Internationalism and Global Governance in Canadian Public Law

by

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A thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science (S.J.D.)

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Abstract

Globalization presents domestic lawmakers with a dilemma. Because of internationalist moral commitments, they may be inclined to use domestic law to protect the rights or interests of people beyond their borders. But globalization also challenges conventional assumptions about the primacy of state law. The increasing global interconnectedness of economic, social, and cultural life raises doubts about the governance capacity of state institutions. And new forms of global governance, based on international organizations and global networks, have become more prominent.

In the last few decades, Canadian lawmakers have enacted a number of statutes and regulations that appear to mobilize domestic law for the pursuit of internationalist values. These include the Official Development Assistance Accountability Act (2008), legislation providing for the environmental assessment of projects outside Canada, and Canada’s Access to Medicines Regime (2004). In this dissertation, I apply post-realist analytic techniques to these legal texts and to the legislative debates surrounding them. These techniques include the analysis of indeterminacies, distributive and constitutive effects, background rules, and historical contingencies.

I argue that these law reform projects are less Canadian than they might appear. They draw on a wide variety of discourses, policy models, and norms imported from other countries, from international organizations, and from expert networks. Rather than reflections of Canadians’ moral and political choices, these legislative regimes appear as nodes in larger configurations of global governance.
I also examine the specific legal and institutional techniques used by Canadian lawmakers to deal with claims of global justice. A number of themes appear in multiple case studies. These include the use of a paired set of arguments about non-discrimination and sovereignty; reliance on procedures; deference to expertise, and the invocation of a public/private distinction. On the whole, Canadian internationalist legislation in the post-Cold War era reflects the influence of neoliberalism.
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Contents

Chapter 1: Introduction ........................................................................................................... 1

Chapter 2: Law, Internationalism, and Globalization ................................................................. 10
  2.1 Introduction...................................................................................................................... 10
  2.2 Selection of Case Studies: Internationalism in Canadian Public Law ......................... 11
  2.3 Starting Points.................................................................................................................. 13
    2.3.1 Liberal-Democratic Positivism .................................................................................. 15
    2.3.2 Embedded Liberalism ............................................................................................... 18
    2.3.3 The Keynesian-Westphalian Frame and Internationalism ...................................... 21
    2.3.4 Canadian Law and the International ......................................................................... 23
  2.4 Globalization and Law...................................................................................................... 29
    2.4.1 Conceptual Issues..................................................................................................... 30
    2.4.2 Neoliberalism ........................................................................................................... 32
    2.4.3 Human Rights .......................................................................................................... 38
    2.4.4 Globalization and Domestic Law .............................................................................. 44
      2.4.4.1 Narratives of Constraint .................................................................................... 45
      2.4.4.2 Narratives of Complicity .................................................................................. 47
      2.4.4.3 Narratives of Competition ................................................................................. 49
      2.4.4.4 The Variable Impact of Globalization ............................................................... 51
    2.4.5 Globalization and International Law ........................................................____________ 55
      2.4.5.1 Expansion ............................................................................................................ 55
      2.4.5.2 Deformalization and “Governance” .................................................................. 57
    2.4.6 Canadian Particularities ............................................................................................ 59
2.5 Post-Realist Legal Analysis ................................................................. 63
   2.5.1 The Realist Legacy ........................................................................ 64
   2.5.2 Analytic Techniques .................................................................... 68
       2.5.2.1 The Indeterminacy of Legal Concepts .................................. 69
       2.5.2.2 The Distributive Effects of Legal Rules ............................... 71
       2.5.2.3 A Constitutive Understanding of Law ................................... 74
       2.5.2.4 “Background” Rules and the Public/Private Distinction .......... 77
       2.5.2.5 Alternative Histories ............................................................ 79
   2.5.3 Normative Implications ................................................................. 80

Chapter 3: The *Official Development Assistance Accountability Act* .................. 84

   3.1 Introduction ....................................................................................... 84
   3.2 The Development Assistance Field ................................................... 86
       3.2.1 Actors, Practices, Policies, and Norms .................................... 88
       3.2.2 Substantive Aid Policy Debates ............................................... 95
       3.2.3 Institutional and Procedural Debates ....................................... 98
       3.2.4 In the Background: Knowledge and Expertise ....................... 103
   3.3 Aid Reforms, Accountability, and Effectiveness ................................. 110
       3.3.1 The DAC’s Reform Agenda ..................................................... 111
       3.3.2 Aid Reforms in the United Kingdom ....................................... 116
       3.3.3 The Global Call to Action Against Poverty ............................. 120
   3.4 The Canadian Context .................................................................... 121
       3.4.1 Canadian Aid Institutions and Policies ................................... 122
       3.4.2 The Sponsorship Scandal and Minority Government ............... 127
   3.5 The *ODA Accountability Act* ......................................................... 128
       3.5.1 The Legislative Process ............................................................ 129
Chapter 5: Canada’s Access to Medicines Regime ................................................................. 223

5.1 Introduction .................................................................................................................... 223

5.2 Patent Law and Access to Medicines........................................................................... 227

5.3 Globalized Intellectual Property Rights ....................................................................... 235

5.3.1 Trade Liberalization and the Intellectual Property Project ........................................ 236

5.3.2 The TRIPS Agreement .............................................................................................. 242

5.3.3 The Access to Medicines Controversy ...................................................................... 245

5.3.4 TRIPS-Plus ................................................................................................................ 249

5.4 The Canadian Context .................................................................................................. 250

5.4.1 The Rise and Fall of Compulsory Licensing .............................................................. 250

5.4.2 Jean Chrétien’s African Agenda ................................................................................ 258

5.5 Canada’s Access to Medicines Regime ........................................................................ 261

5.5.1 The Moderation of the General Council Decision ...................................................... 262

5.5.2 Rights, Welfare, and “Balancing”............................................................................... 270

5.5.3 Humanitarianism and Jurisdiction .......................................................................... 276

5.5.4 Proceduralism ............................................................................................................ 280

5.6 Conclusion ...................................................................................................................... 283

Chapter 6: Conclusion ....................................................................................................... 285

6.1 Law and Globalization .................................................................................................. 285

6.2 Canadian Internationalism in the Post-Cold War Era .................................................... 289

Bibliography ........................................................................................................................ 295
Chapter 1: Introduction

Shortly before it was disbanded in 2006, the Law Commission of Canada published a discussion paper entitled *Crossing Borders: Law in a Globalized World*. The paper succinctly summarizes the challenges of globalization as they are understood by many Canadian lawyers. It groups these challenges into two categories.

The first category deals with Canada’s relationship with international law, including Canada’s participation in international law-making processes as well as the reception of international law into the Canadian legal system. The discussion paper suggests that these phenomena raise issues of legitimacy and accountability: international law-making often occurs through secretive processes, and its reception into domestic law can upset the balance among domestic institutions.

The second category concerns the substance of international and domestic law, and whether these rules adequately respond to global injustices. The discussion paper laments that international law provides effective remedies in some areas (especially trade), but not in other areas (especially human rights). It asks whether Canadian law should supply remedies where international law is lacking, either through extraterritorial regulation or through Canadian courts’ assumption of jurisdiction over international wrongs.

The discussion paper reveals a number of dilemmas. It emphasizes the globally interconnected nature of Canadian society, but it also highlights the (domestic) democratic foundations of Canadian law. It expresses concerns about global injustices, but it also questions the legitimacy of international lawmaking. It ponders a stronger role for domestic law in addressing global issues (especially where human rights are at stake), but it also considers the need for cooperation and the importance of respecting other states’ autonomy.

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The discussion paper does not purport to resolve these dilemmas; indeed, its purpose is to ask questions. Largely for that reason, the discussion paper provides an excellent starting point for the analysis offered here. In a sense, this dissertation represents a sustained engagement with some of the themes identified by the Law Commission.

One of these themes is the fact that Canadians have economic, social, and personal ties with people around the world, and sometimes imagine themselves as part of a broader global community. This set of changes raises questions about the appropriate geographic frame for thinking about justice. During the middle decades of the twentieth century, the dominant approach to justice, at least in North America and Western Europe, was contained within what Nancy Fraser has called the “Keynesian-Westphalian Frame.” In this perspective, the strongest obligations of justice—including obligations of distributive justice—were reserved for fellow members of one’s national community. However, as the Law Commission notes, the changes associated with globalization have destabilized this approach and raised questions about obligations of justice beyond borders: To what extent should citizens and governments strive to protect the rights or ensure the welfare of people in other countries? What is the appropriate response to activities in one country that directly or indirectly cause harm to people in another country, or to international disparities in wealth or income? Is it possible to imagine institutions that would help to address these issues? And how could one ensure democratic participation in the design of such institutions as well as in their operation?

Another theme is the potential use of Canadian law to address global issues. This dissertation examines three situations where Canadian legislators have expressly mobilized domestic law to address issues beyond Canada’s borders: the legal framework governing the environmental assessment of projects outside Canada, Canada’s Access to Medicines Regime, and the Official Patent Act, R.S.C., c. P-4, ss. 21.01-21.2; Food and Drugs Act, R.S.C., c. F-27, ss. 30(5), 30(6), 37(2); Food and Drug Regulations, C.R.C. c. 870, ss. C.07.001-C.07.011; Medical Devices Regulations, SOR/98-282, ss. 43.2-43.6; Use of Patented Products for International Humanitarian Purposes Regulations, SOR/2005-143.
*Development Assistance Accountability Act.* It seeks to describe what has occurred, and what continues to occur, in these instances of “internationalist” law reforms.

However, a major contention of this dissertation is that the Canadian laws in question are less Canadian than they might appear. Although these laws were enacted by Canada’s Parliament, partly in response to domestic political pressures, it would be misleading to characterize them as essentially domestic (or “unilateral”). These internationalist law reforms have largely been assembled in Canada from imported parts. In two of the three cases, Canadian legislators consciously imitated certain aspects of other countries’ domestic laws. In all three cases, Canadian legislators were engaged in processes of negotiation or consultation with other countries’ governments and with international organizations. In two of the three cases, Canadian legislators explicitly incorporated norms and technical standards borrowed from international sources. In all three cases, Canadian legislators drew on discourses circulating within international networks. A major part of this dissertation is devoted to documenting these outside influences on Canadian lawmaking.

These aspects of Canadian lawmaking demonstrate that the challenge of globalization does not only consist of socio-economic changes (and struggles over the appropriate frame for justice) but also of legal and institutional changes. In many domains, law and governance have themselves been globalized. And these globalized processes shape the way Canadian legislators respond to global issues.

