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AMERICAN BAR ASSOCIATION

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MESSAGE FROM THE CHAIRS

J. Brett Grosko, Jennifer Wills, David Downes, and Chris Costanzo

The Section of International Law's International Environmental Law Committee and the Section of Environment, Energy, and Resources' International Environmental and Resources Law Committee are delighted to bring you this joint issue, which focuses on environmental law developments in China. Given the 2012 changes in China's political leadership, the massive ongoing economic development occurring there, and the implications of China's growth for global environmental trends, now is a particularly appropriate time to consider the state of Chinese environmental law.

This issue presents four articles. First, Adam Moser provides a succinct commentary on the major governance challenge that China presents, both for its recently selected leaders and for the international community. He observes that the gap between written law and actual practice, lacunae in the written law, and the intense pace of development all create an unprecedented context for addressing core questions of sustainability and environmental policy. Next, Anna Mance focuses on a fascinating aspect of this challenge: the complex environmental and human rights questions that proposed expansion of Chinese hydroelectric dams present for China's neighbors and Asia. For example, she observes that given the projected effects of climate change, including increased water scarcity, China's investment in large-scale dams may be ill-advised in the long term. She concludes that irrespective of the wisdom of dam building, China should engage more actively in river-sharing agreements and offer transparent consideration of the environmental and social effects of dam construction on downstream riparian neighbors.

Third, Heather Croshaw and Wang Ye team up to consider the important question of transparency in Chinese resource extraction activities worldwide. They call for greater Chinese involvement with a voluntary program known as the Extractive Industries Transparency Initiative (EITI). EITI seeks to address political failings in resource management throughout the globe. The authors conclude that U.S.-China cooperation within EITI will help increase global energy security by, *inter alia*, improving access to market information, increasing community participation, promoting sustainable development, reducing corruption, and encouraging corporate best practices.

Finally, Bernadette Brennan suggests that companies doing business in China can benefit from staying ahead of changing Chinese regulatory requirements for information disclosure by adopting policies that ensure voluntary self-disclosure. The author suggests that such a policy will protect such companies from the risk created by somewhat unpredictable but increasingly substantive environmental disclosure requirements.

We hope you enjoy this informative exploration of these new developments and critical matters. Please

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J. Brett Grosko, Editor

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IN PIONEERING ENVIRONMENTAL GOVERNANCE, CHINA'S NEW LEADERS FACE NO SMALL TASK

Adam Moser

In November 2012, after months of political intrigue and just days after the reelection of President Obama, China's Communist Party anointed a new group of leaders led by the new General Secretary and President, Xi Jinping. In the months since, China watchers have scoured Xi's speeches and those of other high-level officials for hints as to whether or not the new leadership will effectuate reform—political, economic, and social—and if so, what those reforms might be. The general consensus amongst observers is that China's economic and political system is in need of major reform, lest the status quo continue to perpetuate imbalances that threaten economic development, social stability and environmental sustainability. At stake over the next ten years, during which China's new leaders are expected to reign supreme, is nothing less than the direction of the global economy, any chance of mitigating the worst impacts of climate change, and possibly the fate of China itself. Hyperbole? I think not.

Not surprisingly, the issue of legal reform has been at the center of discussions regarding everything from economic reforms to freedom of the press and environmental protection. In China's reform era, law has always been a delicate matter. On the one hand, there had to be enough law to encourage confidence for the conduct of business and to deal with a myriad of civil disputes. On the other hand, the government has never seriously promoted an independent judiciary. The rapid development of environmental courts in China may evince the judiciary's desire to play a larger role in environmental enforcement. Without larger legal reforms, however, these courts and their judges will be confined to making decisions deemed beneficial to their immediate political superiors.

China has a substantial body of environmental laws and regulations, many directly influenced by U.S. and European Union (EU) models. Simply put, however, a reliable mechanism for enforcing these laws does not exist. The local environmental protection bureaus that

are primarily in charge of enforcement are, generally speaking, hampered by the lack of support that they receive from their local government superiors and too often corrupted by the opportunity to capitalize on their niche rent-seeking opportunity, e.g., the ability to approve permits and collect fines.

Even if there were a reliable system of enforcement (i.e., if citizens had effective oversight capabilities, and if China's judiciary had a modicum of independence and could enforce orders beyond small payments for compensation), then China would still need new legislation that adequately penalized the most common environmentally harmful behaviors. Current laws are grossly inadequate to punish the intentional misreporting of pollution data. In some instances, a fine can be levied, but it usually must be accompanied by an actual emission or discharge violation. The fines for exceeding pollution limits are far too low to recapture even a portion of the financial benefits that accrue to firms that do not implement pollution-control measures. Furthermore, there is no way to hold bad actors criminally liable for intentional or repetitive behavior, unless the behavior caused "severe" environmental damage.

In contrast, while these are examples of gaps in the written law, there are also aspects of China's written law that appear to be progressive. China's Environmental Impact Assessment (EIA) Law, for example, covers an extremely broad scope of construction projects. It requires that all new sources of pollution meet emission standards before starting operation. However, a 2007 study found that nearly 60 percent of all EIAs were approved after the construction of the project began. This lack of compliance can be attributed to the general lack of enforcement but also to the lack of penalties imposed by the EIA law. Even if a construction project is found to be in willful noncompliance with the EIA law, all that it needs to do to come into compliance is submit a postproject or supplemental EIA. And even when EIAs are done chronologically in accordance with the law, they can still leave much to be desired substantively.

Researchers and law professors in south China recently examined the EIA for a lead-acid battery factory in Guangdong. In the village where the factory was located, hundreds of the villagers, mostly children, were found to have excessive blood lead levels. The researchers found that the EIA only listed 11 households within 500 meters of the factory's proposed site. In fact, there were 140 households in the area at the time the EIA was conducted. The researchers asked the chief writer of the EIA report how there could be such a discrepancy. The EIA writer replied that the information was obtained through an onsite investigation, but that he could not remember the specific case.

China's EIA law contains specific enforcement mechanisms to deal with egregious errors in EIAs. According to law, the entity that conducted the EIA can be fined and lose its license. Unfortunately, although errors like the one described are not rare, punishment for submitting false or erroneous EIAs remains the exception. When China does take decisive action, it often uses quasi-legal means that are often independent of existing legal enforcement mechanisms and almost always outside the scope of judicial review.

In May 2011, after a string of high-profile lead poisoning incidents surfaced in the media, China's Ministry of Environmental Protection issued a three-page notice on the need to improve the regulation of lead emission sources. Remarkably, the impact of this notice surpassed that of hundreds of pages of promulgated law. By July 2011, nearly 90 percent of China's lead-acid battery industry, the world's largest, had been idled or permanently closed, and the price of lead on global commodity markets began to fall. The remarkable impact of this notice is attributable to the political pressure that it placed on local leaders to take action. However, industry data shows that production volumes for November 2011 had already recovered to levels exceeding the previous year's monthly high.

The quick recovery of China's lead-acid battery industry is a lesson in the limits of using politically motivated and politically enforced crackdowns to replace law-based regulatory systems. Many of the smallest factories that were "shut down" simply

picked up and moved, mostly to more rural and even less regulated regions. Factories that were temporarily idled started operations again once they proved to local regulators that they had the required pollution-control equipment. But without further reforms to ensure consistent regulatory oversight and citizen participation, there is no guarantee that such equipment will be used.

Article 55 of China's newly revised Civil Procedure Law permits registered civil society organizations to bring public-interest claims against entities that harm the public through environmental pollution. This is the first time in China's recent history that public-interest standing has been permitted nationally, though several environmental tribunals have very recently experimented with it. Permitting public-interest standing could potentially increase oversight and enforcement, but many challenges remain. Forthcoming judicial interpretations could restrict the types of civil society groups that have standing to sue. And all cases will still have to go through China's young and relatively feeble judiciary.

