AN EXPLORATION OF THE EXTRACTIVE INDUSTRIES TRANSPARGENCY INITIATIVE AS A MODEL FOR INCORPORATING COLLABORATIVE ACCOUNTABILITY INTO COLLECTIVE GLOBAL GOVERNANCE

JENNIFER J. RITER*

ABSTRACT

The business of mineral extraction fundamentally entails environmental costs and social challenges. However, the harm caused by operations is disproportionately present in the developing (as opposed to the developed) country context. Using an interdisciplinary approach, this paper seeks to uncover why the presence of extractive industries in developing countries inhibits development by delving into the role of law in the governance of transnational corporations. The transnational order is evolving toward an era of sector-specific, non-hierarchical collective global governance mechanisms such as the Extractive Industries Transparency Initiative (EITI). This paper responds to social science research which deemed the EITI ineffective at affecting key

* Jennifer J. Riter, Esq., LL.M. is passionate about the sustainable management of our natural resources. She has extensive negotiations and business development experience within the energy sector—both domestically and abroad—and has served as a lecturer in International Law and Global Governance with Erasmus University Rotterdam, the Netherlands. Jennifer acknowledges Dr. Andria Naudé-Fourie’s expertise and guidance, as well as, the wise counsel and collaborative thinking of Professor Ellen Hey and Dr. Federica Violi. All of which were invaluable contributions to the work. Jennifer holds an LL.M. in International and European Union Law from Erasmus University Rotterdam, the Netherlands (2017); a J.D. specializing in Energy and Natural Resources Law from University of Oklahoma College of Law (2012); and a B.A. with high honors from The University of Tulsa (2008). She is a member of the American Bar Association and the Oklahoma Bar Association.
governance indicators. It counters this finding by demonstrating that effectiveness is an insufficient metric for assessing regulatory quality in this context and then proffers an alternative metric. Instead, mechanisms like the EITI are better assessed by the two-prong test developed herein: (1) the role it plays in catalyzing consensus and changing institutional behaviors and (2) the mechanism’s institutional flexibility. This paper explores how a departure from the concepts enshrined in linear liability models will be required to achieve the EITI’s sustainable development goals. The cornerstone contribution of this paper is its innovative introduction of the notion of “collaborative accountability” in the place of more traditional linear responsibility concepts. It sets out the argument that organizations like the EITI that possess the concepts of collaborative accountability have a robust potential to positively impact the governance of transnational corporations.
# Table of Contents

1. Introduction ............................................................................... 842  
   1.1. Achieving Sustainable Development through Collective Governance ................................................ 842  
   1.2. Globalization .................................................................... 843  
   1.3. Structural Harm .................................................................. 846  
   1.4. Research Methods ........................................................... 848  
2. Global Governance and the Regulatory Transition ............... 851  
   2.1. Governance Defined ....................................................... 851  
   2.2. The Regulatory Transition: From External Supervision to Voluntary Self-Monitoring ........................................ 853  
   2.3. Elements of Collective Governance ............................... 858  
      2.3.1. Transparency ....................................................... 859  
      2.3.2. Stakeholder Engagement ................................... 861  
3. An Example of Collective Governance: The Extractive Industries Transparency Initiative ......................... 862  
   3.1. The Reason Behind the EITI – The Resource Curse .... 862  
   3.2. An Overview of the Extractive Industries Transparency Initiative: What is the EITI and How does it Operate? ........................................................................................................ 866  
      3.2.1. A Developmental Timeline of The EITI .......... 867  
      3.2.2. EITI Operations ................................................. 870  
   3.3. Effectiveness of the EITI ............................................... 873  
4. Incorporating Collaborative Accountability into the Collective Governance Model ........................................ 876  
   4.1. The Blurred Lines of Liability ........................................ 878  
   4.2. The Responsibility of Corporations through the Lens of Collaborative Accountability ............................... 881  
   4.3. Characteristics of Collaborative Accountability within the EITI ................................................................. 886  
5. Conclusion .............................................................................. 889
1. INTRODUCTION

1.1. Achieving Sustainable Development through Collective Governance

Sustainable development has been defined as human progress that “meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹ It is a developmental concept recognizing the existence of the three intertwined dimensions to progress: social, economic, and environmental. Sustainable development aims to balance these indivisible objectives. In 2015, the United Nations sought to more specifically delineate sustainable development targets in its Sustainable Development Goals.² Achieving these goals requires national and subnational political reforms, access to knowledge and resources, and the rethinking of existing international governance frameworks.³ Sustainable development recognizes that while nature imposes certain thresholds, growth is critical to sustainability, especially within the context of developing nations. However, it has become increasingly clear that this growth can no longer be based on the overexploitation of natural resources, but must be managed in a way that enhances the societies in which such resources are produced. We have entered into a new era in the history of development. It is an era of managing natural resources, not simply exhausting them; an era of linking economic growth and environmental protection in strategies for sustainable development.⁴

Achieving sustainable development will require an unprecedented global effort, only possible under a shared global framework consisting of both authority and accountability mechanisms.⁵ Redrafting components of the existing framework

² G.A. Res. 70/1, Transforming our World: The 2030 Agenda for Sustainable Development, at 1 (Sept. 25, 2015).
³ World Comm’n on Env’t & Dev., supra note 1, at 29.
⁴ Id. at 30.
⁵ Johan Rockström & Jeffrey D. Sachs with Marcus C. Öhman & Guido Schmidt-Traub, Sustainable Development and Planetary Boundaries, SUSTAINABLE DEV. SOLUTIONS NETWORK: A GLOBAL INITIATIVE FOR THE UNITED NATIONS, at 21 (May
requires involvement from a diverse set of stakeholders that must also include the private sector.\(^6\) Private sector involvement will require transnational oversight that is broader than even the best laid corporate social responsibility (CSR) efforts.\(^7\) This politically enlarged concept of corporate accountability\(^8\) extends beyond the boardroom, taking the form of a collective effort by government, civil society, and industry.\(^9\) While it is recognized herein that transnational oversight of this magnitude requires an international collective governance mechanism, I do so with pause as I by no means advocate moving toward a “world government.” Extrapolating existing command and control concepts imbedded within domestic regimes and implementing them in toto at the international level would result in an overly bureaucratic system devoid of true democracy. Such a system would be even more “accommodating to power, more hospitable to hegemonic ambition, and more reinforcing of the roles of states and governments rather than the rights of people.”\(^10\) Despite these concerns, it is the nature of global problems that they must be solved with global solutions.\(^11\) Hence, collective governance mechanisms at the international level will be required in order to achieve sustainable development.

One essential aspect of these collective mechanisms is the promotion of regulatory quality at the national and subnational level.\(^12\) Regulatory quality “[r]eflects perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development.”\(^13\)

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\(^8\) Wettstein, *supra* note 6, at 173.

\(^9\) Andrews, *supra* note 7, at 68.


\(^12\) See BEVIR, *supra* note 10, at 107 (stating that although there are a number of other developmental objectives, for the purpose of limiting the scope of this piece, the focus herein is exclusively on regulatory quality).

There are two sides to the coin of regulatory quality: the input and the output. In other words: the decision-making process surrounding the creation and implementation of regulation, as well as, the accountability mechanism enforcing that regulation. Therefore, collective governance models simultaneously seek to promote democratic participation in this decision-making process with the aim that this participatory process will lead to greater regulatory quality at the subnational and national levels, and thus enhance corporate accountability. However, based on a review of social science literature, it is apparent that there exists a breakdown in corporate accountability. As such, the analysis herein will seek to identify the source of that breakdown and advocate an evolutionary iteration to the accountability component of existing collective global governance mechanisms at the international level.

This work will explore how rethinking a particular aspect—the accountability mechanism—of collective global governance frameworks will enhance sustainable development progress by begetting improved regulatory quality at the national and subnational levels. The remainder of this chapter discusses the concepts of globalization, its role in cultivating structural harm, and the research methodology employed herein, which seeks to contextualize and frame the larger discussion. Chapter 2, breaks down the definitional elements of governance honing in on its regulatory aspects, followed by a walkthrough of the regulatory transition from external supervision to self-regulation as catalyzed by globalization. The subsequent segment delves deeper into these self-regulation methods of governance which began with CSR but have evolved into corporate participation in public-private partnerships (PPPs). These PPPs, one type of collective governance mechanism, are characterized by two concrete elements: transparency and stakeholder engagement. The notion is that these elements—along with the more nuanced organizational ability to adaptively problem-solve—have the capability of begetting corporate accountability, but an examination of the Extractive Industries Transparency Initiative (‘EITI’) in Chapter 3 demonstrates that a breakdown in accountability occurs because the current framework is reliant upon the ill-fitting concept of linear liability. Chapter 4 proffers a departure from the inclusion of linear

is likely caused by: a limited mandate, voluntary nature, stakeholder resistance, and dependence on strong civil society).

14 BEVIR, supra note 10, at 107.
liability in the framework and advocates a move toward a notion of collaborative accountability.

1.2. Globalization

Globalization is becoming increasingly accepted as an economic, political, and societal reality. Despite this broad conceptual recognition, globalization lacks a hard-and-fast definition. Generally speaking, the term globalization refers to entrenched and enduring patterns of global interconnectedness. The transactions associated with this interconnectedness continue to grow in magnitude and intensity, enmeshing societies in worldwide systems and networks.¹⁵ This global interconnectedness is swiftly changing the nature of harm, which calls for a shift in the nature of governance.¹⁶ In the midst of this global transition, it is becoming increasingly apparent that existing global governance mechanisms are no longer equipped to face current global challenges.¹⁷ The world is transitioning toward an era requiring collective and collaborative responses to global challenges arising from and compounded by the ever-increasing interconnections between people and communities across the globe.¹⁸ Naturally, such a tectonic societal and political shift will have a momentous impact on the legal responsibility of businesses if we intend to achieve sustainable development.¹⁹

This interconnectedness of globalization has been the fertile soil for the incredible growth associated with transnational corporations. As such, another hallmark of globalization is the rampant blurring of the lines between private enterprise and public interest.²⁰ Due to the relatively recent and striking amassment in size, income, and technological capacity of transnational corporations rivaling that of many nations, it has become increasingly difficult to regulate and monitor corporate activities and compliance. Even the most powerful and developed nations face surmounting difficulties in controlling the activities of

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¹⁵ Wettstein, supra note 6, at 156.
¹⁶ Id. at 181.
¹⁷ Id.
¹⁸ Id.
¹⁹ Id.
²⁰ Sovacool et al., supra note 13, at 187.
The unfortunate reality is that governments are generally unwilling to regulate transnational companies even when legal regulation is plausible. This is particularly the case when such entities operate outside of their jurisdiction. This phenomenon creates an accountability gap which leaves transnational companies under-regulated at best and the populations residing where they operate without recourse in the event of damage.

A transnational system is multi-actor by definition. States are embedded in a broader and deeper transnational arena. Borders are “transcended” rather than crossed, relations become increasingly “supraterriorial” as distance, and borders and geographic space itself lose economic and political significance. It is a system in the throes of evolution where uncertainty about structures, relationships, norms and institutions abounds. Increasingly, private actors operate in authoritative positions and fulfill governing functions, which were previously seen as the exclusive domain of governments. This combination of fragmentation and shift in public authority to private actors can lead to structural harm, most notably in the developing country context.

1.3. Structural Harm

Structural harm is harm caused to a governance system. It is distinct from the concept of “social violence,” where the governance structure and institutions cause individual inequity. Structural harm is also distinct from intentional wrongful acts of an individual agent or the willfully repressive policies of a state, in that it lacks the intent to do harm. Rather, this type of harm is the inability of the

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22 See Stephen J. Kobrin, Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights, 19 BUS. ETHICS Q. 349, 351 (2009) (explaining that transnational corporations should be held liable for human rights violations, but liability is often complicated by the discontinuity between the political structures of the corporations).