This dissertation thus responds to some of the themes raised in the discussion paper. However, it brackets, for present purposes, the other major concern raised by the Law Commission: Canada’s role in the creation and implementation of public international law. Indeed, the laws it discusses were selected for study partly because they did *not* arise from any treaty obligation. However, this is not to say that international law was absent. International law always remained relevant in the “background” of these law reforms, providing the framework of rules and institutions within which Canadian law was meant to operate. Widening our perspective even farther, we can also see that international law helped provided the background conditions for many of the changes associated with globalization. Setting aside the formal implementation of treaties helps to show

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5 *Official Development Assistance Accountability Act, S.C. 2008, c. 17 [ODA Accountability Act; the Act].*
how many other international institutions and projects also influence Canada’s legislative responses to global issues.

The central purpose of this dissertation is to analyze the legal and institutional techniques, the rhetorical and bureaucratic strategies that Canadian lawmakers have used when grappling with global issues. An analysis of the case studies reveals a number of constant themes. From the outset, I would like to note four of these themes.

The first of these themes is reliance on specialized expertise. Canadian lawmakers have frequently emphasized the technical, scientific character of various issues and downplayed their political and conflictual character. Technicality is seen as a reason for deferring to the judgment of specialized experts and organizations. As I have noted, the sources of this specialized expertise are often international. The period since the Second World War has witnessed the proliferation of (and the broadened mandate of) international organizations in just about every field of governance. Beyond from these formal international arrangements, government officials as well as private actors from around the world have often organized themselves into more or less loosely structured “networks” aimed at addressing particular issues. The influence of such managerial forms of governance is evident in all three case studies in this dissertation, especially the case studies on development assistance and environmental assessment.

A second theme consists of proceduralism. In effect, the establishment of institutions and the elaboration of formal procedures to respond to claims for rights protection or the provision of welfare measures serves to defer the difficult political choices that would be involved in setting out substantive rights and obligations (including under international law-making by treaty processes). Formal legal procedures help to shunt these choices into institutional channels where the underlying conflicts are less apparent. Such proceduralism is a feature of all three case studies in this dissertation.

A third theme is the distinction between “public” and “private.” The public/private distinction is a basic feature of liberal political theory. Liberal theorists such as John Stuart Mill have portrayed the private sphere as a zone of liberty to be protected from public coercion. Liberal legal systems have also posited a public/private distinction. In the classic conception of this distinction, the public sphere is seen as coercive and value-laden (and hence subject to liberal and democratic safeguards), whereas the private sphere is seen as free and value-neutral. Each of
the laws examined in this dissertation deals with an administrative or regulatory regime, and thus contains a “public” element. In general, legislative drafters have been careful to ensure that these “public” elements are contained within Canada. However, each of these laws also deals with—or relies upon—“private” rights and obligations that flow across borders much more easily. The intersection of Canadian legislative measures and such private activity is not always openly acknowledged.

A fourth theme is the use of a paired set of arguments about the universal application of Canadian policies, on one hand, and respect for the autonomy of foreign states and communities, on the other. This paired set of arguments is related to, and perhaps derived from, the international legal principles of non-discrimination and non-intervention. However, in domestic legal processes, arguments resembling these principles are often mobilized in an informal manner, without any explicit reference to international law. These arguments have no inherent substantive content. The same actors may argue for universality in one set of circumstances and for deference to other countries’ sovereignty in another. Indeed, as the example of Canada’s Access to Medicines Regime shows, the same political actors will sometimes mobilize each set of arguments to deal with different aspects of the same political debate.

The dissertation proceeds as follows. In Chapter 2, I begin by describing the conventional understanding of law that forms a starting point for discussions of law and globalization. This understanding combines liberal-democratic positivism (at the national scale) with a liberal-positivist account of international law. I then show how globalization has complicated this understanding, emphasizing the role of two major global political projects—neoliberalism and human rights. I explain globalization’s significance for domestic law in terms of a number of key narratives: narratives of constraint, complicity, and competition. However, I also explain that the globalization’s impact on domestic law has been unevenly distributed, affecting some spheres of governance, and some countries, more than others. I also describe the impact of globalization on public international law. On one hand, globalization appears to have expanded the range of subject-matters that are addressed by international law. On the other hand, globalization has also been accompanied by more informal governance arrangements that fall outside international law’s formal structures.
I then explain my methodology. My analytic techniques are generally descended from the work of the early-twentieth-century U.S. legal realists. In keeping with this tradition, I highlight the indeterminacy of legal texts—the fact that rules do not determine practical outcomes. I also pay attention to the distributive consequences of law: the way law allocates advantages and disadvantages. I consider the constitutive aspects of law: the way law helps to shape what is understood as social reality. These elements may come together in an analysis of “background” rules: Rather than examining only those laws that are obviously applicable to a given legal controversy, I also consider laws that are taken for granted. Finally, this realist approach also entails a careful attention to legal history.

In Chapters 3 to 5, I apply this approach to the legislation I have identified. I begin each case study by situating the Canadian laws in global context, showing the relevance of certain discourses, policy models, and norms circulating among international organizations and expert networks. I then focus in on Canada, describing the legal, institutional, and political-economic context into which such globalized elements were imported. Finally, I examine the Canadian legislation itself, considering how it was drafted and how it passed through Parliament, as well as how it has been interpreted and applied since it came into force.

The first of these case studies concerns the *Official Development Assistance Accountability Act*. This statute is derived from certain discourses, policy models, and norms circulating among development assistance institutions worldwide. In particular, it represents a response to the recent emphasis on “accountability” and “effectiveness” in aid delivery, and an imitation of a British statute that enshrined “poverty reduction” as the purpose of aid. Canadian activists drew on these globalized elements to try to push Canadian aid in a more “social” direction. However, the government interpreted these terms so as to be consistent with its commercial and security goals. I argue that the proponents of the Act were fully aware that the terms they were using could be interpreted in multiple ways, and that they thus looked to scientific expertise as the best way to pursue their agenda.

The second case study deals with laws for the environmental assessment (EA) of projects outside Canada. The origins of environmental assessment can be traced to its use in the United States in the early 1970s, and to its adoption by other states and international organizations during the 1970s and ’80s. The environmental assessment policy model involves a great deal of
managerialism as well as proceduralism. It constitutes a specialized form of expertise, but it nevertheless allows diverse institutions to mobilize this expertise. Canadian EA laws owe their particular shape to certain elements of the Canadian context, such as federalism and the economic importance of resource extraction. Canadian laws for the EA of projects outside Canada have been based on an attempt to apply Canadian standards internationally, while making allowances for the international context in which EA is applied. (However, recent legislative changes have reduced the importance of managerialism and proceduralism in Canadian EA of projects outside Canada.)

The third and final case study involves Canada’s Access to Medicines Regime (CAMR). This Canadian legislation was designed to implement the WTO General Council’s August 30, 2003 decision, which established a humanitarian exception to the patent rules required under the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). The General Council Decision was the WTO’s response to a global campaign for access to affordable medicines for people in the global South. Canada’s reception of the access to medicines project was shaped by an outgoing prime minister’s determination to establish a legacy of humanitarianism. Nevertheless, Canadian legislators eschewed many of the “flexibilities” offered by the WTO’s rules. This rigidity, I suggest, can be attributed to the fact that legislators and government officials had already internalized a maximalist interpretation of intellectual property rights, which is related to neoliberal assumptions about the appropriate roles of private and public actors.

The case studies thus document how Canadian actors (including legislators and government officials) have imagined Canada’s relations with the world beyond its borders, and how they have tried to structure this relationship in legal terms. They show how the nature of this relationship has been contested, with certain actors arguing that Canada has greater or lesser moral obligations towards people elsewhere. And in response to these debates, they show the operation of the various techniques I have identified, including managerialism, proceduralism, the public/private distinction, and paired arguments about non-discrimination and respect for other nations’ sovereignty.

However, beyond the recurring themes, it is also possible to identify certain historical shifts in Canadian law during the period covered by the case studies—a period which, for lack of a better
term, I identify as the “post-Cold-War” moment. Among the political and intellectual elite in Western countries, this post-Cold-War moment was characterized by a renewed optimism about the potential of international law and organizations to promote peace, prosperity, and justice. Canadian elites shared this optimism; they also imagined that Canada could play an important role in building a more liberal and democratic world order. Lloyd Axworthy’s tenure as Minister of Foreign Affairs from 1996 to 2000 is often cited as the peak of this Canadian post-Cold-War liberal internationalism.

In my conclusion, I suggest that the legislative record adds an important dimension to our understanding of Canadian internationalism during this period. The case studies in this dissertation show that a dominant trend during this post-Cold-War period was the consolidation of neoliberalism. Canadian lawmakers shifted from a “public” approach to economic issues toward a vision that emphasized support for the functioning of markets. Social issues, meanwhile, were largely recharacterized in terms of human rights.

The post-Cold-War internationalist era came to a gradual end in the late 2000s as the Conservative government of Stephen Harper consolidated its power. The Conservative government’s foreign policy has emphasized nationalism, militarism (initially focused on the NATO intervention in Afghanistan), bilateral alliances, the capture of rents from Canada’s natural resources, and other policies designed—in the eyes of many observers—to win favour with ethnic and religious diasporic voters at home. The Harper government has explicitly repudiated the internationalist ethos of previous Liberal and Progressive Conservative governments. For example, it has displayed a skeptical attitude toward the United Nations, reacting with scorn when defeated in a 2010 bid for a Security Council seat.

It is too early to tell whether the Harper government’s rejection of liberal internationalism will have a lasting impact on Canadian foreign relations, or on the way Canadians understand their role in the world. Nevertheless, this shift in foreign policy provides an opportune moment to reflect on the Canadian internationalism of the past two decades or so. In this sense, this

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This dissertation takes up the Law Commission’s invitation to consider the implications of globalization for Canadian law.

However, this dissertation’s response to the Law Commission’s invitation is limited in at least one additional respect. The Law Commission’s discussion paper appears to contemplate that an analysis of globally-oriented law-making will lead to proposals for law reform. This dissertation provides a critical analysis of internationalist legislation, but it stops short of recommending specific amendments or alternatives. As I explain in Chapter 2, it can be useful to separate critique from reconstruction. The goal of this dissertation is to identify the major themes and trends in Canadian internationalist lawmaking. However, it leaves the policy implications of this analysis up to future projects.
Chapter 2:
Law, Internationalism, and Globalization

2.1 Introduction

Globalization presents domestic lawmakers with a dilemma. Values of democracy and distributive justice, previously associated with national welfare states, seem to be increasingly relevant at a global scale. Lawmakers may therefore be inclined to use domestic law to pursue internationalist purposes. But globalization also challenges conventional assumptions about the primacy of state law. The increasing global interconnectedness of economic, social, and cultural life raises doubts about the governance capacity of state institutions. At the same time, international treaties (especially in the areas of trade and investment) have imposed formal limits on the powers of national governments. And new forms of global governance, based on international organizations and global networks, have become more prominent.