The preceding examples illustrate the difficult governance situation that China faces as it attempts to improve traditional environmental protection. The environmental governance experiences of developed countries can be of use to China, and China has already borrowed from these systems. However, these examples—even if perfectly deployed in China—are likely to be insufficient. This is not only because such practices are products of a particular time and place, and of broader cultural and political factors, but also because China's economic development situation is so drastically different.

The United States was the world's largest manufacturer of goods from 1895 to 2011; that's when China overtook the United States to reclaim the top spot that it had previously occupied early in the nineteenth century. It took the United States over seventy-five years as the world's largest manufacturer to develop the political will and the governance systems to systematically regulate for environmental protection. Moreover, this only took place after the destruction of nearly every old-growth forest and rivers became so polluted that they caught fire. China's task is daunting; it must pioneer a path that simultaneously promotes economic and human development, while cleaning up and protecting the environment for future generations. And unfortunately, the world's developed economies have not provided China with the type of examples or the support that it needs to do this.

The 1992 United Nations Conference on Environment and Development proposed that economic development and environmental sustainability be mutually and simultaneously promoted and that doing so was the best way to ensure a just and equitable world. This idea was what global leaders ostensibly endorsed when they signed on to Agenda 21 and the Rio Declaration, including then-President George Bush. However, actualizing genuine sustainable development at the country level, not to mention globally, remains a work in progress even for the world's most advanced economies.

To its credit, China has attempted to connect economic development and environmental protection in ways seldom seen in developed economies. During China's 11th Five-year Plan (2005–2010), thousands of miles of high-speed railways were laid, and thousands of water-treatment plants and flue gas desulfurization systems were built and deployed across China. This was a massive industrial undertaking that spurred both economic growth and, hopefully, environmental protection—although the jury is still out on the latter.

During the same period, China's aggressive pursuit of energy efficiency and renewable energy also led to major successes. China reduced its carbon intensity by 15 percent. China now has more installed wind power capacity than any other country and the capacity to manufacture more solar photovoltaic panels than the rest of the world combined (a success that has spurred the United States, the EU, and India to bring trade-related claims against China before the World Trade Organization's dispute settlement body). But China also remains the world's largest consumer of coal, and it is quickly catching up to the United States in oil consumption. Its greenhouse gas emissions are nearly the size of the next three largest emitters combined: the United States, India, and Russia respectively. On a per

capita level, China's emissions are just over the global average. Continued development and urbanization, however, promise to drive China's emissions even higher.

It is projected that more than 225 million Chinese will move from the countryside to cities in the next fifteen years. Based on China's recent past, that means more cars, more meat consumption, more factories moving from cities to less developed and less regulated areas, and more energy consumption. What becomes clear is that China's environmental and development problems are the world's problems. To facilitate a global political environment that is conducive to China going green, world leaders and global institutions will have to fundamentally reassess many of the traditional principals and values that they hold sacred. While China's new leaders will be the most influential in determining China's fate, the rest of the world must also be increasingly engaged and innovative in pioneering truly sustainable development models, lest the status quo continue to create imbalances that threaten our very existence.

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THE UNCERTAIN FUTURE OF HYDROELECTRIC DAMS ON CHINA'S TRANSBOUNDARY RIVERS

Anna Mance

As the world's largest hydroelectric energy producer and consumer, water is critical to China's continued economic growth. The country depends heavily on its big dams for the massive amounts of energy they produce to fuel its burgeoning industries and agricultural sector and the freshwater they provide to citizens. Cleaner than coal and other fossil fuel sources, hydroelectric dams are heralded as a cost-effective, dependable, and largely renewable source of energy. They offer a sustainable alternative that can allow countries to reduce dependence on polluting fossil fuels while spurring development. In the context of a changing climate, this is highly important. However, hydroelectric dams are, obviously, dependent on water and steady river flows. Despite its rich water resources, water scarcity is one of China's foremost problems. Water tables in the country are falling, and global warming is causing glaciers to melt at a faster pace than in the past, creating more erratic flows. Considering that freshwater resources are shrinking, it would be wise to evaluate the long-term viability of big dams. Big dam building may be a short-term solution to China's water and energy problems, but it is not a clean energy panacea due to the high social and environmental costs. Nonetheless, after a brief moratorium on big dam construction in certain regions, China is again moving to expand its already complex network of dams. China's purely internal rivers are largely saturated with dams already; thus, the government is increasingly targeting transboundary rivers, such as the Brahmaputra, as new sources of hydroelectricity. With no water-sharing agreements in place, big dams on cross-border rivers will come at a high cost to China's downstream riparian neighbors.

I. China's Need for and Experience with Hydroelectric Power

Dams are attractive options for any country seeking to use its natural water resources for economic development. As a water-rich country, China has long

exploited its rivers for energy and currently leads the world in hydroelectricity production; in the last decade alone, more than 60 percent of all hydropower projects completed worldwide were in China, and hydroelectric dams can be found in nearly every region of the country. David Biello, *The Dam Building Boom: Right Path to Clean Energy?*, YALE ENV'T 360, Feb. 23, 2009, *available at* http://e360.yale.edu/feature/the_dam_building_boom_right_path_to_clean_energy/2119/ (last visited Feb. 28, 2013). However, the price of harnessing hydroelectric power is often linked to significant environmental and social disadvantages, such as mass displacements, inadequate compensation to local communities, and the collapse of local economies dependent on the rivers and fishing.

As an example, the Three Gorges Dam, on China's Yangtze River, is the world's largest reinforced concrete hydroelectric dam with the dual benefits of controlling the powerful and flood-prone Yangtze and the capacity to produce 22,500 megawatts of electricity, as much as twenty-five large coal-fired plants. Fabian Acker, *Taming the Yangtze*, E&T. Mar. 2, 2009, *available at* http://eandt.theiet.org/magazine/2009/04/taming-the-yangtze.cfm; Keith Schneider, et al., *Choke Point China: Confronting Water Scarcity and Energy Demand in the World's Largest Country*, 12 VT. J. ENVTL L. 713, 715 (2011). However, the Three Gorges Dam is also a prime example of how large dam projects create problems for local communities and the environment. The dam promised massive amounts of energy, but also set records for flooding cities, towns, and villages, displacing at least 1.1 million people, a number expected to rise to four million by 2020 when rising waters, erosion, and pollution due to dam construction force further displacement. John A. Sautter, *The Clean Development Mechanism in China: Assessing the Tension Between Development and Curbing Anthropogenic Climate Change*, 27 VA. ENVTL. L.J. 91, 107108 (2009). According to the World Commission on Dams, the Three Gorges Dam has caused extensive damage to vulnerable riverine communities of people that often have a poor understanding of their legal rights, had transformative impacts on the ecosystem by destroying fisheries and fragmenting rivers, and affected the quality of downstream river water. In the case of transboundary rivers, downstream neighboring states may suffer from reduced water flow, and the quality of the water that does reach the neighboring states is often polluted. Thus, the potential for political disputes and water wars is especially acute.