23 Id. at 359-60.

24 Wettstein, supra note 6, at 162.

25 See The Oxford Handbook of the Social Science of Poverty 47 (David Brady & Linda M. Burton eds. 2016) (discussing the distinction between structural and social violence).

26 See Iris Marion Young, Responsibility and Global Justice: A Social Connection Model, 23 SOC. PHIL. & POL’Y 102, 114 (2006) (clarifying the claims about global
institution to develop itself in a manner sufficient to govern effectively. Structural harm is the systemic destabilization of governance and institutional structures at the national or subnational level, and results in the deterioration and breakdown of mechanisms that drive the creation of stable governance institutions and social structures within a localized society.

Providing effective regulatory oversight of transnational corporations is difficult due in large part to the nature of modern corporate entities. Transnational corporations are challenging the traditional concepts of both the law of corporations and international law, in that legal concepts fashioned to serve a society in which the role of business was limited and local have become archaic in a world where business is conducted worldwide by giant corporate groups comprised of affiliated companies organized in dozens of countries.\(^27\) In today’s globalized world, corporate actors have the potential to cause and contribute to structural harm in the societies where they operate simply by going about routine activities—even without the intent to cause harm in a conventional sense.\(^28\)

The ability for a corporate actor to contribute to (distinct from cause) structural harm is particularly relevant in contexts where institutional governance structures are weak, or where the rule of law is lacking.\(^29\) Developing nations face greater challenges than developed nations in providing effective regulatory oversight of transnational corporations.\(^30\) This is due in large part to existing structural and institutional inadequacies.\(^31\) Often, developing nations lack the institutional structure in the form of political will, technical capacity, as well as physical infrastructure, to provide effective regulatory oversight of transnational corporations.\(^32\) One of the overarching structural reasons for the breakdown of governance institutions in developing nations is that the capacity of many developing governments to regulate foreign investment has been undermined by years of economic intervention by international financial institutions and is deeply embedded in the structure of the justice and injustice which are popular in our world and theorizing about the responsibility of moral agents).

\(^27\) Kobrin, \textit{supra} note 22, at 358.  
\(^28\) Wettstein, \textit{supra} note 6, at 157.  
\(^29\) \textit{Id}.  
\(^30\) SIMONS & MACKLIN, \textit{supra} note 21, at 7–8.  
\(^31\) \textit{Id}.  
\(^32\) \textit{Id}.
international system” through trade and investment treaties. International trade and investment treaties, as well as, investor-state contracts, tend to constrain government capacity to introduce public interest legislation and regulations. Therefore, a host nation may lack the institutional structures to enforce laws and regulations. Developing host governments may also lack political will in that they may be disinclined to impose regulatory constraints on foreign corporate actors out of a desire to attract and retain foreign investment.

This type of structural harm occurs typically as a consequence of a multiplicity of individuals, organizations, and institutions acting in pursuit of what would otherwise be fruitful endeavors in another context. In essence, they are playing by the rules, yet still they are causing harm even where it is counter to their intent. “Such structural injustice arguably poses new challenges to the problem-solving capacities of governments. The roots of such problems are not only notoriously complex and difficult to comprehend, but they often systematically lie beyond the reach of any one government.”

Previously, a distant, local development would have been a relatively isolated incident, yet it now has the potential to have far-reach impacts causing significant global repercussions. The ever-increasing degree of structural interconnectedness that characterizes our world today has changed both the nature of harm, as well as, that of the governance responses required to prevent and alleviate it.

1.4. Research Methods

This piece utilizes non-doctrinal, empirical research methods to do two things. First, to seek to identify the mechanism within contemporary collective governance models that allows structural

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33 Id. at 180.
34 Id.
35 Id. at 181.
36 See Wettstein, supra note 6, at 157 (explaining the unintended consequences of structured social action).
37 Id.
38 Id.
39 See id. at 156 (describing the global increase in structural interconnections).
40 Id.
harm to perpetuate. Second, to proffer a new iteration in the evolution of the accountability mechanisms of these models. This concept is termed herein as collaborative accountability. For the purposes of such an assessment, doctrinal legal research would have proved insufficiently narrow in scope in that it fails to recognize the social conditions essential to understanding the problems addressed herein.41 Rather, non-doctrinal legal research can be said to take a “law in context” approach.42 This type of research seeks to transcend traditional, silo-ed academic understanding. It integrates knowledge streams from various disciplines in order to create connections between these disciplines. This network allows for deeper insight and explanations of complex issues, which no discipline can do single-handedly.43 Empirical research—analyzing data to draw conclusions44—is required to delve into complex societal issues such as globalisation and sustainable development.45 This is directly relevant here, as this piece addresses how globalization’s impact on harm inhibits sustainable development.

As such, interdisciplinary research is particularly relevant in the sense that it is necessary to understand the broader scope of the problem. This type of research in general and my research specifically


42 See Van Gestel & Micklitz, supra note 41, at 26 (describing the increasing support for a “law in context” approach); Law in Action, U. Wisc. L. SCH. (2017), http://law.wisc.edu/law-in-action/davislawinactionessay.html [https://perma.cc/RU2T-PGUC] (detailing the application of law in action approach at University of Wisconsin Law School); see also Paul D. Carrington & Erika King, Law and the Wisconsin Idea, 47 J. LEGAL EDUC. 297 (1997), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1154&context=faculty_scholarship, [https://perma.cc/5FSQ-NFBA] (describing the developmental history of law in action at the University of Wisconsin).

43 See Arild Buanes & Svein Jentoft, Building Bridges: Institutional Perspectives on Interdisciplinarity, 41 FUTURES 446, 446–47 (2009) (speaking to the necessity of interdisciplinary approaches in order to solve “real world” problems); Am. Ass’n for the Advancement of Sci., Facilitating Interdisciplinary Research and Education: A Practical Guide 3 (Edward G. Derrick et al. eds., 2012) (describing the potential of interdisciplinary research).

44 See Van Gestel & Micklitz, supra note 41 (explaining the varied definitions of empiricism within legal research).

is useful for transferring information from the “laboratory” to the real world. Principle 1 of the EITI states that “the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development.” Interdisciplinary research is the tool by which one can analyze the effectiveness of the EITI’s ability to contribute positively to sustainable development. If its efforts fail in doing so, the EITI needs to keep reshaping itself. By understanding the social contexts of the problem, we can better understand the necessary legal steps to undertake in the evolutionary process.

This research, although interdisciplinary, is situated clearly within the social sciences. Sociology is utilized to define the problem in that qualitative social science research is analyzed to determine the effectiveness of the EITI. This assessment relies on the existing data and literature from sociological researchers regarding the impact of the EITI on regulatory quality across implementing countries. Ultimately though, this research meets at the crossroads of law and political science by engaging directly in a review of the impacts of globalization on the nature of harm and governance. These concepts are fundamentally rooted in political science discourse. However, the piece retains legal character in that it analyzes how concepts such as linear liability further perpetuate structural harm. By analyzing the political science trends, one is able to understand how legal concepts of liability might continue to evolve in order to mitigate structural harm. The object of the research is twofold in that it aims to further the expertise of the field of law, as well as, address a specific social problem. In this way, the piece endeavors to contribute to legal academic literature and political policy.

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49 See Tait & Lyall, supra note 47, at 2 (describing the use of interdisciplinary research in order to further policy goals).
2. GLOBAL GOVERNANCE AND THE REGULATORY TRANSITION

2.1. Governance Defined

As the nature of harm shifts, so must the nature of governance in order to best address the harm it seeks to mitigate. Governance is the *process* of governing, rather than an *institution*. Although it is often institutions that do the work of governing, governance is about “processes of rule more than institutions of government”. The term “governance” highlights the reality that governing may occur in a more collective context without an effective sovereign power. This means that it may be undertaken – as was traditionally the case – by a government, but also via the market or another governance network. Governance can occur through hard laws or social norms. It also differs from government in that it focuses less on the state and its institutions and more on social practices and activities. Regulation, in this context, may occur through self-monitoring, as well as, external supervision. Similarly, coordination between the various governed bodies can be the result of mutual, voluntary cooperation among actors, as well as, of rules in a hierarchic organization. These means of regulation and coordination are not mutually exclusive. For example, both types of regulation – self-monitoring and external supervision – can and often do occur within a single governance system.

Global interconnectedness delivers a direct challenge to territorial principles of modern social and political organization. Current public problems do not always fall neatly under the jurisdiction of a specific agency or even a particular nation. Effective global governance today requires new governing strategies to span jurisdictions, link people across all levels of government, and mobilize a variety of stakeholders. This results in a fragmentation of the traditional links between political

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50 BEVIR, supra note 10, at 1.
51 BEVIR, supra note 10, at 11.
52 BEVIR, supra note 10, at 1.
53 BEVIR, supra note 10, at 82.
54 BEVIR, supra note 10, at 4, 83.
55 BEVIR, supra note 10, at 4.
56 BEVIR, supra note 10, at 4–5.
authority and public accountability.\textsuperscript{57} Global governance extends across territorial bounds and – among other objectives – seeks to manage the global commons, regulate transnational activities, and promote sustainable development.\textsuperscript{58} Not only have the once distinct realms among subnational, national, and international governance structures begun to blur, but so has the line between private and public governance.\textsuperscript{59}

The processes of governing now involve more diverse actors and more diverse organizational forms.\textsuperscript{60} Increasingly, governments rely on private and voluntary sector actors to manage and deliver governance services.\textsuperscript{61} State power and state action is now dispersed among a vast array of spatially and functionally distinct networks consisting of all kinds of public, voluntary, and private organizations.\textsuperscript{62} Due to these interdependencies, the regulatory power of national governing institutions has become increasingly constrained.\textsuperscript{63} This increasing range and variety of stakeholders has led to the emergence of new self-regulatory practices and collective institutional designs, ranging from formal CSR schemes to PPPs such as the EITI.\textsuperscript{64} “Governance” in this sense then moves beyond the aforementioned abstract definitions and also captures the concrete formal and informal responses to the changing global order.\textsuperscript{65}

Corporations are perceived as powerful forces in the emerging new global governance structure, exerting power to a degree that we have commonly assumed only with governments. This new situation calls for a deliberative turn in our thinking, not only in regard to corporate authority, which embeds corporate decision-making in the political planning processes,\textsuperscript{66} but also in the nature of corporate accountability. There is no doubt that large

\textsuperscript{57} See Wettstein, supra note 6, at 161 (describing the shift to collaborative responsibility).
\textsuperscript{58} BEVIR, supra note 10, at 4, 83.
\textsuperscript{59} See Wettstein, supra note 6, at 161 (describing the blurred distinction between the public and private spheres as a product of an emerging transnational world order).
\textsuperscript{60} BEVIR, supra note 10, at 3.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 67.
\textsuperscript{63} Id. at 5.
\textsuperscript{64} Id. at 7.
\textsuperscript{65} Id. at 5.
\textsuperscript{66} See Wettstein, supra note 6, at 173 (describing the role of corporate responsibility as political responsibility).
corporations are among those institutions with the most profound potential to impact today’s global structures. Thus, they should naturally also be among those institutions that bear a responsibility to contribute toward positive improvement of our global problems.67 This recognition, combined with the weakening power of national governments, has resulted in a call for a shift from external regulatory oversight of corporate entities toward increased self-monitoring behaviors.

