on the phenomenon, and explains how the curse is linked to corruption and institutional failures across a broad range of less developed countries.

A. *Understanding the Phenomenon*

The seminal paper in the resource curse literature is a 1995 study by economists Jeffrey Sachs and Andrew Warner,[28] which found that economies with a high ratio of natural resource exports to GDP in 1971 had lower growth rates during the period from 1971–1989 than did other comparable economies.[29] This negative relationship between natural resource wealth and development persisted even when controlling for variables typically viewed as important for growth, such as initial per capita income, foreign investment rates, and trade policy.[30] Subsequent studies have largely confirmed these findings.[31]

In recent years, researchers have found evidence that resource-rich states not only develop more slowly than others,[32] but also tend to be less democratic,[33] more corrupt,[34] and more likely to experience civil

28. Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth*, NAT'L BUREAU OF ECON. RESEARCH, WORKING PAPER NO. 5398 (1995), *available at* http://www.nber.org/papers/w5398.

29. *Id.* at 6–7.

30. *Id.* at 21–22.

31. *See, e.g.*, Jeffrey D. Sachs and Andrew M. Warner, *The Curse of Natural Resources*, 45 EUR. ECON. REV. 827 (2001); Angus Deaton, *Commodity Prices and Growth in Africa*, J. ECON. PERSP., Summer 1999, at 23. For an excellent overview of the resource curse literature from the perspectives of both international economics and political science, see generally Paul Collier, *Laws and Codes for the Resource Curse*, 11 YALE HUM. RTS. & DEV. L.J. 9 (2008).

32. Sachs & Warner, *supra* note 28, at 21.

33. *See* Bruce Bueno de Mesquita & Alastair Smith, *Political Survival and Endogenous Institutional Change*, 42 COMP. POL. STUDS. 167, 167 (2009) ("Empirical tests show that governments with access to revenue sources that require few labor inputs by the citizens, such as natural resource rents, . . . reduce the provision of public goods and increase the odds of increased authoritarianism in the face of revolutionary pressures. In contrast, without these sources of unearned revenues, governments respond to revolutionary pressures by increasing the provision of public goods and democratizing."). *But see* THAD DUNNING, CRUDE DEMOCRACY: NATURAL RESOURCE WEALTH AND POLITICAL REGIMES 3 (2008) (arguing that, although natural resource wealth has been shown to promote authoritarianism, "there are also mechanisms through which resource wealth can promote *democracy*").

34. *See* Carlos Leite & Jens Weidmann, *Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth*, INT'L MONETARY FUND, WORKING PAPER NO. WP/99/85 (1999), *available*

conflict.[35] Each of these phenomena presents its own set of challenges. Each also exacerbates the problems already associated with resource extraction more generally, including environmental harms and human rights abuse.[36] For obvious reasons, then, the resource curse has captured the attention of a wide variety of development professionals, human rights activists, environmentalists, national security experts, and international lawyers. Politicians have also begun to take note of the phenomenon; the ESTTA is just one example of a growing number of legislative initiatives aimed at lifting the resource curse or ameliorating its most harmful effects.[37]

Scholars have proposed a range of theories to explain the paradox. Economists, following Sachs and Warner, first postulated that the resource curse arises because of macroeconomic dynamics such as commodity price volatility and the so-called "Dutch Disease." The commodity price mechanism is relatively straightforward: over-reliance upon a single export commodity can expose an already fragile developing economy to devastating macroeconomic shocks when world prices shift drastically, as they did between 2006 and 2009.[38] The Dutch

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at http://ssrn.com/abstract=259928. *See also* Xavier Sala-i-Martin & Arvind Subramanian, *Addressing the Natural Resource Curse: An Illustration from Nigeria*, NAT'L BUREAU OF ECON. RESEARCH, WORKING PAPER NO. 9804 (2003), *available at* http://www.nber.org/papers/w9804.

35. *See* Macartan Humphreys, *Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms*, 49 J. CONFLICT RESOL. 508, 510-13 (2005). *See also* Paivi Lujala, *Deadly Combat Over Natural Resources: Gems, Petroleum, Drugs, and the Severity of Armed Civil Conflict*, 53 J. CONFLICT RESOL. 50 (2009); James D. Fearon, *Primary Commodities Exports and Civil War*, 49 J. CONFLICT RESOL. 483 (2005); Michael L. Ross, *How Does Natural Resource Wealth Influence Civil War?: Evidence from Thirteen Cases*, 58 INT'L ORG. 35 (2004); NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ACTIONS (Ian Bannon & Paul Collier, eds., 2003).

36. *See* Jedrzej George Frynas, *The False Development Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies*, 81 INT'L AFF. 581, 596 (2005).

37. The ESTTA was introduced following debate in the 110th Congress on a similar initiative, the Extractive Industries Transparency and Disclosure Act. *See infra* note 71 and accompanying text. In Canada, Bill C-300, which was also introduced in 2009, addresses the human rights and environmental impacts of multinational oil, gas and mining firms' overseas operations. *See* Bill C-300, *supra* note 27. Other countries that have introduced legislation targeting aspects of the resource curse include Australia, the United Kingdom, France, Sweden, and the Netherlands. *See* Christen Broecker, *"Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability*, 41 N.Y.U. J. INT'L L. & POL. 159, 202-13 (2008) (discussing a variety of legislative proposals to regulate the overseas activities of multinational resource extraction corporations).

38. *See* Lawrence Edwards & Robert Z. Lawrence, *South African Trade Policy Matters: Trade Performance and Trade Policy*, NAT'L BUREAU OF ECON. RESEARCH, WORKING PAPER NO. W12760 (2006), *available at* http://www.nber.org/papers/w12760 (discussing the harmful effects of South Africa's over-reliance on primary commodity exports during the 1980s as compared to its more diversified economy in the 1990s and beyond); *see also* Matthew Genasci & Sarah Pray, *Extracting*

Disease mechanism is less obvious. It describes a particularly pernicious dynamic first observed in the Netherlands following the discovery of new offshore natural gas deposits in the 1960's.[39] As occurred in the Dutch case, a new export sector boom can result in large foreign capital inflows, which lead both to sharp currency appreciation and to the over-allocation of resources away from other important sectors to "feed" the boom, thus hampering long-term economic growth through underinvestment.[40]

More recently, scholars have turned away from purely economic explanations of the resource curse.[41] If the problem were simply a matter of economics, then "cursed" states should have been able to achieve positive results by implementing the simple fiscal policy tools recommended by economists, including monetary sterilization and temporary subsidies to manufacturing sectors.[42] Where put into effect, however, these measures have proven largely unsuccessful in lifting the curse. Current research thus emphasizes the negative impacts of natural resource wealth not just on a country's economic position, but also on state institutions and mechanisms of accountability between government actors and citizens.[43] At first glance, then, the resource curse appears to be an economic problem. But like so many other development challenges, it is an economic problem caused by the complex interaction of multiple political and institutional failures. Foremost

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Accountability: The Implications of the Resource Curse for CSR Theory & Practice, 11 YALE HUM. RTS. & DEV. L.J. 37, 43 (2008).

39. *See* W.M. Corden, *Booming Sector and Dutch Disease Economics: Survey and Consolidation*, 36 OXFORD ECON. PAPERS 359 (1984). According to Corden, the term "The Dutch Disease" first appeared as the title of an article in the Nov. 26, 1977 issue of *The Economist* magazine. *Id.* at 359 n.1.

40. *See* Christine Ebrahim-zadeh, *Dutch Disease: Too Much Wealth Managed Unwisely*, 40 FIN. & DEV. 1 (2003), *available at* http://www.imf.org/external/pubs/ft/fandd/2003/03/ebra.htm; ALAN H. GELB ET AL., OIL WINDFALLS: BLESSING OR CURSE? (1988). The seminal paper outlining the basic economic model for the Dutch Disease phenomenon is W.M. Corden & J. Peter Neary, *Booming Sector and De-Industrialisation in a Small Open Economy*, 92 ECON. J. 825 (1982). Crucially, although Dutch Disease is typically associated with new discoveries of natural resources, the macroeconomic dynamics of which it is a symptom can occur whenever an economy receives large inflows of foreign currency, including "a sharp surge in natural resource prices, foreign assistance, and foreign direct investment." Ebrahim-zadeh, 40 FIN. & DEV. 1, 1.

41. *See, e.g.*, Sala-i-Martin & Subramanian, *supra* note 34.

42. *See* Michael Ross, *The Political Economy of the Resource Curse*, 51 WORLD. POL. 297, 305-306 (1999).

43. *Id. See also* Alastair Smith, *The Perils of Unearned Income*, 70 J. POL. 780, 790 (2008) ("The consequences of discovering a readily exploitable natural resources [sic], or other forms of free resources, depend upon the institutional context.").

among these is corruption.

B. *The Curse and Corruption*

Corruption is an easy concept to define but a difficult phenomenon to describe in real-world terms. A straightforward definition holds that corruption is the use of public office or public resources for private gain.[44] Experts distinguish "petty" corruption—the taking of bribes by low-level officials such as traffic police—from "grand" corruption, which most commonly refers to the misappropriation of government revenues by a country's rulers.[45] Petty corruption is itself hugely problematic,[46] but grand corruption is most clearly tied to the resource curse,[47] and will thus be the focus of this Article.[48]

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44. *See* Cheryl Gray & Daniel Kaufmann, *Corruption and Development*, FIN. & DEV., Mar. 1998, at 7, *available at* http://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/gray.pdf (defining corruption as "the use of public office for private gain"); GREGORY MOCK, WORLD RESOURCES INST., UNDUE INFLUENCE: CORRUPTION AND NATURAL RESOURCES 1 (2003), *available at* http://earthtrends.wri.org/pdf_library/feature/gov_fea_corruption.pdf (expanding the definition of corruption to include the use of "public resources," as well as public office, for private gain).

45. *See* SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 29-38 (1999).

46. The most authoritative source of data on global public perceptions of corruption is Transparency International's Global Corruption Barometer. In its most recent survey of over 73,000 individuals in 69 countries, the organization found that approximately "10 per cent of the general public reported paying a bribe in the previous year, and the most vulnerable appear to be hardest hit." TRANSPARENCY INT'L, GLOBAL CORRUPTION BAROMETER 21 (2009), http://www.transparency.org/policy_research/surveys_indices/gcb/2009. The U4 Anti-Corruption Resource Centre, which serves as an information clearinghouse for the development agencies of six European countries plus Australia and Canada, explains that petty corruption "is often just as damaging to the poor [as is grand corruption], and more immediate and tangible" in their daily lives. U4 Anti-Corruption Resource Centre, U4 Helpdesk Query: Petty corruption and shadow economies, http://www.u4.no/helpdesk/helpdesk/queries/query72.cfm#1 (last visited July 17, 2010).

47. *See* TRANSPARENCY INT'L, CORRUPTION AND RENEWABLE NATURAL RESOURCES (2008), *available at* http://www.transparency.org/content/download/21104/306127; Genasci & Pray, *supra* note 38, at 45.

48. This is not to say that petty corruption is not often tied to natural resource extraction as well. Indeed, the relationship between petty corruption and natural resource mismanagement is a widespread problem, even within the United States. A September 2008 report by the inspector general of the U.S. Department of the Interior revealed that more than a dozen agency employees, including the director of the oil royalty program, improperly received gifts from oil companies seeking permits to drill on public lands. *See* Derek Kravitz & Mary Pat Flaherty, *Report Says Oil Agency Ran Amok*, WASH. POST, Sept. 11, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/09/10/AR2008091001829.html. Although some advocacy groups have begun to use the term "resource curse" to characterize aspects of the domestic U.S. energy industry, *see* Rob Perks, *Appalachia's Own 'Resource Curse'?*, HUFFINGTON POST, Jul. 2, 2009,

Transparency International, a leading anti-corruption watchdog,[49] identifies various consequences of grand corruption, including poverty, weak democratic and rule of law norms, international trade distortions, human rights violations, and the unsustainable exploitation of natural resources.[50] Scholars have identified a broad range of contributing factors,[51] and, although there is some disagreement about their relative importance,[52] most experts who have examined the data concur in one important respect: natural resource mismanagement is both a leading cause and a prime consequence of corruption.[53] The question is, "Why?"

Empirical research suggests that grand corruption tends to be correlated with so-called "point source" natural resources such as oil, minerals, and gems, which are drawn from a narrow geographic area.[54] These

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http://www.huffingtonpost.com/rob-perks/appalachias-own-resource_b_224912.html (last visited July 17, 2010) (Natural Resources Defense Council staff member analogizing between the Niger River Delta in Nigeria and Appalachian coal country), for the sake of clarity this Article uses the term exclusively in connection with foreign countries.

49. Transparency Int'l, About Us, http://www.transparency.org/about_us (last visited July 17, 2010).

50. *Id.*

51. Factors that have been correlated with a lower prevalence of corruption include a highly developed economy, a long-established liberal democratic political system, a free and widely read press, a relatively high proportion of women in government, and a history of openness to trade. *See* Daniel Treisman, *What Have We Learned About the Causes of Corruption from Ten Years of Cross-National Empirical Research?*, 10 ANNU. REV. POLIT. SCI. 211 (2007). Factors that have been correlated with higher rates of corruption include overly intrusive business regulations, unpredictable inflation, and dependence on fuel exports. *Id.*

52. *Compare* Susan Rose-Ackerman & Jacqueline Coolidge, *High-Level Rent-Seeking and Corruption in African Regimes: Theory and Cases* (World Bank, Policy Research Working Paper No. 1780, 2005) (suggesting that leaders are economically motivated to engage in corrupt behavior because political power is often the main source of economic benefit in less developed countries), *with* Hung-En Sung, *Democracy and Political Corruption: A Cross-National Comparison*, 41 CRIME, L. & SOC. CHANGE 179 (2004) (arguing that it is the presence or absence of democratic institutions, not the economic motivations of leaders, which best predicts the prevalence of corruption in a society).

53. *See* PAUL COLLIER & ANTHONY J. VENABLES, EUROPEAN REPORT ON DEVELOPMENT: NATURAL RESOURCES AND STATE FRAGILITY (2009), *available at* http://erd.eui.eu/BackgroundPapers/ERD-Background_Paper-Collier_Venables.pdf; Nicholas Shaxson, *Oil, Corruption, and the Resource Curse*, 83: 6 INT'L AFF. 1123 (2007); Simon Dietz, Eric Neumayer & Indra De Soysa, *Corruption, the Resource Curse, and Genuine Saving*, 12 ENV'T. & DEV. ECON. 33, 38 (2007). *See also* TRANSPARENCY INT'L, *supra* note 47.