Although Chinese officials are perhaps ignoring the social costs and political tensions, they have at least acknowledged the serious and possibly catastrophic environmental costs of the Three Gorges Dam. As reported by Jane Macartney, Wang Xiaofeng, the director of the administrative office that built the Three Gorges dam, cautioned, "'We absolutely cannot relax our guard against ecological and environmental security problems sparked by the Three Gorges project. We cannot win passing economic prosperity at the cost of the environment.'" Jane Macartney, *Three Gorges Dam Is a Disaster in the Making, China Admits*, TIMES ONLINE, Sept. 27, 2007, available at http://www.timesonline.co.uk/tol/news/world/article2537279.ece, accessed Feb. 25, 2013). Given these many issues with hydroelectric power, the social and environmental costs of big dams may be outpacing their benefits. Perhaps the most critical consideration is that hydroelectric dams are dependent on predictable water sources, and water scarcity is fast becoming the world's premier concern. Thus, the effects of climate change on water resources will directly impact the utility of hydroelectric plants in the future.

Nations that are heavily dependent on hydroelectricity face a conflict in balancing the compelling need to meet an increasing demand for energy and a desire to preserve the environment. China is no exception. Despite its great water wealth, China is struggling to provide necessary resources to the world's largest group of citizens, crops, and burgeoning industries all thirsty for water. While the south of China is water rich, water tables in the dry and arid North have been consistently falling for decades, leaving the millions of inhabitants in the North without a steady supply of water. Recently, however, the water-rich South is also steadily losing moisture. In 2009, total freshwater reserves in the Yangtze River Basin dropped 17

percent from 2005 levels, according to the China Statistical Yearbook.

Anticipating its present and future water needs, China has developed several water transport projects, such as the South-North Water Diversion Project (SNWDP), a project designed to alleviate water scarcity by transporting water from the South to the North. Thus, in addition to using its rivers for energy production, projects such as the SNWDP are also highly dependent on continued sources of water. China must now reconcile its prowess as a hydroelectric powerhouse with the realities of climate change: intense drought, rising oceans, desertification, and shrinking freshwater resources.

The Institute for Governance & Sustainable Development estimates that seasonal Himalayan glacial melt contributes up to 45 percent of total river flow of ten of Asia's largest rivers. Three, the Indus, Ganges, and Brahmaputra, supply approximately 500 million people with water for agriculture and other purposes. The region as a whole is important to biodiversity, rainfed and irrigated agriculture, and hydropower. Himalayan glaciers are retreating rapidly, and projected climate change in the next century will likely increase this melt rate. In this case, river flows will become more intense and erratic in the short term; in the long term, however, they will diminish.

II. Transboundary Risks and Impacts of Proposed Chinese Dams

Considering that freshwater resources are becoming more scarce, it would be wise to evaluate the long-term utility of big dams as a viable source of energy. Yet, by 2020, China aims to increase its hydropower capacity to 430,000 megawatts to meet the anticipated energy needs of its almost one-and-a-half billion citizens. Robert G. Wirsing, *The Brahmaputra: Water Hotspot in Himalayan Asia*, June 2, 2012, Global Water Forum, *available at* http://www.globalwaterforum.org/2012/06/02/the-brahmaputra-water-hotspot-in-himalayan-asia/).

To do so, China is shifting its focus to dam projects on transnational rivers. Thus, at a time when many developed nations are beginning to deconstruct dams, China is looking increasingly to as-yet untapped sources for hydropower, including the Upper Mekong, Salween, and the Brahmaputra. Each of these rivers originate in the Tibetan plateau and traverse China and several of its neighbors to the south and southwest before draining into the Bay of Bengal (Salween and Brahmaputra) and the South China Sea (Mekong). Hydroelectric dams on the upper reaches of these transboundary rivers will have significant environmental, social, legal, and geo-political impacts on the region as the primary benefits of these dams are directed into China, while the lower riparian states will bear the majority of the social and environmental costs.

Of the rivers on which China has set its sights for new hydroelectric projects, the 2,906 kilometer-long Brahmaputra raises some of the most important potential cross-border riparian issues. The Brahmaputra flows through China (Tibet), India, and Bangladesh, which are the world's first, second, and seventh most populous countries, respectively. Like China, India and Bangladesh also face severe problems of water scarcity and a rising demand for energy. As the Brahmaputra flows into India and Bangladesh, it eventually converges with the Ganges and Meghna rivers before flowing into the Bay of Bengal. Along the way, the river provides irrigation for crops for a number of ethnic minorities and tribes living in the Brahmaputra valley and also feeds the forests and swamps in Assam (which includes Kaziranga National Park, a UNESCO World Heritage site that is home to the endangered one-horned rhinoceros).

The Brahmaputra is a powerful river prone to flooding during the monsoon season. Yet it is, thus far, relatively unexploited. Plans to develop its hydropower potential upstream on China's side of the border through a series of dams may incite serious cross-boundary resource conflict. Both China and India have plans to divert the Brahmaputra as part of their respective water programs. Diverting waters from India's water-surplus northeast to its drought-stricken western and southern states is the key to India's River Linking Project (RLP), for example. If China includes the Brahmaputra in an extended version of the SNWPD's pending Western Route, as has been proposed, the

consequences for downstream India and, even more so, Bangladesh may be disastrous. *See* Wirsing, *supra*.

China has already constructed smaller-scale dams on tributaries of the upper Brahmaputra, with several more under construction or up for proposal. Of particular concern, however, are China's plans to build a series of major dams on the middle reaches of the Brahmaputra itself, one of which is due to be completed in 2014.

The middle reaches are near an area of the river known as the "Great Bend," a highly bio-diverse area and the point at which the river curves south and southwest before entering India's Assamese plain. Completion of a hydroelectric dam near the Great Bend will give China a significant capacity to control the Brahmaputra's flow, making India completely dependent on China in this respect. *See* Wirsing, *supra*. If China goes forward in diverting the Brahmaputra to its arid North, Indian scholar Brahma Chellaney warns that such action "would constitute the declaration of a water war on lower-riparian India and Bangladesh." *See* Wirsing, *supra* (*citing* BRAHMA CHELLANEY, WATER: ASIA'S NEW BATTLEGROUND (Georgetown University Press, 2011)).

III. China's Role as a Leader in Water Resources

China is the largest and most powerful country on the world's driest continent. With over 60 percent of Asia's waters within its borders, China is undoubtedly a key player in determining the future of water resources in Asia. Presently, however, there are no formal agreements at all between China and India in regard to water sharing of the transboundary Brahmaputra. In fact, China has been unwilling to participate in any transboundary agreements with any of its neighbors who share its rivers. In contrast to the bilateral water treaties and agreements between many of its neighbors, such as the Indus pact, Ganges accord, and Mekong River Commission (MRC), China rejects the concept of a water-sharing arrangement or joint, rules-based management of common resources. The MRC promulgated the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (1995 Agreement). Under Article 5, the 1995 Agreement binds signatories to use the Mekong waters in a "reasonable and equitable manner." China, however, has not signed the Agreement. China has, however, shown some willingness to participate in an observer role. As an example, though China is not a member of the MRC, it has engaged as a dialogue partner since 1996, and, since April 1, 2002, has provided water level data in the flood season to the MRC.

Apart from specific treaties and agreements, there are several principles found in customary international law regarding the regulation of transboundary waters, which would apply to China's use of its transboundary rivers. First, the Helsinki Rules on the Uses of the Waters of International Rivers (Helsinki Rules) of the International Law Association of 1966 incorporate the key principles of equitable utilization of water resources, including equitable and reasonable utilization, prior notification of planned measures, and a "no harm" rule. The latter is an agreement to not cause substantial damage to the environment or natural condition of the waters beyond a nation's jurisdiction. *See* Helsinki Rules, Articles IV-VIII.