2.2. The Regulatory Transition: From External Supervision to Voluntary Self-Monitoring

The existing international governance system was built on a state-centric model characterized by hard national borders and mutually exclusive territorial jurisdiction. In such a system, economic activity and international relations were linear, organized, and conducted via a defined process.68 Under this Westphalian world order, each state possessed its own independent and sovereign regulatory powers.69 Power was abrogated from the state to the international level through state consent. Without such consent, international mechanisms lacked legitimacy. While some element of shared interests and institutions existed at the international level, such a state-centric structure impinged the development of international norms, and implies – arguably even requires – that norms at the international level are weaker than national or subnational norms.70

Under this framework, international law presupposes that nations will exercise regulatory oversight over transnational corporations operating within their territory to ensure that the activities of such entities do not violate the rights – whether social, civil, or contractual – of individuals and communities under national jurisdiction. However, as demonstrated, due to globalization’s impact on the nature of harm and corporate entities

67 See id. at 170 (arguing for proactive company engagement in addressing global injustices).
68 See Kobrin, supra note 22, at 359 (explaining the scope of private obligations in a Westphalian context).
69 See id. at 365 (examining the relationship between transnational corporation responsibility vis-à-vis the state).
70 See id. at 359 (describing the limited power of international norms under a Westphalian order).
role in contributing to that harm, this type of national oversight is proving ineffective. Continued operation under a territorial oversight model will only further entrench the accountability gap leaving many transnational companies under-regulated and the structural harm caused unaddressed. As such, it has become increasingly argued that collective governance mechanisms, rather than the independent and isolated hierarchical legal regimes characterized by the Westphalian world order, might prove more effective at simultaneously strengthening national and subnational regulatory quality and corporate accountability.\footnote{BEVIR, supra note 10, at 5.}

This is the case for several reasons. At a minimum, it would prove difficult to extend the hierarchical “hard law” regime beyond national borders given the lack of an overarching authority within the international governance system.\footnote{See Kobrin, supra note 22, at 364 (detailing the challenges associated with imposing international authority over transnational corporations).} Further, assuming the existence of such an authority, it is unlikely that the international community could agree on a meaningful set of standards regarding the responsibilities of private actors, and the extent to which such actors should be held accountable.\footnote{Id. at 361.} Supposing the international community performed this arduous task of agreeing on a set of standards, enforcement is likely to remain implausible.\footnote{See id. at 364 (arguing for the need for a transnational solution akin to ISO standards).} While the international system is becoming increasingly less state centered, states continue to remain the most prominent and powerful actors and are not likely to cede sovereignty to an international institution to impose obligations on transnational corporations.\footnote{Id. at 364–65.} Therefore, the most likely outcome would be to establish indirect obligations on companies by holding nations responsible for corporate behavior.\footnote{Id. at 361.} That would be problematic as nations are already reluctant to intervene across borders to protect human rights directly and may be even less likely to do so through the convoluted network of transnational firms.\footnote{Id. at 364–65.} Additionally, “[t]here are marked differences across states—even among the industrialized countries—in terms of beliefs about the market versus regulation,
the relationship between corporations and government, and the power of the corporate community.”

Beyond these difficulties lies the more philosophical and nuanced point that imposing human rights obligations on transnational firms “through ‘hard’ international law is anachronistic.” Reinforcing this system today is an attempt to impose a solution derived from the Westphalian international system on a post-Westphalian collective world. It is becoming increasingly clear that the realities of today’s globalized society are in direct opposition to this principle of territoriality that has characterized the modern approach to global governance. While the recognition that private actors such as transnational firms could be subjects of international law, and therefore liable under that system, may be heralded as a significant legal development of the early twenty-first century, it is nonetheless “an attempt to force a square peg into a round hole, an attempt to adapt state-centric international law to a multi-actor environment.” In order to properly address structural harm, collective governance will have to continue to evolve past this notion of direct and linear accountability enshrined in the existing hierarchical frameworks. It follows then that more contemporary globalization has been marked by a transition away from a state-centric world order toward a multi-actor collective governance system. A fundamental purpose of the Westphalian world order was to set norms and rules surrounding the decision-making process around which various actors could rely. To some extent the emerging collective regimes reflect an absence of public governance in the global arena. “When

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78 See id. at 365 (speaking to the difficulty of coalescing around common interests in a post-Westphalian world).
79 Id. (citing Naomi Roht-Arriaza, Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment, 22 Ecology L. Q. 479 (1995)).
80 See Wettstein, supra note 6, at 156–57 (arguing that the biggest challenge to the “territorial principle” is the growing number of global issues that various countries face).
81 Kobrin, supra note 22, at 365 (emphasis added).
82 See id. at 361 (arguing that a non-hierarchical human rights compliance mechanism is more feasible in light of states’ reluctance to cede sovereignty to a transnational human rights authority).
83 Wettstein, supra note 6, at 161.
84 See Kobrin, supra note 22, at 352–53 (describing the historical context of notions of sovereignty under the Westphalian order).
85 Id. at 365.
governments are unwilling or unable to govern effectively, political leaders may see private governance as a valuable tool to achieve public ends.”

In a related trend, ideas surrounding the promotion of corporate accountability have shifted away from the promotion of external oversight that is characteristic of hierarchical regimes. This shift has been one toward self-monitoring. This is consistent with the increasingly recognized and accepted notion that companies have a responsibility to the societies in which they operate beyond those enshrined in the law, and that managing solely on behalf of shareholders at the expense of other external stakeholders cannot sustain performance. Globalized communication networks have further strengthened the ability of these external stakeholders to detect and publicize wrongdoing. Pressure from such stakeholders has forced companies to recognize that industry does not exist in a vacuum. This pressure, combined with frequent weak legal standards, corrupt governments, and non-peaceful means of resolving social conflict characteristic of developing countries, has forced many companies seeking to minimize risk to self-regulate in the form of formal, but almost entirely, internal CSR models.

There currently exists a widespread acceptance of CSR among corporate actors rising out of the notion that reputational harm can be as detrimental as legal liability. However, there exists a wide variation between CSR models across business enterprises.

87 See David Spence, Corporate Social Responsibility in the Oil and Gas Industry: The Importance of Reputational Risk, 86 Chi.-Kent L. Rev. 59, 61–62 (2011) (defining “corporate social responsibility” as an idea that there is an affirmative duty of corporations beyond those enshrined in law).
88 Id. at 67–68 (quoting R. Edward Freeman, Jeffry S. Harrison, & Andrew C. Wicks, Managing for Stakeholders: Survival, Reputation, and Success 3–4 (2007)).
89 See id. at 61 (noting that increasingly “business is done out in the open” in the new age of instant communication).
90 See id. at 71 (noting that legal standards may be weak or non-existent in developing countries).
92 See Spence, supra note 87, at 76 (noting that international oil companies increasingly embrace CSRs because reputational harm, like legal liability, may diminish positive financial returns in the long run).
Therefore a definition, let alone a set of norms, for CSR is almost entirely lacking. Despite this, many corporations continue to engage in CSR efforts in an attempt to balance their best interests against the desires of the communities in which they do business. While CSR has laudable sustainability goals, it has been heavily criticized. At a minimum, it is often seen as ineffective and uneconomic: as mere window dressing that is nothing more than unfairly spending shareholders’ money in ways from which they do not profit. This criticism has not fallen on deaf ears. Rather, a number of corporate entities are furthering their means of self-monitoring through voluntary participation in sector-specific public-private partnerships. These collaborative attempts take the CSR model one step further and promote systemic community development by assisting governments in developing "both the will and the capacity to protect human rights, provide security and public services, and be accountable to their people." These non-hierarchical collective governance mechanisms take the concept of corporate regulation a step further beyond self-monitoring. These mechanisms promote the concept of co-regulation, which is quite a conceptual shift from the regulation method of external oversight that is characteristic of hierarchical regimes. Many of these non-hierarchical collective governance mechanisms are commonly taking the form of PPPs. PPPs consist of one or more public sector actors combining with one or more private or voluntary sector actors to form a collective governance mechanism. PPPs bring public sector and other actors together to coproduce policies and services. This emphasis on coproduction explains some of the other characteristics of PPPs. Here, actors have an enduring relationship. They actively collaborate with one another rather than merely entering into a contract. Each actor brings one or more key resources to the partnership in the form of

93 See Genasci & Pray, supra note 91, at 40 (contending that NGOs and corporations have different meanings for CSRs).
94 See Spence, supra note 87, at 84 (arguing that oil company CSRs are designed to fill the regulatory void in countries that lack good governance).
96 See id. at 80–81 (using the World Bank’s Extractive Industries Transparency Initiative (“EITI”) as an example of a type of public partnership approach to CSRs).
97 Id. at 80–82.
98 Bevir, supra note 10, at 68.
finance, property, authority, or legitimacy,\textsuperscript{99} joining the corporate sector, governments and civil society together in a common cause.\textsuperscript{100} Non-hierarchical collective governance mechanisms such as the EITI are consistent with the evolving transnational order; it is within such frameworks that one has to sketch the outlines of the next iteration of collective global governance. “That is a difficult task given that the process of systemic change has just begun to unfold and that only dim outlines of its eventual endpoint are visible.”\textsuperscript{101}

2.3. Elements of Collective Governance

In political science and legal scholarship, the term “new governance” describes a broad range of governance forms and modalities that depart from the above described hierarchical command-and-control regulation. The term law is sometimes equated with and confined to such command-and-control regulation, whereas “new governance is envisaged as existing largely apart from and beyond law, as an amorphous cluster of new processes, instruments and values.”\textsuperscript{102} The parameters of new governance have not been definitively resolved, but there exists agreement as to certain constitutive elements: collaboration, transparency, stakeholder participation, and adaptability.\textsuperscript{103}

First, new governance envisages an approach to regulation that is more collaborative than traditional forms of regulation in terms of the relationship between the regulator and the regulated. Second, new governance regulatory initiatives give more freedom to the regulated to determine their internal means of compliance, while at the same time requiring transparency. Third, new governance approaches tend to include broad stakeholder participation and voice.\textsuperscript{104} This collective governance approach seeks to involve a broad array of stakeholders from non-governmental organizations, citizens’ movements, multinational corporations, and the global

\textsuperscript{99} Id.

\textsuperscript{100} See Wettstein, supra note 6, at 162 (noting the increase in partnerships between businesses and public institutions to tackle some of the world’s most pressing problems).

\textsuperscript{101} Kobrin, supra note 22, at 361.

\textsuperscript{102} SIMONS & MACKLIN, supra note 21, at 13.

\textsuperscript{103} Id.

\textsuperscript{104} Id.
capital market. Under this model, the existing institutional system would remain central with a focus on improving the means of collaboration across the various institutions at the international level and between these institutions: the individual communities; national, regional, and local governments; private entities; and NGOs. The purpose of transparency and stakeholder participation within collective governance mechanisms is in an attempt to foster accountability. Finally, new governance is adaptable in that it emphasizes problem-solving and experimentation in the ongoing design of regulatory strategies. The remainder of this chapter will elaborate upon those more clearly defined concepts—transparency and stakeholder engagement—which relate directly to accountability. This framework will be used as a basis for the analysis of the EITI. The more nuanced elements of collaboration and adaptability will be developed more throughout Chapter 4.

2.3.1. Transparency

Collective governance is characterized by what is referred to as governance by disclosure, or in other words, a push for transparency. Governance by disclosure has become a defining feature of collective global governance models. “To an increasing extent, private actors such as firms and non-governmental organizations are becoming involved in the design and operation of transnational rules that aim to increase transparency.” Examples of these schemes can be found across diverse sectors, including labor rights, environmental protection, accounting, and telecommunications. Transparency as a regulatory strategy is based on the assumption that reporting will generate information, which can be used to hold companies accountable. Access to information allows various stakeholders, including members of the wider public, to pressure corporations to modify their conduct. Regulation of corporate activity through disclosure is an approach that presents a midway

105 BEVIR, supra note 10, at 107.
106 Sovacool, supra note 13, at 179.
107 Id.
108 BEVIR, supra note 10, at 109–11; SIMONS & MACKLIN, supra note 21, at 150.
solution between strict external oversight mechanisms and the purely voluntary self-monitoring found within CSR models.109

Political scientists, legal analysts, governance scholars, and ethicists have argued that transparency—defined as “timely and reliable economic, social, and political information accessible to all relevant stakeholders”—can partially counteract some aspects of structural harm, as well as, improve social welfare and regulatory quality.110 A host of progress objectives—anti-corruption, poverty reduction, sustainable development, economic growth, and better governance—may be attributed to and catalyzed by the simple act of transparent accounting alone.111 However, critics respond that this claim is too good to be true and that these researchers are merely presuming that such a link between transparency and better governance exists.112 To ensure better governance, it is imperative to recognize the distinction as well as the interplay between transparency and accountability. “The right to information is not accountability in itself, but is instrumental to it, and transparency does not automatically produce accountability but is a necessary but insufficient condition for it.”113 The benefits of transparency are contextual, and dependent on aspects like the capacity of the population to understand and use the information and the accountability mechanisms that can sanction nontransparent behavior.114 This translation and dissemination of information does not tend to happen where institutions are weak.115 Therefore, although accountability requires transparency, transparency does not necessarily beget accountability.