54. *See* Jonathan Isham, Michael Woolcock, Lant Pritchett & Gwen Busby, *The Varieties of Resource Experience: Natural Resource Export Structures and the Political Economy of Economic Growth*, 19 WORLD BANK ECON. REV. 141 (2005) (presenting data to demonstrate that countries dependent on point source natural resource exports do relatively poorly across a range of institutional governance indicators as compared with countries dependent on more diffuse natural resources such as

resources present opportunities for corruption because they are extracted at sites that are more readily controlled by government actors,[55] they typically involve capital intensive processing facilities that require government participation or permission,[56] and they are usually subject to sovereign control rather than private ownership.[57] In short, where a ruling family or a small cadre of political elites controls state institutions, revenues from point source natural resource exports can be misappropriated more easily for private gain.[58]

It is also useful to think about the wealth generated by point source natural resources, in economic terms, as a category of windfall gains.[59] Windfalls, by definition, generate rents and, thus, rent-seeking behavior such as corruption.[60] Political scientist Alastair Smith uses a game

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timber and agricultural products). *See also* Leite & Weidmann, *supra* note 34, at 27–29 (discussing the different effects on corruption of point source and non-point source natural resources).

55. *See* KARL, *supra* note 18, at 60–61 ("[L]ocal rulers did not expend the same efforts at building states in mining [and, later, oil-rich] countries as they did in agricultural exporters. Intent on extracting rents from highly mineralized enclaves rather than from agricultural areas spread throughout the country, [leaders] needed merely to control specific mining and export sites . . . . [n]or were they forced to collect taxes beyond the export sector.").

56. *See generally* Stephen Bond & Adeel Malik, *Natural Resources, Export Structure, and Investment*, 61 OXFORD ECON. PAPERS 675 (2009) (presenting empirical evidence from 78 developing countries showing that increased oil and gas exports tend to increase public investment and suggesting reasons why this might be the case).

57. *See* Pauline Jones Luong & Erika Weinthal, *Rethinking the Resource Curse: Ownership Structure, Institutional Capacity, and Domestic Constraints*, 9 ANN. REV. POL. SCI. 241 (2006) (arguing that privatization of natural resources can ameliorate the resource curse by distributing proceeds from their export more widely).

58. *See* Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz, *Introduction* to ESCAPING THE RESOURCE CURSE 10 (Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz eds., 2007).

59. The concept of windfall gains can be illustrated in a simple before-and-after example, in which country X discovers a previously unknown deposit of oil, gold, or other commercially valuable commodity. The revenue generated by this discovery represents a windfall in the sense that it is income derived from an unforeseen event over which the country had no control. Even if an active search for mineral resources had been underway for some time, the discovery is a windfall because the national economy had not been planned, *ex ante*, around the existence of the resources. For a fuller discussion of the economic theory of windfall gains, see GELB, *supra* note 40, at 14–29.

60. In standard economic theory, "rent" is defined as the receipt of payment for a resource less the opportunity cost of that resource. In other words, it is the portion of the payment a resource owner receives in excess of the amount that the resource could command in any alternative use. *See* James M. Buchanan, *Rent Seeking and Profit Seeking*, *in* 40 YEARS OF RESEARCH ON RENT SEEKING 55 (Roger D. Congleton, Arye L. Hillman & Kai A. Konrad, eds., 2008). The term "rent seeking" was coined by economist Anne Krueger in a seminal 1974 paper that built upon the earlier work of Gordon Tullock and James Buchanan. The concept refers to the extraction of uncompensated value from others and is distinguishable from "profit seeking" in that those who

theoretical approach to explore the potential consequences of these dynamics, pointing out how natural resource rents can help leaders maintain power in the face of political opposition or even revolutionary pressure for change.[61] If the leaders of oil- and mineral-rich states can control natural resource rents, they can more easily circumvent the accountability mechanisms that would otherwise be necessary where budgets depend upon popular taxation.[62] A government's reliance upon tax revenue gives citizens leverage over political leaders and increases their stake in debates over government policy.[63] By decoupling the viability of a state's institutions from a government's accountability to its citizenry, natural resource abundance can generate—and worsen—political and institutional failures.[64] The result is the vicious

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seek rents do not contribute to productivity or otherwise add to the stock of wealth. Anne Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974).

Numerous scholars have explored the ways in which natural resource abundance generates rent-seeking behavior by political elites. *See* Bueno de Mesquita & Smith, *supra* note 33, at 172; Carl-Johan Dalgaard & Ola Olsson, *Windfall Gains, Political Economy and Economic Development*, 17 J. AFR. ECON. 72 (2008) (proposing a theoretical economic framework to analyze how both natural resources and foreign aid operate as windfall gains that can negatively affect total output in society through rent seeking activities); D. MICHAEL SHAFER, WINNERS AND LOSERS: HOW SECTORS SHAPE THE DEVELOPMENT PROSPECTS OF STATES 231-32 (1994) (noting that extractive sectors in resource rich states are dominated by a small number of firms, have high barriers to entry, and high levels of asset specificity, all of which encourage rent seeking by firms and a tendency by governments to offer high levels of protection to firms).

61. Smith, *supra* note 43, at 792. Smith's work builds upon the "selectorate theory" of political competition developed by Bueno de Mesquita and others. This theory assumes that political leaders are self-interested actors who implement policies to ensure their survival in public office and explains how existing institutional arrangements can determine which policies leaders will choose to enact in response to political threats. For a general introduction to the theory, *see* Bruce Bueno de Mesquita and George Downs, *Development and Democracy*, FOREIGN AFF., Sept.–Oct. 2005, at 77. Smith points out that "unearned income" from sources *other than* natural resource rents—including, notably, foreign aid payments—may yield similarly pernicious political effects. *See* Smith, *supra* note 43 at 787. A discussion of the similarities and differences between these sources of income—and their effects on political institutions—is beyond the scope of this Article.

62. KARL, *supra* note 18, at 60–61. *See also* Thirteenth Annual Anti-Corruption Conference, Plenary Report: Corruption in Natural Resources and Energy Markets (Oct. 31, 2008), http://www.13iacc.org/files/tion_in_Natural_Resources_and_Energy_Markets.pdf (last visited July 17, 2010) ("Revenue flows from natural resource extraction provide a government with a huge amount of monies that are independent of the taxes that citizens pay. When the normal channels of accountability are missing between a government and the governed, opportunities are created for patronage and self-enrichment.").

63. *See* ORG. FOR ECON. COOPERATION & DEV., DEV. ASSISTANCE, COMM., GOVERNANCE, TAXATION AND ACCOUNTABILITY: ISSUES AND PRACTICE 9 (2008), *available at* http://www.oecd.org/dataoecd/52/35/40210055.pdf.

64. *See* Genasci & Pray, *supra* note 38, at 44–45.

cycle known as the resource curse.

At the extreme, the negative interaction between the resource curse and corruption may render all domestic political avenues short of armed insurrection meaningless in the push for reform.[65] Even where corruption is not so severe as to obviate the possibility of genuine participation in the political process, domestic actors seeking to overcome institutional failures may still face daunting challenges, including lesser forms of corruption, state capture, and undue influence.[66] Where corruption is endemic, or where elites control the state apparatus, purely domestic responses to the resource curse will necessarily fall short. Thus, any serious effort to lift the curse must include measures that are transnational in scope. The next Part describes one of the most promising current efforts: the Energy Security Through Transparency Act of 2009.

III. Transparency as an Anti-Corruption Tool

In resource-rich countries like Equatorial Guinea, corrupt political elites often rely upon natural resource rents to maintain their power, leaving citizens with very little leverage to demand improvements in governance.[67] This is because the accountability deficit at the heart of the resource curse is exacerbated by the lack of information available to citizens about the actions of their leaders.[68] In particular, opacity surrounding concession agreements, royalties, and other financial arrangements between governments and natural resource extraction companies enables high officials to plunder their nations' sovereign wealth with impunity.[69] This Part examines the use of transparency-

65. *See* Smith, *supra* note 43, and accompanying text.

66. *See* Joel S. Hellman, Geraint Jones & Daniel Kaufmann, *Seize the State, Seize the Day: State Capture, Corruption and Influence in Transition*, at 2 (World Bank, Policy Research Working Paper No. 2444, 2000), *available at* http://ssrn.com/abstract=240555 (distinguishing between administrative corruption, state capture, and political influence by elites).

67. *See supra* notes 61-66 and accompanying text.

68. *See, e.g.*, Transparency Int'l, Using the Right to Information as an Anti-Corruption Tool 5 (2006), http://www.transparency.org/content/download/9633/66877/file/TI2006_europe_access_information.pdf.

69. The amounts in question are truly staggering: according to the U.S. Senate Permanent Subcommittee on Investigations, the ruling Obiang family of Equatorial Guinea controlled American bank accounts containing over $700 million in allegedly misappropriated funds. *See* Riggs Bank Report, *supra* note 8, at 38; Similarly, according to anti-corruption NGO Global Witness, President Nazarbayev of Kazakhstan controls a Swiss account containing over $1 billion. Global Witness, Time for Transparency: Coming Clean on Oil, Mining, and Gas Revenues 7-17 (2004), *available at* http://www.globalwitness.org/media_library_detail.php/115/en/time_for

based transnational regulation to curb corruption under the Energy Security Through Transparency Act of 2009. It then situates the bill within the context of its major antecedents: the voluntary, multi-stakeholder EITI, the mandatory disclosure and reporting requirements of Section 13 of the Exchange Act, and the aggressive anti-bribery regulations of the FCPA.

A. *The Energy Security Through Transparency Act of 2009*

Senator Richard Lugar (R-IN) introduced the Energy Security Through Transparency Act (ESTTA) on September 23, 2009,[70] capping off several years of heightened congressional attention to the problems posed by the resource curse.[71] Section 6 of the ESTTA

_transparency; In Angola, "more than four billion dollars in state oil revenue disappeared from [ ] government coffers from 1997–2002, roughly equal to the entire sum the government spent on all social programs in the same period." Press Release, Human Rights Watch, Angola: Account for Missing Oil Revenues (Jan. 11, 2004), *available at* http://www.hrw.org/en/news/2004/01/11/angola-account-missing-oil-revenues (last visited July 17, 2010). At the time of his death in exile in 1997, President Mobutu Sese Seko of Zaire (now the Democratic Republic of Congo) had "amassed a personal fortune estimated to be as much as $5 billion, with homes in Switzerland and France." *Mobutu Dies in Exile in Morocco: Ruled Zaire with Iron Grip for 3 Decades*, CNN.COM, Sept. 7, 1997, http://www.cnn.com/WORLD/9709/07/mobutu.wrap (last visited July 17, 2010).

70. ESTTA, *supra* note 21. The bill's five original co-sponsors were Democratic Senators Cardin, Feingold, Schumer and Whitehouse, and Republican Roger Wicker. *See* Press Release, U.S. Senator Richard Lugar, Senators Introduce Energy Payment Transparency Bill (Sept. 23, 2009), *available at* http://lugar.senate.gov/press/record.cfm?id=318169. It should be noted here that this Article discusses the provisions of the ESTTA as that legislation existed prior to passage of the Dodd-Frank bill in July of 2010. Section 1504 of the Dodd-Frank bill contains the core operative language of the earlier version of the ESTTA as discussed herein but streamlines and narrows the bill by cutting out several sections, including those discussed below relating to the "sense of Congress" on transparency and extractive industries. *See* H.R. 4173 § 1504 (to be codified at 15 U.S.C. § 78m(q)).

71. As the ranking member on the Senate Foreign Relations Committee, Senator Lugar developed a keen interest in the resource curse, holding several hearings on the subject. *See, e.g.*, *Resource Curse or Blessing?: Africa's Management of its Extractive Industries*, 110th Cong. (2008); *The Hidden Cost of Oil: Hearing Before the S. Comm. on Foreign Relations*, 109th Cong. (2006) (statement of Sen. Lugar), *available at* http://foreign.senate.gov/testimony/2006/LugarStatement060330.pdf. Lugar also presided over the publication of a 2008 Foreign Relations Committee report on the subject. THE PETROLEUM AND POVERTY PARADOX: ASSESSING U.S. AND INTERNATIONAL COMMUNITY EFFORTS TO FIGHT THE RESOURCE CURSE, S. PRT. NO. 110-49 (2008) (hereinafter PARADOX REPORT).

The ESTTA is substantially similar to the Extractive Industries Transparency Disclosure Act, S. 3389, 110th Cong. (2008) [hereinafter EITDA], which was introduced by Senator Charles Schumer (D-NY) in 2008 amid a flurry of Congressional action related to the EITI and the resource curse.

A discussion draft of the House version of the bill, which was circulated by Congressman

contains the bill's operative language, creating a new disclosure obligation for natural resource extraction companies operating abroad.[72]

Frank in early 2010 in advance of final negotiations on the Dodd-Frank Wall Street Reform and Consumer Protection Act, contained language broadly analogous to that of the ESTTA. One major difference, however, was the degree of detail the bill contained regarding the amendment of Section 13 of the Exchange Act. Exchange Act, *supra* note 23, 15 U.S.C. § 78m. In contrast to the ESTTA, which establishes general principles on disclosure and leaves the details to the SEC rulemaking process, Congressman Frank's discussion draft contained more specific statutory language. Discussion Draft: Extractive Industries Transparency Disclosure Act of 2010 (on file with Georgetown Journal of International Law). Because the Dodd-Frank bill, which integrated and modified these two versions of the legislation, was passed as this Article was going to print, the remainder of this Part will discuss the ESTTA only.

72. ESTTA, *supra* note 21, § 6. In addition to Section 6, the bill also includes congressional findings on transparency and natural resource projects, *id.* § 2, and congressional recommendations for U.S. foreign policy, *id.* §§ 3-4. This Article does not address Section 5 of the ESSTA, which requires the Secretary of the Interior to disclose payments "relating to the commercial development of oil, natural gas, and minerals on Federal land made by any person to the Federal Government." *Id.* § 5.