This dissertation explores the implications of globalization for internationally-oriented domestic laws, Canadian laws in particular. It shows that these domestic laws are not as domestic as they might seem—that they draw on a wide variety of global influences. It also identifies a number of themes in the design of such laws, such as their emphasis on procedures and their reliance on managerial modes of governance. This chapter provides the global context for this inquiry, and explains the analytic techniques used to reach such conclusions.

I begin, in part 2.2, by identifying the immediate issue—Canadian laws that reflect internationalist values and purposes—and explaining my choice of case studies. In part 2.3, I set out the conventional understanding of law that still forms a starting point for many lawyers and law reformers. This understanding is centred on the institutions of the liberal-democratic state, situated within an international legal order. This understanding of law has gone hand in hand with a moral theory that places limits on the obligations of justice owed to those outside the national community.
In part 2.4, I show how globalization has disturbed these conventional understandings. I begin by analyzing the concept of globalization itself. Globalization has interconnected socio-economic, institutional, and discursive dimensions. The history of two major global political projects—neoliberalism and human rights—serves to illustrate the interconnectedness of these various dimensions.

I then examine the implications of globalization for law. Scholarly accounts of the impact of globalization on domestic law have tended to follow certain standard narratives, which I group under the headings of “constraint,” “complicity,” and “competition.” However, it is also acknowledged that the impact of globalization on state law varies widely, and along with it, the applicability of these standard narratives. With respect to international law, a narrative of expansion has been accompanied by the recognition of deormalization and the use of informal modes of governance.

The theoretical approach I employ in this dissertation is set out in part 2.5. This approach is descended from the work of the early-twentieth-century U.S. legal realists; it is informed by an understanding of law as a social, economic, and political phenomenon. This tradition provides a number of analytic techniques that are helpful in understanding law and globalization. These techniques including paying attention to the indeterminacy of legal texts, analyzing the distributive consequences of legal rules, considering the constitutive qualities of law, and recognizing historical contingency. I describe each of these analytic techniques and explain how I apply them in the case studies. I also ponder the possible normative implications of such an analysis.

2.2 Selection of Case Studies: Internationalism in Canadian Public Law

This dissertation was prompted by the observation that Canada’s Parliament had enacted a number of statutes that purported to address matters beyond Canada’s borders. Moreover, several of these laws appeared to reflect a concern for the rights or interests of people in other countries. In short, they seemed to reflect internationalist values.
I use the term “internationalism” to stand for a moral or ethical orientation in which citizens of one country are held to have significant duties—individually as well as collectively—toward people in other countries. Understood this way, internationalism is distinct from cosmopolitanism—the idea that national borders are irrelevant to considerations of justice. Internationalists believe that moral or ethical ties are stronger among members of a national community. But they nevertheless value international cooperation, and sometimes emphasize the construction of shared institutions that transcend national interests.¹

In practice, the operation of Canadian internationalist laws often seemed to fall short of their self-proclaimed objectives. As a Canadian with internationalist sympathies, my original intention was to evaluate these laws, to identify their shortcomings, and perhaps to recommend law reforms that would better represent internationalist values.

In order to undertake this project, I chose case studies that satisfied three basic criteria. First, each of them was a statute created by the Canadian government or Canadian parliamentarians. None of them represented the straightforward implementation of a treaty obligation. In formal terms, at least, each of them could be interpreted as a unilateral Canadian initiative. Second, each of these laws had been officially described as manifesting a concern for the rights, welfare, or environment of people beyond Canada’s borders. In each case, politicians or bureaucrats involved with their implementation had claimed that these laws reflected international moral responsibilities. In some cases, Canadian officials had used the language of altruism or humanitarianism to describe these laws. Third, each of these laws was primarily concerned with the attribution of powers and responsibilities to state authorities, and was therefore understood as a matter of public law.

The first criterion seemed necessary in order to isolate these laws as Canadian laws. The second and third criteria appeared to supply standards according to which these laws could be evaluated. Their professed internationalist objectives appeared to invite an immanent critique: Had Canada lived up to its global promises? And their “public” nature appeared to invite scrutiny in terms of values such as legitimacy, effectiveness, and accountability.

However, it gradually became apparent that such an approach would be misguided. The primary problem was in the first criterion. The laws I had chosen were only formally unilateral. Although none of them implemented a treaty obligation, each of them was in fact the product of international institutions, discourses, and norms. And each of them contributed, in subtle ways, to broader processes that included institutions beyond those of the Canadian state. Portraying these laws as instances of Canadian unilateralism would therefore have been misleading. The global interconnectedness of these laws also meant that an immanent critique, using these laws’ explicit objectives as a standard, would have been misplaced.

Rather than asking whether Canadian laws had fulfilled their global promises, I discovered that the more important questions to ask were: How are Canadian laws connected to global discourses, institutions, and norms? How do these global factors shape the kinds of promises that Canadian lawmakers might be inclined to make? And how does Canadian law contribute to these global discourses, institutions, and norms? Rather than using Canadian laws to assess Canada’s engagement with the world beyond its borders, I found it more interesting to treat Canadian laws as windows onto issues of law and globalization.

In order to undertake this inquiry, I also found it necessary to bracket the public law-inspired normative concerns that had originally informed my analysis, such as democracy, legality, dignity, fairness, and equality. Attempts to evaluate laws in terms of these concerns interfered with my descriptive efforts. I return to normative questions at the end of this chapter, and at various points in the dissertation. However, before doing so, I try to offer a clear descriptive account of the relevant laws and their social, economic, and political contexts.

### 2.3 Starting Points

Before considering the effects of globalization on law, it is necessary to describe the conventional understandings of law that globalization calls into question. It is also important to recognize the political and philosophical ideas associated with these conventional understandings of law. This part of the chapter provides an account of these starting points.

I begin, in section 2.3.1, with an account of conventional understandings of law. In contemporary Western societies, ideas about law are centred on the institutions of the liberal-democratic state.
In some respects, this state legal system is imagined as autonomous, the expression of a sovereign will. However, in other respects, this system is seen as part of a cooperative international order. Conventional understandings of law therefore incorporate an underlying tension between national autonomy and international connectedness.

In North America and Western Europe, during the first three decades after the Second World War, this state-centred understanding of law was accompanied by state-centred economic planning and social welfare systems. I describe these arrangements, which John Gerard Ruggie characterized as “embedded liberalism,” in section 2.3.2. Next, in section 2.3.3, I examine the theories of justice that have accompanied the conventional state-centred understanding of law. I use Nancy Fraser’s idea of the “Keynesian-Westphalian frame” to explain the idea that primary obligations of justice have frequently been understood as arising exclusively among members of a nation-state community.

A state-centred understanding of law also provides the formal basis of a global political and economic order. However, the fact that state law is imagined as autonomous often contributes to a kind of “methodological nationalism.” Legal scholars are often inclined to exaggerate the uniqueness of their own national legal tradition. To escape such methodological nationalism, I have deliberately avoided any references to Canadian law in the first three sections below. I focus instead on structural features of the prevailing theoretical model.

However, state legal systems’ approaches to the international may vary somewhat according to economic, social, and cultural factors, or according to legal doctrines and institutions. No two countries manage the autonomy-interconnectedness tension in exactly the same way. In section 2.3.4, I therefore turn to Canada, highlighting some of the particularities of Canadian law’s approach to the international.

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2.3.1 Liberal-Democratic Positivism

Conventional understandings of law in modern Western societies are centred on state legal positivism. Legal positivism is the idea that there can be neutral criteria for identifying law and distinguishing it from other phenomena—morality, norms, custom, society, facts, and so on. Since the early nineteenth century, legal scholars have looked to the state and its institutions (courts, parliaments, the executive) as the exclusive sources of law—and thus defined law in terms of the normative output of state institutions.¹ These positivistic assumptions have helped legal scholars to imagine—and to construct—state law as an autonomous practice (differentiated from politics or social custom), in which general rules are applied to specific facts as well as organized into a coherent system.²

However, over the course of the same period, state law has undergone a number of other transformations. Liberal constitutions and systems of representative democracy have been established in many countries. State legal positivism therefore coexists with other values, including those derived from liberalism and democracy. The “legitimacy” of state law is now commonly attributed to its democratic authorization as well as its liberal respect for citizens’ private autonomy.³ State legal institutions have also become more diverse and specialized, reflecting attempts to promote the security and welfare of the population—the ethos Foucault identified as “governmentality”.⁴ All of these trends culminated by the mid-twentieth century in the triumph of a “social” or “substantive” concept of law, in which law was understood as a tool of public policy and harnessed to the Keynesian policies of the liberal-democratic welfare state.⁵

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These various ideas about law are often in tension. Indeed, tremendous debates have arisen over the relationship between law and justice in liberal-democratic societies, or the relative priority of democracy and liberal rights. My point here is merely to note the coexistence of these different understandings in a set of arrangements that could be summarized as “liberal-democratic positivism.” These arrangements typically include written constitutions, general elections for representative legislatures, the promulgation of vast amounts of complex and detailed legislation, and the judicial review of this legislation for constitutionality.

The liberal-democratic positivist paradigm has not meant the complete isolation of state law from outside influences. Indeed, the very concept of the state, on which it is based, was a local innovation (originating in Europe in the early modern era) that was later adopted around the world. Most states trace their legal systems to one or more legal “families,” such as civil law, common law, and Islamic law. Ideas such as liberalism and democracy (and their legal expression) emerged in Europe during the eighteenth and nineteenth centuries, and were subsequently globalized. John Meyer and his collaborators note that contemporary states exhibit a high degree of “structural isomorphism,” and suggest that the state has become a cultural feature of a world society: “nation-states are more or less exogenously constructed entities—the many individuals both inside and outside the state who engage in state formation and policy formulation are enactors of scripts rather more than they are self-directed actors.”

Duncan Kennedy has shown how certain paradigmatic ways of thinking about law achieved global currency during the nineteenth and twentieth centuries.

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9 See generally H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593; Lon L. Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart" (1958) 71 Harv. L. Rev. 630.


Conventional understandings of law also incorporate an account of global order, including international law. This account is partly based on a “Westphalian” paradigm. In the Westphalian paradigm, states are imagined as sovereign entities, possessing unlimited power to act and to legislate, and not subject to any higher authority. The coexistence of multiple sovereigns creates the potential for conflict; public international law is used to prevent and resolve these conflicts through mechanisms such as diplomacy, treaties, arbitration, and war.

However, contemporary accounts of international law go far beyond this classic Westphalian model. International law also deals with topics ranging from trade and investment, to transportation and communication, to labour, environment, health, and the family. While states remain the primary subjects of international law, states have also used the mechanisms of public international law to protect individuals and to establish powerful international organizations. Such organizations carry out important governance functions; they also contribute to the further expansion and elaboration of international law. Moreover, contemporary international law also deals with individual human rights. This contemporary model of international law could be described as “liberal positivism”: states remain international law’s primary subjects and its principal lawmakers, but international law is also thought to reflect values such as peace, prosperity, and human dignity.