Second, the 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (1997 Convention) on shared water resources, in part, binds signatory countries to not use resources in a way that negatively affects downstream countries. Article 6 lists factors relevant to determining "equitable and reasonable utilization" of international watercourses, including "geographic, hydrographic, hydrological, climatic, ecological, and other factors of a natural characters," "social and economic needs of the watercourse States concerned," "the population dependent on the watercourse," and "the effects of the use or uses of the watercourses in one watercourse State on other watercourse States." *See* 1997 Convention, Article 6(1). The 1997 Convention thus requires party states to utilize international watercourses, such as the Brahmaputra, in an "equitable and reasonable" manner, a phrase also emphasized by the International Court of Justice (ICJ) in the *Case Concerning the Gabcikovo-Nagymaros Project* (Hung./Slovk.). (1997 I.C.J. 92 (Sept. 25)). Thus, international courts have also adopted these principles of equity and reasonable use.

China is not a signatory to the 1997 Convention. Nonetheless, certain core provisions of the 1997 Convention are pertinent to the dam project implementation, particularly given China's desire to exercise extensive control over its transboundary w**a**tercourses. For instance, Articles 11 and 12 of the 1997 Convention and principles of international environmental law define a clear international legal obligation on China's part to notify, consult, and negotiate with its riparian neighbors about its proposed dam projects on the Brahmaputra. Similarly, in the *Fisheries Jurisdiction Case* (UK v. Iceland), the ICJ affirmed the principle that states cannot use their territory in a way that would harm other states. 1974 I.C.J. Rep. 3 (25 July).

Finally, the principle of "good neighbourliness" is set out in Article 74 of the United Nations Charter and in the dictum of the *Corfu Channel Case* (U.K. v Albania), in which the ICJ promulgated the idea that the principle of sovereignty embodies "the obligation of every state not to allow its territory to be used for acts contrary to the rights of other states." 1949 I.C.J. Reps 4, 22 (9 Apr.).

By refusing to consult or negotiate with India or other affected riparian states regarding its planned projects, or to enter into any bi-lateral water sharing treaties or agreements, China is violating these key duties, incumbent on all states by way of customary international law.

In rejecting the 1997 Convention, China may be seen to be asserting the claim that an upstream power has the right to assert absolute territorial sovereignty over the waters on its side of the international boundary. Brahma Chellany posits that by building huge dams and reservoirs near the border, China is effectively reengineering the flows of major rivers "that serve as the lifeline to lower riparian states." Brahma Chellaney, *China's Hydro-Hegemony*, N.Y. TIMES, Feb. 7, 2013, *available at* http://www.nytimes.com/2013/02/08/opinion/global/ chinas-hydro-hegemony.html (last visited Feb. 28, 2013). Presently, China has the upper hand to exploit its transboundary rivers for energy and water diversion projects, without suffering any of the negative consequences the downstream riparian states will likely face. Thus, for there to be any meaningful agreement on the future of managing water resources, China must participate.

IV. The Future of Hydroelectricity in Light of Climate Change

China continues to invest in hydroelectric projects as a way to meet its great need for energy to continue its economic and industrial boom and also to provide fresh water to its massive population. Thus, at a time when many developed nations are questioning the cost-benefit of big hydroelectric dams and working to mitigate the problems they have caused, China is moving forward with new dam projects.

Given the realities of climate change, China is in the precarious position of balancing a continued push towards development and economic prosperity without destroying the environment. China should also consider that its investment in huge dams may be ill-advised in the long term as water resources become ever more scarce as the glaciers that feed the rivers continue to recede. Further, if, in relying on its hydroelectric system, China imperils the very people for whom it is generating power and important environmental resources that it is trying to protect with cleaner energy, more sustainable alternatives must be sought.

Regardless of the wisdom of dam building in the face of uncertain water resources in the future, China has the opportunity to become a leader in water management in Asia. However, China will need to actively engage in river-sharing agreements and offer transparent consideration of the environmental, social, and geo-political implications on its downstream riparian neighbors. Given China's dire water situation, combined with its impressive economic and military strength, and its uniquely advantageous upper riparian position, Brahma Chellaney fears that there is little reason to expect that China will engage in river-sharing agreements with lower riparian countries in the near future.

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BRIDGING THE TRANSPARENCY GAP: CATALYZING MEANINGFUL U.S.- CHINA PARTICIPATION IN THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE FOR ENERGY SECURITY

Heather Croshaw and Wang Ye

I. Resource Curse, Energy Security, and EITI

Both the United States and China invest in foreign countries to access natural resources to ensure energy security for their respective economies. Energy security and the resource curse become linked when dealing with weak natural resource governance, causing supply disruptions and price increases. Many resource-rich states suffer from the "resource curse," a phenomenon where these countries fail to benefit from their vast natural wealth as a result of regressive development and failed government institutions. *See generally* Paul Collier and Anke Hoeffler, *Resource Rents, Governance, and Conflict*, 49 THE JOURNAL OF CONFLICT RESOLUTION, 4, *Paradigm in Distress? Primary Commodities and Civil War* (Aug. 2005), at 625–633.

To combat the "resource curse," in 2002, a network of public, private, and civil society groups established the Extractive Industries Transparency Initiative (EITI), a multi-stakeholder, voluntary initiative that promotes transparency in taxes and payments and raises public awareness. EITI aims to combat the political failings of natural resource management, such as corruption, through government accountability for resource rents and other payments. Matthew Genasci and Sarah Pray. *Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice*, 11 **YALE HUM. RTS. & DEV. L.J**. 37; 38 (2008). Implementing countries agree to participate in EITI either through a domestic law or a *de facto* requirement. Genasci, at 51. Reporting country requirements may differ from country to country but must comply with the basic EITI rules. *See generally EITI Rules 2011 Edition, including the Validation Guide*, the **EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE** (2011), *available at* http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf.

In effect, EITI rules require the involvement of civil society groups, including nongovernmental organizations, businesses, and industry trade associations, to ensure public participation and accountability in the extractive industries. Thus, the EITI offers a cooperative platform to strengthen the U.S. and Chinese involvement in the global transparency movement, improving energy security for both traditional fossil fuels and minerals vital to the low-carbon energy economy.

II. U.S. and Chinese Cooperation in EITI's Framework: An Energy Security Perspective

The United States and China both need access to energy supplies in order to sustain their respective carbon-based and low-carbon economies to maximize present and future energy security. Currently, Chinese and U.S. cooperation over energy security remains limited due to contradictions, suspicions, and competition in the global energy market. Wu Lei, **ENERGY SECURITY AND SINO-U.S. RELATIONS: COMPETITION, CONFLICT AND COOPERATION** (Beijing: China Social Sciences Press, 1st ed., Mar. 2009) at 235.

In China, energy security is defined as "an ability to rapidly adjust to its new dependency on global markets and engage in energy diplomacy, shifting from its former commitments to self-reliance and sufficiency ("*zili gensheng*") to a new desire to build a well-off society ("*Xiaokang Shehui*")" and become open to the outside word ("*duiwai kaifang*"). B. Sovacool and M. A. Brown, *Competing Dimensions of Energy Security: An International Perspective*, **ANN. REV. ENVIRON. RESOURCE**. 2010.35:77–108, 80 (2010), *available at* http://www.environ.annualreviews.org; *see also* 18 Lim Tai Wei, **OIL IN CHINA: FROM SELF-RELIANCE TO INTERNATIONALIZATION,** Series on Contemporary China, **(**Aug. 2009), at 158. The Chinese concept of energy security guarantees a sufficient and reliable energy supply at a reasonable price without impairing sovereignty and normal operation of the economy. Lim Tai Wei, at 63.