Notably, Sections 3 and 4 of the ESTTA urge the President to work with foreign governments to encourage similar disclosure requirements in their domestic laws and with international initiatives such as the EITI. *Id.* §§ 3(1)-(2), 4. By requiring this sort multilateral engagement up front, the bill seeks to replicate—and accelerate—the decades-long process by which the OECD Anti-Bribery Convention came into existence following unilateral passage by the U.S. of the FCPA in 1977. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1996, S. Treaty Doc. No. 105-43 (hereinafter OECD Convention). For a comprehensive review of issues related to the drafting and implementation of the OECD Convention, *see* Indira Carr & Opi Outhwaite, *The OECD Anti-Bribery Convention Ten Years On*, 5 MANCHESTER J. INT'L ECON. L. 3 (2008). *See also* David C. Weiss, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 479 (2009) (discussing the push among U.S. actors for an international treaty).

Sections 3 and 4 also seek to preempt opposition from the business community, whose concerns largely mirror those raised in the anti-corruption context following the unilateral passage of the FCPA. *See* David Ivanovich, *Oil Firms Face Tough Disclosure Rules: Congress Wants to Know How Much Companies Pay Foreign Governments*, HOUSTON CHRON., Dec. 14, 2008, *available at* http://www.chron.com/disp/story.mpl/business/6163857.html ("Oil industry officials argue the measure could hamper voluntary transparency efforts. And they fear it would disadvantage U.S. companies to the benefit of foreign competitors—particularly in China—that would not have to make such disclosures."). For a discussion of business responses to the FCPA, see Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 674 (2004) ("For a decade following enactment of the FCPA, most U.S. multinationals identified the law as one of the principal 'export disincentives' they faced when competing with companies from other countries, a result of losing contracts to their foreign, bribing competitors."). The State Department began seriously discussing anti-bribery in the OECD in response to a provision of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415-25 (1988), which had been aggressively lobbied for by business interests seeking a level playing field in international markets. *See* Tarullo at 674–75.

Specifically, Section 6 amends the Exchange Act by requiring firms defined as "resource extraction issuers"[73] to disclose, in their annual reports to the SEC, information "related to any payment made . . . to a foreign government for the purpose of the commercial development of oil, natural gas, or minerals."[74]

The SEC will have 270 days after the enactment of the bill to promulgate final rules that, in pertinent part:

> [R]equire each resource extraction issuer to include in [its] annual report . . . information relating to any payment made . . . to a foreign government for the purpose of the commercial development of oil, natural gas, or minerals, including: (i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals; and (ii) the type and total amount of such payments made to each foreign government.[75]

The bill defines the term "payment" broadly to include "taxes, royalties, fees, licenses, production entitlements, bonuses, and other material benefits. . . ."[76] The bill also stipulates that these final SEC rules must, "to the extent practicable," support the commitment of the United States to "international transparency promotion efforts" such as the EITI and other multilateral initiatives.[77]

Notably, several key assumptions underlying this new extraterritorial

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The ESTTA's proponents respond that many foreign resource extraction firms have listed their securities on U.S. exchanges, meaning that they will be covered by the statute's disclosure rules. *See* PUBLISH WHAT YOU PAY - U.S., QUESTIONS AND ANSWERS ON THE ENERGY SECURITY THROUGH TRANSPARENCY ACT 2, http://action.openthebooks.org/content.jsp?content_KEY=345 (scroll to the bottom of the page and follow the hyperlink after "Detailed Question and Answer on the ESTT Act") ("Many of the operations of Chinese companies will be covered by the ESTTA Act. For example, Petrochina Company Ltd, the principle holding company of China National Petroleum Company (CNPC), is traded on the NYSE and files annual reports."). However, recent amendments to SEC Rule 12g3–2(b), which regulates registration of non-U.S. companies under the Exchange Act, may cut against this argument. The new rule exempts non-U.S. companies from registration as long as they electronically publish, in English, certain information that would be deemed material to an investment decision regarding the issuer's securities. 17 C.F.R. § 240.12g3–2(b) (2010).

73. ESTTA, *supra* note 21 § 6.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

information-forcing regime are made explicit in Section 2 of the ESTTA, which lists a set of congressional findings related to transparency and overseas natural resource extraction. For instance, Section 2(2) states that "the consequences of what is known as the 'resource curse'. . . are likely to pose a long-term threat to the national security, foreign policy, and economic interests of the United States,"[78] thus justifying the need for disclosure rules with far-reaching extraterritorial effect. More relevant for the purposes of this Article, Section 2(3) finds that "[t]ransparency in revenue payments to governments enables citizens to hold their leaders more accountable,"[79] while Section 2(5) states that corporate shareholders will benefit from such transparency because it will allow them to "assess financial risk, compare payments from country to country, and assess whether such payments help to create a more stable investment climate."[80]

Although meaningful insofar as they elucidate congressional purposes, these findings rest upon largely untested assumptions regarding the role transparency can play in countering foreign corruption, the motivations of corporate shareholders, and, relatedly, the scope of "materiality" under U.S. securities laws.[81] The rest of this Part explains how the ESTTA's antecedents have helped to shape these assumptions, and why they ought not be taken at face value. Part III.B first describes the Extractive Industries Transparency Initiative, which has served as a useful model for the ESTTA's disclosure-based approach but is nonetheless limited by its voluntary nature. Part III.C then outlines the key background principles that inform the federal securities and anti-corruption statutes. These principles make good sense in their original contexts but lose much of their coherence when transposed onto the ESTTA's transnational, transparency-based regulatory framework.

B. *The Extractive Industries Transparency Initiative*

The Extractive Industries Transparency Initiative (EITI) is a multi-stakeholder organization made up of dozens of governments, resource extraction companies, and civil society groups.[82] The initiative was launched by British Prime Minister Tony Blair at the 2002 World

78. *Id.* § 2(2).

79. *Id.* § 2(3).

80. *Id.* § 2(5).

81. For a discussion of the principle of materiality, see *infra* Part III.C.1.

82. EITI, *supra* note 22. It should be noted that despite their mutual membership in the organization and their commitment to its general goals, government, business, and NGO participants in the EITI process have vastly differing—and even conflicting—objectives.

Summit on Sustainable Development in Johannesburg, South Africa.[83] Its stated objective is to "increase transparency over payments and revenues in the extractives sector in countries heavily dependent on these resources."[84] The framers of the EITI, however, were concerned with deeper objectives; they hoped not just to increase transparency *per se* but also to lift the resource curse by countering corruption, one of its root causes.[85]

Prior to the establishment of the EITI, revenues obtained from natural resource extraction were typically kept confidential by host governments, enabling corruption by domestic officials and allowing multinational firms seeking valuable concessions to turn a blind eye to the widespread misappropriation of funds.[86] Along with advocacy campaigns targeting the World Bank[87] and a related project known as "Publish What You Pay,"[88] the EITI process was viewed optimistically by

83. *Id.*

84. EITI, STATEMENT OF PRINCIPLES AND AGREED ACTIONS (June 17, 2003), *available at* http://www.dfid.gov.uk/pubs/files/eitidraftreportstatement.pdf.

85. *See supra* notes 47, 53 and accompanying text.

86. *See* Collier, *supra* note 31, at 17 ("Until the Extractive Industry Transparency Initiative (EITI), which began in 2002, revenues paid to governments by resource extraction companies were usually confidential."). Although outright bribery of foreign government officials is forbidden in the U.S. by the FCPA and, since 1999, by the OECD Anti-Bribery Convention, these anti-corruption rules do not extend to the misappropriation of *legitimate* revenues by local actors once royalty or concession payments are made a host government. Indeed, it was evidence of grand corruption of this sort in Angola that provided a key impetus for the establishment of the EITI in 2002. *Id.* at 18. *See also* Publish What You Pay, *infra* note 88.

87. Watchdog groups such as the Bank Information Center have pushed the International Finance Corporation—the private arm of the World Bank—to adopt and, later, improve upon a set of Performance Standards for development and infrastructure lending that include major commitments on transparency and openness and involve the office of the Compliance Advisor/Ombudsman, an independent recourse mechanism available to communities and individuals who have grievances with Corporation-funded projects. *See* Bank Information Center, Institutions: International Finance Corporation, http://www.bicusa.org/en/Institution.6.aspx (last visited July 17, 2010). Similarly, following pressure from environmental and human rights groups, the World Bank Group "announced in 2000 that it would conduct a comprehensive review of its activities in the extractive industries sector—the Extractive Industries Review (EIR)—in response to concerns expressed by a variety of stakeholders, primarily environmental and human rights organizations." IFC, Extractives Industry Review, http://www.ifc.org/eir (last visited July 17, 2010). The EIR process emphasized many aspects of World Bank lending in the extractive industry sector but paid particular attention to "the overall quality of governance in host countries, broader inclusion of local stakeholders, [and] transparency of revenue management and project documents." *Id.*

88. Publish What You Pay is an international network of over 70 civil society groups committed to natural resource revenue transparency. It was founded in 2002 by U.K.-based groups Global Witness, Oxfam Great Britain, and Save the Children U.K., among others. The impetus for

NGO participants such as Transparency International and the Revenue Watch Institute,[89] which hoped that by lifting the veil on the financial transactions that underlie resource extraction projects,[90] the initiative would help to lift the resource curse itself. This logic—driven by the assumption that transparency can alter incentives and change behavior—informs the approach taken by the ESTTA as well.

The EITI framework is built upon a foundation of twelve principles related to transparency, government accountability, sustainable economic growth, and national sovereignty,[91] and consists of six criteria designed to ensure that governments implementing the EITI comply with these principles.[92] This broad platform has attracted the participation of dozens of resource-rich states,[93] and has garnered the support of many resource extraction companies and developed country govern-

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the original coalition was the 1999 publication by Global Witness of a report entitled "A Crude Awakening," which for the first time called on resource extraction companies to disclose their payments to governments such as Angola, the primary subject of the report. Publish What You Pay, History: What Are the Origins of the Publish What You Pay Campaign?, *available at* http://www.publishwhatyoupay.org/en/about/history (last visited July 17, 2010).

89. The Revenue Watch Institute began as a project of the Open Society Institute, but became an independent organization in 2006. Revenue Watch "promotes transparent, accountable and effective management of natural resource wealth to help countries avoid the resource curse," and identifies itself as "the only organization dedicated exclusively to addressing the special problems of oil, gas and mining-dependent countries." Revenue Watch Institute, About RWI, http://www.revenuewatch.org/about-rwi/index.php (last visited July 17, 2010).

90. The EITI does not require complete transparency regarding these financial arrangements. For instance, neither implementing countries nor participating corporations are expected to disclose the terms of the underlying contracts, such as concession agreements or project financings, which set royalty rates and other terms of the revenue sharing.

91. EITI, The EITI Principles and Criteria, http://eiti.org/eiti/principles (last visited July 17, 2010).

92. *Id.*

93. As of June 2010 only Azerbaijan and Liberia had completed EITI validation and become EITI compliant. *See* Extractive Industries Transparency Initiative, EITI Countries, http://eiti.org/countries (last visited July 17, 2010). In addition to these "Compliant Countries," at the time this Article was submitted for publication there were 29 EITI "Candidate Countries," as well as three additional countries that had "signaled their intent to implement the EITI." *Id.* Notably, although Equatorial Guinea briefly became an EITI Candidate Country in February of 2008, largely at the behest of ExxonMobil, which is a participant in the EITI, s*ee* Genasci & Pray, *supra* note 38, at 52, the country was removed from the list of candidate countries in April 2010 when the EITI Board denied its request for an extension. *See* Letter from Peter Eigen to President Obiang, Apr. 29, 2010, *available at* http://eiti.org/files/2010_04_29_letter_he_president_obiang_equatorial_guinea.pdf.

ments.[94] Over time, the EITI has taken on an increasingly formalized governance structure, with the creation of a 20-member board and secretariat,[95] the adoption of rules and criteria for the validation of "Candidate" and "Compliant" countries,[96] and the accreditation of private party "validators" authorized to certify a country's implementation process.[97] In order to be certified as a "Candidate," a participating country must commit to require that extractive companies operating within its territory report the payments they make to the government.[98] It must also publicly report its receipt of such payments in order to reconcile any disparities.[99]

Notwithstanding this relatively rigid structure, however, the EITI remains a voluntary enterprise for all involved. Indeed, industry and government delegates to the 2003 meeting at which the EITI principles were drafted strongly emphasized the importance of voluntariness,[100] working hard to fend off calls from civil society groups for a mandatory approach to natural resource revenue disclosure.[101] The EITI is thus a limited, albeit powerful, tool in the fight against corruption and the

94. Currently, seventeen supporting governments and 42 company participants provide varying degrees of political, technical and financial assistance to implementing countries. *See* EITI, Supporting Countries, http://eiti.org/supporters/countries (last visited July 17, 2010).

95. *See* EITI, History, http://eiti.org/eiti/history (last visited July 17, 2010).

96. EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, EITI RULES INCLUDING THE VALIDATION GUIDE (version 20, 2009), *available at* http://eiti.org/document/rules. In order to be certified as a "Candidate," a participating country must commit to require that extractive companies operating within its territory report the payments they make to the government. *Id.* at 11. It must also publicly report its receipt of such payments in order to reconcile any disparities. *Id.* at 16. A much stricter set of benchmarks must be met in order for a candidate country to be deemed "Compliant." *Id.* at 11.

97. EITI, EITI Validators, http://eiti.org/validation/validators (last visited July 17, 2010).

98. EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, *supra* note 96, at 11.

99. *Id.* at 16. Notably, however, the EITI does not require company-by-company reporting by implementing countries, meaning that most governments opt for aggregate yearly figures. *See* Letter from Dr. Peter Eigen, Founder of Transparency International and Chairman of the EITI Board, to U.S. Senator Richard Lugar (Nov. 12, 2009) (on file with Georgetown Journal of International Law) [hereinafter Eigen Letter].

100. Department for International Development (U.K.) [hereinafter DFID], Report of the Extractive Industries Transparency Initiative (EITI) London Conference (June 17, 2003), http://collections.europarchive.org/tna/20070701080507/http:/www.dfid.gov.uk/news/files/eitireport-conference17june03.asp (last visited July 17, 2010).

101. *Id.* ("NGOs welcomed efforts to improve transparency under the Initiative but questioned whether a voluntary approach would work. The Publish What You Pay campaign, supported by 130 NGOs, called for: the use of templates to shape *mandatory* arrangements, reinforcement of the principles through conditionality on export credit agency funding, [and a] requirement to disclose on the part of aid programmes.") (emphasis added).

resource curse. Several consequences of its voluntary nature are particularly noteworthy. While some are addressed by the ESTTA, others remain problematic even under the bill's mandatory disclosure regime. First, participating resource extraction companies are only asked to disclose their payments to governments to the degree required under the domestic law of EITI-compliant countries or those countries, like Nigeria, that are not yet "compliant" but have nonetheless passed legislation to implement the EITI's revenue disclosure rules in domestic law.[102] This problem is addressed by the ESTTA, which creates a uniformly high bar for all resource extraction issuers.