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109 Cf. Andrews, supra note 7, at 60 (arguing that the Extractive Industries Transparency Initiative does not “absolutely eradicate” the accountability and ethical issues that corporations face).

110 Sovacool, supra note 13, at 181.


112 See Sovacool, supra note 13, at 180 (citing metrics to argue that countries did not perform better once subject to EITI compliance standards).

113 Id.

114 Id.

2.3.2. Stakeholder Engagement

Another method utilized by collective governance mechanisms in attempts to foster accountability is the creation of a multi-stakeholder group. These groups comprise representatives from various disciplines and functions across government, industry, and civil society. The goal behind such a diverse group is two-fold. First, this mechanism seeks to ensure cross-sector representation in the decision-making process. Each group is representative of a diverse set of ideas. This representation promotes democratic processes through public participation. Secondly, such a group functions as a checks-and-balances system where the primary role of civil society is to hold government and industry accountable. Their paramount purpose is consciousness-raising.\(^{116}\) Within sector specific governance mechanisms these organizations typically operate by distilling and disseminating report finding to communities. The goal of this communication is to raise awareness in order to promote reform.\(^{117}\)

Like transparency, the multi-stakeholder nature of this framework does not necessarily beget accountability. This is especially the case in developing nations. Often the general public is not aware of the existence of the governance mechanism nor is it able to comprehend the content of such reports.\(^{118}\) Without basic levels of awareness and comprehension, it is not possible for such efforts to achieve accountability. Additionally, research demonstrates that the partnership between civil society and government is a limited one where governments have not allowed full civil society participation in the process.\(^{119}\) Naturally, such a partnership raises questions about civil society’s independence and whether this relationship inhibits its role as a critical watchdog.\(^{120}\)

Such relationships between industry and government call to mind similar questions regarding corporate motivations in that these


\(^{117}\) Id. at 56.

\(^{118}\) See Andrews, supra note 7, at 71 (arguing that a limitation of the transparency goals of Ghana’s compliance with the Extractive Industry Transparency Initiative was a lack of awareness of the initiative by the local population).

\(^{119}\) Id.

\(^{120}\) Global Urban Justice, supra note 116, at 58.
relationships fail to recognize the perils of influence. Critics argue that the public is better served when struggle between the public and private sector exists. The danger of collaboration in this way with industry presents an opportunity to “conflate the common good with common ground.” It allows industry to frame public concerns in a way that is most beneficial, in other words, least threatening to their commercial interests.

3. AN EXAMPLE OF COLLECTIVE GOVERNANCE: THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE

To add context and a level of specificity, the next two chapters will utilize the EITI as a focal point to illustrate how the aforementioned general concepts of collective governance mechanisms operate within one, notably opaque, industry sector—the extractive industry. The first section will expand specifically on the type of structural harm caused by the presence of extractive industries in the developing country context. It will be followed by a discussion of how the industry seeks to self-regulate through the EITI and finish with an analysis of the EITI’s effectiveness as a global governance mechanism. The EITI initiative is fueled by the growing intersection between civil society led social movements on the one hand and the corporate sector on the other. “Governments play an important role by leading the initiative, making the multi-stakeholder arrangement an example of what has become known as ‘collective governance.’”

3.1. The Reason Behind the EITI – The Resource Curse

It is not only well documented that weak governance resulting in poor regulatory quality is compounded in the context of developing nations; but additionally—by their very nature—

121 Jonathan Marks, Associate Professor of Bioethics, Human. and L., TEDxPSU at University Park: In Praise of Conflict (Feb. 12, 2017).
122 Id.
123 Id.
124 See Andrews, supra note 7, at 60–61 (describing the underlying motivation for the establishment of the Extractive Industry Transparency Initiative).
125 Id. at 60.
126 SIMONS & MACKLIN, supra note 21, at 16.
extractive operations are rife with inherently dangerous activities due to the simultaneously technical and mechanical nature of such operations.127 Due to the hazardous nature of mineral extraction, the magnitude of risk assumed by those engaged in resource development spans a broad spectrum including environmental, health and safety, liability, as well as, reputational.128 “The business of exploring for and producing [resources] will always entail environmental costs and social challenges.”129 In developed countries, mitigation and regulation of these risks is done through the rule of law in the form of regulation.130 While regulatory failure or human error cannot be entirely prevented, it is expected in industrialized democracies that the legal system will structure relationships between corporations and external stakeholders in a manner that provides redress for harm and fairly apportions liability.131 The risks assumed are further compounded by the social and political contexts in which extraction companies often operate, as this relationship is often non-existent in the context of developing nations either due to a dearth of regulation or inadequate enforcement thereof. “Therefore, societies look to [extractive] companies to self-regulate: to do more to guard against risks to society than merely comply with the law.”132 Corporate entities within the extractive industry may not be able to void finding themselves in such a position. These corporations are constrained by the location of resources. Companies must operate where minerals are found. Companies within the extractive industries are therefore more likely than other industries to find themselves in areas of weak governance due to this lack of mobility.133

Such direct corporate self-regulation proves difficult for several reasons.134 Extractive industries are often under political control, meaning that there exists rampant blurring of the lines between public, shareholder, and personal interests. This is especially true in the case of state owned companies.135 Additionally, there exists

127 See Spence, supra note 87, at 59 (citing the Deep-Water Horizon oil spill as an example of the dangers involved in extractive industries).
128 Id.
129 Id. at 84.
130 Id. at 60.
131 Id. at 70.
132 Id. at 60.
133 SIMONS & MACKLIN, supra note 21, at 16.
134 Id.
135 Sovacool, supra note 13, at 187.
limited competition in the extractive sector,\(^\text{136}\) which results in fewer transnational checks and balances compared to more competitive sectors.\(^\text{137}\) Further, the channels of integration for resource rich countries into the global economy are often limited, opening avenues for illicit financial flows.\(^\text{138}\) Finally, the complex processes of extractive sectors require technical and financial expertise. This leads to companies, rather than countries, doing much of the accounting for tax payments, especially in developing countries, which leaves room for misappropriation in cases where reliable auditing is limited.\(^\text{139}\)

In the late 1990s and early 2000s—paralleling the academic discussions surrounding globalization—there was growing international recognition of, and attention paid to, the phenomenon of the resource curse. The term “resource curse” has been coined to describe the phenomena that occur when countries continue to exhibit comparatively high levels of poverty and inequality, deteriorating environmental quality, institutionalized corruption, and an increased frequency of conflict despite decades of natural resource development.\(^\text{140}\) According to resource curse scholars, while revenue from oil, gas, and mining companies in the form of taxes, royalties, signature bonuses, and other payments is expected to be an important engine for economic growth and social development in resource-rich countries, the lack of accountability and transparency in these revenues “often aggravates poor governance and leads to corruption, conflict, and poverty.”\(^\text{141}\) For example, in the Niger Delta, after years of oil exploration and production, the lives of average citizens have remained relatively stagnant even though oil companies have a number of CSR initiatives targeted at bettering the lives of people.\(^\text{142}\)

\[^{136}\text{Jon Yeomans, Revealed: The Biggest Companies in the World in 2016, THE TELEGRAPH (June 20, 2016), http://www.telegraph.co.uk/business/2016/07/20/revealed-the-biggest-companies-in-the-world-in-2016/ [https://perma.cc/S4XR-2BJ7] (stating five of the top ten Fortune 500 companies were oil and gas companies suggesting that the technological resources are concentrated within a few large transnational players rather than a multiplicity of smaller players. The remaining five companies were from retail, energy, automotive and tech).}\]

\[^{137}\text{Id.}\]

\[^{138}\text{Id.}\]

\[^{139}\text{Id. at 180.}\]

\[^{140}\text{Id. at 180.}\]

\[^{141}\text{Andrews, supra note 7, at 61.}\]

\[^{142}\text{Id. at 64.}\]
This is just one example of where the potential benefits of natural resource wealth are not being realized.\textsuperscript{143} Paradoxically, such wealth is routinely associated with a litany of problems, including: currency appreciation; the decline of non-resource sectors – commonly referred to as the Dutch Disease; tax system failures, such as revenue capture by elites due to a break down in the accountability that results from tax collection; as well as the exacerbation of regional and community tensions.\textsuperscript{144} Corruption and opacity plague those countries and companies involved in resources extraction.\textsuperscript{145} Additionally, it has been established that the collusion between corporations and government officials further compounds the adverse consequences of resource wealth.\textsuperscript{146} However, the extent of the resource curse is contingent on multiple factors including political incentives, the types of resources the country in question has, and the nature of rent seeking.\textsuperscript{147}

These structural obstacles seem to be best counteracted (or otherwise avoided altogether) by particular structural advantages. More specifically, counter-weights to this resource curse appear to be political stability, economic diversification, and active civil society engagement.\textsuperscript{148} The presence of these problems and the absence of their counterbalancing structural advantages presents a wide range of governance challenges that quickly outstretches developing nations capacity, including: the need to develop fair, efficient, and inclusive systems for licensing; bidding; contracting; revenue collection; auditing; and public spending.\textsuperscript{149} Increasingly, environmental and social impacts of these industries became causes of complaint. Even though it was widely recognized that there was no single reform that on its own could effectively address all of these problems, a common conclusion was that greater transparency and dialogue between stakeholders must be part of the solution.\textsuperscript{150} The EITI was developed in response to the resource curse and in an attempt to fill this governance void.
3.2. An Overview of the Extractive Industries Transparency Initiative: What is the EITI and How does it Operate?

The EITI offers a useful template by which to assess the value of collective governance mechanisms, if any, on the international stage.\textsuperscript{151} The EITI is one example of a collective governance mechanism that seeks to address the above-described structural harm caused by the presence of extractive industries within developing nations. It is a trans-national public-private partnership supported by a coalition of government, companies, and civil society that takes a sector-specific, multi-stakeholder approach to create an international governance framework in an attempt to simultaneously promote regulation by governments and corporate responsibility within the extractive industry.\textsuperscript{152} Partnership initiatives such as the EITI seek to bring industry and government sectors together in nation-building.\textsuperscript{153} Generally speaking, nation-building efforts seeks to promote governance structures, improve workforce conditions, build transparent and productive relationships between business enterprises and the government, and reduce corruption.\textsuperscript{154} The EITI defines itself as “a global standard to promote the open and accountable management of oil, gas and mineral resources” and address governance issues within the industry.\textsuperscript{155} It recognizes that poor natural resource governance leads to corruption, conflict, and the mismanagement of these resources and their associated profits. Consequently, stagnating social development and economic growth rather than utilizing this wealth for public benefit.\textsuperscript{156}

Put simply, the EITI is about ensuring that citizens have access to reliable and useful information regarding how much their governments receive from the exploitation of their nation’s finite oil, gas, and mineral resources. To achieve this, EITI implementation has two core components – transparency and stakeholder

\textsuperscript{151} Sovacool, supra note 13, at 179.

\textsuperscript{152} EITI INTERNATIONAL SECRETARIAT, Who We Are, EITI, https://eiti.org/who-we-are [https://perma.cc/F6LE-A9KT], [hereinafter EITI, Who We Are], (defining EITI as the global standard to promote the open and accountable management of oil, gas and mineral resources).

\textsuperscript{153} Spence, supra note 87, at 83.