Broadly, the Chinese government abides by a "non-interventionist" policy by not engaging with the internal affairs of host countries. BO KONG, **CHINA'S INTERNATIONAL PETROLEUM POLICY.** (Praeger Press. Dec. 22, 2009) at 27. However, state-owned enterprises companies (SOEs)— such as China National Petroleum Corporation, China National Offshore Oil Corporation, Sinopec, and PetroChina— are tasked with national security and foreign policy objectives with foreign governments. *The Changing Role of National Oil Companies in International Energy Markets*, Baker Institute Policy Report, No. 35 (Apr. 2007) at 6 and 9. China's energy security also includes purchasing stakes in extractive industries; bidding for concessions or contracts in resource-rich regions, such as in Afghanistan; deploying the military to protect shipping lanes and extractive fields; and embarking on an "energy scramble" for the last remaining energy reserves in Africa. Sovacool et al., at 80. Thus, Chinese investment in volatile resource-rich countries causes them to be vulnerable to disruptions in energy supplies.

In the United States, the government's foreign policy reflects its ambition to stabilize energy markets and secure natural resources for U.S. companies. *China and Long-Range Asian Energy Security: An Analysis of the Political, Economic, and Technological Factors Shaping Asian Energy Markets*, Baker Institute Study. No. 11 (Apr. 1999) at 3. The concept of U.S. energy security gained importance during the 1970s oil crisis. The resulting policy, known as the Carter Doctrine, determined that national security and energy supply are deeply intertwined. Sovacool et al., at 78. Even today, energy security remains focused on U.S. access to the Middle East's oil resources and the role of U.S. military intervention to maintain this flow of oil. On the domestic front, the United States has concerns with its limited supply of natural resources and China's increasing its share of the global energy market.

III. Chinese and U.S. Involvement in EITI

In general, the Chinese government has not openly endorsed or opposed EITI. However, the western world criticizes China for failing to insist on transparency and anticorruption standards, like EITI, which in turn tarnished their global reputation in business dealings. Barry Sautman and Yan Hairong, *Trade, Investment, Power and the China-in-Africa Discourse* (2010), www.japanfocus.org/-Barry-Sautman/3278. Moreover, Chinese corporations, especially SOEs, have become important players in resource-rich countries, such as those in Africa and western Asia. Despite offering infrastructure and investment for natural resources, "when it comes to China's relations with Africa, international views, especially in the US, whether scholarly or journalistic, seem to regard China as a 'bad influence.'" *The Changing Role of National Oil Companies in International Energy Markets*, at 9. On the other hand, research conducted in Gabon and the Democratic Republic of Congo (DRC) demonstrates that "there is considerable support for EITI among Chinese company representatives in Gabon;" and "there seem to be little difference per se between Chinese and other companies active in the DRC" and "[m]edium and large Chinese companies with a long-term strategy for their presence in the DRC are more likely to be open to CSR issues including transparency." J. JANSSON, C. BURKE AND W. JIANG, **CHINESE COMPANIES IN THE EXTRACTIVE INDUSTRIES OF GABON & THE DRC: PERCEPTIONS OF TRANSPARENCY**, UNIVERSITY OF STELLENBOSCH (Aug. 2009) at 22 and 42. Many Chinese subsidiaries are not familiar with EITI due to the lack of discussion at home.

However, Chinese companies operate differently at home due to lax laws and local-level corruption. Chinese SOEs act as the "good-student" abroad and engage in "bad-student" behavior at home. Interview with Che Er, Chief Officer of International Business, CITIC Bank, and Professor at Peking University, in Beijing, China. (Dec. 28, 2011). Supporting EITI would help strengthen the Chinese government's global image as not tolerating corruption as well as indirectly supporting other countries' attempts to improve government transparency.

Implementing EITI domestically could help combat corruption in China's resource-rich yet economically poor regions. China is rich in several kinds of crucial

natural resources, such as rare earth metals, raw materials, and even oil—critical for energy supply. Scholars acknowledge that many resource-rich regions in China are less developed than their coastal counterparts. Xu Kangning and Wang Jian, *A Empirical Study of Linkage Between Natural Resource Abundance and Economic Development*, ECONOMY RESEARCH (2006). Additionally, some scholars argue that China should promote the transparency of extractive industries in domestic regions through a mechanism like EITI to combat corruption. Che Er, *Transparency in Extractive Industries: A Chinese Paradox* (unofficial translation), **WORLD AFFAIRS**. (2011). Thus, EITI could help build transparency within China to ensure companies operating domestically follow the rules. Interview with Che Er, *supra*. Moreover, domestic NGOs are encouraging China to join EITI as part of their goal to work towards sustainable development. *AFRICA & CHINA: COOPERATION FOR SUSTAINABILITY*, **BRIEFING NOTE**, WORLD WILDLIFE FUND-CHINA (Mar. 9, 2012).

In comparison, as early as 2007, the U.S. government declared that "[i]t is the policy of the United States: (1) to increase energy security by promoting anti-corruption initiatives in oil and natural gas rich countries; and (2) to promote global energy security through promotion of programs such as the [EITI] that seek to instill transparency and accountability into extractive industries resource payments." Transparency In Extractive Industries Resource Payments, Pub. L. 110–140, title IX, § 935, 42 U.S.C.A. § 17374 (b)(1-2)(121 Stat. 1748) (2007).

As EITI becomes more prevalent in resource-rich countries, U.S. corporations must comply with these new EITI laws. Additionally, the U.S. government announced that the United States will become an EITI-candidate country as part of the Open Government Partnership. *U.S. Extractive Industries Transparency Assessment and Multi-Stakeholder Group Options*, 77 **FED. REG**. 86, 26,315–26,316 (Dept. of the Interior, Apr. 27, 2012), at 26,316. The future "USEITI" law would require corporations, both domestic and foreign, and the U.S. government to submit reports on mining activities on federal and tribal lands, including amounts paid to the U.S. government. The USEITI law would enhance domestic energy security not only by publicly publishing who is extracting which mineral on federal and native American tribal lands, but also by holding government offices accountable for resource rents and other payments.

Another "tool" to enhance EITI's effectiveness includes mandating that extractive industries be registered with specific stock exchanges in major markets to report payments to foreign governments for natural resources. Recently, the United States, United Kingdom, Hong Kong, and the European Union have either passed or will pass reporting requirements for extractive industries. In the United States, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank bill), Section 1504, requires extractive industries registered with the Securities and Exchange Commission (SEC) to report payments to foreign governments. Dodd-Frank Bill, 15 U.S.C.A. § 78m (q)(1-3), PL 111-203 § 1504, 111th Congress, also known as the *Disclosure of Payments by Resource Extraction Issuers*, www.sec.gov/about/laws/wallstreetreform-cpa.pdf. These requirements apply to both U.S. corporations and Chinese SOEs, as long as they remain registered with the SEC.

IV. Cooperation through Extractive Industries in the New Energy Economy

While U.S. and Chinese current energy industries continue to rely upon carbon, the new green energy economies present their own challenges for energy security. According to a U.S. study, the chief minerals involved in the low-carbon economy include lithium, manganese, uranium, nickel, cobalt, zinc, copper, and rare earth metals. **OFFICE OF POLICY AND INT'L AFFAIRS, DEPT. OF ENERGY**, 2011 CRITICAL RESOURCES STRATEGY (Dec. 2011), http://energy.gov/sites/prod/files/DOE_CMS2011_ FINAL_Full.pdf, at 14 [hereinafter 2011 CRITICAL RESOURCES STRATEGY]. Nuclear energy, while not necessarily a "green" technology, may be part of the low-carbon economy, especially in China. **WORLD NUCLEAR ASSOCIATION**, NUCLEAR POWER IN CHINA, (updated Apr. 2012), www.world-nuclear.org/info/inf63.html. The Chinese

government plans to build between fourteen and seventy-seven new reactors over the next decade. *Id.* On the other hand, nuclear energy in the United States remains a very contentious issue and requires specific minerals, including uranium, plutonium, thorium, deuterium, tritium, gadolinium, and zirconium; fission will use lithium and boron. *Id.* Many of the minerals for green technologies—such as the magnets in wind turbine blades, refrigerators, and traction motors for electric cars; photovoltaic (PV) cells; batteries for electric vehicles and bicycles; automatic catalytic converters; guided missiles; energy-efficient lighting; fuel cells, and vehicle lightweighting—often originate in volatile, resource-rich countries and/or EITI countries, such as Niger, DRC, and Afghanistan. 2011 CRITICAL RESOURCES STRATEGY, at 14, 19–20.