Furthermore, the EITI does not require revenue reporting by governments on a company-by-company basis, and most participating countries have opted to report only one aggregate annual figure. Although the EITI engages in a reconciliation process to match payments by companies to receipts by governments in a single national report, the disjunction between the figures reported by individual firms and the aggregate amounts listed by governments necessarily generates ambiguities, undermining the usefulness of data generated in the EITI process.[103] This problem is exacerbated under the ESTTA, since the bill does nothing to address reporting by host governments.

Another limitation of the EITI is that it may not attract participation by those states where revenue transparency might do the most good, but where ruling elites are unwilling to open their books. Even those countries that do participate in the EITI validation process may not achieve the desired results in terms of improved transparency and reduced corruption, since they face no real sanctions for shortcomings. Nigeria, for instance, was the first country to pass a statute implementing the EITI in domestic law,[104] yet remains plagued by high levels corruption several years later.[105] Likewise, although Equatorial Guinea

102. *See* EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, *supra* note 96, at 11. Nigeria's EITI law, the Nigeria Extractive Industries Transparency Initiative Act (NEITI Act) was passed into law on May 28, 2007. *See* Nigeria Extractive Industries Transparency Initiative, About NEITI, http://www.neiti.org.ng/about.htm (last visited July 17, 2010); *see also* Naomi Cahn & Anthony Gambino, *Towards a Typology of Corporate Responsibility in Different Governance Contexts: What to Do in the Absence of Responsible Country Governance?*, 39 GEO. J. INT'L L. 655, 666-67 (2008).

103. *See* Eigen Letter, *supra* note 99.

104. *Id.*

105. *See* TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 200 (2009), *available at* http://www.transparency.org/content/download/46256/740820 (placing Nigeria 121st out of 180 ranked countries).

obtained EITI Candidate status in February of 2008,[106] it has made little progress towards implementing and validating the EITI criteria. The EITI Board set a deadline of March 2010 for it to do so, and in late April denied the government's request for an extension, removing it from the list of candidate countries.[107]

Finally, the EITI asks very little from its "supporting" countries. To be a supporter, a country must simply make a public endorsement of the initiative, and need not commit to any further action.[108] The EITI thus has relatively few resources available to help provide technical support to implementing countries or to audit their progress.[109] Nigeria's tremendous reliance upon British aid and NGO assistance in the implementation of the Nigeria EITI Act was entirely ad hoc; neither the U.K. nor any other supporting country has set aside funds dedicated to EITI technical assistance programs.[110] Strong validation and monitoring procedures obviously cost money. Without them, and without real disincentives for non-compliance, some critics worry that EITI implementing countries will have little reason to truly reform the way they manage natural resource revenues.[111]

In fact, many observers note that it is too soon to tell whether the EITI will result in any real improvements in governance in resource-rich countries.[112] Even its strongest proponents agree that the EITI, in part because of its voluntary nature, will always have limited effective-

106. *See* EITI, EITI Countries: Equatorial Guinea, http://eiti.org/EquatorialGuinea (last visited July 17, 2010).

107. *Id.* Watchdog groups are concerned that such delays, which are occurring with increasing frequency, may threaten the integrity of the EITI process. *See, e.g.*, Press Release, Human Rights Watch, Decisive Moment for Global Transparency Effort: Most Countries Miss Deadline to Demonstrate Openness on Petroleum, Mining Revenues (Mar. 9, 2010), *available at* http://www.hrw.org/en/news/2010/03/08/decisive-moment-global-transparency-effort.

108. *See* EITI, Supporting Countries, http://eiti.org/supporters/countries (last visited July 17, 2010) ("[T]he only formal requirement of a supporting country is to make a clear public endorsement of the initiative. . .").

109. *See* David Goldwyn, *Extracting Transparency*, 5 GEO. J. INT'L AFF. 5, 9 (2004).

110. *Id.*

111. *See, e.g.*, Marisa Van Saanen, Response, *Paul Collier: Laws and Codes for the 'Resource Curse'*, 11 YALE HUM. RTS. & DEV. L.J. 29, 34 (2008) ("[Q]uestions remain, notably about how countries with low governance standards will find their way in such a system, when little is directly demanded of them.').

112. *See, e.g.*, Dilan Ölcer, *Extracting the Maximum from the EITI* (OECD Development Centre, Working Paper No. 276, 2009), at 10, *available at* http://www.oecd.org/dataoecd/56/60/42342311.pdf ("[W]hen perceptions of corruption in the countries that have signed up to the EITI are examined, there has been no visible positive effect so far.").

ness.[113] For this reason, advocates have long pushed for a binding version of the initiative, claiming that the EITI's weaknesses "help[ ] make the case" for a statutory approach. The ESTTA is the result of this advocacy. As noted above, the ESTTA fixes some of the EITI's problems by making disclosure mandatory for resource extraction companies that issue securities in U.S. markets. Nevertheless, by situating its disclosure obligations within securities law while relying wholly upon stakeholder incentives for its effectiveness, the ESTTA creates a mismatch between its goal—lifting the resource curse—and the mechanisms it employs to achieve it. Part III.C explores this mismatch in greater depth by outlining the disclosure-based approach of the Exchange Act and the very different merit-based prohibitions imposed by the FCPA.

C. *Background Principles: The Exchange Act and the FCPA*

The new extraterritorial information-forcing obligations imposed by the ESTTA take the form of an amendment to Section 13 of the Securities Exchange Act of 1934,[114] which contains many of the reporting and disclosure duties that have formed the basis of federal securities law for the past eight decades. Perhaps surprisingly, although the ESTTA expressly seeks to curb foreign corruption,[115] it makes no mention of the preeminent weapon in the U.S. anti-corruption arsenal: the Foreign Corrupt Practices Act. To understand why the bill's drafters emphasized transparency under securities law rather than the FCPA's more substantive approach to the problem of foreign corruption—and to grasp the advantages and disadvantages of this choice—it is first necessary to review the basic structure of these regulatory regimes, as well as the policy debates that informed their creation.

Part III.C.1 addresses the Exchange Act's disclosure rules, the importance of "materiality" in limiting the scope of a security issuer's disclosure obligations, and the so-called "battle of philosophies" that led to the adoption of a transparency-based approach to securities regulation rather than substantive regulation on the merits. Part III.C.2 explains the reasons behind the turn, nearly half a century later, to precisely this

113. *See* Publish What You Pay United States, Fact Sheet: Energy Security Through Transparency Act of 2009, *available at* https://org2.democracyinaction.org/o/5399/images/ESTTA%20backgrounder.pdf ("The EITI is a critical first step in the global effort to increase transparency and fight the resource curse. But any voluntary agreement necessarily has limited reach. The EITI helps make the case for the ESTT Act.").

114. Exchange Act, *supra* note 23.

115. ESTTA, *supra* note 21, § 2(5).

type of merit-based regulation in the special case of foreign bribery, which was criminalized by the FCPA in 1977.

1. The Securities Exchange Act of 1934: Materiality and Disclosure

Following the stock market crash of 1929 and the widespread acknowledgement that fraud on the part of securities issuers was partly to blame,[116] Congress passed the Securities Act of 1933 (Securities Act) in order to, *inter alia*, require companies to disclose material information upon the issuance of new securities.[117] The Securities Exchange Act of 1934 (Exchange Act) extended this information-forcing regime to firms whose securities are traded in secondary markets.[118] The disclosure requirements of both statutes are now integrated,[119] as are detailed instructions, contained in Regulation S-K, for how securities issuers must format such information and report it to the SEC.[120]

Although exceedingly specific, the disclosure requirements under Regulation S-K are subject to a "materiality" screen, which places significant limits on the information that can be demanded of firms. In

116. *See* 77 CONG. REC. 937 (1933) (message from President Roosevelt to the Senate, March 29, 1933, discussing goals of legislation that became the Securities Act of 1933) ("In spite of many State statutes the public in the past has sustained severe losses through practices neither ethical nor honest on the part of many persons and corporations selling securities . . . . There is . . . an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public . . . . This proposal . . . puts the burden of telling the whole truth on the seller. It should give impetus to honest dealing in securities and therefore bring back public confidence.").

117. Securities Act of 1933, ch. 38, 48 Stat. 74 (1933) (codified at 15 U.S.C. § 77a-77kk (2010). *See also* William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 171 (1933) ("All the Act pretends to do is to require the 'truth about securities' at the time of issue, and to impose a penalty for failure to tell the truth. Once it is told, the matter is left to the investor.").

118. Securities Exchange Act of 1934, 48 Stat. 881 (1934) (codified at 15 U.S.C. § 78a *et seq.*). Generally speaking, the Securities Act and Exchange Act impose four broad categories of required disclosure. First, information must be disclosed whenever new securities are issued to the public. Second, additional information is required quarterly and annually under the Exchange Act's period reporting requirements. Third, the securities laws mandate additional proxy disclosures related to board elections and annual shareholder meetings. Finally, extraordinary events such as mergers or sales are governed by their own disclosure rules. *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1207 (1999) (citing 15 U.S.C. §§ 77e, 77g, 77j and 77aa (Securities Act) and 15 U.S.C. §§ 78l(b)(1), 78l(g)(1), 78m, 78n and 78o(d) (Exchange Act)).

119. *See* SEC, Adoption of Integrated Disclosure System, Securities Act Release No. 6383 (1982) (adopting integrated disclosure).

120. Reg. S-K, 17 C.F.R. §§ 229.10–229.702 (2005).

many cases, the regulation itself sets out a materiality benchmark; specific information that falls below the benchmark is deemed immaterial and need not be disclosed.[121] Where the regulation does not specify a standard for materiality, the Supreme Court has held that a general standard applies.[122] Under this standard, in order for information to be material, "there must be a substantial likelihood that the disclosure of [an] omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" by the issuer.[123]

The periodic reporting requirements imposed by U.S. securities laws, together with the limitations imposed by materiality, are so tightly integrated into contemporary business practice that their existence today is generally taken for granted. In the early 1930s, however, mandatory disclosure of material information by securities issuers was not a foregone conclusion; indeed, the relative benefits and drawbacks of a disclosure-based regime—as opposed to a substantive, merit-based approach—were the subject of intense debate among politicians, businessmen and legal scholars.[124] On one side of the debate, leading writers such as Adolf Berle, whose 1932 book "The Modern Corporation and Private Property"[125] had a galvanizing effect on President

121. For example, Item 103 of Regulation S-K requires issuers to "[d]escribe briefly any *material* pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject." 17 C.F.R. § 229.103 (2005) (emphasis added). The instructions to Item 103 set out a materiality benchmark of ten percent of the issuer's current assets, meaning that many legal proceedings that would otherwise be required to be disclosed are deemed immaterial if they involve sums less than this amount, and may thus be kept from the public. 17 C.F.R. § 229.103(2) (2005).

122. T.S.C. Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (holding that an omitted fact was not material, for purposes of an action under § 14(a) of the Exchange Act). The definition of materiality enunciated by the Supreme Court in *Northway* "has been followed (*mutatis mutandis*) in other SEC contexts," such as Rule 10b-5 actions. LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 580 (5th ed. 2004) (discussing *Northway*). The legal standards that determine whether information is material and must be disclosed are less than straightforward, and stem from contested policy judgments regarding the fundamental purposes of securities regulation, including investor protection. *See* Peter H. Huang, *Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investors*, 13 SUP. CT. ECON. REV. 99, 109-12 (2005) (discussing the Supreme Court's approach to materiality in light of new behavioral economic research demonstrating that traditional policy goals should be revisited).

123. *Northway*, 426 U.S. at 449.

124. *See* Williams, *supra* note 118. *See also* LOSS & SELIGMAN, *supra* note 122, at 32–45.

125. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Harcourt, Brace & World 1967) (1932).

Roosevelt's approach to securities regulation,[126] argued that disclosure would solve many of the agency problems associated with the separation of ownership and control in large, publicly traded companies.[127] Under Berle's view, echoed and amplified by more renowned public figures such as Louis Brandeis and Felix Frankfurter,[128] disclosure of material information would serve as the prime mechanism to enforce the accountability of corporate management to shareholders, preventing fraud and waste by executives while at the same time promoting market efficiency by allowing investors to properly value securities.[129]

In stark contrast to the familiar transparency-based approach to securities regulation, many others advocated that issuers should be allowed to sell securities into the market only upon meeting certain substantive criteria designed to protect investors. Such a merit-based system, already common under the state "blue sky" laws that predated

126. Williams, *supra* note 118, at 1215–16 ("Although Berle had a peripheral role in the actual drafting of the Securities Act and the Exchange Act, he was an important member of Roosevelt's 'brain trust,' and his ideas were pivotal in providing the intellectual foundation for securities regulation.").

127. *See* BERLE & MEANS, *supra* note 125, at 84.

128. While Berle was an influential proponent of transparency-based securities regulation, perhaps the most widely regarded champion of disclosure was Louis D. Brandeis, who was already a Supreme Court Justice by the time the federal securities laws were drafted, but whose earlier writings and speeches had influenced both President Roosevelt and Felix Frankfurter. *See* MELVIN UROFSKY, LOUIS D. BRANDEIS: A LIFE 692 (2009). Frankfurter himself was intimately involved with drafting the Securities Act and securing its passage through Congress. *See* LEONARD BAKER, BRANDEIS & FRANKFURTER: *A DUAL BIOGRAPHY* 283-85 (1984). HIS ANALYSIS SHAPED IN LARGE PART BY BRANDEIS' EARLIER WRITINGS, FRANKFURTER BECAME A MAJOR CHAMPION OF THE DISCLOSURE-BASED REGULATORY APPROACH THAT ULTIMATELY WON THE DAY AND CAME TO BE THE FOUNDATIONAL PRINCIPLE UPON WHICH THE MAJOR SECURITIES LAWS WOULD BE BUILT. *SEE* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 39-72 (rev. ed. 1995).