From the perspective of the state legal order (understood in liberal-democratic positivist terms), the existence of this international legal order (understood in liberal positivist terms) gives rise to a basic tension. On one hand, state law is understood as autonomous, and international law appears to be an alien influence. On the other hand, state law is understood as one component of a cooperative international order. This basic tension is manifested in several areas of domestic legal doctrine. First, it appears in the rules governing the reception of international law into the

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domestic legal system, which include elements of “monism” as well as “dualism.” Second, it appears in the rules of private international law, in which the tendency toward harmonization competes with the integrity of the domestic legal system. Finally, it is evident in the rules governing the territorial application of statutes, in which the reach of domestic law may be extended or curtailed depending on ideas about sovereignty and international cooperation. Although different countries have approached these tensions differently, and approaches have shifted over the course of history, these tensions are inherent a conventional understanding of law and are not susceptible of any general resolution.

2.3.2 Embedded Liberalism

Discussions of law and globalization also generally assume, as a starting point, a particular set of political-economic arrangements that prevailed during the postwar era. The international relations scholar John Gerard Ruggie has characterized these arrangements as “embedded liberalism.” From the late 1940s to the 1970s, the economies of North American and Western European countries were deeply “embedded” in national societies. Almost all states engaged in some form of economic planning. States (or in some places, private employers) provided extensive social welfare benefits such as health care, unemployment insurance, and pensions. Moreover, large segments of the labour force were unionized and able to act collectively.

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22 Ruggie’s notion of the “embedded” economy is borrowed from Karl Polanyi, The Great Transformation (Boston: Beacon Press, 1957 [1944]).
These domestic arrangements, which are sometimes characterized as “social democracy” or “welfare capitalism,” generally reflected the macroeconomic thought of John Maynard Keynes. Keynes argued that economic downturns were caused by a lack of demand in the economy; the unemployed were unable to help restore this demand. Keynes therefore called for increased taxation and public spending to promote full employment and enable widespread economic participation.

As the historian Tony Judt has explained, the triumph of social democracy in the postwar era was due to a particular set of circumstances. Recent experiences of the Great Depression, fascism, and the Second World War had made Western Europeans and North Americans sensitive to the fragility of their political arrangements and inclined to value social and economic security. At the same time, socialism in the Soviet Union offered both an alternative model and a threat. Governments and citizens of Western countries chose social democracy partly in hopes that it might help to stave off depression, war, and revolution.

The “liberalism” in Ruggie’s phrase refers to the framework of international institutions surrounding these national economic arrangements. The agreements concluded at Bretton Woods, New Hampshire in 1944 led to the establishment of two major organizations. The World Bank was created to help states finance post-war reconstruction and longer-term development. The International Monetary Fund was established to oversee a global system of currency controls based on the U.S. dollar. This “Bretton Woods system” was meant to ensure the financial stability of governments around the world. In addition, the General Agreement on Tariffs and Trade (GATT) process was initiated in 1947 to ensure a multilateral approach to trade liberalization. This international institutional order was thus designed to liberalize world trade while respecting the economic policy choices of national governments.

World trade did, in fact, increase during the postwar years. World trade had declined during the first half of the twentieth century, as war and depression persuaded Western governments to

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impose a host of tariffs, quotas, and other protectionist measures. But trade began to recover in the late 1940s. And by the 1970s, world trade once again reached the levels it had attained on the eve of First World War. This trade was not universal. The world remained divided into power blocs with competing economic systems. Moreover, this trade was not equal. Industrial production was concentrated in Europe, North America, and Japan. The manufacturing centres of the global North reaped most of the benefits of postwar peace and prosperity, while Southern countries supplied natural resources at low prices.

Most countries in Africa, Asia, and Latin America thus could not afford to establish comprehensive national welfare programs during the postwar era. However, it was generally accepted that they, too, should be able to develop their national economies according to national policies. Most of those countries that had been European colonies obtained formal independence during this period. Many states in the global South pursued a strategy of “import-substitution industrialization”: protecting infant industries from foreign competition. Many of these states also nationalized foreign-owned infrastructure and industries.

During the 1960s and ’70s, Southern states became increasingly critical about the unequal terms of global trade. They used their new-found majority in the United Nations to establish doctrines, such as “permanent sovereignty over natural resources,” and institutions, such as the United Nations Conference on Trade and Development (UNCTAD). The Southern critique of the postwar economic order culminated in the 1970s in the movement for a New International Economic Order (NIEO).

However, as I shall explain (in section 2.4.2 below), this movement was eventually neutralized by the rise of neoliberalism.

27 Economists recognized this structural problem of unequal “terms of trade” in the late 1940s. See the following report written by Raul Prebisch: United Nations Economic Commission for Latin America, The Economic Development of Latin America and its Principal Problems (Lake Success, N.Y.: United Nations Department of Economic Affairs, 1950); see also H.W. Singer; “US Foreign Investment in Underdeveloped Areas: The Distribution of Gains between Investing and Borrowing Countries” (1950) 40 Amer. Econ. Rev. 473.
2.3.3 The Keynesian-Westphalian Frame and Internationalism

Conventional, state-centred understandings of law have often been accompanied by a particular set of ideas about justice. In modern Western societies, ideas about justice have normally been framed by the nation-state and its borders. Political actors and theorists have generally assumed that primary obligations of justice arise within a national political community. However, in the name of “internationalism,” many actors and theorists have also recognized some limited obligations of justice beyond borders.

As I have observed, the construction of modern territorial states has led to a close association between the state and law. Another corollary of the state model has been a close association of the state with justice. Political claims for justice have primarily been articulated among fellow citizens and addressed to national authorities. Moreover, philosophical theories of justice, including both utilitarian and Kantian theories, have generally assumed that the obligations of justice arise within the context of the nation-state. The political philosopher Nancy Fraser has referred to this state-centred assumption as the “Keynesian-Westphalian frame” for justice. It is built on a Westphalian notion of sovereignty, and it attained perhaps its fullest realization in the Keynesian welfare policies of the embedded liberal era.30

Fraser acknowledges that states have occasionally taken action in response to faraway wars, revolutions, or famines. But she observes that states have generally assigned these responses to the realm of “foreign policy,” characterizing them as matters of security or humanitarianism rather than obligations of justice. For Fraser, they are thus the “exceptions that proved the rule.”31

However, as I have noted, state-centred conceptions of law are also conventionally situated within an international legal order. And this international legal order is also associated with ideas

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30 Fraser, supra note 2 at 12-19.
31 Ibid. at 13.
of justice. Conventional understandings of international law generally imply that the strongest obligations of justice arise within national communities, but that states and their citizens also have certain (somewhat weaker) obligations toward other states and toward foreigners. Nancy Fraser identifies this framing of moral or ethical obligations as “internationalism.”

One prominent version of internationalism is known as liberal internationalism. Liberal internationalism combines a regard for international peace and cooperation with liberal values such as political and economic freedom. Liberal internationalists support interstate cooperation: both as an end in itself, and because they see it as having widespread benefits. Liberal internationalists are also enthusiastic about international trade, and believe in promoting certainty, reducing transaction costs, and eliminating protectionist biases. Liberal internationalism is also based on “a moral cosmopolitanism linked to a liberal individualism.” Liberal internationalism thus implies a concern for individuals—especially their right to fair treatment at the hands of foreign sovereigns. However, liberal internationalists have historically offered a relatively thin account of distributive justice at the global scale. As Robert Wai has explained, the elements of liberal internationalism are not necessarily coherent, but in political discourse, they are often presented as parts of a larger package.

During the era of embedded liberalism, some internationalists adopted a more activist response to global inequalities. Projecting the values of the domestic welfare state onto the global scale, they combined the values of liberal internationalism with the endorsement of some form of global economic redistribution. Such an outlook was evident in Southern countries’ calls for a New International Economic Order, as well as in the responses of sympathetic Northerners.

32 Ibid. at 32-33.
34 Ibid. at 169-174.
35 Ibid. at 162-169.
36 Ibid. at 157.
37 Ibid. at 175-176.
38 The most prominent example of a sympathetic Northern response to the NIEO proposals can be found in the work of the Brandt Commission: Independent Commission on International Development Issues, North-South: A Program for Survival (Cambridge, Mass.: MIT Press, 1980).
This approach to global justice could be labelled “social-democratic internationalism.” As in the domestic welfare state, the social-democratic concern for redistribution is partly altruistic and partly self-interested: Social-democratic internationalists see poverty and inequality not only as intrinsically unjust, but also as threats to stability and security.

This discussion of ideas about domestic and international justice is not meant to be exhaustive. Indeed, other political orientations have often produced other approaches to the international, ranging from liberal cosmopolitanism to diasporic nationalisms to Marxist class-based solidarity. This discussion is mainly intended to highlight the fact that the tension between autonomy and interconnectedness, characteristic of conventional understandings of law, is also mirrored in debates about justice. The Keynesian-Westphalian frame provides a state-centred starting point, but it is accompanied by moral and ethical theories that sometimes bend, stretch, or skew this frame.

2.3.4 Canadian Law and the International

As I have explained, from the standpoint of state law, the existence of an international legal system gives rise to a basic tension between autonomy and interconnectedness. However, the way this tension is mediated varies from state to state. In Canada’s case, domestic laws relating to the international have historically reflected a particularly strong version of liberal internationalism, partly rooted in Canada’s constitutional structure. Liberal internationalism has thus been the dominant paradigm through which Canadian legal actors have approached the world beyond Canada’s borders.

Canada’s laws are located within a constitutional framework that is understood to be self-referential, based on written texts as well as unwritten principles derived from “an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.” But Canadians have often imagined their legal system as part of a

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broader international community. To begin with, Canada is a former colony with strong ties to its former French and British metropoles. Canada’s constitutional texts were originally U.K. statutes, and until 1982, only the U.K. Parliament could amend them. The Constitution Act, 1867 (originally the British North America Act) formally declares that Canada’s constitution is to be “similar in principle to that of the United Kingdom.”41 Until 1949, Canadian court decisions could be appealed to the Judicial Committee of the Privy Council. Canadian law is often derived from English sources, and in Quebec, French sources as well. While English law is no longer formally valid in Canada, Canadian courts continue to cite English sources (along with other Commonwealth sources) as “persuasive authority.”42 In the twentieth century, U.S. economic and cultural dominance meant that the U.S. legal system also frequently served as a model for Canada.