For example, lithium is a critical mineral in electric vehicles, batteries, energy storage, and other green technologies for the low-carbon economy. Countries with the two largest lithium deposits are Bolivia and Afghanistan, with the latter possessing approximately $1 trillion in lithium reserves, dubbed the "Saudi Arabia of lithium." James Risen, *U.S. Identifies Vast Mineral Riches in Afghanistan*, **N.Y. TIMES** (June 13, 2012), www.nytimes.com/2010/06/14/ world/asia/ 14minerals.html?pagewanted=all.

Afghanistan joined EITI in March 2009 and became an EITI candidate country in February 2010, but political instability has stalled the development of the lithium industry. EITI: Afghanistan, **EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE** (May 2012), http://eiti.org/Afghanistan. Also, Afghanistan already suffers from corruption in the natural resources sector. In 2009, the former minister of mines was accused by American officials for accepting a $30 million bribe to award China the development rights for a copper mine. Risen, *U.S. Identifies Vast Mineral Riches in Afghanistan*. The Chinese government's involvement in Afghanistan is to secure energy resources, not only oil concessions, but for lithium, copper, iron, and other minerals. Clifford Coonan, *China First to Win Oil-hunt Rights in the Scramble for Afghanistan*, **THE INDEPENDENT** (Dec. 28, 2011), www.independent.co.uk/news/world/asia/china-first-to-win-oilhunt-rights-in-the-scramble-for-afghanistan-6282135.html. In 2011, China became Afghanistan's largest natural resource investor. One contract alone was worth USD $3.5 billion. *Id.*

Critical to both the United States' and China's low-carbon development, rare earth metals will compose a vital part of the new energy economy. Significant reserves of rare earth metals exist around the globe, including in the United States, Canada, Australia, and South Africa, but China currently produces 95 percent of the world's rare earth metals with 35 percent of known global reserves. Cindy Hurst. *China's Rare Earth Elements Industry: What Can the West Learn?* Institute for the Analysis of Global Security (IAGS) (Mar. 2010) at 3 and 15. In China, the rare earth industry suffers from smuggling, illegal mining, local-level corruption, organized crime, environmental pollution, and overexploitation. *Id.* at 20; *see also Several Opinions of the State Council on Promoting the Sustainable and Healthy Development of the Rare Earth Industry* (May 10, 2011), No. 12 State Council, May 10, 2011. PKU Law. China loses millions of dollars a year from smuggling alone due to the disappearance of as much as one-third of rare earth metals extracted. *China Mulls Plans to Curb Rare Earth Smuggling*, **XINHUA** (Sept. 14, 2009), http://www.china.org.cn/ environment/2009-09/14/content_18523309.htm. A Chinese EITI law would enable the Chinese government and members of civil society to hold public officials and corporations accountable for corruption, illegal mining, and smuggling of rare earth metals. Additionally, in the United States, the USEITI would apply to rare earth metals or uranium extracted on federal and tribal lands. F. Fonseca, *Mine Operators Win Grand Canyon Uranium Fight*, **SEATTLE POST INTELLIGENCE**, (Feb. 4, 2013), http:// www.seattlepi.com/news/article/Court-sides-with-BLM-in-uranium-mine-challenge-4249581.php).

V. Moving Forward with Transparency: Cooperation through EITI

Cooperation by the United States and China, as the two largest consumers of energy, in the extractive industries by promoting EITI will enable global energy security. First, for both countries, promoting EITI would improve the global energy market through data sharing to help lower transactions costs and improve

understanding of the actions of other energy market players. Dr. Steven W. Lewis, *Energy Security in Northeast Asia: The Potential for Cooperation among the Major Energy Consuming Economies of China, Japan and the United States,* Baker Institute for Public Policy, Rice University (Jul. 18 2005) at 6, *available at* www.bakerinstitute.org/publications/SIIS_SWLEWIS_chinajapanUScooperation_071805.pdf. This platform would provide an opportunity to understand the global energy market so that corporations operating abroad will be able to better negotiate with host governments.

Second, EITI will help both the United States and China avoid conflict both domestically and abroad due to their foreign relations policies. China in particular wants to avoid social unrest, political protests, and "discontent over its foreign relations, including cooperation and conflict over energy supplies. . . .[the] Chinese do value multilateral cooperation on energy and environmental issues, but [are] also relatively uninformed about the exact nature of their foreign energy ties" *Id*. at 11. China's SOEs often operate as a surrogate foreign diplomat; even if they do have greater autonomy than in years past, they have to deal with inefficiency and lack of competitiveness. Furthermore, China's extractive companies are willing to work in very hostile and politically unstable areas, such as Sudan and South Sudan, where killings and kidnappings are not uncommon. Ulf Laessing and Sui-Lee Wee. *Kidnapped Chinese Workers Freed in Sudan Oil State*, **Reuters** (Feb. 7, 2012), http://www.reuters.com/article/2012/02/07 /us-china-sudan-workers-idUSTRE8160UU20120207. EITI would help with the political instability and improve foreign relations with resource-rich states by fostering good governance over natural resources.

Third, EITI can assist with diplomatic relations, especially over minerals that cross territorial lines. For instance, if China and Japan (or Vietnam and the Philippines, for example) had to resolve their dispute over territorial claims in the East China Sea through sharing the mineral base, EITI would help the parties jointly manage this region and minimize conflicts through transparency over contracts and mineral rents. Shelly Zhao, *China's Territorial Disputes in the South China Sea and East China Sea*, **China Briefing** (May 31, 2011), www.china-briefing.com/news/2011/05/31/chinas-territorial-disputes-in-the-south-china-sea-and-east-china-sea.html. Additionally, for the United States, EITI could assist with the division over the Arctic Circle's extractive resources between the Arctic Circle nations and tribal groups through transparency of contracts, statistical information of transactions, publication of revenues, and other capacities to ensure smooth diplomatic relations.

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

VI. Conclusion

Overall, the United States and China can improve their level of public trust concerning energy issues by raising awareness and educating the public about EITI and how it can improve governance in the energy sector. EITI can improve energy relations between the two nations through transparency and accountability, where the public and corporations can have a voice in how their governments manage natural resources for the public good. As the two largest energy consumers in the world, U.S.-China cooperation within EITI will help increase global energy security by improving access to market information, empowering the public, increasing community participation, promoting sustainable development, improving government accountability, reducing corruption, minimizing military involvement, encouraging corporate best practices, and enforcing due diligence both home and abroad.

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MANAGING ENVIRONMENTAL INFORMATION RISKS FOR COMPANIES DOING BUSINESS IN CHINA

Bernadette V. Brennan

I. Environmental Information Risks

The trend in China is toward more open sharing of environmental information. What is a trend in China today can be official policy tomorrow. If companies doing business in China fail to keep pace with the trend toward more open environmental information, they risk missing a new reporting or disclosure obligation. That, in turn, presents its own risks because the consequences for failing to provide environmental information are uncertain. In addition to the risks associated with missing a reporting or disclosure requirement, there is also an increasing risk that a company's environmental information will become public in a way that is outside of the company's control. This is the result of the government's increased efforts to release company information and, at the same time, the public's increased interest in environmental information. The risk here is that a company's environmental information, released without its input, may be misunderstood or there may be an overreaction to the information.