It was Justice Brandeis, however, who penned the pithy phrase, "Sunlight is said to be the best of disinfectants," LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Co. 1914), and it was the title of his book, *Other People's Money*, to which President Roosevelt alluded in his message to the Senate upon the introduction of the legislation that became the Securities Act. *See supra* note 116 (message from President Roosevelt to the Senate, March 29, 1933) ("What we seek is a return to a clearer understanding of the ancient truth that those who manage banks, corporations, and other agencies handling or using *other people's money* are trustees acting for others.") (emphasis added).

For Brandeis, disclosure as a regulatory strategy served two distinct but interconnected purposes. First, disclosure allowed investors and the public to "assert some measure of [. . .] control over the economic concentration that he identified as a 'social and industrial disease,' while the secondary purpose was to permit investors to value securities accurately." Williams, *supra* note 118, at 1214–15.

129. *See* Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984); Williams, *supra* note 118, at 1223.

federal securities regulation,[130] would have "authorize[d] [regulators] to deny registration to a securities offering unless the substantive terms of the offering and the associated transactions (i) ensure a fair relation between promoters and public investors, and (ii) provide public investors with a reasonable relation of risk to returns."[131] Instead of arming market participants with information and allowing them to police firms' conduct themselves through the purchase and sale of shares, a merit-based approach would have relied upon regulators to make individualized, case-by-case judgments about the underlying fundamentals of a given security or issuer.[132]

Typically, merit-based regulation is considered most appropriate where society has chosen to ban, limit, or otherwise control specified activities because of their intrinsic harmfulness or, in cases of market failure, where existing incentive structures are not sufficient to achieve socially optimal outcomes.[133] Criminal law is perhaps the most obvious example of such substantive regulation. In the case of foreign bribery, for instance, Congress determined that, without the threat of criminal sanctions, businessmen would find it advantageous to bribe and shareholders would not have the incentive to stop them, even while the activity harmed vital national foreign policy interests and eroded confidence in international markets.[134] The problems created by foreign bribery thus justified outlawing the activity rather than relying

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130. LOSS & SELIGMAN, *supra* note 122, at 35.

131. Ad Hoc Committee on Merit Regulation of the State Regulation of Securities Committee of the American Bar Association, *Report on State Merit Regulation of Securities Offerings*, 41 BUS. L. 785, 829 (1986).

132. In fact, the bills which would become the Securities Act of 1933 originally provided for revocation of a security's registration upon an administrative finding that, *inter alia*, "the enterprise or business of the issuer . . . or the security is not based upon sound principles, and that the revocation is in the interest of the public welfare," or that the issuer "is in any other way dishonest" or "in unsound condition or insolvent." S. 875 & H.R. 4314, 73d Cong., 1st Sess. §§ 6(c), (e), (f) (1933). For the definitive narrative account of how Congress made the transition away from the blue sky merit-based approach and towards the familiar mandatory disclosure regime, see James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959–60).

133. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. L. & ECON. 67 (1968). For an elaboration of this economic approach to the field of legal studies generally, see Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUD. 399 (1973).

134. *See, e.g.*, *Foreign Payments Disclosure: Hearing Before the Subcomm. on Priorities and Economy in Government of the Joint Econ. Comm.*, 94th Cong. 173 (1976) (statement of Rep. Stephen J. Solarz) ("Thus what is at stake is much more than the individual interests of corporations which are

upon disclosure and information-forcing to disincentivize misconduct. In 1977 the Foreign Corrupt Practices Act became the world's first law to criminalize the bribery of foreign officials by both individuals and corporate actors.[135] A brief review of the FCPA's key provisions will prove useful here, as many criticisms of disclosure-based regulation—including the ESTTA—juxtapose transparency with regulation on the merits.[136]

2. The Foreign Corrupt Practices Act: Regulation on the Merits

The FCPA has proven successful in countering certain types of corruption,[137] such as the payment of bribes by U.S. oil executives to corrupt foreign government officials in order to secure valuable drilling rights, as dramatized in the 2005 film *Syriana*.[138] The statute prohibits "any promise, offer, or payment of anything of value if the offeror 'knows' that any portion will be offered, given, or promised to a foreign official, foreign political party, or candidate for public office

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competing for a share of foreign markets. What is in fact at stake is the foreign policy and national interest of the United States.").

135. Krever, *supra* note 24, at 87.

136. *See infra* Part V.B.

137. *See* John Russell, *Special Report: Anti-corruption*, ETHICAL CORPORATION (Oct. 2008) at 32-38 (praising the positive effects of the FCPA). Of course, the FCPA has been criticized as well. *See, e.g.*, Jennifer Dawn Taylor, Comment, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 871-880 (2001) (arguing that statutory ambiguities undermine the FCPA's effectiveness by imposing unnecessary compliance and due diligence costs on American businesses); *See generally* STUART H. DEMING, ABA INT'L PRACTITIONER'S DESKBOOK SERIES: THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS (2005).

138. During the 1980's, James Giffen, upon whom a character was based in the film "Syriana," *see* SYRIANA (Warner Bros. 2005), became the so-called "oil consigliere" to Kazakh President Nursultan Nazarbayev when the Republic was still a part of the Soviet Union. He continued to play this role as a newly independent Kazakhstan began to auction off valuable drilling rights in its enormous oilfields. *See* ROBERT BAER, SEE NO EVIL: THE TRUE STORY OF A GROUND SOLDIER IN THE CIA'S WAR ON TERRORISM 241 (2002) ("If you wanted an oil concession in Kazakhstan, you went to Giffen because his consulting company . . . held all the keys to the kingdom."). On April 2, 2003, Giffen was indicted by the federal government on 62 counts of conspiracy, mail fraud, wire fraud, tax fraud, money laundering, and violations of the FCPA, all in relation to the auction of Kazakh oil concessions to multinational oil firms. *See* Press Release, U.S. Attorney's Office for the Southern District of New York, U.S. Dept. of Justice, American Businessman Charged with $78 Million in Unlawful Payments to Kazakh Officials in 6 Oil Transactions (Apr. 2, 2003), *available at* http://www.justice.gov/usao/nys/pressreleases/April03/giffenwilliams.pdf. *See also* United States v. Giffen, 326 F. Supp. 2d 497, 499 (S.D.N.Y. 2004) (describing the counts against Giffen). The FCPA violations for which Giffen was indicted were under 15 U.S.C. § 78dd-2 (2000).

for the purpose of influencing a governmental decision,"[139] or if any portion will be used "to assist in obtaining or retaining business."[140] Unlike such bribes, the natural resource payments covered by Section 6 of the ESTTA are not made to influence governmental decisions or to obtain business. Rather, they represent entirely legitimate consideration paid in exchange for granting access to valuable oil or mineral deposits within the sovereign territory of a foreign state. As such, the payments covered by the ESTTA almost by definition must remain outside the scope of what is prohibited by the FCPA.

The FCPA's anti-bribery provisions are subject to two additional limitations that make the statute even less likely to be useful in countering the kind of foreign corruption at the root of the resource curse. First, they apply only to those payments made "corruptly" to foreign officials, presenting a significant ambiguity and potential enforcement loophole.[141] Second, though extraterritorially applicable, their jurisdictional reach is far from universal, as their primary aim is to

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139. Stuart Stuart H. Deming, *The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act,* 96 J. CRIM. L. & CRIMINOLOGY 465, 467 (2006) (quoting 15 U.S.C. §§ 78dd-1 to -3). The FCPA is a two-pronged statute. The first prong, addressed here, consists of the anti-bribery provisions. 15 U.S.C. §§ 78dd(1)-(3). This Article does not address the FCPA's second prong, which contains the statute's record-keeping provisions. Under these provisions, covered firms are required to keep accurate books and records and to maintain internal systems of control to ensure their integrity. 15 U.S.C. § 78m(b)(2).

140. *Id.* This requirement is commonly referred to as the "business purpose test." U.S. Dep't of Justice, Lay-Person's Guide to FCPA (hereinafter DOJ Guide) at § E, http://www.justice.gov/criminal/fraud/fcpa/docs-lay-persons-guide.pdf.

141. 15 U.S.C. § 78dd-1(a) (2000). The word "corruptly" is ambiguous, and is nowhere defined in the statute. Federal courts have struggled to give precise meaning to this term. A leading case is United States v. Liebo, 923 F.2d 1308 (8th Cir. 1991). In *Liebo*, an American arms dealer was convicted for violating the FCPA by giving a Nigerian government official airline tickets for his honeymoon. On appeal, Liebo challenged the sufficiency of the evidence showing both that the tickets were "given to obtain or retain business" and that he had given them "corruptly." *Id.* at 1311. The Eighth Circuit held that the district court had properly instructed the jury on the term's meaning, stating:

> Here, the court instructed the jury that the term "corruptly" meant that "the offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so," and that "an act is 'corruptly' done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." Contrary to Liebo's argument, the instructions as a whole adequately instructed the jury that a gift or gratuity does not violate the Act unless it is given "corruptly." Accordingly, the court did not abuse its discretion by refusing to give [Liebo's] requested instruction.

punish U.S. bribe-*makers* rather than foreign bribe-*takers*.[142] The statute provides for traditional "territorial" jurisdiction over conduct occurring through "any means or instrumentality of interstate commerce,"[143] as well as an "alternative" jurisdictional hook,[144] which prohibits any "United States person"[145] from corruptly doing "any act" outside the United States "in furtherance of" a bribe, regardless of whether the act made use of interstate commerce.[146] Corrupt acts with no territorial nexus in the United States, carried out by a non-"United States person," are not covered. In other words, much of the wholly *foreign* corrupt conduct of *foreign* leaders—activity at the root of the resource curse but unconnected to bribery by U.S. persons—necessarily falls outside the FCPA's regulatory ambit.[147]

The FCPA's detailed substantive prohibitions, outlined above, and its relatively broad jurisdictional reach, taken together with recently con-

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Id. at 1312. It seems clear that the payments covered by Section 6 of the ESTTA would not meet the *Liebo* standard.

142. The doctrine of universal jurisdiction (UJ), by which a state may assert jurisdiction over certain acts no matter where they are committed, is generally reserved for grave violations of international law such as genocide and crimes against humanity, and is therefore not an appropriate mechanism by which to hold foreign officials accountable for corruption. *See* Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law, 168 (Stephan Macedo, ed. 2004).

143. 15 U.S.C. § 78dd-1(a) (2000).

144. 15 U.S.C. § 78dd-1(g), §78dd-2(i). This "alternative jurisdiction" provision was added as part of the 1998 amendments to the FCPA in order to implement the OECD Convention's requirement that signatories apply their anti-bribery statutes to extraterritorial conduct. *See* S. REP. NO. 105-277 (1998) at 3.

145. The statute defines "United States person" as "a national of the United States or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof." 15 U.S.C. § 78dd-1(g)(2), §78dd-2(i)(2).

146. 15 U.S.C. § 78dd-1(g), §78dd-2(i).

147. This territorial limitation has been ameliorated somewhat as new international treaties on foreign corruption have entered into force. After decades of U.S. business lobbying, the "unfair playing field" they long complained about has been largely leveled as increasing numbers of countries sign and ratify OECD Convention, the UN Convention, and other multilateral instruments. *See* Tarullo, *supra* note 72, at 674–75 (explaining that the State Department began discussing anti-bribery in the OECD in response to a provision of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415-25, which had been aggressively lobbied for by business interests seeking a level playing field in international markets).

cluded international anti-bribery treaties,[148] make the global anti-corruption regime a prime example of successful merit-based extraterritorial regulation. However, it remains an ineffective vehicle to control the sort of foreign corruption by foreign actors that is typical of natural resource-rich countries such as Equatorial Guinea and others plagued by the resource curse. These limitations help to explain the approach adopted by the drafters of the ESTTA, which situates the bill's operative language within the Exchange Act's information-forcing provisions rather than under the merit-based anti-bribery regime of FCPA. Unfortunately, the ESTTA is not a natural fit with the securities laws. Part IV explores two types of limitations that, taken together, make the bill less likely to succeed in lifting the resource curse.

IV. The Trouble with Transparency

Transnational transparency-based regulation solves some otherwise intractable problems associated with corruption and rent-seeking in developing countries,[149] and may thus present the best opportunity to lift the resource curse.[150] However, the transparency-only approach taken by the ESTTA also creates new problems for which there are no easy answers. In particular, extraterritorial information-forcing obligations introduce difficulties associated with incentives and policing that raise significant concerns about the effectiveness of the ESTTA as currently constituted. This part addresses each of these concerns in turn.

A. *Misaligned Incentives*

The strength of disclosure-based regulations such as the ESTTA depends upon properly incentivized stakeholders who can make use of

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148. In addition to the OECD Convention, *supra* note 72, other recently concluded multilateral anti-corruption agreements include the United Nations Convention Against Corruption, 9 *opened for signature* Oct. 31, 2003, 43 I.L.M. 37 (2004); the Inter-American Convention Against Corruption, 29 Mar. 1996, 35 I.L.M. 724 (1996); the Council of Europe's Criminal Law Convention on Corruption, 27 Jan. 1999, Europ. T.S. No. 173; the Council of Europe's Civil Law Convention on Corruption, 4 Nov. 1999, Europ. T.S. No. 174; the European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union, May 26, 1997, 37 I.L.M. 12; and the African Union Convention on Preventing and Combating Corruption, *opened for signature* July 11, 2003, 42 I.L.M. 1284 (2003).

149. *See supra* notes 61-66 and accompanying text.

150. *See* EITI, EITI Benefits, http://eiti.org/eiti/benefits (last visited July 17, 2010); Open The Books!, *infra* note 163.

disclosed information to police misconduct. In the context of U.S. securities laws, the principle of materiality cuts against the extraterritorial information-forcing logic of the ESTTA, revealing a fundamental disjunction between the tool employed (disclosure under Section 13 of the Exchange Act) and the end to which it is being directed (countering corruption by foreign government officials). Materiality helps to define and reinforce the fiduciary duties owned by a firm's managers to its "reasonable" shareholders, and excludes information that does not pertain to these duties.[151] In economic terms, it is easy to see why the standard definition of materiality allows the SEC to set disclosure guidelines and enables securities issuers to determine what to disclose: if a reasonable investor would consider a piece of information significant to his or her decision about whether to purchase a security, then it must be disclosed.[152] Under this traditional view, there has always been a fairly tight fit between materiality and shareholder incentives.