A complex body of doctrine governs Canadian law’s relationship with international law. With regard to customary international law, Canadian law is generally held to have inherited the “monist” position of English common law.43 Since the eighteenth century, English courts have presumed customary international law to be directly applicable, unless its operation is ousted by clear domestic legislation. According to Blackstone, “the law of nations… is here adopted in it[]s full extent by the common law, and is held to be a part of the law of the land.”44 However, the common law’s monism with regard to custom gives rise to certain conceptual challenges. For example, in cases where customary international law conflicts with a well-established domestic common law rule, it is unclear which should take priority.45 One way Canadian courts have avoided these conceptual challenges is by refusing to wholeheartedly endorse a “monist”

45 R. St. J. MacDonald, supra note 43 at 91-92.
position. Indeed, they have often obscured it or expressed discomfort with monism.\(^{46}\) In the case of *R. v. Hape*, Lebel J., writing for a majority of the Court, appears to endorse monism, but also uses ambiguous language (qualifiers such as “should”), and refers to the reception of customary international law as a process to be undertaken by the courts, rather than something that occurs automatically.\(^{47}\)

With regard to treaties, the English common law position is that they must be implemented through legislation in order to take effect in domestic law. Treaties that are ratified by the executive are binding on Canada as a matter of international law, but unless they are implemented, they do not create domestic rights and obligations. Canadian law is therefore said to be “dualist” with regard to treaties.\(^{48}\) However, the apparent clarity of the dualist approach to treaties is blurred by the lack of any consistent process for treaty implementation.\(^{49}\)

The dualist approach to treaty implementation was established in the *Labour Conventions* case, a Privy Council decision concerning the federal-provincial division of powers. Lord Atkin held that the federal and provincial heads of power under ss. 91 and 92 of the *British North America Act* constituted “watertight compartments”: the federal government could not enact treaty-implementing legislation in an area of provincial legislative authority.\(^{50}\) Dualism in the implementation of treaties is thus entrenched in Canada’s constitutional structure.


\(^{49}\) Armand de Mestral & Evan Fox-Decent, “Implementation and Reception: The Congeniality of Canada’s Legal Order to International Law” in Oonagh Fitzgerald, ed., *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Toronto: Irwin Law, 2006) 31 at 45-56. In some instances, Parliament has created a statute that reproduces the substantive provisions of the treaty: see e.g. *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24. At other times, Parliament has appended the treaty itself to the implementing legislation: see e.g. the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 (schedules to the Act contain the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*). In still other cases, Parliament has simply incorporated the treaty into domestic legislation by reference: see e.g. *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, s. 10.

Canadian approaches to private international law have also been shaped by federalism. Most notably, in the 1990 case of *Morguard v. De Savoye*, the Supreme Court of Canada established the principle that the court systems of Canadian provinces must recognize one another’s judgments as long as the subject-matter has a “real and substantial connection” with the province issuing the decision. Writing for a unanimous court, La Forest J. justified this decision on the basis of Canadian constitutional principles.

But La Forest J. also appealed to the idea of globalization, writing that “The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative.” Fourteen years later, in the case of *Beals v. Saldhana*, the Court extended the “real and substantial connection” test to international judgments, essentially holding that the principles governing the interprovincial recognition of judgments must also apply internationally. Canadian jurists have thus sometimes imagined the international as the interprovincial writ large, and the interprovincial as the international writ small.

These are only a few of the doctrines and structures governing Canadian law’s relationship with the international. A comprehensive survey would also make reference to the presumption of conformity with international law, private international law rules of jurisdiction, rules governing the extraterritorial application of statutes, and special doctrines with regard to

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54 But see LeBel J.’s dissenting opinion in *Beals*, *ibid.*, in which the recognition of international judgments is distinguished from the recognition of interprovincial judgments.
constitutional rights. Each of these areas of law is beset with controversy. There are debates, for instance, over the weight to be accorded to international legal sources, or the use of Canadian courts as fora for redressing transnational wrongs. The general point is that such controversies reflect the autonomy-interconnectedness tension that is inherent in state law’s approach to the international. Canadian laws tend to mediate this tension through the ideas of liberal internationalism.

Liberal internationalism has acquired additional resonance, in Canada, from its role in foreign policy. During the Cold War, Canadian politicians and diplomats embraced internationalist ideas. Under the leadership of Louis St. Laurent and Lester B. Pearson, Canada became a major player in international diplomacy and in the construction of NATO, the United Nations, and other international organizations. These efforts were partly informed by strategic calculations. The Second World War had convinced many Canadians that they could not afford to stand aloof from world affairs. Moreover, multilateral diplomacy and institution-building sometimes appeared to provide Canadian governments with a “counterweight” to U.S. influence. But Canada’s internationalism was also an idealistic pursuit. Canada’s diplomacy was meant to promote peace and security, as well as liberal values such as political liberty and the rule of law. The former diplomat and international relations scholar John W. Holmes wrote that “Internationalism’ was almost a religion in the decade after the Second World War.”

Canadian diplomats of the postwar era thus portrayed Canada as a “middle power” able to contribute disproportionately to global peace and prosperity. The classic illustration of Canada’s internationalist role is Pearson’s successful mediation of the 1956 Suez Crisis, for which he was awarded the Nobel Peace Prize. Through such developments, “the idea of


Canadian activism on behalf of the larger community of states as a normative good was increasingly entrenched in Canadian political culture.” In retrospect, many Canadian internationalists now celebrate the postwar era as a “golden age” in the history of Canadian diplomacy.

The liberal values that informed Canadian internationalism during the postwar era also had a firm basis in Canadian politics and society. Indeed, the historian Ian McKay has proposed that liberalism can be seen as the basic organizing principle of Canadian public and private life: “Canada as a project can be defined as the attempt to plant and nurture, in somewhat unlikely soil, the philosophical assumptions, and the related political and economic practices, of a liberal order.” Since the early nineteenth century, liberal ideas imported from Britain have become hegemonic in Canada, while also being reshaped through compromises with older, civic humanist traditions (such as English Toryism and French Catholic clericalism) and through a self-conscious dialogue with U.S. versions of liberalism and republicanism.

Historical and cultural ties, constitutional structures, and political ideologies may thus influence a given state’s laws vis-à-vis the international. In Canada’s case, legal actors (along with their counterparts in politics, business, and culture) have struggled to remain open to global forces while also preserving a sense of national autonomy. At the same time, Canada’s federal system has reproduced these dynamics on a national scale, pitting nation-building against efforts to preserve provincial autonomy. While Canada’s fidelity to liberal internationalism is consistent with global patterns, many Canadian legal and political actors also identify liberal internationalism as distinctly Canadian.

64 See e.g. Andrew Cohen, *While Canada Slept: How We Lost Our Place in the World* (Toronto: McLelland & Stewart, 2004).
66 McKay, *ibid.* at 639-640.
67 See e.g. Canada, Department of Foreign Affairs and International Trade, *Canada’s International Policy Statement: A Role of Pride and Influence in the World: Overview* (Ottawa: Department of Foreign Affairs and International Trade, 2005) at 4-5.
2.4 Globalization and Law

Having analyzed conventional understandings of law (as well as their social and ideational context), we are now in a position to consider how these understandings are affected by globalization.

I begin this part of the chapter by explaining what I mean by globalization. In section 2.4.1, I set out some basic conceptual issues, explaining that globalization has socio-economic, institutional, and discursive dimensions, and that these dimensions are interdependent. In sections 2.4.2 and 2.4.3, I tell the stories of two major global political projects: neoliberalism and human rights. These accounts provide the historical background for a discussion of globalization. Each of them also illustrates the interdependence of the socio-economic, institutional, and discursive aspects of globalization.

Next, I explain how these projects and the changes they produced have altered understandings of domestic and international law. Section 2.4.4 identifies three standard narratives that legal scholars have used to discuss globalization’s impact on domestic law: narratives of constraint, complicity, and competition. However, scholars have also generally acknowledged that the impact of globalization on domestic law is unevenly distributed. Section 2.4.5, presents two major narratives about the relationship between globalization and public international law. On one hand, international law appears to have been expanded to address a wider range of issues. On the other hand, international law has also become less formal, and juxtaposed with “governance” arrangements involving state as well as non-state actors.

As in the previous discussion of starting points, I have deliberately chosen to present a somewhat generic account of globalization. I have organized my analysis in this way in order to emphasize the structural features of globalization’s challenge to state-based conceptions of law—features that are not particular to Canada or any other state. However, as I have noted, the effects of globalization on domestic law have also varied significantly from state to state. I therefore end this part of the chapter with a brief discussion of globalization’s impact on Canadian law, in section 2.4.6.
2.4.1 Conceptual Issues

In a generic sense, globalization refers to the intensification of worldwide economic, social, and cultural connections.\(^{68}\) For example, the philosopher Jürgen Habermas has defined globalization as follows:

> By ‘globalization’ is meant the cumulative processes of a worldwide expansion of trade and production, commodity and financial markets, fashions, the media and computer programs, news and communications networks, transportation systems and flows of migration, the risks generated by large-scale technology, environmental damage and epidemics, as well as organized crime and terrorism.\(^{69}\)

As this definition implies, certain aspects of globalization have been underway for a long time, although they have been geographically uneven, and they have ebbed and flowed over the centuries.\(^{70}\) Nevertheless, some aspects of globalization are new. Some theorists suggest that the intensification of globalization in the last few decades has produced a qualitative change in social relations. For example, the anthropologist Arjun Appadurai argues that increases in migration and electronic media since the 1970s have produced a globalization of cultural consciousness that is so different as to constitute a historical rupture.\(^{71}\)

In contemporary legal scholarship, it is widely thought that globalization challenges a conventional state-centred understanding of law. But explaining how it does so is fraught with conceptual difficulties. One set of difficulties has to do with the fact that changing ideas about law can also be attributed to local or national factors. The “social” or “substantive” conception of law, which had been central to national efforts to promote social welfare and productivity during the era of embedded liberalism, came under fire in the 1960s and ’70s from both right and left.

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\(^{69}\) Jürgen Habermas, *The Divided West* (Cambridge: Polity, 2006) at 175.


Critics on the right argued that state law had become overextended and overly intrusive, while critics on the left argued that it had abandoned its democratic and egalitarian goals. According to Peer Zumbansen, current anxieties about the breakdown of state law under the pressure of globalization may be read as global expressions of this “regulatory crisis” that already occurred at the national scale.\(^2\) Indeed, neoliberalism and human rights, which I describe below as globalized projects, also appeared in many places as local or national projects. Identifying the precise cause of the changes associated with globalization can be difficult.

Another set of difficulties has to do with the concept of globalization itself. If globalization is mainly understood in socio-economic terms, it is not clear why it should disturb a state-centred understanding of law. Liberal-democratic positivism is, after all, a paradigm. Socio-economic changes may present new data to be incorporated into this paradigm—new challenges for law to grapple with—but they do not necessarily upset the paradigm itself.\(^3\)

However, globalization is not only a socio-economic phenomenon. It also has discursive and institutional dimensions. And these dimensions of globalization are interrelated in three ways. First, the socio-economic changes associated with globalization have a legal and institutional basis. They are partly the result of the enactment of particular laws and the pursuit of particular policies. Neither the economic and social changes nor their surrounding legal framework is conceptually prior to the other.