\textsuperscript{154} Id.

\textsuperscript{155} EITI, Who We Are, supra note 152.

\textsuperscript{156} Id.
The transparency prong requires oil, gas, and mining companies to disclose their payments to the government; and the government, its receipts. The figures are reconciled by an independent administrator and published in annual EITI Reports alongside contextual information about the extractive sector. The second prong is the creation of the multi-stakeholder group. The multi-stakeholder group is comprised of representatives from government, companies, and civil society. It is established to oversee the accounting, auditing, and reporting processes and is charged with disseminating the findings of the EITI Reports. More broadly, it should promote the integration of the EITI domestically, as well as extractive industry reform efforts. The overarching goal of these two prongs is to enhance accountability within the extractive sector by strengthening both government and corporate governance systems.

3.2.1. A Developmental Timeline of The EITI

The EITI was created in 2002 to improve the domestic governance in resource-rich countries by bringing global accountability to the collection of revenues. The idea came about as a way to avert the specific type of structural harm caused by the presence of extractive industries in developing nations. In 2003, the EITI’s Statement of Principles (Principles) was agreed to, centering on the need for the transparent management of natural resources. The EITI Principles recognize the importance of the “prudent use of natural resource wealth” for sustainable development, as well as, the sovereign right of states over their natural resources. In accordance with the aforementioned discussion on collective governance mechanisms, these twelve Principles enshrined two key prongs: transparency and stakeholder engagement.

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157 Short, supra note 46, at 10.
158 Id.
159 Sovacool, supra note 13, at 179.
160 For a more detailed discussion of the resource curse, see Andrews, supra note 7, at 63.
162 Id.
163 Id.
engagement. An underlying rationale of the EITI is that these elements will remove the blinds that make the extractive industries opaque. The Principles set forth a workable approach to the disclosure of payments to governments by corporations within the extractive industry with the notion that public understanding of these revenues would assist public debate and inform decisions surrounding appropriate and realistic options for sustainable development. Over 40 institutional investors signed a statement of support for the EITI under the assumption that this type of information disclosure would improve corporate governance and reduce operational risk.

The Principles were incorporated into the initial EITI Standard (Standard) launched in 2011. The Standard set out 21 specific Requirements for EITI implementing countries, including provisions on sign-up, preparation, disclosure, dissemination, review, validation, and compliance. Only two of these Requirements are directives to corporations. The remainder almost exclusively set out guidelines for governments. At their inception, these Requirements were a set of minimum standards. The Standard was first revised in 2013, and again in 2016. Each iteration of Requirements builds upon the previous set. The 2013 changes had five broad aims: (1) making EITI reports more comprehensible; (2) increasing the relevance of the EITI through national dialogue; (3) enhancing disclosure requirements; (4) improving the validation system in order to recognize countries that exceed the minimum requirements; and (5) making the Requirements more coherent. More specifically, the 2013 Standard enhanced countries’ role in the implementation of the EITI domestically by introducing new disclosure requirements, including but not limited to information

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164 Andrews, supra note 7, at 63.
165 EITI, EITI Principles, supra note 161, at 4.
166 Short, supra note 46, at 10.
168 Id.
169 Id.
171 Short, supra note 46, at 10.
172 SIMONS & MACKLIN, supra note 21, at 152.
surrounding the transfer of national funds to subnational entities, disclosure of corporate social contributions where contractually required, and reporting of financial transfers between state owned companies and other government entities.\textsuperscript{173}

Until the adoption of these enhanced Standards, there was a danger that EITI reporting simply ticked boxes but did not actually lead to improved transparency. Successful EITI implementation at the national level hinges on the ability of the process to develop to meet the diverse on-the-ground challenges present in each country in order to encourage reform of the underlying systems. For example, in some countries, corruption is a significant challenge and EITI reporting assists in that it is the first step in verifying these funds and assuring their proper accounting.\textsuperscript{174} Other countries face other challenges, such as building trust in local communities.\textsuperscript{175} This makes extractive sector governance and regulatory quality a priority warranting a greater focus on sub-national transfers and operations in local communications.\textsuperscript{176} In all the countries, data must be reported to relevant populations in such a way that it leads to informed debate, which would ideally result in better management of the extractive sector within that community.\textsuperscript{177} The adoption of the 2013 Standard encourages implementing countries to go beyond the minimum requirements where appropriate.\textsuperscript{178} Further, it calls on multi-stakeholder groups to set implementation objectives that are reflective of national priorities.\textsuperscript{179} The multi-stakeholder groups are also encouraged to be innovative in regard to the methods of public reporting, keeping in mind that the primary goal of reporting is to increase comprehension in order to foster accountability across the industry.\textsuperscript{180} This innovation can take reporting to a higher level than simple accounting audits. It has led to some countries requiring disclosure of the nature and content of contracts, and where not disclosed, an explanation why publishing was not

\begin{footnotes}
\item[173] Short, supra note 46, at 10; Moberg, supra note 170.
\item[174] Short, supra note 46, at 11.
\item[175] Id.
\item[176] Id.
\item[177] Id.
\item[179] See id. at 14–5 (referencing Requirement 1.4).
\item[180] Id.
\end{footnotes}
feasible. The 2013 Standard requires transparency beyond revenue payments from companies to governments, including disclosure of licensing information, sales by state-owned companies, and significant social payments made by companies. It also requires that reports provide contextual information on questions such as tax arrangements, proportion of government revenues from extractives, quantity of production, and likely exhaustion dates, so that a member of the wider public reading the report would be better able to understand the contributions and implications of the presence of the extractive industry to their economy and society.

The 2016 changes await their 2020 implementation, but they make a particularly noteworthy addition to the 2013 Standards. “The most groundbreaking aspect of the 2016 EITI Standard is that the identity of those that own and profit from extractive activities must now be disclosed. All countries must ensure that the companies that bid for, operate or invest in extractive projects declare who their beneficial owners are.” Identifying who owns extractive companies and disseminating this beneficial ownership information will enhance the public’s ability to expose corruption and to hold corporations accountable.

3.2.2. EITI Operations

In order to be recognized as an EITI implementing country, the government of a nation needs to apply for “EITI Candidature.” A number of sign-up steps is required, including constituting the multi-stakeholder group. Once the country has been accepted as a candidate she has 1.5 years to publish an initial EITI Report and 2.5 years to complete the validation process. The EITI Board conducts a validation process to assess a country’s progress in complying with each of the Requirements outlined in the Standard. Detailed

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181 Short, supra note 46, at 11.
182 Id.  
184 Id.  
185 Id.  
186 Id.  
187 Short, supra note 46, at 11.  
188 EITI STANDARD, supra note 178.
guidance on the process is set out in the EITI Validation Guide.\(^\text{189}\) Countries that satisfy the requirements are designated compliant.\(^\text{190}\) If a country is deemed non-compliant it may either be suspended\(^\text{191}\) or delisted\(^\text{192}\) from EITI membership. Suspension is a temporary mechanism. The suspension may be lifted at any time the board deems the matter resolved. At that time, a country’s compliant status would be reinstated.\(^\text{193}\) The Board also reserves the right to revoke a country’s status “where it is manifestly clear that a significant aspect of the EITI Principles and Requirements are not adhered to.”\(^\text{194}\) A country has the right to appeal either decision by the Board.\(^\text{195}\)

To date, there are 52 implementing countries.\(^\text{196}\) Since its inception, the EITI has reconciled and disclosed USD $2.3 trillion in revenues paid by the extractive industries to governments.\(^\text{197}\) Over 750 people serve on EITI multi-stakeholder groups and 350 people around the world work full time on the EITI.\(^\text{198}\) Moreover, the European Union, African Union, G8 and G20, and the United Nations have all endorsed the EITI.\(^\text{199}\) Compliance and candidacy under the EITI is perceived to carry with it a vast array of benefits for countries and corporations. Countries use EITI membership to strengthen the investment climate.\(^\text{200}\) It is a signal to investors and financial institutions that there will be increased transparency, accountability, and governance. For corporations and investors, doing business in these countries reduces political and reputational risk.\(^\text{201}\)

With implementing governments from all continents committed to reforms and openness to varying degrees and with varying levels


\(^{190}\text{EITI STANDARD, supra note 178, Requirement 8.3; Short, supra note 46, at 10.}\)

\(^{191}\text{Id. Requirement 8.7.}\)

\(^{192}\text{Id. Requirement 8.6.}\)

\(^{193}\text{Id. Requirement 8.6.}\)

\(^{194}\text{Id. Requirement 8.7.}\)

\(^{195}\text{Id. Requirement 8.8.}\)

\(^{196}\text{See generally EITI INTERNATIONAL SECRETARIAT, EITI COUNTRIES (2017), https://eiti.org/countries [https://perma.cc/3FTE-QKK5] (describing how countries are progressing towards meeting the 2016 EITI Standards).}\)

\(^{197}\text{Id.}\)

\(^{198}\text{Short, supra note 46, at 11.}\)

\(^{199}\text{Sovacool, supra note 13, at 179.}\)

\(^{200}\text{Id. at 181.}\)

\(^{201}\text{Id.}\)
of economic development, many more specific factors motivate EITI implementation, all of which are based on the following assumptions. The primary assumption is that greater transparency leads to less corruption within political elites, collusion between governments and companies, and mismanagement of funds.\textsuperscript{202} Additionally, following an internationally recognized standard demonstrates a general commitment to openness and reform.\textsuperscript{203} It is further assumed that EITI compliance will ensure that both corporate and governmental accounting and auditing systems are functioning efficiently and effectively. Lastly, in practice these accounting and auditing processes—the transparency mechanisms—are self-reinforcing, meaning that undertaking these endeavors will not only identify accounting errors, but also will highlight opportunities to reform and strengthen these systems.\textsuperscript{204}

“The EITI [therefore] operates on the principle of having free, full, independent, and active assessments of the ways that various companies within the extractive industries interact with government and impact communities and society.”\textsuperscript{205} Presently, the EITI targets host state behavior by providing information about payments to governments by extractive industry companies.\textsuperscript{206} The hope is that this information, once in the hands of citizens, will be a tool for accountability and a catalyst for necessary reform.\textsuperscript{207} As such, this financial information plays into the larger agenda of host state governance and host state regulation of corporate actors, but for the time being it only indirectly addresses the conduct of transnational corporations.\textsuperscript{208}

Like other multi-stakeholder initiatives, EITI has evolved from a set of ideals to a governance “regime” with norms, membership criteria, compliance processes, and a governance structure. The underlying intent of the EITI is that through proper financial disclosure, these corporate and governmental institutions and their respective actors will become empowered to perform their development-oriented role.\textsuperscript{209} Although the EITI’s work appears to

\textsuperscript{202} Short, supra note 46, at 12.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{205} Sovacool, supra note 13, at 179.
\textsuperscript{206} SIMONS & MACKLIN, supra note 21, at 151.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Andrews, supra note 7, at 64.
have established transparency as a norm within extractive industry governance—a feat in its own right—the utility of this norm is still up for debate. To examine the validity of the critics’ claims, an analysis of the EITI will be conducted herein. However, the mere existence of this debate should be sufficient to challenge us to be modest and to examine critically the practical utility of global norms, particularly those that are based on voluntary compliance.  

Achieving transparency may not be the cure-all it has been lauded to be, especially where civil society is not strong enough to convert the information received into accountability.

3.3. Effectiveness of the EITI

It was once widely thought that PPPs would be an all-encompassing governance solution, but despite best efforts, the effectiveness of the EITI is constrained by many factors including illiteracy, livelihood demands, lack of interest, as well as cultural and political factors. In many developing countries, particularly in Africa, public discussion of extractive industry revenues and civil society activity is discouraged, which inhibits development. The EITI makes the claim that it contributes positively to the achievement of the Sustainable Development Goals. But, based on recent social science research, there is seemingly little marked evidence that it does. It merits noting, however, that it is difficult to quantify the effects of EITI reporting because intangibles such as corruption, trust, and capacity do not lend themselves to easily quantifiable metrics.