The disclosure of natural resource payments under Section 6 of the ESTTA moves much further afield. While such information may be important to so-called "social investors"[153] who carefully screen investments to avoid certain categories of products, practices, or countries, or seek to invest in companies with positive environmental, human rights, or labor impacts,[154] the vast majority of investors do not purchase shares on the basis of non-economic criteria.[155] Taking a narrowly economic view of materiality, as do both the SEC and the Supreme Court, the new disclosure obligations created by the ESTTA clearly would not be material to the "reasonable" investor.[156]

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151. *See infra* notes 153-56 and accompanying text.

152. *See Northway*, 426 U.S. at 449.

153. Professor Cynthia Williams makes a compelling argument that the SEC has the statutory authority, pursuant to Section 14(a) of the Exchange Act, 15 U.S.C. § 78n, to require "expanded social disclosure" on "public interest" grounds unrelated to the investor protection rationale and not limited by the narrow materiality standard enunciated in *Northway*, 426 U.S. at 449. Williams, *supra* note 118, at 1273–1299.

154. *See* Williams, *supra* note 118, at 1276. The growth over the past decade of socially responsible investment (SRI) vehicles is a testament to the burgeoning importance of non-financial considerations to an expanding range of investors. *See* SOCIAL INVESTMENT FORUM, 2007 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES: EXECUTIVE SUMMARY ii (2007), *available at* http://socialinvest.org/pdf/SRI_Trends_ExecSummary_2007.pdf.

155. While SRI assets rose to $2.71 trillion as of 2007, *see id.*, total mutual fund assets alone were still ten times greater. *See* Investment Company Institute, Worldwide Mutual Fund Assets and Flows, Fourth Quarter 2009, http://www.ici.org/research/stats/worldwide/ww_12_09 (last visited July 17, 2010).

156. Although its regulations defining materiality do not explicitly limit the concept to "economic" materiality, the SEC implicitly considers materiality to include information bearing

Viewed from this perspective, Section 2(5) of the ESTTA[157] seems to cloak broad social and foreign policy objectives under the rubric of an investor protection rationale that, upon close inspection, makes little sense. It is doubtful whether sufficient numbers of investors consider the resource curse or natural resource revenue payments important enough to necessitate their disclosure under a traditional materiality standard. From a reasonable shareholder's perspective, there is nothing wrong with a firm making payments to foreign governments for natural resource concessions—indeed, unlike bribery, the arrangement of such payments is a predicate for every energy or mineral project undertaken in a foreign state. Since every oil, gas and mineral company operating internationally makes such payments on a routine basis, it seems rather dubious to state categorically that shareholders in fact "have a desire to know the amount of such payments in order to assess financial risk."[158] Disclosure of natural resource revenue data is not primarily about managing investors' exposure to financial risk, but rather geared towards leveraging changes in developing country governance. These changes are important, but not clearly linked to the investor protection rationale underlying the securities laws. To claim otherwise weakens the ESTTA by creating an implicit mismatch between investor incentives and the goals of the legislation.[159]

The bill's drafters were likely aware of this incentives problem. Instead of looking at the disclosure obligations through the lens of investor protection and materiality, they may have been thinking about

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on the economic value of an investment according to a "reasonable investor" standard, while excluding information that does not directly affect a stock's price. *See* Faith Kahn Stevelman, *Legislatures, Courts, and the SEC: Reflections on Silence and Power in Corporate and Securities Law,* 41 N.Y. L. SCH. L. REV. 1107, 1137 (1997); Williams, *supra* note 118, at 1264.

157. Section 2(5) of the ESTTA states that corporate shareholders will benefit from natural resource revenue transparency because they "have a desire to know the amount of such payments in order to assess financial risk. . . ." ESTTA § 2(5), *supra* note 21.

158. *Id.*

159. It is worth noting that even for the subset of "social investors" who may indeed purchase and sell securities on the basis of disclosed natural resource revenue data, *see supra* note 153, disclosed information will do little to help lift the resource curse because corporate shareholders are not the actors with the capacity to catalyze needed governance changes in resource-rich states. If the cause of the curse is not foreign investment *per se*, but rather domestic corruption and institutional failures largely unconnected to the actions of multinational firms, *see supra* notes 53-66 and accompanying text, then the improvements in corporate governance that would result from investors' knowledge of natural resource payment information are largely beside the point. The actors who should might meaningfully make use of this information—the citizens of "cursed" states—are entirely left out of the equation when natural resource revenue disclosure is linked to shareholders' incentives, as it is under the ESTTA.

another set of stakeholders with very different motivations: anti-corruption watchdog groups like Transparency International, the Revenue Watch Institute, and Publish What You Pay.[160] Unlike typical shareholders, these organizations have the incentives to make use of disclosed information about natural resource payments in campaigns to improve institutional integrity and lift the resource curse across a range of developing states.[161] Indeed, these groups were instrumental in lobbying for the introduction of the Extractive Industries Transparency and Disclosure Act in 2008,[162] and pushed heavily for passage of the ESTTA in subsequent years.[163]

Whether it makes sense for the SEC to require what would otherwise be non-material company disclosures in order to empower NGOs to pressure corrupt foreign governments to change is an open question, and an important one. Congress is free to amend the Exchange Act in any way it sees fit,[164] and if natural resource revenue data becomes material *ipso facto* under the ESTTA, many problems would be ameliorated that might otherwise arise were the SEC to impose such expanded reporting requirements pursuant to its current statutory authority.[165] Nevertheless, the bill's basic flaw endures; its extraterritorial

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160. Transparency International, http://www.transparency.org/ (last visited May 18, 2010); Revenue Watch Institute, http://www.revenuewatch.org/ (last visited Mar. 10, 2010); Publish What You Pay, About Us, http://www.publishwhatyoupay.org/en/about (last visited Apr. 25, 2010).

161. Although Section 2(3) of the ESTTA states that "[t]ransparency in revenue payments to governments enables citizens to hold their leaders more accountable," it is clear that in countries such as Equatorial Guinea or the Democratic Republic of Congo—where institutional failures render domestic actors relatively powerless to demand changes from political leaders—local citizens must rely upon the direct support and solidarity of international civil society groups if they hope to lift the resource curse. ESTTA, *supra* note 21, § 2(3). Thus, notwithstanding § 2(3), disclosure under the ESTTA may be understood to be as much for the benefit of international NGOs as it is for the citizens of "resource cursed" states, of whom the bill speaks.

162. EITDA, *supra* note 71.

163. The website OpenTheBooks.org, a project of Publish What You Pay—U.S. Coalition, was launched to help support efforts to pass natural resource revenue disclosure legislation in the U.S. Congress. *See* Open The Books!, http://www.openthebooks.org (last visited May 15, 2010).

164. Subject, of course, to judicial review. *See* Marbury v. Madison, 5 U.S. 137 (1803).

165. SEC authority to require non-economic disclosures by issuers was the subject of extensive debate, administrative rulemaking, and judicial proceedings throughout the 1970s. In 1971, as part of the first wave of corporate responsibility activism on the environment, the Natural Resources Defense Council and the Project on Corporate Responsibility brought a rulemaking petition to the SEC seeking expanded disclosure rules, under the existing securities laws, for civil rights and environmental reporting by issuers. *See* NRDC v. SEC ("*NRDC I*"), 389 F. Supp. 689, 693-94 (D.D.C. 1974). The SEC held public hearings to consider the petition, but concluded that the statutes did not authorize or require such expanded disclosure. *See* Commission Conclusions

information-forcing provisions are grounded in the disclosure obligations of the Exchange Act, which rely upon reasonable shareholders' incentives to police misconduct. In the context of the resource curse, such incentives are largely absent. No amount of NGO activism can substitute for the actions of self-interested investors, nor should it; the Exchange Act was not designed with such a purpose in mind.

B. *Policing Problems*

Setting aside the materiality and incentives problems identified above, questions remain about whether the SEC, individual investors serving as private attorneys general, or even NGO watchdogs have the capacity to properly police regulated resource extraction issuers to ensure that they accurately report payments made to foreign governments.[166] Even if the disclosure of natural resource payment amounts had the intended effect of curbing the foreign corruption at the root of the resource curse, there is little in the ESTTA to guarantee that firms will in fact report such data accurately. Policing problems can be divided into two categories: *public* policing carried out by the SEC or other governmental agencies, and *private* policing performed by individual investors or civil society groups.

In the international anti-corruption context, Kevin Davis argues that relying upon international rather than domestic institutions to combat foreign bribery means that the success of anti-bribery initiatives depends upon the altruism of "foreign institutions and the actors who

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and Rule Making Proposals, Securities Act Release No. 5627, Fed. Sec. L. Rep. (CCH) at 85,706-07 (Oct. 14, 1975). The NRDC challenged the rulemaking in federal court. In two different proceedings, the district court found that the SEC had violated the Administrative Procedures Act. *NRDC I,* 389 F. Supp. at 693 (remanding to the SEC for reconsideration); NRDC v. SEC ("*NRDC II*"), 432 F. Supp. 1190, 1194-95 (D.D.C. 1977) (striking down the SEC's decision to reject expanded disclosure as arbitrary and capricious). The D.C. Circuit reversed, upholding the SEC's actions on both procedural and substantive grounds. NRDC v. SEC ("*NRDC III*"), 606 F.2d 1031, 1036 (D.C. Cir. 1979). Since *NRDC III* was decided the SEC has maintained that it does not have the statutory authority, under existing provisions of the securities laws, to require so-called "expanded" social disclosure beyond the traditional definition of materiality. *See* Williams, *supra* note 118, at 1266.

166. This is less of an obstacle than it might first seem, since the biggest challenge facing the ESTTA is not underreporting by firms but rather the disconnect between such data, once disclosed, and the corrupt activities of foreign officials over whom the international community has little leverage. Taking the ESTTA on its own terms, policing problems may nevertheless undermine the statute's effectiveness by making it too easy for firms to shirk.

inhabit them."[167] The concern is that these actors may be "indifferent or even hostile to the welfare of distant populations," leading public institutions like the SEC to under-enforce extraterritorial anti-bribery laws, especially where political actors in the U.S. are unaffected by or disinterested in the conduct in question and therefore fail to lobby for effective policing.[168] Furthermore, even where some U.S. stakeholders stand to *benefit* from anti-corruption initiatives such as the ESTTA,[169] regulators may still fail to police non-compliance in cases where foreign investments by regulated firms are deemed to be particularly important. Regulators are most likely to help U.S. firms "obtain[ ] legitimate government contracts in jurisdictions whose economic development they consider uniquely important, while turning a blind eye to bribes paid to obtain otherwise-unobtainable goods such as illegal logging concessions."[170] This indifference-based objection to transnational anti-corruption initiatives applies with equal or greater force to public policing of the disclosure obligations under the ESTTA, especially in light of the incentives problems identified in Part IV.A above.[171]

Aside from indifference, public policing problems may also emerge due to institutional under-capacity, which may manifest itself in one of two ways. First, the SEC may simply lack sufficient resources to investigate whether or not the figures reported by resource extraction issuers match up with the revenues received by foreign governments. Unlike the EITI, which devotes considerable attention to capacity building and monitoring of "Candidate" and "Compliant" countries,[172] the ESTTA

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167. Kevin E. Davis, *Does the Globalization of Anti-Corruption Law Help Developing Countries?* 3, 11 (N.Y. Univ. Ctr. for Law, Econ. & Org., Working Paper No. 09-52, 2009), *available at* http://ssrn.com/abstract=1520553.

168. *See id.* (citing W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS (1979)).

169. *See* ESTTA, *supra* note 21, §2(4) ("There is a growing consensus among oil, gas, and mining companies that transparency in revenue payments is good for business. . .").

170. Davis, *supra* note 167, at 12–13. A recent cross-national comparison of anti-bribery laws found that many countries with strong FCPA-type laws on the books still demonstrate this type of selective enforcement, and that even the U.S. seems to have engaged in some "self-interested non-enforcement." Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT'L BUS. STUD. 634 (2008).

171. For an elaboration of these dynamics in the human rights context, see Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L. J. 123, 141-142 (1996) (explaining that proposals for "home state" regulation of foreign conduct by U.S. companies often encounter a decided lack of enthusiasm, in part because powerful interest groups place a low priority on the human rights of non-citizens).

172. *See supra* note 93.

does not contemplate much beyond annual reporting to the SEC by regulated securities issuers.[173] This limitation, combined with the SEC's inability to inspect foreign government bookkeeping, makes it far too easy for firms to falsify or underreport natural resource payments when it is in their interest to do so.

Second, even presuming sufficient resources, the SEC may still lack the institutional knowledge and skill-set to properly investigate instances of underreporting by regulated firms. Unlike the FCPA, which divides enforcement responsibilities between the SEC and the Department of Justice, the ESTTA does not contemplate enforcement or monitoring by other government agencies. Under the FCPA, the SEC is primarily responsible for civil enforcement of the record-keeping requirements imposed on firms, while the DOJ is tasked with investigating actual cases of foreign bribery, which are criminalized.[174] The statute's record-keeping provisions require covered firms to keep accurate books and records and to maintain internal systems of control to ensure their integrity.[175] Notably, however, they do not require firms to *report* anything to the SEC; reporting is unnecessary because foreign bribery is simply criminalized. Thus, insofar as the new disclosure obligations imposed by the ESTTA will require the SEC to verify compliance with more rigorous methodology than that deployed currently, effective policing may require the acquisition of additional capabilities, including, but not limited, to the capacity to engage in forensic accounting of foreign government records.

Fraud and misrepresentation by securities issuers is policed not only by the SEC,[176] but also by individual investors, serving as "private attorneys general." The Supreme Court has recognized an implied private right of action under Section 10(b) of the Exchange Act,[177] and

173. *See* ESTTA, *supra* note 21, § 6. Notwithstanding the "sense of Congress" relating to multilateral cooperation and participation in the EITI, *id.* §§ 3-4, the core of the ESTTA remains the disclosure and reporting rules in Section 6.

174. Historically, the SEC focused on civil violations, specifically those that violated the accounting and record-keeping provisions of the statute, while the DOJ concentrated on criminal violations of the anti-bribery provisions. *See* DEMING, *supra* note 137 at 41. The DOJ also takes the lead on civil enforcement matters not related to securities issuers. *Id.* Although this neat division has begun to break down over the past decade, particularly following the Enron and WorldCom scandals of 2001–2002, this model of coordinated enforcement across agencies remains important under the FCPA regime. *See* Weiss, *infra* note 72 at 483–84.

175. 15 U.S.C. § 78m(b)(2).

176. *See* 15 U.S.C. §§ 78u(d)(1), (d)(3)(A) (2000).