Second, the socio-economic changes associated with globalization have had a discursive basis. They have been partly inspired by political ideas about individual rights and freedoms as well as economic ideas about competition and efficiency. And for some people, increased trade, investment, migration, and communication have helped to foster a sense of global interconnectedness. Many have therefore come to imagine economic, social, and cultural globalization as an inevitable, quasi-natural process: Globalization has thus become a powerful discourse in its own right. As with the institutional dimensions of globalization, it is impossible to fully separate economic, social, and cultural globalization from its discursive environment.

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\(^3\) Compare Thomas S. Kuhn, The Structure of Scientific Revolutions, 3d ed. (Chicago: University of Chicago Press, 1996); compare Hoffmann, supra note 11 at 270.
Third, and just as importantly, the institutional and discursive aspects of globalization are also interrelated. The discourses underpinning economic, social, and cultural globalization in the last several decades have included ideas about institutions: notably, ideas about the state. Neoliberals have tried to discredit the state as a site for the pursuit of social welfare. As I explain in the following pages, the discourse of globalization promotes a sense that the ability to address many important economic and social issues is beyond the capacity of any individual state—and perhaps beyond the capacity of an inter-state system. New institutions and processes have thus been designed to discipline states or compensate for their failings. These institutions help to reproduce the ideas on which they were founded.

Globalization thus involves social and economic phenomena, institutions, and discourses. These three dimensions of globalization interact and influence one another. It is sometimes necessary to distinguish among them for analytic purposes, but such a distinction is somewhat artificial.

I have chosen to describe globalization in terms of projects pursued by particular actors, especially the project of neoliberalism and the project of human rights. There are two advantages to explaining globalization this way. First, this approach helps to highlight the interconnectedness of the socio-economic, institutional, and discursive dimensions of globalization. Second, it helps to emphasize the contingency of the changes associated with globalization—a much-needed counterpoint to the popular discourse in which globalization is presented as natural or inevitable.

Following this account, I explain how globalization challenges state-centred understandings of law. Understanding the relationship among the socio-economic, institutional, and discursive dimensions of globalization is key to understanding this challenge. Globalization’s challenge to state law is never simply a matter of socio-economic changes that are beyond the state’s control, or of global institutions that render the state irrelevant. It also derives from the way these socio-economic changes have been elaborated into discourses. This is why I have chosen to explain the relationship between globalization and state law by explicating its dominant narratives.

2.4.2 Neoliberalism

Neoliberalism is a political project centred on the promotion of markets as an organizing principle for social and economic life. The neoliberal project was launched in the late 1970s by a
variety of actors, including national politicians and officials, representatives of international organizations, businesspeople, and intellectuals. Neoliberal ideas have influenced a wide range of institutions and have helped to generate major discourses about globalization.

Ideationally, neoliberalism is partly derived from the work of libertarian theorists such as Friedrich Hayek and Milton Friedman. Long before the 1970s, these theorists had celebrated private ownership and market transactions, both as efficient mechanisms for allocating resources and as expressions of individual freedom.74 The neoliberal project combined these libertarian ideas with public choice theory, a political theory in which it is assumed that state officials are motivated by rational, self-interested calculations.75 Public choice theory fuels a suspicion that most kinds of public administration and regulation are in fact disguised forms of “rent-seeking,” and thus serves to discredit the role of the state in economic planning and welfare provision. Neoliberalism therefore provides a worldview in which the economic decisions of self-interested private actors are portrayed as normal and natural, whereas public policies designed to safeguard social welfare are portrayed as futile or even dangerous.76

Neoliberal ideas offered a challenge to the “embedded liberal” arrangements of the postwar era, in which the state took a leading role in economic activity. The postwar era was generally a time of economic growth and stability. But embedded liberalism also contained latent tensions which would later rise to the surface. The growth and stability of the 1950s and ’60s gave way, during the 1970s, to economic turmoil. The Bretton Woods “adjustable peg” system of currency exchange rates stopped working in the late 1960s under pressure from U.S. budget deficits. It finally collapsed when the U.S. abolished the convertibility of its currency into gold in 1971.77

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76 For a deeper explanation of these two elements of neoliberalism and their relationship, see Kerry Rittich, Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform (The Hague: Kluwer, 2002) [Rittich, Recharacterizing] at 99-125.

Exchange rates were left to “float” according to supply and demand. Subsequent economic crises, including the oil price shocks of 1973 and 1979, led to slower economic growth and high levels of inflation in many countries. These economic upheavals coincided with changes in social attitudes in many northern countries, including a cultural backlash against the perceived overreach of the administrative-welfare state. These changes created political space for new policy ideas, and in a few countries, neoliberalism entered this space.

Neoliberalism’s breakthrough occurred with the election victories of Margaret Thatcher (1979) and Ronald Reagan (1980). These political leaders (and their counterparts in other Northern countries) championed the privatization of state functions, limits on workers’ ability to act collectively, and the curtailing of social welfare benefits. In these countries and around the world, neoliberals found allies among political, business, and financial elites. Neoliberalism also attained a position of orthodoxy within the discipline of economics.

Under Reagan, the U.S. government also imposed a neoliberal outlook on the Bretton Woods institutions. Beginning in the 1980s, Southern countries that came to the Bretton Woods institutions for financial help were forced to accept “structural adjustment programs,” which included controlling the money supply, reducing the state budget, laying off public employees and selling state-owned enterprises. Southern governments were also pressured to reduce tariffs and make their regulatory systems more receptive to foreign investment. (Many Southern countries were thus forced to abandon the strategy of import-substitution industrialization that they had embraced during the postwar era.) This package of reforms came to be known as the “Washington consensus” due to its promotion by the U.S. government as well as the Bretton Woods institutions. These neoliberal policies caused hardship and suffering in Third World countries far beyond anything experienced in the global North. At the end of the 1980s, the collapse of state socialism in Eastern and Central Europe opened a new terrain for neoliberal

78 Duncan Kennedy, “Three Globalizations,” supra note 8 at 62.
reforms. The World Bank, the IMF, and other foreign advisors persuaded the leaders of countries “in transition” to undertake radical programs of privatization and economic liberalization.  

Internationally, one of the most important institutional expressions of neoliberal ideas occurred in the realm of trade law. Although international trade liberalization was already well underway during the 1950s and ’60s, it took a new form in the 1980s. Whereas in the postwar era, international trade agreements had been largely concerned with the reduction of tariffs, quotas, and other visible trade barriers, trade negotiators now began to scrutinize the trade effects of “internal” laws and policies. This approach reflected neoliberalism’s hostile attitude toward state regulation; it represented a stark departure from postwar “embedded” liberalism. This neoliberal approach was enshrined in regional and bilateral treaties such as the Canada-U.S. Free Trade Agreement (1988, entered into force 1989), which became the North American Free Trade Agreement (1992, entered into force 1994) with the addition of Mexico. This approach also dominated the Uruguay Round of GATT, initiated in 1986, which led to the formation of the World Trade Organization. The establishment of the WTO institutionalized this neoliberal approach to trade. These institutional changes meant that all kinds of state regulation were now in danger of being characterized as trade barriers.

One specific development, which I discuss in greater detail in chapter 5, was an effort to globalize the protection of patents, copyrights, and trademarks. This effort was launched by U.S. business managers, who then convinced the U.S. government to make such protection part of its trade policy. These actors also helped popularize the discourse of “intellectual property rights.” Eventually, the protection of patents, copyrights, and trademarks was enshrined in the Agreement on Trade-Related Aspects of Intellectual Property Rights, one of the agreements

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83 This departure was also partly attributable to the very success of the postwar trading regime. As Robert Howse has explained, the multilateralism of the GATT process succeeded in depoliticizing international trade law, leading to the triumph of an expert community that understood its trade-liberalizing mission in technical terms. These experts neglected the political aspects of the embedded liberal compromise: its respect for the economic policy choices of national governments: Robert Howse, “From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime” (2002) 96 A.J.I.L. 94 at 98-100.

establishing the WTO. A project of intellectual property rights thus became appended to the broader neoliberal project.

Developments in international investment law during this period paralleled changes in international trade law. During the postwar era, the legitimacy of state-managed economic development had been taken for granted. In the 1980s and ’90s, however, neoliberal discourse emphasized the importance of a stable “investment climate” for foreign investors, including the protection of their property rights. A new generation of investment treaties began to enshrine these rights and to provide for investor-state arbitration panels with the power to award compensation. Moreover, just as international trade lawyers expanded their concept of “trade barrier,” investment lawyers began to characterize diverse forms of state regulation as expropriation.

These and other institutional changes helped bring about economic and social changes. The volume of world trade rapidly expanded: Between 1990 and 2005, world merchandise trade increased at an average rate of almost 6 percent per year—more than double the average annual percentage increase in world production during that period. The character of trade also changed: factories were linked together in global supply chains, with different stages of manufacturing occurring in different countries. Intercontinental migration also increased dramatically during this period, partly due to the declining cost of air travel, and partly due to the abandonment of discriminatory immigration policies in the United States, Canada, and other Western countries. Moreover, technological media such as satellite television, audio and video recordings, international telephone calls, and the Internet also enabled unprecedented levels of communication among different parts of the world.

These economic and social changes have helped to fuel a particular discourse linking socio-economic globalization—especially increases in international trade—to market-oriented

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institutional reforms. On one hand, this discourse implies that states must undertake market reforms in order to promote globalization. On the other hand, it suggests that globalization is inevitable, and that market reforms are merely the state’s way of coming to terms with globalization. Sometimes “globalization” is even portrayed as an independent variable with causal power of its own. Despite its circularity and its descriptive inaccuracy, this discourse has become sufficiently powerful to have important effects on institutions and their practices. Internalized by actors within national governments, it has led to tax cuts, regulatory reforms, and other institutional changes designed to make their firms and workers more “competitive” in global markets.

A great deal of empirical research on the socio-economic dimensions of globalization has been intended to counter this particular discourse. For example, Paul Hirst, Grahame Thompson, and Simon Bromley argue that the world economy is less global than international: based on relations among national economies and national firms. Moreover, they note that “global” trade and investment flows are in fact concentrated among the triangle of Europe, North America, and East Asia. They also emphasize that historical levels of trade and migration have fluctuated rather than steadily increased. They make it clear that their research is directed against this neoliberal globalization discourse: “Many overenthusiastic analysts and politicians have gone beyond the evidence in overstating the extent of the dominance of world markets and their ungovernability. If this is so, we should seek to break the spell of this discomfiting myth.”

The history of the neoliberal project thus allows us to observe how socio-economic changes have contributed to ideational changes, which have been manifested in institutions—and how institutions have produced discursive as well as material socio-economic effects. In all of these changes, however, it is crucial to recognize the human agency involved. Like globalization itself,

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88 For example, the journalist Thomas Friedman has written, “I feel about globalization a lot like I feel about the dawn. Generally speaking, I think it’s a good thing that the sun comes up every morning... But even if I didn't much care for the dawn there isn't much I could do about it. I didn’t start globalization, I can’t stop it—except at a huge cost to human development—and I’m not going to waste time trying”: Thomas Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (New York: Farrar, Straus and Giroux, 1999) at xxi-xxii.


neoliberalism is neither natural nor inevitable. It has been the project of particular people working under particular circumstances.