Previous studies have examined the emergence, institutionalization, and accountability mechanisms of transnational

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210 Id. at 62.
211 Sovacool, supra note 13, at 188.
212 BEVIR, supra note 10, at 68.
213 Sovacool, supra note 13, at 188.
214 Id.
216 Sovacool, supra note 13.
217 Short, supra note 46, at 13.
standards for transparency, but less is known about their effectiveness. The study explored in this section statistically analyzes the efficacy of transnational disclosure standards of the EITI. For these purposes effectiveness is defined based on whether the transparency engendered by the EITI actually results in better governance and development outcomes in EITI compliant countries by looking at eight distinct metrics: accountability; political stability; government effectiveness; regulatory quality; rule of law; corruption; foreign direct investment; and growth in per capita GDP. Researchers looked at two research categories to determine EITI effectiveness. The first category was whether there were significant differences in the developmental metrics between EITI and non-EITI countries. In the second category researchers analyzed whether differentiation occurred within the same country prior to and after EITI implementation. The study utilized comprehensive, peer-reviewed data from the World Bank. This data was sourced from more than 30 other sources permitting meaningful comparisons. This study found no statistically significant differences across any of the eight developmental metrics for either research category. Despite recognized limitations of the study, the research concluded that the “EITI has an insubstantial role at affecting key governance indicators.” Acting in the absence of the institutional weight of governmental support, the EITI is unable to ensure good governance and proper accountability. This analysis suggests that the EITI is not as successful as its advocates want us to perceive it to be. However, despite these general conclusions and although not statistically significant, the analysis does indicate possible positive effects of the EITI initiative on the metric of regulatory quality. Regulatory quality during candidacy was found to be significantly greater than zero and higher

218 Sovacool, supra note 13, at 179.
219 Id.
220 Id. at 179-80.
221 Id. at 179.
222 Id. at 180, 185.
223 Id. at 188.
224 Id. at 186.
225 Andrews, supra note 7, at 72.
226 Sovacool, supra note 13, at 188.
227 Id. at 185.
than the non-EITI country comparison group in the phase directly prior to EITI implementation.\textsuperscript{228}

While it was expected that the EITI would prove a better governance tool than CSR measures, it has not seemed to do so.\textsuperscript{229} In my opinion, however, effectiveness is only one tool by which to gauge a collective governance mechanism, and while valid, it is arguably a short-sighted metric. Its use here is equivalent to announcing a marathon victor after determining who was in the lead at the first yard. There is simply still too much race left to run. The development of the EITI is a process. All effective processes take time and iterations to develop into a working form, and all global processes take even more time. Further, the EITI demonstrates that global governance mechanisms are an iterative process, one oft-refined through trial and error. The EITI therefore should neither be lauded for its effectiveness nor condemned (yet) for its lack thereof. Rather, it should be recognized that the EITI played an important role in catalyzing the development of consensus around the need for transparency norms on payments to governments.\textsuperscript{230} At this time, it is immaterial that these transparency norms have not positively impacted governance. The EITI continues to play a useful role in clarifying problems within the industry and identifying potential remedies while building necessary support for reform.\textsuperscript{231} This is due to the unique position the EITI has been able to carve for itself within the global governance arena. It has successfully departed from both the hierarchical, external oversight mechanisms, as well as the purely voluntary self-monitoring models encompassed throughout CSR initiatives. Its success in this departure can be attributed to insisting upon multi-stakeholder participation. This ensures that stakeholder voice is heard, heeded, and incorporated throughout the design and implementation of the EITI.

Bringing the diverse, complex, and often conflicting set of stakeholders—including multinational and state-owned companies, host and home governments, industry groups, international financial institutions, investors, and civil society groups—within the industry together around the table is an accomplishment in itself. As a multi-stakeholder initiative, the EITI is able to emphasize its message—encouraging the prudent use of natural resource wealth

\textsuperscript{228} Id.
\textsuperscript{229} Andrews, supra note 7, at 69.
\textsuperscript{230} SIMONS & MACKLIN, supra note 21, at 88.
\textsuperscript{231} Short, supra note 46, at 14.
in the interest of national development—across a wide range of actors. This multi-stakeholder approach is one of the unique features of the EITI. The expectation is that opening the books would build trust between different stakeholders of the extractives sector, and also promote accountability between governments and corporations on one hand and society on the other, thereby advancing public interest.\textsuperscript{232} In the long-run, this collaborative rather than combative approach will likely make the EITI more useful as a global governance mechanism than other approaches.\textsuperscript{233} Since its inception the EITI has demonstrated that such a multi-stakeholder approach can go beyond the lowest common denominator standard and create a process of learning that has gradually raised the bar. This has helped to create an expectation of transparency in the extractive sector which was previously notoriously opaque and murky.\textsuperscript{234} As such, transparency and stakeholder participation have become mutually reinforcing mechanisms within the EITI’s governance scheme. But, transparency by itself cannot ensure the responsible use of resource revenues.\textsuperscript{235} In order to move resource governance toward holistic and sustainable development there must be a new addition to the collective governance model—the addition of collaborative accountability.\textsuperscript{236}

4. INCORPORATING COLLABORATIVE ACCOUNTABILITY INTO THE COLLECTIVE GOVERNANCE MODEL

Despite the traction that collective governance models like the EITI have gained in the global governance arena, they have yet to depart entirely from their Westphalian, command-and-control counterparts. As such, collective governance models still retain certain attributes of those regimes. One such attribute is the concept of linear liability.\textsuperscript{237} Without a departure from this toward a more collaborative accountability mechanism, attempts by the EITI to

\begin{itemize}
  \item \textsuperscript{232} Andrews, supra note 7, at 63.
  \item \textsuperscript{233} Id. at 76.
  \item \textsuperscript{234} Short, supra note 46, at 14.
  \item \textsuperscript{235} Sovacool, supra note 13, at 188.
  \item \textsuperscript{236} Short, supra note 46, at 14; Rockstrom, supra note 5, 19-20; Sovacool, supra note 13, at 189.
  \item \textsuperscript{237} Wettstein, supra note 6, at 157.
\end{itemize}
engender sustainable development will likely be in vain. It bears noting that I do not advocate an unconditional replacement for the existing accountability model. Where corporations actually cause direct harm, they should be held to account under the linear liability model. However, I am advocating the addition of a second prong to this existing accountability mechanism measured in degrees of positive change. This means that we should investigate not only those instances where corporations actually cause harm, but also where either their failure to act or their actions do not result in degrees of positive developmental change.238

Collaborative accountability can be defined by several characteristics, all of which are recognizable within the EITI initiative even though some still require significant development. The first characteristic is based on the assumption that most of the pressing global problems must be solved collectively, requiring proactive, multi-sector—government, industry, and civil society—participation. Second, collaborative accountability requires a larger emphasis on omission from taking positive action rather than the commission of harmful action as the cornerstone of corporate responsibility.239 This shifting emphasis on omission implies that corporate responsibility reaches beyond negative obligations to do no harm and includes positive obligations.240 Lastly, these positive obligations must be framed as political responsibility.241 Political responsibility means actual engagement in and facilitation of the political process and corresponding discourse. Political responsibility may be best understood as a communicative responsibility.242 Otherwise stated, it is a responsibility to engage in a public discourse with others for the sake of organizing our relationships and coordinating action most justly.243

This chapter will explore these concepts further by identifying how linear liability fails to serve as an effective accountability mechanism within the context of structural harm. This is followed by a discourse illuminating why collective governance models must assign more accountability to corporations in order to support

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238 Id. at 181.
239 Id. at 158.
240 Id.
241 Id. at 182.
242 Id. at 172–73.
243 Id. at 173.
sustainable development goals. The final section focuses specifically on how the EITI currently operates to achieve this.

4.1. The Blurred Lines of Liability

As demonstrated, the world is turning toward more collaborative and participatory forms of governance, but within this system exists fragmented and overlapping authority. The individualism of this model, built upon concepts of linear liability, counter-intuitively limits, rather than expands, the accountability for collectively produced harms, allowing institutional actors such as transnational corporations to both intentionally and inadvertently avoid responsibility. When viewed through the lens of linear liability, this fragmentation of authority creates an accountability gap because the nature of structural harm is not linear. The type of structural harm posed by the resource curse is too nuanced to fit within the current linear conception of liability. Therefore, collaboration, not only surrounding the decision-making process—as demonstrated by multi-stakeholder involvement in the development of EITI’s reporting standards—but also within accountability mechanisms, will be a necessary condition for improved regulatory quality in an increasingly interconnected world.

There are two aspects to regulatory quality: the decision-making process surrounding the creation and implementation of regulation, as well as the accountability mechanism of that regulation. As the previous chapter demonstrates, much attention has been paid to building the framework surrounding decision-making within the EITI; the accountability mechanisms have seen little of this due. Instead, collective governance mechanisms such as the EITI have incorporated within their accountability frameworks the existing accountability model based on the concept of linear liability.

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244 BEVIR, supra note 10, at 102.
245 Wettstein, supra note 6, at 161.
246 Id. at 159; see also Michael Green, Institutional Responsibility for Global Problems 30 PHIL. TOPICS 79 (2002) (maintaining that our understanding of moral responsibility is inadequate for regulating large scale social and global problems).
247 Wettstein, supra note 6, at 161.
248 Id.
249 Id. at 157.
Linear liability is based on the conception that human relations consist of small-scale interactions, with clearly demarcated lines of causation among independent actors. Therefore, under a linear liability model, one would hold those who are causally responsible for bringing about a problem responsible for rectifying it. It is further assumed in this linear liability model that such responsibility can be allocated fully between all responsible parties. In practice, however, these precise lines of causation are increasingly obscured under today’s societal, structural conditions, leaving our current understanding of responsibility inadequate for regulating global social problems.

In today’s globalized world, private actors, such as extractive companies, share enlarged public and political authority, often operating in roles that were traditionally understood to be those of the public sphere. As such, authority is no longer associated exclusively with the public sphere, and the line between what is public and what is private also blurs. This line continues to blur as private enterprises increasingly engage in the decision-making processes surrounding regulation. Despite this increased authority, increased accountability—the flip side of the coin—has not followed suit.