177. 15 U.S.C. § 78j(b).

in Rule 10b-5, its implementing regulation.[178] To the extent the SEC lacks the capacity to fully police noncompliance, these general anti-fraud provisions should, in theory, enable concerned investors to police firms that might be underreporting payments made to foreign governments for natural resources. However, two major obstacles stand in the way of such suits. First, a private plaintiff will almost never be able to establish the elements necessary to make out his or her case. As the Court explained in Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., "In a typical §10(b) private action a plaintiff must prove" both a substantive violation, *i.e.*, "(1) a material misrepresentation or omission by the defendant; (2) scienter; [and] (3) a connection between the misrepresentation or omission and the purchase or sale of a security"; and three further elements establishing a causal link between the alleged violation and the plaintiff's injury, *i.e.*, "(4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."[179] Each of these requirements raises serious difficulties in the context of the ESTTA's natural resource revenue disclosure rules.[180] When taken together, they present a nearly insurmountable hurdle to private party enforcement actions.

A second obstacle to private policing actions may arise because of the extraterritorial nature of the transactions covered by the ESTTA's disclosure and reporting rules. U.S. courts have long upheld a presumption against the applicability of U.S. statutes to conduct committed abroad, especially where statutes are silent with respect to their extraterritorial reach.[181] The Exchange Act is such a statute.[182] Although courts

178. 17 C.F.R. § 240.10b-5. *See* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008) ("Though the text of the Securities Exchange Act does not provide for a private cause of action for §10(b) violations, the Court has found a right of action implied in the words of the statute and its implementing regulation.").

179. *Stoneridge*, 552 U.S. at 157.

180. First, as discussed in Part III.C.1 above, a plaintiff may have trouble demonstrating the materiality of misrepresented or omitted information pertaining to otherwise legitimate payments made to foreign government officials. Second, it is unclear whether any investor, "reasonable" or not, could connect his or her purchase or sale of shares to information on such payments, let alone—third—show that he or she *relied* upon the misrepresentation or omission. Fourth, even if a plaintiff could overcome the aforementioned hurdles, he or she would likely be unable to show economic loss. Finally, and perhaps trickiest, the causal link between misstated or omitted natural resource revenue data and any economic loss suffered by an investor would not simply be attenuated, but would likely run in the wrong direction. In other words, the chance of a resource extraction company's shares *appreciating* due to underreported figures is higher than the chances such a misstatement would cause the share price to fall.

181. This presumption holds that a court will not apply a jurisdictionally ambiguous statute to entirely foreign conduct, instead requiring a clear statement to the contrary by Congress in

have applied the presumption against extraterritoriality only very loosely to federal securities laws,[183] the Supreme Court decided a major case in June 2010—Morrison v. National Australia Bank, Ltd.—that may significantly narrow the extraterritorial scope of such statutes, including the disclosure obligations of Section 13 of the Exchange Act and the ESTTA, which would amend to it.[184] In contrast to the FCPA, Congress

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order to do so. *See* EEOC v. Arabian Am. Oil Co. ("*Aramco*"), 499 U.S. 244, 248 (1991) ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions.") (internal citations omitted). *See also* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (Holmes, J.) (noting that the "almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done" so as to avoid "interference with the authority of another sovereign, contrary to the comity of nations."). *See generally* Pamela K. Bookman, *Solving the Extraterritoriality Problem: Lessons from the Honest Services Statute*, 92 VA. L. REV. 749, 755-59 (2006) (describing the traditional presumption and discussing how it has been applied by courts throughout U.S. history).

182. *See* Morrison v. National Australia Bank, Ltd., 547 F.3d 167, 170 (2d Cir. 2008), *aff'd*, 561 U.S. ___ (June 24, 2010). ("When Congress wrote the Securities Exchange Act, however, it omitted any discussion of its application to transactions taking place outside of the United States.") (citing Itoba Ltd. v. LEP Group PLC, 544 F.3d 118, 121 (2d Cir. 1995), *cert. denied*, 516 U.S. 1044 ("It is well recognized that the Securities Exchange Act is silent as to its extraterritorial application.")).

183. *See* Bookman, *supra* note 181 at 758. Courts have established a set of rules for determining the extraterritorial scope of a given provision of the securities laws with the understanding that Congress intended for at least some extraterritorial conduct to fall under the overall regulatory regime. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975) (Friendly, J.), *cert. denied sub nom.* Bersch v. Arthur Anderson & Co., 423 U.S. 1018 (explaining that it has been left for the federal courts to implement "what Congress would have wished if these problems had occurred to it."); Schoenbaum v. Firstbrook, 405 F.2d 200 (206) (2d Cir. 1968) (Friendly, J.), *cert. denied*, 395 U.S. 906 (1969) (articulating the so-called "effects test" for international securities claims); Leaseco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) (Friendly, J.) (establishing the "conduct test" for such claims).

184. *Morrison*, 561 U.S. ___ (2010). In *Morrison*, the Court affirmed the Second Circuit's decision, *supra* note 182, but on different grounds, holding that the Exchange Act simply does not apply extraterritorially to provide a cause of action to foreign plaintiffs suing foreign defendants for misconduct in connection with securities traded on foreign stock exchanges. In contrast, the Second Circuit had proceeded to the question of subject matter jurisdiction, applying the "conduct test" to hold that an action under Rule 10b-5 by (i) foreign plaintiffs alleging (ii) fraudulent conduct in a foreign country perpetrated by (iii) a foreign issuer (a so-called "F-cubed" case) could not proceed because the court lacked subject matter jurisdiction over such claims. 547 F.3d at 176 ("The actions taken and the actions not taken by [respondent issuer] in Australia were, in our view, significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida."). Notably, just days before this Article went to print, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173 (2010), *see supra* note 21, which partially overturned the decision in *Morrison*,

has never provided a clear statement on the applicability of the Exchange Act (or the ESTTA) to wholly foreign conduct.[185] To the extent the *Morrison* decision limits the extraterritorial scope of the statute, disclosure of natural resource revenue payments under the ESTTA may not provide a sufficiently clear U.S. nexus to survive judicial scrutiny.[186] Taken together with the limitations on 10b-5 actions identified above, the presumption against extraterritoriality makes the success of private party policing under the ESTTA less likely.

Finally, beyond SEC enforcement actions and suits by private attorneys general, policing problems may also manifest themselves in lapses by the civil society watchdog groups implicitly entrusted to police regulated firms under the ESTTA's information-forcing regime.[187] In a world of scarce resources, membership- and grant-funded NGOs will, justifiably, tend to focus their attention on particularly high-profile regions or cases of foreign corruption, sometimes ignoring urgent challenges elsewhere.[188] Because NGOs have their own agendas and are *themselves* less transparent—although perhaps at times more high-minded—than governments, selective indifference on their part may

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representing one of the most rapid responses by Congress to a decision of the Supreme Court. *See* H.R. 4173 § 929P(b) ("Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws"). While, as of this writing, it was too soon to tell exactly how – and to what extent – the statute would displace the core holding of *Morrison*, it seemed clear that the extraterritoriality of federal securities laws would continue to be contested for some time. For an excellent preliminary discussion of the issues involved, see Julian Ku, *Morrison: The Fastest Reversal Ever (?) of a U.S. Supreme Court Decision*, OPINIOJURIS.ORG, June 30, 2010, http://opiniojuris.org/2010/06/30/morrison-the-fastest-reversal-ever-of-a-us-supreme-court-decision (last visited Jul. 17, 2010).

185. *See, e.g.*, 15 U.S.C. § 78dd(1)(g) (2000) ("It shall also be unlawful for any issuer organized under the laws of the United States . . . to corruptly do *any act outside the United States* in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, *irrespective* of whether such issuer . . . makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.") (emphasis added).

186. It remains to be seen whether Section 2(2) of the ESTTA, *supra* note 78, would provide sufficient evidence of congressional intent to survive the presumption against extraterritoriality. An in-depth discussion of this question—not to mention speculation regarding the interaction between the Court's decision in the *Morrison* case and the provisions of the Dodd-Frank bill which appeared, as of this writing, to partially overturn it—is necessarily outside the scope of this Article.

187. *See supra* notes 160-64 and accompanying text.

188. This dynamic has been critiqued in the environmental context, where conservation NGOs tend to fundraise particularly well when they focus their efforts on so-called "charismatic megafauna," such as polar bears and Sumatran tigers, which capture the public's attention more readily than other, less camera-friendly species.

lead to over-policing in some areas and under-policing in others. This ad hoc approach runs the real risk of ignoring the corruption that accompanies natural resource extraction across major swaths of the globe, undermining the broad purpose of the statute and leaving citizens of at least some "resource cursed" states to fend for themselves.

V. "Transparency-plus" Transnational Regulation

The apparent intractability of the resource curse has led development experts, anti-corruption activists and other concerned stakeholders to promote natural resource revenue transparency as a promising solution. Yet this transparency-based approach, as exemplified by the ESTTA as currently drafted, generates its own set of difficulties, including challenges associated with misaligned incentives and under-policing. And because the merit-based approach taken by the FCPA is inapposite in the context of the resource curse, the international community is left with a dearth of effective policy options to tackle this sort of corruption. Improving the ESTTA is therefore imperative, yet easier said than done.

Fortunately, two other pieces of legislation introduced around the same time as the ESSTA—one American and the other Canadian—offer up some concrete ideas for improvement. This Part identifies several recommendations for practical modification of the ESTTA, based upon key provisions of the Congo Conflict Minerals Act of 2009 and Canada's Bill C-300.[189] Concededly, such modification will not fully remedy the incentives "mismatch" associated with transparency-based approaches to the resource curse.[190] Nevertheless, by increasing the likelihood that regulated firms will actually comply with the statute's disclosure obligations while tackling the causes of the resource curse more comprehensively, the recommendations outlined below should enhance the capacity of domestic actors to hold their leaders accountable for corruption and, ultimately, lift the curse.

A. *Comprehensiveness: The Congo Conflict Minerals Act of 2009*

The ESTTA was not the only bill in the 111th Congress to address elements of the resource curse. The Congo Conflict Minerals Act (CCMA), introduced on April 23, 2009 by Senator Sam Brownback (R-KS) (and passed as part of the Dodd-Frank bill in July 2010), seeks to

189. *Supra* notes 26-27.

190. *See supra* notes 151-165 and accompanying text.

intervene in the ongoing civil conflict in the eastern part of the Democratic Republic of Congo (DRC) by mandating disclosure to the SEC of chain-of-custody information related to the extraction and processing of columbite-tantalite (coltan), cassiterite and wolframite.[191] These so-called "conflict minerals" are mined in the eastern DRC, and the proceeds from their eventual sale to electronics manufacturers have been traced back to armed bands operating in the region.[192]

The CCMA and ESTTA both locate their disclosure requirements in the same amended section of the Exchange Act, but the CCMA focuses narrowly on just one country—the DRC— and crafts a more comprehensive legislative response to the complicated political, economic, and

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191. CCMA, *supra* note 26. A companion measure, the Conflict Minerals Trade Act, was introduced in the House by Representative James McDermott (D-WA) on November 19, 2009. Conflict Minerals Trade Act, H.R. 4128, 111th Cong. (2009) [hereinafter CMTA]. The CMTA is nearly identical to the CCMA, but rather than relying upon disclosure and reporting under section 13 of the Exchange Act, it states that the Commerce Department,

> in cooperation with the Secretary of State, the International Trade Commission and the Commissioner responsible for U.S. Customs and Border Protection, shall determine and publish in the Federal Register a list of those articles specified in the Harmonized Tariff Schedule of the United States that should be identified as likely containing conflict minerals. Such list shall be referred to as the "Potential Conflict Goods List."

CMTA § 6(a). The bill also tasks the Commerce Department with developing a list of approved auditors, *id.* § 6(b), whose services can be used by those "[worldwide] facilities that process conflict minerals and whose resulting materials are used in products shipped into the United States." *Id.* § 6(c)(1). Importers are required, under section 7 of the CMTA, to certify on their customs declaration that imported articles on the "Potential Conflict Goods List" either "contain conflict minerals" or are "conflict mineral free" in accordance with the auditing procedures required by section 6(c).

The CMTA's customs-based regulatory regime for conflict mineral imports raises some similar issues to the extraterritorial information-forcing at work in the CCMA and ESTTA. It should be noted that the core provisions of the CCMA, taken together with parts of the CMTA, were included in the Dodd-Frank bill passed by Congress on July 15, 2010. Since this late development occurred as this Article was submitted for publication, the remainder of this discussion will focus exclusively on the version of the CCMA introduced by Senator Brownback in 2009.

192. *See* United Nations Group of Experts on the Democratic Republic of the Congo, *Letter dated 10 December 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council*, ¶¶ 73, 129, U.N. Doc. S/2008/773 (Dec. 12, 2008) ("The Group estimates that [armed rebel group] FDLR is reaping profits possibly worth millions of dollars a year from the trade of minerals in eastern Democratic Republic of the Congo, in particular cassiterite, gold, coltan and wolframite. . . . Cassiterite and coltan are used principally in the global electronics industry.").

geographic causes of the resource curse as it affects the Congolese people.[193] If the ESTTA is to be decoupled from the federal securities laws and reconstituted as a freestanding disclosure and reporting regime for overseas natural resource payments, the CCMA provides at least part of a roadmap for how to begin.

Aside from the disclosure of data on conflict minerals,[194] the CCMA requires the State Department to work with NGOs to publish "guidance for commercial entities" so that they can "exercise due diligence on their suppliers" to ensure that mineral purchases are not contributing to the conflict.[195] Furthermore, the CCMA calls for the development by the State Department of a comprehensive U.S. Agency for International Development (USAID) strategy for the eastern DRC region, including "a description of punitive measures that could be taken against individuals or entities whose commercial activities are supporting illegal armed groups and human rights violations in eastern [DRC],"[196] as well as the ongoing inclusion of information on conflict minerals in human rights country reports and OECD Investment Committee reports.[197]

One relatively simple way to build upon the transparency-only approach of the ESTTA would be to adopt some of the policies introduced in the CCMA, applying them not just to a single country but across the globe. Certain proposed actions, such as the inclusion of information on conflict minerals in annual human rights country reports, could be easily expanded to cover a much broader range of countries. Others might present challenges, but nonetheless warrant serious consideration. For example, the Secretary of State might be tasked with initiating, as under Section 4(c) of the CCMA ("Guidance for Commercial Entities"), a multi-stakeholder investigatory process to determine which countries are so prone to the resource curse or corruption that they justify additional care by resource extraction companies operating within their territories.