To manage risks associated with environmental information in China, companies should consider voluntarily self-disclosure. Voluntary self-disclosure gives the company an opportunity to provide all of the relevant facts as it understands them and to take credit for any environmentally responsible activities in which it is currently engaged. Voluntary self-disclosure makes companies trendsetters in China, not followers blindsided by suddenly realized trends in an ever-more environmentally conscientious society.

This article reviews current environmental information obligations in China and offers a tool for managing associated risks.

II. Terms

Before proceeding, it may be helpful to clarify the use of terms that are relevant to open environmental information. First, although open information is an important element of transparency, it is by no means all that that term entails. The primary meaning of transparency in the context of governance is that the government's decision-making process is open to public scrutiny. Environmental information, however, usually refers to facts about environmental quality or impact. While open information may be an important part of assessing government transparency, it is only a part of it. Accordingly, this article refers to open information only and not to the larger concept of transparency.

Next, it is useful to clarify the terms used to describe the three ways in which an entity's environmental information becomes "open." First, when a government office requires a private entity to provide it with information, the private entity usually "reports" that information. Second, the government may "release" information that is in its possession or control. Governments "release" not only information that is reported to them but also information that is independently gathered in the ordinary course of supervisory duties. Third, the government might "disclose" directly to the public information about its own governmental activities. Similarly, a company that provides information directly to the public is making a "disclosure." Sometimes that disclosure is made through a government reporting platform to fulfill the disclosure requirement (e.g., a statutorily required annual report is published on a government website thus fulfilling a concomitant corporate duty to disclose certain information contained therein). Also, it is worth noting that "voluntary self-disclosure" is used in this article in a generic sense and is *not* used in a strict U.S. Environmental Protection Agency (EPA) enforcement context, where a company voluntarily discloses violations to EPA for favorable enforcement treatment. There are, of course, variations on the use of terms, but this article attempts to make consistent use of the terms "report," "release" and "disclose" to add clarity to the discussion.

It may also be helpful to clarify the terms that describe the three basic structures through which foreign companies do business in China because it may affect the entity's environmental information obligation. First, there is the Wholly Foreign-owned Enterprise,

commonly referred to as a "WFOE" (pronounced "woofie"). Next, is the Joint Venture, commonly referred to as a "JV." Finally, there is the party to a contract, usually a supply contract, where the Chinese party is the supplier and the foreign company is the buyer.

III. General Environmental Reporting and Disclosure Obligations

This section gives a general overview of the reporting and disclosure obligations that may be present for a foreign company, depending on the type of business relationship that it has with China.

A foreign party to a contract has no environmental reporting or disclosure obligations in China. If, however, that foreign party is a publicly traded company in its home market or a third country market (foreign companies are still not yet eligible for public offerings in China), then that foreign party may have environmental information obligations outside of China that are triggered by activities within China. For example, if the Chinese supplier is a significant link in the supply chain, then the foreign party may be required to disclose to its home market certain environmental risks, violations, or related stakeholder issues associated with that supplier (as may be the standard for any foreign activity disclosure). If the Chinese party is publicly traded in China, it will have certain reporting and disclosure obligations (discussed in greater detail below), and the foreign party will likely want its home market disclosures to be consistent with those of its supplier. Finally, the Chinese party (like any entity actually operating in China) will have certain reporting obligations to the Ministry of Environmental Protection (MEP) (also discussed below).

A foreign partner to a JV will have obligations similar to that of a contracting party unless the foreign partner is itself an operating entity. We saw this in 2012, with the Bohai Bay offshore oil spill disaster. There, the ConocoPhillips subsidiary in that JV was the actual operator of the problematic offshore oil platform. To date, none of the environmental obligations associated with that disaster (information or otherwise) seem to have attached to the Chinese partner in that JV. Accordingly, we can conclude that the environmental information obligation of a foreign partner to a JV will vary with its role in the JV.

The JV itself is subject to the same basic environmental information obligations as is a domestic entity. In addition to MEP reporting requirements, it may have environmental reporting requirements to the particular government agency with jurisdiction over its specific industry group. For example: the Ministry of Land and Resources has jurisdiction over offshore oil exploration. Similarly, the State Oceanic Administration is charged with controlling ocean pollution, the Ministry of Agriculture manages fisheries, and the Ministry of Water Resources controls water use. The State Forestry Administration is in charge of forests and the lumber industry and the Ministry of Housing and Urban Rural Development of sewage. Although remote, in this growing age of open environmental information, the JV should verify whether there are also environmental reporting requirements to the agency with jurisdiction over its corporate structure, such as the Ministry of Commerce (MOFCOM).

Like a JV, a WFOE also will be subject to basic MEP reporting requirements and likely will have industry-specific reporting requirements. In addition, like the JV, the WFOE may be required to report certain information to MOFCOM in its application to operate the WFOE.

In addition to the expected environmental oversight by the MEP and industry-specific natural resource regulators mentioned above, China also has a unique approach to environmental regulation through its financial regulators. The China Securities Regulatory Commission (CSRC) and the China Banking Regulatory Commission (CBRC) each have a role to play in environmental protection in China by way of environmental information obligations. This is a novel use of financial regulation for environmental protection purposes.

China's capital markets offer an attractive financing option for eligible entities. The CSRC requires candidates for such financing to undergo an environmental review before each initial public offering (IPO). In 2003, the CSRC, together with the MEP, issued the "Notice on Environmental Review of Public

Offerings" (No. 2003-101). Under these review procedures, the candidate submits the IPO. The MEP has the first opportunity to approve or deny the application, and there is an opportunity for public comment. The government posts notice of this opportunity on the MEP webpage. The review is then turned over to the CSRC for a final decision. Although the CSRC has the final decision, it is highly unlikely that it would contradict an MEP finding. If the company waits until the comment period in this process to voluntarily self-disclose explanations for environmental wrongdoing or to take credit for any environmental protection activities, the disclosures may seem self-serving and lack credibility. Accordingly, a company may benefit from voluntary self-disclosure before this process begins to provide its own balanced explanation of its environmental impact. Such voluntary self-disclosure may also allow the public, the MEP, and finally the CSRC to make a more informed decision.

The "MEP Opinion on Reinforcing Environmental Supervision of Listed Companies" (2008-24) is another novel environmental rule that, until recently, was relatively obscure. This 2008 opinion creates a continuous reporting requirement for certain environmental information for China-listed companies. The CSRC and the Shanghai and Shenzhen Exchanges already require an Annual Corporate Social Responsibility Report where, theoretically, companies would report any environmental protection risks or violations. But there is also a continuous reporting (and disclosure) requirement for "Material Events." The MEP opinion interprets certain environmental information, such as violations of emissions standards, to constitute "Material Events" that must be reported to the capital markets (for disclosure to investors).

In addition, anyone seeking a commercial loan in China is subject to the 2012 "Green Credit Guidelines" issued by the CBRC. Through these guidelines, the CBRC requires an environmental review before granting commercial loan applications. These guidelines are implemented by the Peoples Bank of China (PBOC) acting through commercial lenders. When a commercial lender reviews a loan application, it consults with the PBOC, which receives relevant environmental information from the MEP that facilitates the consultation. On the basis of that consultation and information, the commercial lender will determine whether the applicant "passes" the required review process and whether environmental risks are present that should affect the interest rate on the loan. Similar to the capital markets scenario above, if the company waits until this process to disclose explanations for environmental wrongdoing, or to take credit for environmental protection efforts, the disclosure may seem self-serving and lack credibility. Thus, this review is another instance where advanced voluntarily self-disclosure may benefit the company and promote informed decision making by the commercial lender.