2.4.3 Human Rights

Another important political project of the last few decades has consisted of the promotion of human rights. Actors involved in this project have linked a humanitarian sensibility to the universalization of liberal political values. The discourse of human rights has been institutionalized in international law since the 1940s. But it was only in the 1970s that a group of activists succeeded in popularizing this discourse and directing it toward transnational solidarity. Since the 1970s, human rights have provided a basic vocabulary for both local and global political struggles. This increased human rights consciousness has also led to a renewed institutionalization of human rights at the global scale.

As a legal and philosophical concept, human rights have a long history. Individual rights have been a feature of liberal constitutions since the Enlightenment. However, prior to the Second World War, liberal rights were primarily imagined in national terms—as an aspect of the relationship between state and citizen. The phrase “human rights” rarely appeared in English before the 1940s.  

Following the Second World War, human rights were enshrined in international law, beginning with the Charter of the United Nations and the Universal Declaration of Human Rights. Within the United Nations, a Commission on Human Rights was established. These developments heralded an understanding of human rights as a matter of universal concern. However, a national understanding of human rights still remained prominent. Many states promulgated domestic bills of rights and established human rights institutions during this

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Indeed, while international human rights treaties recognized the rights of individuals, the parties to these agreements were states—states that had agreed to respect the rights of individuals under their jurisdiction.

Human rights were already a source of geopolitical controversy during the postwar era. The United States and other Western countries promoted a version of human rights centred on classical liberal values such as freedom of conscience and religion, freedom of expression, freedom from cruel or capricious state violence, and formal legal equality. The Soviet Union and its allies prioritized economic, social, and cultural rights, such as those guaranteeing education and housing. The Universal Declaration contained both types of rights, and the UN General Assembly initially assigned the Commission on Human Rights the task of drafting a single binding treaty. However, the Commission preferred to separate the two categories of rights, and in the early 1950s, the General Assembly accepted the Commission’s recommendation. Two separate treaties were therefore drafted: the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social, and Cultural Rights*, both concluded in 1966.

The 1960s also witnessed the birth of Amnesty International. Amnesty pioneered the use of human rights as a basis for grassroots political mobilization and as a frame for transnational solidarity. Advances in information and communication technology, mentioned earlier, had made it easier for people to imagine themselves as members of geographically dispersed communities, and thus facilitated the growth of an international human rights movement. But Amnesty also built an international movement by tapping into a widespread sense of

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94 In Canada, for example, human rights were judicially recognized as a matter of public policy: *Re Drummond Wren*, [1945] O.R. 778; but see *Re Noble and Wolf*, [1948] O.R. 579-598; they were also enshrined in the *Canadian Bill of Rights*, S.C. 1960, c. 44.


97 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976) [ICCPR].


99 Appadurai, *supra* note 71 at 5-11, 28-31, 53-55;
disillusionment, among citizens of Western countries, with the politics of superpower confrontation. By calling attention to human rights abuses on both sides of the Cold War, Amnesty appealed to human rights as a moral ideal that could transcend these politics.\textsuperscript{100}

Human rights discourse \textit{appears} to be apolitical in two ways. First, “human rights” alludes to a body of domestic and international law. Actors who invoke “human rights” can therefore employ a legalistic mode of argument, grounded in authoritative sources. Second, “human rights” are often imagined to exist independently of these positive sources, to embody a universal standard of justice. In effect, human rights blur the distinction between positivism and natural law. The apparent political neutrality of human rights is derived both from its appeal to law and its appeal to morality.

But appeals to human rights may, in fact, be highly political—as is shown by the separation of human rights into two multilateral covenants. Human rights are a form of discourse that can be deployed in service of a wide variety of projects. In the process, they can help to legitimate certain ideas and assumptions. In the 1960s and ’70s, Amnesty focused on issues such as torture and the plight of political prisoners. Amnesty’s campaigns thus helped to frame popular understandings of human rights as centred on civil and political rights.

Human rights became a major factor in global politics during the 1970s. Amnesty’s membership grew; media references to human rights dramatically increased as well.\textsuperscript{101} As the international human rights movement gained momentum, other actors took up the discourse of human rights, bringing with them different political agendas. Following Jimmy Carter’s victory in the 1976 presidential election, human rights became official U.S. policy. Carter used human rights to infuse U.S. foreign policy with a moralizing quality. Human rights became a way for the Carter administration to criticize—and to deny aid and trade preferences to—countries on both sides of the Cold War.\textsuperscript{102} The Reagan administration later took up the rhetorical weapon of human rights and aimed it squarely at the Soviet Union and its allies, combining human rights with the idea of

\textsuperscript{100} Moyn, \textit{supra} note 91 at 129-133, 146-148.

\textsuperscript{101} \textit{Ibid.} at 231.

\textsuperscript{102} \textit{Ibid.} at 150-161.
“democracy promotion.” Southern countries also took up the language of rights to defend a more centralized, egalitarian vision of the state: for example, they used their majority in the UN General Assembly to pass the 1986 Declaration on the Right to Development. The globalization of human rights politics also produced new human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture, and the Convention on the Rights of the Child.

During the same period, the language of human rights was also adopted by NGOs and social movements around the world. Human rights discourse played a key role in resistance to oppressive regimes in Eastern Europe and Latin America during the 1970s and ’80s. During the 1980s and ’90s, a wide variety of issues affecting women, children, workers, or indigenous peoples were increasingly recharacterized in human rights terms. Human rights had become a global political vocabulary, a discourse through which all kinds of actors could frame their political claims. NGOs and social movements worked to adapt human rights discourse to their local circumstances. In the process, they crafted new understandings of rights; however, these uses of rights sometimes produced complex political outcomes.

Following the end of the Cold War, the political divide separating the two large groupings of rights became easier to bridge. International organizations, northern governments, and NGOs

106 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
109 See e.g. Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (Chicago: University of Chicago Press, 2006).
displayed a greater openness to economic, social, and cultural rights. The 1993 UN Conference on Human Rights in Vienna emphasized the indivisible and interdependent nature of human rights. The United Nations also carried out a series of institutional reforms designed to boost the prominence of human rights in general. These included the creation of the Office of High Commissioner for Human Rights (1993), and a new Human Rights Council (2006). And in 1997, UN Secretary General Kofi Annan directed all UN agencies to “mainstream” human rights into their work.

However, the triumph of human rights discourse also made human rights available to actors and institutions affiliated with the neoliberal project. For example, beginning in the early 1990s, the World Bank adopted elements of the human rights agenda under the banner of “good governance.” However, the World Bank’s governance agenda was limited by its economic priorities. Instead of allowing for local, grassroots understandings of human rights to flourish, the World Bank used “good governance” as a way of insisting on certain political preconditions for economic growth. As Balakrishnan Rajagopal notes, this approach risks redefining human rights in terms of a top-down, technocratic vision: it is only a human right if it doesn’t interfere with economic development. Likewise, advocates of trade liberalization and investment protection since the 1980s have often framed their claims in rights terms, invoking ideas such as property rights, corporate personhood, freedom of movement, and non-discrimination. Some international trade scholars have argued that human rights are based on the same values as international trade liberalization. Upendra Baxi suggests that such claims give rise to an


alternative paradigm of “trade-related market-friendly human rights,” in which human rights are fully reconciled with neoliberalism.\textsuperscript{117}

While international human rights institutions cannot “enforce” human rights in a direct sense, they often have access to mechanisms for promoting state compliance. Under the ICCPR and the ICESCR, states must report periodically to expert committees. An optional protocol to the ICCPR also allows for individual petitions. International organizations have also supported advocacy aimed at domestic human rights law reforms. Within the United Nations and other international organizations, human rights have become a specialized field of knowledge in which human rights “experts” are understood to be able to provide practical solutions.\textsuperscript{118} Contemporary human rights institutions have also begun to experiment with “new governance” mechanisms such as indicators and indices which would authoritatively compare of different countries’ fulfillment of their human rights obligations.\textsuperscript{119}

Along with related cultural changes, the popularization and transnational application of human rights has increasingly called into question the “Keynesian-Westphalian frame” for justice. For many people, the nation-state no longer provides the obvious scale for thinking about claims of economic redistribution or political recognition. Evidence that people in diverse parts of the world are affected by social, political, and economic processes that originate elsewhere has led some theorists to propose what Fraser calls the “all-affected principle”: the idea that all people who are affected by the same institutions and structures must have equal moral standing in relation to these institutions and structures.\textsuperscript{120} Grassroots political activists have also frequently linked their local struggles to global issues—a linkage most visible in the World Social

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\textsuperscript{117} Upendra Baxi, \textit{The Future of Human Rights} (New Delhi: Oxford University Press, 2002) at 144-146.

\textsuperscript{118} David Kennedy, \textit{The Dark Sides of Virtue: Reassessing International Humanitarianism} (Princeton: Princeton University Press, 2004) [David Kennedy, \textit{Dark Sides}].


\textsuperscript{120} Fraser, \textit{supra} note 2 at 24.
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In addition, since the late 1970s, philosophers and political theorists have attempted to articulate more comprehensively cosmopolitan theories of justice—both in Kantian \(^{122}\) and in utilitarian \(^{123}\) terms.

The global human rights project has thus brought about diverse consequences. Human rights are both a body of positive law and a discourse for thinking about justice and injustice. The popularization of this discourse has contributed to the creation of new, global institutions. These institutions reinforce the popularity of human rights discourse and help to specify the meanings of particular legal doctrines. And together, these processes have important effects on the lives of ordinary people.

### 2.4.4 Globalization and Domestic Law

Legal scholars have analyzed the relationship between globalization and domestic law in a number of ways. However, many of these analyses are roughly consistent with one of three standard narratives. The first such narrative, and probably the most familiar one, is a narrative of *constraint*: Globalization is understood to impose limits on state lawmaking. The second narrative, sometimes juxtaposed with the first, is a narrative of *complicity*. This narrative emphasizes the role of states in bringing about globalization, and suggests that constraints on state lawmaking are self-imposed. A third narrative is that of *competition*: the idea that globalization produces a contest among states and between states and other sites of authority.

One image that recurs in several of these narratives is that of a constitution. The idea of constitutionalism has been invoked by scholars writing about domestic law and globalization. In this context, the idea of a constitution evokes constraint as well as complicity. However, scholars

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writing about public international law have also mobilized the idea of constitutionalism as part of narratives of expansion.