No matter which provisions of the CCMA might ultimately be integrated with the ESTTA's broad disclosure and reporting obligations, the movement from a "transparency-only" to a more comprehensive "transparency-plus" posture is critical. Natural resource revenue disclosure makes sense as a "second order" policy tool because the

193. *See* CCMA, *supra* note 26, at §§ 4-7.

194. *Id.* § 5.

195. *Id.* § 4(c).

196. *Id.* § 4(d).

197. *Id.* § 4(e)-(f).

resource curse is not susceptible to traditional development assistance and democracy promotion initiatives. Moreover, because disclosure under the securities laws will always be hamstrung by an incentives mismatch, the ESTTA alone is unlikely to succeed without adopting a more comprehensive approach which includes substantive, "first order" policies. Working to integrate some of the CCMA's provisions with those of the ESTTA would thus be a worthwhile place to start.

B. *Conditionality: Canada's Bill C-300*

Likewise, several substantive elements of a hotly-debated Canadian bill regulating resource extraction companies' overseas operations could serve as complements to the transparency-based provisions of the ESTTA. Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas Corporations in Developing Countries (the "Bill," or "C-300"), was introduced by Canadian Member of Parliament John McKay on February 9, 2009.[198] The Bill represents the culmination of several remarkable years of advocacy, study and dialogue on corporate social responsibility and the Canadian mining sector and was fashioned as an explicit response to the negative impacts of nationally-registered multinational corporations.[199]

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198. *See* Bill C-300, *supra* note 27. A Canadian private Member's bill is one introduced into the House of Commons by a Member of Parliament who is not a cabinet minister. A private Member's bill is typically allotted less time for debate than a government bill, and relatively few Members' bills become law. *See* Peter Koven, *Mining Industry Waits on Fate of Bill*, FIN. POST, Sept. 14, 2009, *available at* http://www.financialpost.com/m/story.html?id=1993347 ("Private member bills have an extremely low success rate in Ottawa.").

199. Debate over the international human rights record of Canadian companies operating overseas was first brought to the attention of the Canadian Parliament as a result of the longstanding resource-driven civil war in the Democratic Republic of Congo. Following extensive debate, the U.N. Security Council in 2000 requested the Secretary-General to establish "an expert panel on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo," which was authorized to investigate the situation and issue a report. *See* The President of the Security Council, *Statement Made on Behalf of the Security Council at the 4151st Meeting*, ¶¶ 3-4, U.N. Doc. S/PRST/2000/20 (June 2, 2000). The Panel issued its Final Report in 2002, in which it called on the Canadian government to investigate the actions of five Canadian companies operating in the country. *See* Letter from Kofi A. Annan, Secretary-General, United Nations Security Council, to President, United Nations Security Council (Oct. 15, 2002), Annex ¶170, Annex III, U.N. Doc. S/2002/1146 (Oct. 4, 2002).

This report led to a first round of debate in Parliament, and discussions have continued in fits and starts ever since. *See* Brett Poppelwell, *Canadian Mining Firms Face Abuse Allegations*, TORONTO STAR, Nov. 22, 2009, *available at* http://www.thestar.com/news/canada/article/729147—canadian-mining-firms-face-abuse-allegations ("[Canadian] politicians have long squabbled over how best to deal with the accusations of abuse. Debate kicked up in 2002 after a United Nations report

If passed, Bill C-300 would regulate, on the basis of substantive international environmental and human rights standards, the relationship between Canadian government agencies and Canadian extractive companies operating in developing countries. First, the Bill would require the Canadian Parliament to establish "guidelines that articulate corporate accountability standards for mining, oil or gas activities."[200] These guidelines are to be issued after consultation with relevant stakeholders within one year of the Bill's passage.[201] Second, the Bill would require Canadian extractive companies to comply with the above-mentioned guidelines in order to receive financial or diplomatic support from Export Development Canada (EDC, Canada's export credit agency), the Canadian Pension Plan Investment Board (CPPIB), or DFAIT.[202]

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called on the Canadian government to investigate the actions of seven Canadian companies accused of illegally exploiting resources from the [DRC] . . . . The Canadian government didn't investigate."). During this period, concerns also emerged about a Canadian mining company's operations in the Philippines. *See* Christian Aid, *Breaking Promises, Making Profits: Mining in The Philippines* (Dec. 2004) (highlighting the role played by Canadian company TVI in constructing an open pit gold mine on the Philippine island of Mindanao without the consent of local indigenous communities), http://www.piplinks.org/system/files//philippines_report.pdf. And in 2003, a U.S. federal court hearing a lawsuit against Talisman Energy, Inc., a Calgary-based oil company, denied its motion to dismiss a complaint alleging corporate complicity in grave human rights abuses in Southern Sudan. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 354 (S.D.N.Y. 2003). *See also* Broecker, *supra* note 37, at 201–16 (discussing other attempts at home state regulation on human rights).

200. Bill C-300, *supra* note 27, § 5(1).

201. *Id.* § 5(1). In order to ascertain which activities around the world may violate the guidelines, the Bill would create a complaints mechanism whereby complaints could be filed with Canadian Ministers of Foreign Affairs and International Trade by "any Canadian citizen or permanent resident or any resident or citizen of a developing country in which such activities have occurred or are occurring." *Id.* § 4(1). If accepted, the complaint would lead to an investigation of a company's compliance with the guidelines and a public report on findings within eight months of receipt of the complaint. *Id.*§ 4(4)-(6).

202. *Id.* §§ 8-10. These restrictions pack quite a punch. EDC provides Canadian investors with credit and debt financing and insurance to support foreign direct investment. In 2008, the most recent year for which figures are available, EDC provided over 8,300 Canadian companies with over C$85 billion in financing and insurance. *See* Press Release, EDC, *EDC Customers and Business Volume at Record Levels in 2008* (Mar. 5, 2009), http://www.edc.ca/english/docs/news/2009/mediaroom_16158.htm. Over 25 per cent of this figure was spent to support Canadian firms' investments in emerging markets. *Id.* EDC support for Canadian extractive companies is vital, particularly since it provides political risk insurance that few other insurers offer. *See* Political Risk Insurance Center, *Export Development Canada*, http://www.fdi.net/documents/WorldBank/databases/pri-center_mockup/edc.html (last visited May 20, 2010). This type of insurance covers risks typically associated with the unstable and conflict-prone countries in which many Canadian mining, oil and gas companies operate. *See* Alan Berkin, *Managing Political Risk in the Oil and Gas*

Several beneficial changes to the ESTTA's disclosure rules could be modeled upon the conditional export credit guarantees contained in Bill C-300. Of course, the United States does not have a national pension investment board, as does Canada, which might condition its investments upon substantive human rights and environmental criteria. It is also a political non-starter to call upon the State Department to withdraw diplomatic support to those American firms who fail to meet such standards. This leaves the Canadian bill's requirement that EDC credit and insurance guarantees be made conditional for Canadian resource extraction firms on their compliance with the standards enumerated in the statute.

Like Bill C-300, the ESTTA could impose new conditions on lending, loan guarantees and political risk insurance provided by the Overseas Private Investment Corporation (OPIC)[203] and the Export-Import Bank of the United States (Ex-Im),[204] two government instrumentalities charged with supporting foreign investment by U.S. businesses.

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industries, 1 TRANSNAT'L DISP. MGMT. 19 (2004), http://www.transnational-dispute-management-.com/samples/freearticles/tv1-1-article_54.htm.

Even more important than EDC support for these firms, however, are the investment decisions of the CPPIB. The Board manages a portfolio of over C$120 billion. CPP Investment Board, *Total Portfolio View*, http://www.cppib.ca/Investments/Total_Portfolio_View (last visited May 18, 2010). All figures cited above are as of September 30, 2009. Approximately 45% of CCPIB investments are devoted to Canadian stocks and bonds, and over 600 Canadian companies are represented in the CPPIB portfolio. CPP Investment Board, *2009 Annual Report*, http://www.cppib.ca/Publications/CPPIB_2009_AR_Online.html. Bill C-300's language amending the Canada Pension Plan Investment Board Act is stark. Not only must "every investment manager who invests the assets of the Board" take the Bill's guidelines into consideration, Bill C-300, *supra* note 27, § 10(2), (3), but he or she must also "ensure that the assets are not invested in any corporations whose activities have been found" to be "inconsistent with the guidelines." *Id.* at §10(3). These restrictions have the potential to impose real financial costs on Canadian extractive companies. Furthermore, as a large institutional investor, the CPPIB's investment decisions are often closely scrutinized by other investors; a decision to disinvest may carry with it the whiff of reputational risk for the "pariah" stock as other socially responsible shareholders follow the Board's lead.

203. OPIC is an independent agency established by the U.S. government to "mobilize and facilitate the participation of the United States private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from nonmarket to market economies, thereby completing the development assistance objectives of the United States." 22 U.S.C. § 2191 (2000).

204. Ex-Im is the official export credit agency of the United States. Its mission is to "assist in financing the export of U.S. goods and services to international markets." Ex-Im, *About Ex-Im: Mission*, http://www.exim.gov/about/mission.cfm (last visited May 15, 2010). Ex-Im was chartered under the Export-Import Bank Act of 1945, *as amended through* Pub. L. No. 109-438, 120 Stat. 3268 (2006) (codified at 12 U.S.C. § 635 *et seq.*).

These requirements could take a variety of forms. One option would be to follow the Canadian example by forcing U.S. firms to meet certain substantive standards in their own international operations and conduct. This approach has the benefit of ensuring tangible changes in company operations on the ground, but extends far beyond the transparency-only framework of the ESTTA. Although some resource extraction issuers may also be human rights violators,[205] the balance struck by the bill was meant to counter corruption by disincentivizing the misappropriation of natural resource wealth by foreign leaders, not to hold securities issuers directly liable for the impacts of their overseas operations.

A second, more palatable option would make OPIC and Ex-Im financing for U.S. companies conditional only upon their compliance with the disclosure obligations of Section 6 of the ESTTA. Of course, since the ESTTA amends the reporting requirements of Section 13 of the Exchange Act, firms would already be liable for false or misleading information under anti-fraud provisions such as Section 10(b).[206] This new conditionality would simply tip the scales a bit in the cost-benefit analysis in which firms may engage when determining whether to comply with the new transparency rules. By imposing additional penalties for non-disclosure of natural resource payment data, and by linking those penalties back to the very foreign investments that form the basis for the disclosure, this approach might modify incentives for companies on the margin, who might otherwise be tempted to under-report. Although a far cry from solving the incentives and policing problems created by the ESTTA, this kind of conditionality, when combined with the comprehensive tactics suggested by the CCMA, will go at least part of the way towards strengthening the bill's extraterritorial information-forcing provisions and ensuring that it achieves some success in lifting the resource curse.

C. *Conclusion*

Transparency has real limits as an anti-corruption tool. Information-forcing measures such as the Energy Security Through Transparency

205. *See, e.g.*, Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (oil extraction in Nigeria); Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003) (copper mining in Peru); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002) (oil extraction in Ecuador); John Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *reh'g ordered by* 395 F.3d 978 (9th Cir. 2003) (en banc) (oil pipeline construction in Burma); Beanal v. Freeport-McMoRan, Inc., 197 F.3d 161 (5th Cir. 1999) (gold mining in Indonesia).

206. For a discussion of Section 10(b), see *infra* notes 177-82 and accompanying text.

Act will tend to work best when they target wrongdoing directly, and when stakeholders to whom a regulated entity is directly accountable can utilize disclosed information in order to police misconduct and ensure compliance. The traditional reporting requirements in Section 13 of the Exchange Act—which will be amended by Section 1504 of the Dodd-Frank bill—are a good example of this approach, since they rely upon self-interested shareholders to guard against fraud by securities issuers.[207] Unfortunately, the twin foundations of disclosure and investor protection upon which Section 13 rests are at their weakest where information-forcing measures target secondary actors and where stakeholders' incentives are not aligned with a measure's goals or not strong enough to ensure full compliance with its requirements. The ESTTA, for example, targets foreign corruption indirectly by regulating disclosure from multinational oil, gas and mining companies, whose conduct has little or no effect upon the grand corruption and institutional failures that cause the resource curse. Meanwhile, the stakeholders whose incentives are most closely aligned with the ESTTA's primary anti-corruption objective—the citizens of developing countries—are precisely those actors with the least leverage over regulated firms. And the shareholders to whom such firms *are* accountable may not care much about misappropriated natural resource wealth; even if they did care, these investors have little ability to influence the behavior of corrupt foreign leaders.

In such circumstances, where stakeholder incentives and capacities are not aligned with key policy objectives, it seems clear that disclosure-based regulation is insufficient. But the criminalization of foreign bribery under the FCPA, which guarantees compliance by firms for whom shareholder incentives would otherwise be too weak to change behavior, is an inappropriate weapon in the fight against the sort of corruption that causes the resource curse. The ESTTA is thus stuck in an unfortunate no-man's land, unable to lift the resource curse through transparency alone, but also incapable of imposing effective anti-corruption sanctions. This posture leads not just to misaligned incentives, but also to policing problems that raise real obstacles to the statute's success.

Fortunately, modifications to the ESTTA, whether imposed by future congressional legislation or by the SEC's implementing regulations, may help to overcome some of the law's limitations. Instead of taking the form of an amendment to the Exchange Act, which from its

207. 15 U.S.C. § 78m, *supra* note 23.

inception has relied upon an investor protection rationale and a stringent materiality standard to ensure its effectiveness, the ESTTA should instead create a freestanding disclosure and reporting regime for overseas natural resource payments, decoupled from the strictures of the federal securities laws but linked to a more comprehensive strategy to better address the governance and development challenges associated with natural resource abundance. Adding a more comprehensive set of tactics—such as those suggested by the Congo Conflict Minerals Act—might help the ESTTA to tackle some of the governance challenges that contribute to the resource curse but are not reachable via natural resource revenue disclosure under Section 13 of the Exchange Act.

Likewise, making financial and political support, such as export credit guarantees and political risk insurance, conditional upon compliance with the ESTTA's new disclosure obligations could help to ensure that firms accurately report what they spend overseas. None of these changes will be the silver bullet solution that is guaranteed to work wonders. But by adopting such "transparency-plus" measures to complement the ESTTA's core strategy of extraterritorial information-forcing, Congress and the SEC can better anticipate that the statute will do some good in countering corruption and, ultimately, lifting the resource curse once and for all.