IV. MEP Reporting, Release, and Disclosure Requirements

There are a number of laws, rules, measures, and opinions, in draft or in force, that contain some type of environmental information obligation. But a discussion of Chinese legislative process and the relative weight of different forms of regulatory authority is beyond the scope of this article. Accordingly, for present purposes, I will refer to these collectively and informally as "rules."

There are five main rules that illustrate current environmental reporting, release, or disclosure requirements. For company reporting obligations, there are the "Rules on Pollutant Discharge Registration" (1992) and the "Hazardous Chemical Products Environmental Registration Measures" (Draft 2011). For government release of information, the basic rule is the MEP "Open Environmental Information Measures (Trial)" (2007), which also includes company disclosure provisions. Companies with construction projects have disclosure requirements under the "Environmental Impact Assessment Law (and Public Participation Measure)" (2002), which also includes government release provisions. In addition, as discussed above, public companies have a continuous reporting requirement (for disclosure purposes) under the MEP "Opinion on Reinforcing Environmental Supervision on Listed Companies" (2008-24).

Of course, there are exceptions to every rule. For example, the laws and policies related to State Secrets and to Commercial Secrets may affect or negate a report, release, or disclosure obligation. For the sake

of brevity, the following discussion addresses only situations where no such exception applies (and does not repeat the discussion of "material events" disclosure above).

The basic environmental "reporting" requirement for companies operating in China is the Pollutant Discharge Registration. Depending on where the operation is located, applicants for business licenses from the local Administration for Industry and Commerce may be directed to the local MEP office to complete a Pollution Registration Statement before the operating license will be granted. The registration statement covers water, air, solid waste, and noise pollution. If the business will discharge water or air pollutants, the operator may need to obtain a pollution permit from the Provincial Environmental Protection Department or Municipal or County Environmental Protection Bureau and comply with national emissions standards for water (e.g., concentrated oxygen demand (COD)) and air (e.g., SO_2). However, some facilities are located in an area that does not require permitting. Despite recent efforts to improve environmental quality in China, there is no national pollution permit system that applies to all polluters, and not all pollutants are covered by the permit system that does exist.

The 2011 draft Hazardous Chemicals rule is a step in the direction of a national "reporting" system for dangerous substances. Operations using chemical products should pay close attention to the status of this draft rule, and the new reporting and self-disclosure regime that it will likely usher in. China's trend toward a U.S.-style Toxic Release Inventory (TRI) or a European-style Pollution Release and Transfer Registry (PRTR) is discussed below.

The government's own responsibility to "release" information to the public is outlined in the MEP's Open Information Measures (Measures). The Measures implement (on a trial basis) a call from the State Council for increased release of environmental information. It is the basic environmental disclosure requirement, and it is applied with some regularity to anyone operating in China. It is also the trigger for the capital markets continuous reporting requirement mentioned above. There is no umbrella Freedom of Information Act-type law in China. Accordingly, these agency-specific rules fill the gap. Currently, the MEP is not required to release all information that it may have in its possession or control. The obligation to release is triggered by "bad news," such as violations, administrative sanctions, or accidents. The Measures also include a "disclosure" requirement for the companies that are the subject of an action. Because disclosure in response to accidents or other triggers may seem self-serving and lack credibility, companies may wish to consider voluntary self-disclosure before trouble arrives.

The Environmental Impact Assessment (EIA) process includes a "disclosure" obligation to allow public participation in the process. That process had been inconsistently administered for many years, however, such that some EIAs were never posted or they were posted for an insufficient time to allow for meaningful comment. As discussed below, a sudden policy shift now demands strict adherence to the public participation aspect of the EIA process.

V. Trends

As mentioned above, the trend in China is toward more open environmental information. This presents two risk areas. One is that companies will miss reporting or disclosure requirements where trends turn to rules on relatively short notice as with the EIA and CSRC rules discussed above (examples are given below). Another information risk is that a company's environmental information will be released to the public without its control, thus leaving the company without an opportunity to explain or expound upon the information, facing the risk that the information will be misunderstood or that there will be an overreaction to it. A company operating in China may want to consider voluntary self-disclosure as one way to manage these and other potential risks associated with the trend toward more open environmental information.

In the "reporting" area, China is fully aware that a TRI-type system is becoming standard international practice. Examples include Japan's Pollution Release and Transfer Registry; the European Union's PRTR; Australia's National Pollution Inventory; and the United Kingdom's Pollution Inventory. China's 2011 draft Hazardous Chemicals Products Environmental Registration Measures shows that the country is

moving toward reporting environmental information in a similar way. That trend was advanced in May 2012 with a high-level conference between the Law and Policy Department of the MEP and the U.S. EPA General Counsel's office focusing on open environmental information, like the TRI system in the United States. The trend took another step closer to rulemaking in September 2012 when officials from the U.S. EPA information office met with counterparts at the MEP on a technical assistance mission concerning the technical aspects of government-run environmental information registration systems.

The trend continues in the "release" area. For example, the September 2012 version of proposed amendments to China's Environmental Protection Law included provisions that would elevate to law the current MEP measures requiring the release of certain environmental information, such as violations, administrative actions, and accidents. In addition to this top-down effort at increased release of information, there are also bottom-up efforts driven by the public interest in government release of environmental information. For example, each year the local nongovernmental organization, Institute for Public Affairs and the Environment (IPE), produces the Pollution Information Transparency Index (PITI). The PITI ranks the performance of 113 Chinese municipalities in terms of their performance under their obligations to release environmental information. It shows that, over the past three years, the trend is toward more government release of company information.

Recent changes in policy related to the EIA process show how quickly a "disclosure" trend can become a firm obligation. In a sudden change, on August 30, 2012, the MEP announced that going forward, all EIAs must be posted online without exception and without expiration. The new rule was to take effect on September 1, 2012, just two days after it was announced. And just like that, a trend in China led to an enforceable environmental information obligation. Another "disclosure" trend-turned-firm-obligation is the continuous environmental information reporting requirement for public companies. In May 2012, the CSRC slapped Zijin Gold Mine Company with a renminbi (RMB) 300,000 fine (equivalent to roughly US$50,000) for failing to disclose to investors a 2010 environmental enforcement action regarding an acidic copper spill into a local river. The willingness and ability to enforce this previously obscure rule shows China's journey from trend to rule with regard to environmental information. The practice of voluntary self-disclosure may help companies avoid (or at least mitigate) failures to meet these types of environmental information obligations.

VI. Trendsetters: Voluntary Self-disclosure

Voluntary self-disclosure allows the company to grow accustomed to the practice of environmental information disclosure in China. In the unique Chinese regulatory context, it also may mitigate or avoid the uncertain consequences from failing to meet a prescribed reporting or disclosure requirement if the company can point to a place where that information has indeed already been made available to the public. Voluntary self-disclosure also gives the company an opportunity to explain the facts as it understands them and offer examples of good environmental governance, thus reducing the risk that the information may be misunderstood or that there may be an overreaction to it. Waiting to disclose until "trouble" starts may appear self-serving and lack credibility, but getting out in front of the news gives the company some control over its environmental information.

Key platforms for making voluntary self-disclosure include the company's own webpage and third-party websites featuring such disclosures. IPE, for example, offers space on its website for companies in China to voluntarily self-disclose their pollution discharge and emission information. Voluntarily placing their information on these webpages allows companies to be trendsetters, not followers, and presents an opportunity to minimize the risks associated with the trend in China toward requiring the more open disclosure of environmental information.

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