Linear liability assigns blame in order to compensate for past wrongdoings. This backward-looking approach is distinct from the forward-looking nature of collaborative accountability, which acknowledges the impossibility of tracing individual shares of responsibility in the case of structural problems. Instead, it is directed at the transformation of harmful structures by assigning responsibility for creating positive change to actors even when they are not to blame for past harm. “The point is not to blame, punish, or seek redress from those who did it, but rather to enjoin those who participate by their actions in the process of collective action to

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251 Id. at 155.
252 Id. at 157.
253 Id. at 162.
254 Id. at 161.
255 Id. at 162.
change it.”259 This responsibility is a shared responsibility and can only be discharged through collective action: “[t]he structural processes can be altered only if many actors in their diverse and unique social positions work together to intervene in these processes to produce different outcomes.”260 This requirement and necessity of collaboration is embedded in the model, which essentially requires it to be a positive responsibility or, in other words, actual concrete actions.261

The reality of today’s globalized world presents a mismatch between the individualism of this linear liability model and the imperative for collaborative responses to global problems in the collective age.262 The current conception of accountability as individual increasingly clashes with the collective nature of structural harm.263 Moving beyond negative obligations to positive obligations is not a clear process under the circumstances of large-scale structural problems for two reasons. First, under such circumstances, the full extent of actions is rarely fully comprehended. Often it is unforeseeable in the sense that a person or organization could contribute to harm without even engaging in any overtly harmful action.264 Under such circumstances, the no harm principle loses normative strength and thus the potential to provide guidance for how to behave.265 Second, if it is indeterminable to what extent and in what manner actors contribute to a persisting large-scale problem, both blame and its remedial responsibility cannot be proportionately allocated. As a result, the structural problem remains systematically unaddressed, or at least under-addressed. Structural harm is notoriously ambiguous. Understanding what actions by what actors contributed to the harm lacks clarity. This complexity combined with the sheer number of actors breaks the chain of causation. Therefore, in situations of structural harm, there is a breakdown in the logic of the linear liability model. It is virtually impossible to pinpoint the exact source of the harm, and therefore impossible to mitigate it. In actuality, the linear system may prevent, rather than facilitate, viable solutions for

259 Young, supra note 26, at 122.
260 Id. at 123.
261 Wettstein, supra note 6, at 172.
262 BEVIR, supra note 10, at 102.
263 Wettstein, supra note 6, at 159.
264 Id. at 167.
265 Id. at 168.
the most pressing of today’s prevailing global problems.\textsuperscript{266} Corporate responsibility needs to be reframed to take this into account. It should be a conception of collaborative accountability taking into account the multiplicity of today’s actors and the various interdependencies between them.\textsuperscript{267}

This restrictive nature of the existing liability model in practice leaves the most pressing and challenging problems we face as a global society in the domain of supererogatory action.\textsuperscript{268} This is an inadequate ethic for the collective age.\textsuperscript{269} An adequate ethic “must be able to provide guidance for ascribing responsibility beyond the principle to do no harm.”\textsuperscript{270} It calls for a fundamental change in how we conceptualize what is and is not appropriate corporate conduct and how we allocate responsibility for misconduct.\textsuperscript{271} Such an allocation of responsibility would suggest that while we all have a responsibility to make a difference, it is those with the greatest power to have a potential positive impact on the situation who bear the largest share of accountability. “While everyone in the system of structural and institutional relations stands in circumstances of justice that give obligations with respect to all the others, those institutionally and materially situated to be able to do more to affect conditions of vulnerability have greater obligations.”\textsuperscript{272}

4.2. The Responsibility of Corporations through the Lens of Collaborative Accountability

One way of enhancing collaborative accountability mechanisms is by assigning greater responsibility to institutional agents, such as corporations. Corporations are better equipped to deal with the structural conditions of today’s large-scale global problems. Institutions are better at collecting and processing information than individuals and more able to bear the costs of regulating large problems.\textsuperscript{273} These attributes make them better able to assess and

\begin{thebibliography}{99}
\bibitem{266} Id.
\bibitem{267} Id. at 158.
\bibitem{268} Id. at 168.
\bibitem{269} Id.
\bibitem{270} Id.
\bibitem{271} Id. at 169.
\bibitem{272} Id. at 170.
\bibitem{273} Green, supra note 246.
\end{thebibliography}
understand indirect effects of their decisions, which place them in the best position to avoid harmful outcomes linked to their conduct. Thus, corporate actors have greater leverage and impact in terms of producing harm, as well as, preventing and remedying it.\textsuperscript{274} This shift to collaborative accountability is of large relevance to corporations not only because they are institutional agents, but also because they most certainly are among those institutions which have dramatically increased their authority at the global level. Thus, corporate responsibility in the collective age must increasingly be interpreted within this larger conception of collaborative accountability. This means that corporations must increasingly collaborate with other private and public institutions in order to promote positive change in regard to the pressing global problems we currently face. This claim is not merely ethical, but also political.\textsuperscript{275}

Corporations should engage in this process and greater responsibility should be placed with these institutional agents for several reasons.\textsuperscript{276} Further, companies have powerful built-in platforms to advocate for action. When they join together their voices are much more effective at creating real change.\textsuperscript{277} Companies possess access and influence that are central to sustainable development. They play an active role in translating political programs into action. As such, industry should be at the forefront of fostering development.\textsuperscript{278} Additionally, the reputation of a corporation is one of its most important financial assets.\textsuperscript{279} Since corporations exist in the broader social world, they depend on forms of public governance to sustain them and the conditions under which they operate.\textsuperscript{280} The perception of corporations as instruments for the maximization of private interests is a relatively young one, and it denotes a distortion of what these institutions were originally designed to be. Corporations were historically created as public institutions to address public needs. Profits are an

\textsuperscript{274} Wettstein, supra note 6, at 160.
\textsuperscript{275} Id. at 162.
\textsuperscript{276} Id. at 157.
\textsuperscript{277} Id. at 174.
\textsuperscript{278} World Comm’n on Env’t & Dev., supra note 1, at 31.
\textsuperscript{279} BEVIR, supra note 10, at 49.
\textsuperscript{280} Id. at 57.
instrument to fulfill the corporate purpose, rather than the actual purpose itself.\textsuperscript{281}

Despite this, corporate actors cannot solve pressing global problems acting alone. Collaborative accountability is required.\textsuperscript{282} Collaborative accountability shifts the primary responsibility for structural problems from individuals to institutions.\textsuperscript{283} Further, it detaches the responsibility to contribute to solutions from an actor’s prior involvement in causing the problem.\textsuperscript{284} In contrast to the liability model, a conception of collaborative accountability assigns responsibility to all actors, whether individual or institutional, whose contribution is deemed essential for a viable solution to prevailing global problems regardless of whether they were involved in causing the problem initially.\textsuperscript{285} Thus, in order to assign institutional responsibility for regulating global injustice, it is less important to show that an institution has actually caused poverty or a human rights abuse than it is to show how it is capable of taking remedial steps against them.\textsuperscript{286} This model places a larger emphasis on positive obligations. A positive obligation is an obligation to change the status quo for the better, that is, to improve an unsatisfactory state of affairs or to assist others in doing so.\textsuperscript{287} Such a model is more suitable for the collective age in that it focuses on a corporation’s contribution to collective efforts aimed at global problem-solving.\textsuperscript{288} Therefore, corporate responsibility in the collective age entails positive obligations. The present view is that such participation is beyond the call of duty.\textsuperscript{289}

According to the current conception of responsibility, corporations would not have an obligation to participate in such discourse unless they were instrumental in causing the relevant harm. Collaborative accountability suggests otherwise.\textsuperscript{290} Under a collaborative accountability model, if the urgency of the situation is clear to a reasonable person and it seems similarly clear what kind of action is needed to rectify harm then a positive obligation exists

\textsuperscript{281} Wettstein, supra note 6, at 171.
\textsuperscript{282} Id. at 160.
\textsuperscript{283} Id. at 161.
\textsuperscript{284} Id.
\textsuperscript{285} Id.
\textsuperscript{286} Green, supra note 246, at 125.
\textsuperscript{287} Wettstein, supra note 6, at 163.
\textsuperscript{288} Id. at 161.
\textsuperscript{289} Id. at 163.
\textsuperscript{290} Id.
to act to improve the situation. Further, when the action and expected outcome are so clearly favorable, a random collection of individuals may be held responsible for failure to take collective action. This presupposes that we have an idea about what constitutes an improvement to a given situation and thus about what it is that we are striving for in a society. This could be contentious in regard to global responsibilities as it seems difficult enough to design a common idea of “good” within the boundary of a particular culture. Therefore, determining with precision what acts by what actors will make a positive impact is always a daunting task and may even prove impossible. However, in regard to issues such as global poverty, environmental degradation, climate change, and sustainable development it is obvious to the reasonable person that action rather than inaction by the collection is called for even if the specific required action(s) is not self-evident. Despite this lack of clarity, corporations should not escape accountability. Rather, they should hold a collective responsibility to participate in the political conversation about how to best rectify harm. Thus, under a model of collaborative accountability, all those institutions with essential and unique capabilities to contribute to potential solutions for the pressing global problems are accountable for actively engaging in political discourse on the matter. The power to influence these political processes and outcomes is an important factor in determining an institution’s degree of responsibility under a collaborative accountability framework.

This suggests that corporations should be held accountable not only for causing harm, but also for failing to engender positive change in the communities in which they operate. At a minimum, corporations should be charged with participating in those multi-actor policy dialogues that are essential for decision-making surrounding collective courses of action. Such engagement then is

291 Id. at 164.
292 Id. at 176.
293 Id.
294 Id.
295 See Virginia Held, Can a Random Collection of Individuals Be Morally Responsible?, 67 J. Phil. 471, 479 (1970) (arguing a collective group may be morally responsible for not constituting itself into a group capable of deciding upon an action); Wettstein, supra note 6, at 165 (arguing for a moral responsibility to avoid inaction even when the required action is not apparent).
296 Wettstein, supra note 6, at 165.
297 Id. at 170.
no longer a voluntary CSR initiative as it is commonly perceived. It no longer belongs to the realm of supererogation, but can be demanded of corporations. The more vital the role of multinational corporations in solving large-scale global problems, the more their participation in such collaborative approaches becomes a matter of obligation.298 “Corporations that point to a lack of appropriate platforms that would provide an opportunity for them to participate in such efforts need to rethink their excuses,”299 especially as organizations like the EITI continue to grow, develop, and garner international credibility and become increasingly capable at providing such a platform. Further, we should consider that corporations ought to be held accountable where they fail to participate in the already existing collective governance platforms, and that they should be charged with participating in building these platforms where they do not yet exist. “In other words, the responsibility of corporations may well go beyond merely participating in such collective attempts; in some situations, they may have a responsibility to step up and take the initiative in organizing collective efforts to address certain issues.”300

Business can no longer make do with merely not causing harm in the pursuit of the goals that they freely choose.301 Rather, the very purpose of businesses and corporations must be informed and ultimately legitimized by their potential contribution to the solution of prevailing social problems.302 A growing number of business ethicists argue for proactive corporate involvement in addressing global problems, including the promotion of just institutions, rule of law, and regulatory quality, as well as a duty to assist poor countries in their development.303

298 See id. at 166 (describing the need for a shift in responsibility from public to private spheres).
299 Held, supra note 295, at 480.
300 See Wettstein, supra note 6, at 166 (describing the need for a shift in responsibility from public to private spheres).
302 See Wettstein, supra note 6, at 171 (arguing for proactive company engagement in addressing global problems).
303 Scherer & Palazzo, supra note 301, at 1110. See also Wettstein, supra note 6, at 170–71 (explaining that businesses must go beyond not causing harm in their pursuits, but instead be informed and legitimized by their contribution to social problems).
4.3. Characteristics of Collaborative Accountability within the EITI

The signs of collaborative accountability—collective mechanisms, positive obligations, and political responsibility—are already taking shape within the EITI in a number of ways. For example, the EITI is a fundamentally collective organization. This is concretely demonstrated by the EITI’s requirement of “effective multi-stakeholder oversight.”\(^{304}\) This multi-stakeholder group must collectively agree to a work plan with clear objectives for EITI implementation.\(^{305}\) The remaining characteristics—positive obligations which are framed herein as political responsibility\(^ {306}\)—and how these impact corporate responsibility requires a slightly more nuanced discussion as laid out below.

The EITI sets forth requirements across eight broad categories. Each category further delineates more specific clear-cut guidelines for compliance of these requirements, which arguably represent positive obligations of its implementing countries and associated corporate partners.\(^ {307}\) These requirement categories are: (1) oversight by the multi-stakeholder group; (2) legal framework, including allocation of contracts and licenses; (3) exploration and production; (4) revenue collection; (5) revenue allocations; (6) social and economic spending; (7) outcomes and impact; and (8) compliance.\(^ {308}\) While much of the onus is on the obligations of governments, notions of corporate responsibility are less overtly strewn throughout. Corporations are bequeathed positive obligations throughout the requirements in two ways: directly and vis-à-vis the multi-stakeholder group.\(^ {309}\) Positive obligations within the EITI are most frequently in the form of disclosure requirements. The purpose of these disclosure requirements is to enable understanding and inform public debate about the governance of the extractive industries and how resource revenues can be used effectively. The EITI requires disclosure of information related to

\(^{304}\) EITI STANDARD, supra note 178.

\(^{305}\) Id.

\(^{306}\) See Wettstein, supra note 6, at 182 (defining positive obligation as an obligation to change the status quo for the better).

\(^{307}\) EITI STANDARD, supra note 177.

\(^{308}\) Id. at 12–38.

\(^{309}\) See id. at 13–5 (referencing Requirements 1.2 and 1.4).
operational licenses and contracts, production data, taxes, revenue allocations, social expenditures, as well as impact of the extractive sector on the economy. As of 2020, the EITI will also require disclosure information regarding beneficial ownership. This demonstrates that within the EITI there is a clear trend of continuing to enhance disclosure requirements and that the EITI as an organization recognizes that addressing structural harm is an iterative process.

These obligations are political to the extent that they require discourse and decision-making surrounding definitional concepts. For example, not all contracts must be disclosed; there is discretion allowed within the disclosure requirements in that only those contracts deemed material must be publicly disclosed. This discretion is afforded to the multi-stakeholder group which is charged with determining this materiality. In this way, the companies who are members of the multi-stakeholder group have positive obligations to contribute to this type of political discourse on the subject matter. Companies, even those that are not members of the multi-stakeholder group, are also directly charged with being “fully, actively, and effectively engaged in the EITI process.” The multi-stakeholder group is required to commit to work with these companies and should undertake effective outreach activities communicating their central role in EITI implementation.

According to Florian Wettstein:

[This] account of political responsibility provides exactly the conceptual and theoretical frame for the kind of collaborative corporate accountability outlined earlier, that is, the responsibility to participate in and in some instances to actively organize the communicative platforms that allow a variety of different actors to deliberate and decide on the

310 See id. at 17–21 (referencing Requirement 2).
311 See id. at 22 (referencing Requirement 3).
312 See id. at 22–6 (referencing Requirement 4).
313 See id. at 26–7 (referencing Requirement 5).
314 See id. at 28–9 (referencing Requirement 6).
315 Id.
316 See id. at 17–21 (referencing Requirement 2).
317 See id. at 13 (referencing Requirement 1.2).
318 See id. at 15 (referencing Requirement 1.4).
collective courses of action needed to respond to specific problems.\textsuperscript{319}

As demonstrated, the EITI attempts to do precisely this.

The reality on the ground, however, is that some companies are not cooperating with the EITI’s vision. There is anxiety that as the EITI becomes more entrenched in reforming the sector’s policies, the companies that currently contribute to the annual disclosures process will cease to do so.\textsuperscript{320} “[O]ur fear now is that as we proceed deeper and deeper into reforming the sector, there is the likelihood that some of the companies would bow out of the EITI because some of the reforms” are no longer in their favor.\textsuperscript{321} While membership within the EITI itself is voluntary, countries are able to prevent companies from shirking those corporate responsibilities enumerated within the EITI by legislating the EITI framework making disclosure mandatory.\textsuperscript{322}

Arguably, such national implementation makes the EITI redundant. But practically speaking that is not the case. Political tides at the national level can swiftly change, such as when leaders transition. One example of this is the recent repeal of the domestic implementing legislation of the EITI in the United States.\textsuperscript{323}

\begin{itemize}
\item \textsuperscript{319} Wettstein, supra note 6, at 173.
\item \textsuperscript{320} See Andrews, supra note 7, at 72 (describing the limited efficacy of EITI in the Ghanaian extractive sector).
\item \textsuperscript{321} Id.
\item \textsuperscript{322} Id.
\end{itemize}
International institutions such as the EITI help create a type of immunity against ill changes of the political tide. They serve as important mechanisms to establish norms and ensure continuity. But further, the EITI does more than just publish numbers. It simultaneously involves people in the decision-making processes. Although the EITI provides an international standard, it is implemented at the national level. “The role of the international management is to support and encourage [the EITI’s] meaningful implementation.”

This dual framework of national implementation combined with international validation will be the linchpin of the EITI’s success as a governance mechanism. When countries implement the EITI it is the people of those countries—through their respective democratic processes—who drive the initiative. The EITI is simply a platform for dialogue about the management of their country’s natural resources. The goal is to pry decisions regarding natural resource management and the associated revenue out of the private hands of corporate interests and thrust the conversation onto the public stage. This means that the decisions regarding how to adapt the EITI implementation process to best reflect local circumstances, needs, and preferences are removed from the international body and placed squarely with those better able to contextualize, localize, and facilitate the political dialogue: those on the ground at the national level.

5. CONCLUSION

It may be premature to deem the EITI a success story as an effective collective governance mechanism, but it is not premature to laud its accomplishments. The EITI has a flexible, open organizational mindset that recognizes the complexity of the problems it seeks to address. This adaptability alone puts it on the path toward success. However, it must be recognized that there is still significant work to be done in further establishing corporate


325 Short, supra note 46, at 13. Arguably, cities would be better able to localize this process than when these processes are handled at the national level. Such a system would require implementation at the city level vis-à-vis mayors, such as within organizations like the C40. These concepts are not sufficiently explored herein, but are ripe for further research.
Disclosure requirements. Transparency has not yet become habitual corporate behavior, and it still lacks a level of conformity across the extractive industry. However, this is often the case with international norms. What can be said is that transparency in the extractive industries—a traditionally opaque sector—is no longer exceptional. The EITI has played a leading role in mobilizing governments, industry, and civil society in advancing transparency through corporate disclosure. In this way, the EITI embeds corporations within the problem-solving processes of global governance.

The linear liability model no longer provides a satisfactory approach to counteract harm under current globalized conditions where injustices are often the result of actions from numerous actors and an array of organizational policies. It can be the case that those with the greatest power in the system are far removed from any interaction with those who are most harmed by it. A move toward collaborative accountability is critical in order to adequately address large-scale structural problems because it is not possible to trace with specificity the actor who caused the harm. It can be unfortunately tempting to insist on strengthening existing institutional regimes rather undergoing the onerous process of inventing new frameworks. However, it is worth considering that while certain models, like linear liability, may have served us well historically, they cease to do so today.

Instead it may be time to employ more organic alternatives—ones which problem-solve and promote positive change through spontaneous evolution by recognizing when there is the capacity and ability to make changes and iteratively, intentionally, and repeatedly remove obstacles to progress. Admittedly, these models—like the EITI—are less definitive, but might prove more

326 See Sovacool, supra note 13, at 187 (noting the difficulties of examining financial flows between governments and extractive companies).
327 See Andrews, supra note 7, at 74 (describing the limited effectiveness of EITI in making the extractive sector less opaque).
328 Sovacool, supra note 13, at 181. See also Short, supra note 46, at 8 (describing the EITI’s leading role in normalizing transparency in the extractive industries).
329 See Scherer & Palazzo, supra note 301, at 1110 (arguing that transnational corporations have already started to assume responsibilities once regarded as governmental).
330 See Wettstein, supra note 6, at 171 (describing the insufficiency of standard models of responsibility).
331 Id. at 172.
332 Id.
productive in a globalized world. Ideally, such a model is reflective of and reflexive to the needs, cultures, and viewpoints of the diverse set of stakeholders which it represents in order to mitigate the likelihood of ethnocentrism and avoid the tendency to give priority to only those most apparently detrimental consequences of our actions. This is critically important in the global sphere where normative standards are not yet broadly accepted and governance mechanisms are weak. As a transnational institution focused on the obligations of corporations, the EITI provides the opportunity for learning, persuasion, and deliberation, all of which are critical to acceptance of the moral legitimacy and authoritativeness of the evolving norms, standards, and rules it seeks to establish.

Although I applaud the EITI’s dynamism, I recognize that its framework is not without limitations. The EITI is confronted with administrative difficulties in data collection, challenges to integrating EITI efforts with other CSR initiatives, conflicting stakeholder expectations and power relationships, and disinterest in reforms. Further, the EITI’s narrow definition of transparency is problematic. It focuses on transparency in government revenue—the financial flows between industry and national treasuries—but misses where the corruption is often far worse: in government spending. However, the EITI was never intended to be a stand-alone initiative, but rather an entry point that would begin “a process of disclosure and accountability in one link of the value chain—revenue flows from corporations to the governments of resource-rich countries,” and a process that would encourage governance reforms in other parts of the extractive value chain. Despite this narrow approach, there is evidence that the EITI has given communities a means to hold governments and industry

333 See id. at 175 (arguing for a conception of collaborative responsibility as human rights responsibility in order to mitigate suspicions of imperialism).
334 Id. at 176.
335 Id. at 177.
336 Kobrin, supra note 22, at 367.
337 See Andrews, supra note 7, at 60 (assessing the effectiveness of EITI in the Ghanaian mining sector).
338 Id. at 69.
339 Id. at 68.
340 See Sovacool, supra note 13, at 187 (noting the difficulties of examining financial flows between governments and extractive companies).
341 SIMONS & MACKLIN, supra note 21, at 157.
accountable for extractive revenues and to demand reinvestment of such funds in their communities.\textsuperscript{342}

The voluntary nature of the EITI is also the frequent subject of criticism. Again, it was recognized from the outset that the EITI is not be sufficient on its own accord to drive the necessary reform. The EITI explicitly recognizes its role as complementary to, and not exclusive of, other standards, laws, and institutions that are necessary to ensure effective governance of natural resources. The initiative was designed as a stepping-stone to further domestic governance reforms to address rent-seeking behavior and will be most successful where it is part of wider legal reforms.\textsuperscript{343}

Further, the lack of legally binding obligations does not mean that adherence is entirely voluntary: agreements may be enforced through a variety of non-hierarchical compliance mechanisms such as public opinion.\textsuperscript{344} Additionally, the EITI Requirements may affect the public regulatory process in a number of ways: global and regional trade agreements may explicitly recognize them; government regulations may refer to them for definition of terms; and government procurement rules may adopt them. Further, through pressure consumers, financiers, insurers, and competitors may insist on observing the Standards’ prerequisites for companies wanting to do business in that market.\textsuperscript{345} There are numerous instances of non-binding commitments evolving over time into hard international law: the soft law of today can become the hard law of tomorrow.\textsuperscript{346} The International Organization for Standardization (ISO) has evolved ahead of the EITI but is one such example of this phenomenon. Increasingly, ISO sets industry standards in conjunction with or in addition to those set by domestic regulators. As such, the ISO provides one example of a sector-specific, non-hierarchical regime that morphed, in part, into hierarchical compliance enforced through hard law as standards were incorporated within country’s regulatory frameworks.\textsuperscript{347}

\textsuperscript{342} Id.
\textsuperscript{343} Id. at 152.
\textsuperscript{344} See Kobrin, supra note 22, at 360 (providing an overview of the various factors that impact transnational corporate compliance outside of binding law).
\textsuperscript{345} Id. at 366.
\textsuperscript{346} Id. at 360.
\textsuperscript{347} Id. at 366.
monitoring violations, judging transgressions and enforcing compliance.\textsuperscript{348}

Institutional flexibility is important, because uncertainty regarding the future exists. Models such as the EITI are helpful, but they are not perfect. These frameworks, while not predictive, inform processes. Processes take time and global processes take even longer. While the work of the EITI and transparency in general has been brandished as ineffective, their current effectiveness is immaterial. Rather, what is pertinent is the institutional flexibility that the EITI as an organization possesses: namely, its recognition that systemic problems such as the resource curse are complex and further compounded by today’s interconnectedness, its ability to assess, reassess, and evolve to the changing needs, and the understanding that this is an ongoing, iterative process. When assessing organizations like the EITI it is imperative not to read too much into a static assessment of effectiveness, but to look deeper at the institutional and organizational structure and its methodology, processes, and problem-solving strategies. Effectiveness in the empirical sense is largely immaterial. Rather, we should assess the degrees of positive change that a sector-specific public-private partnership like the EITI and other global governance mechanisms have initiated within the realm of corporate governance. In this instance, the extractive industry has moved out of the opaque and murky waters of confidentiality into the expectation of transparency when conducting transnational operations. This is no small step, but a colossal feat. And based on its track record the EITI has little intention of stopping there. Due to its institutional flexibility the long-term potential of the EITI for effectively creating positive change within the extractive industry is robust.

\textsuperscript{348} Id.