Constraint, complicity, and competition are unevenly distributed among the institutions of any given state. Moreover, global pressures are unevenly distributed among states. Some states have contributed more to globalization than others; some are better able to resist its pressures. It is therefore important to contextualize the relationship between law and globalization with reference to social, economic, and political factors. This is what I attempt to do in the final subheading under this section.

### 2.4.4.1 Narratives of Constraint

Perhaps the most common kind of narrative about globalization’s effect on state law has been one in which globalization constrains the options available to state lawmakers and other public decision-makers. This narrative of constraint is most closely associated with neoliberal-inspired international regimes for trade liberalization and investment protection. The rules of these regimes require states to refrain from enacting laws or undertaking policies that would diminish opportunities for foreign firms. These formal constraints are enhanced by institutionalized compliance mechanisms. The WTO agreements include an inter-state dispute settlement function that includes the use of retaliatory trade sanctions. Investment agreements often provide for investor-state arbitration, allowing private investors to directly pursue their claims against host states.

As many scholars (as well as journalists and public commentators) have observed, these rules and institutions impose important constraints on the kinds of laws that states can enact. They are particularly antithetical to the kind of “embedding” of economic activity in national society that was characteristic of the era of embedded liberalism. Observing these developments, scholars like Harry Arthurs have concluded that “[g]lobalization renders dysfunctional any system based on national policies, laws, and institutions.”

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Such narratives of constraint problematize important elements of the liberal-democratic positivist paradigm. By highlighting the severe limits on state authority, these narratives challenge the image of state institutions as sovereign legislators. These narratives also cast doubt on the ability of state institutions to respond to the democratically expressed wishes of their people.

Some scholars have used the metaphor of a “constitution” to describe the way trade and investment rules constrain state law.\(^{125}\) Thus, trade and investment treaties have the effect of removing certain public policy decisions from the control of democratically elected legislatures. One way they do this is by establishing rights. David Schneiderman has explained how Chapter 11 of NAFTA “constitutionalizes” property rights for foreign investors in Canada, despite the fact that most property rights in Canada receive no constitutional protection.\(^{126}\) The sociologist Saskia Sassen has suggested that such arrangements create a new kind of “economic citizenship” for transnational corporations.\(^ {127}\)

This narrative of constraint could also be used to describe the impact of human rights treaties. After all, human rights treaties specify limits on the powers of national governments. The fact that human rights treaties are seldom described this way is partly due to the fact that their application is rarely backed by the possibility of economic penalties or sanctions, as in the case of trade and investment treaties. But it is also due to the fact that commentators on globalization have generally been enthusiastic about human rights and have supported the expansion of an international human rights regime. I therefore return to this topic in my discussion of public international law in section 2.4.5, below.

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2.4.4.2 Narratives of Complicity

Academic commentators thus describe globalization as constraining the state, placing important issues beyond the reach of state regulation. But such commentators have also observed that states have helped to establish the legal and institutional structures that facilitate globalization. States are not just passive victims of globalization; they are also its accomplices. Narratives in which the state is constrained by globalization therefore only tell part of the story. Narratives of complicity do not contradict narratives of constraint. But they reveal an important layer of complexity, implying that narratives of constraint should not be taken at face value.

The most prominent way in which states have been complicit in globalization is in negotiating and signing international trade and investment treaties. In other words, to the extent that these treaties detract from state sovereignty, states can be understood as having voluntarily renounced their sovereignty in these areas. Moreover, governments have also made substantial changes to their domestic laws in order to comply with these treaties. It would be misleading to assume that such changes are necessarily “imposed,” contrary to state actors’ preferences. Indeed, state actors have sometimes used external constraints as convenient pretexts for political choices that would have been unpopular at home.

The image of a constitution, discussed in connection with narratives of constraint, is also relevant for narratives of complicity. While a constitution imposes limits on democratic politics, these limits are imagined to reflect prior choices to insulate certain matters from majority rule. In the same way, international trade and investment treaties may be understood as a “pre-commitment strategy” that insulates economic rights from any subsequent democratic change of heart.\(^{128}\)

Moreover, while neoliberal policies may be partly attributable to trade and investment treaties, many governments have deliberately chosen to undertake such policies.\(^{129}\) Since the 1970s, centre-right governments in many Western countries have been elected on platforms of

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128 Schneiderman, “NAFTA,” supra note 126 at 514; see also Clarkson, supra note 125 at 164-165; Arthurs, supra note 124 at 817-818

privatization, deregulation, tax cuts and fiscal restraint. Governments led by traditionally social-democratic parties have often embraced a “third way,” trying to reconcile values of democracy and social justice with a more individualistic philosophy and greater reliance on market mechanisms. Governments from both left and right have embraced notions of “the new public management” or “reinventing government,” infusing government with private-sector values of productivity, flexibility, competition and consumer choice.

Another way states have been complicit in globalization is by providing a framework of private rights. The private ordering of the market is founded on systems of property and contract, systems that are enshrined in state law. States also provide for the setting up of corporations, regulate the issue of securities, prohibit the abuse of monopoly power, and create stable forms of money. Such forms of economic regulation have become essential to the functioning of global markets.

Narratives of complicity have often been embraced by scholars concerned about a progressive response to neoliberalism. Because narratives of complicity emphasize the role of the state in establishing neoliberalism, they imply that states have it within their power to undo certain aspects of the neoliberal revolution. Such scholars have therefore looked for ways to re-localize the social—to reassert the state’s role in the provision of social welfare. Sassen states that “sovereign power remains the single most efficient way of securing legitimate authority” and suggests that states retain important tools, e.g. competition law and environmental laws, that


133 This point recapitulates some of the basic ideas of legal realism; for an overview, see Rittich, Recharacterizing, supra note 76 at 132-143. Parallel observations can be derived from institutional economics: See e.g. Douglass C. North, Institutions, Institutional Change, and Economic Performance (Cambridge: Cambridge University Press, 1990).

134 See e.g. Clarkson, supra note 125 at 167.

135 See e.g. Howse, supra note 83; Schneiderman, Constitutionalizing, supra note 86.

136 Sassen, “Global Economy,” supra note 129 at 373.
could be used to modify or moderate economic globalization. However, such attempts to relocalize the social may be in tension with attempts to construct more democratic and/or egalitarian institutions on a global scale. Moreover, they also face the challenge of competition, to which I now turn.

**2.4.4.3 Narratives of Competition**

Another important set of narratives about state law and globalization have been narratives of competition. In these narratives, states are described as competing with one another and with other kinds of institutions as sites of economic production and as sites of legitimate authority. The consequences of this competition for state authority are ambivalent.

Perhaps the most widespread understanding of global competition is as a factor that constrains the options available to national governments. (Indeed, this particular narrative of competition could also be described as a narrative of constraint.) As noted earlier, the liberalization of trade and investment means that states are under pressure to ensure that their firms and workers remain “competitive” in a global market. Competitiveness includes both the ability to attract foreign investment and the ability to produce products that will be competitive in global markets. Such competitive pressures are imagined to constrain states’ ability to tax businesses (to pay for social welfare programs) or to regulate them (to ensure the protection of workers, consumers, and the environment). In the worst-case scenario, globalization is sometimes imagined to produce a “race to the bottom”: a competitive lowering of social and environmental standards. Competitive pressures may also be understood to constrain states by requiring them to invest in higher education (to develop “human capital”) and in infrastructure for “global cities.”

International economic competition may also be described as an opportunity for national governments rather than a constraint. In this narrative, competition is understood as a system that

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rewards the most “innovative” firms and jurisdictions. Moreover, higher regulatory standards (in environmental matters, for example) may help to spur innovation. States may be encouraged to strengthen regulation in hopes of gaining a competitive edge. Rather than a “race to the bottom,” international competition may produce a “race to the top.” However, even in this narrative, international economic competition is hardly sovereignty-enhancing. States are encouraged to foster innovation, but recognized modes of fostering innovation (investment in education, subsidies for research, protection of intellectual property rights, etc.) have become rather uniform.

Narratives of competition also relativize the state as a site of legitimate authority. The increased interconnectedness of global economic, social, and cultural life implies that many legal issues cross borders. Private actors may “shop” for the laws that best suit their requirements. This search may take them beyond state law, to consider transnational, “private” forms of regulation.

The implication of competition narratives for liberal-democratic positivism are ambivalent. Narratives of competition suggest that the state has become one site of authority among many and that it must struggle to remain relevant. Competition narratives thus potentially problematize both sovereignty and democracy, and thus challenge these aspects of the liberal-democratic positivism. But the extent of the challenge may depend on the outcome of the competition: more “successful” states may find their sovereignty enhanced.

2.4.4.4 The Variable Impact of Globalization

Global pressures are unevenly distributed, both within and among states. The impact of globalization on domestic law is therefore variable, depending on the institution or sector involved as well as the state’s place in broader economic, social, and cultural flows.

Global pressures are felt strongly in some areas (such as the regulation of telecommunications and intellectual property), while other areas of state law remain highly sovereign and territorialized (such as immigration and criminal law). Rather than choosing among the narratives of constraint, competition, and complicity, it may be more accurate to say that each of these narratives applies to certain areas of state law.

Saskia Sassen argues that many state institutions have become “denationalized”: actors in these institutions have internalized certain global models, and are pursuing global rather than national projects.¹⁴² Certain economic sectors (such as finance and business services) and certain geographical spaces (such as “global cities” and export processing zones) have also been denationalized. Sassen also notes that globalization has redistributed power within states, strengthening executive authority at the expense of legislatures.¹⁴³

Globalization may thus appear as a threat for some state institutions; for others, an opportunity. Boaventura de Sousa Santos writes that the nation-state and the interstate system have become “an inherently contested terrain… complex social fields in which state and non-state, local and global social relations interact, merge and conflict in dynamic and even volatile combinations.”¹⁴⁴ Santos suggests that globalization de-centres the state and renders it unpredictable, heterogeneous and incoherent.¹⁴⁵

¹⁴³ Ibid. at 168-179.
¹⁴⁵ Ibid. at 198-199.
The financial crisis that began in 2007 has highlighted the complexity of state law’s relationship with private power—including the inability of state law to address important issues. The crisis began with irresponsible financial practices in the United States and several European countries. Governments abetted these practices through their lax regulatory policies—which they often justified in the name of innovation and competitiveness. However, these practices were also made possible by (private) credit rating agencies that endorsed risky investments as if they were safe. When private financial institutions tottered, governments bailed some of them out, fearing that their collapse would have had drastic repercussions for national and global financial systems. Some governments, such as that of Ireland, assumed public responsibility for vast amounts of private-sector debt. Other governments, such as that of Greece, had large public debts which they could no longer afford to service once the recession began. (Credit rating agencies played a role here too, downgrading many countries’ debt ratings and making it more expensive for them to borrow.) However, the possibility of government defaults threatened the stability of the private banks that these governments had borrowed from, and hence also the fiscal situation of the “core” European countries in which these banks were based. Across North America and Western Europe, many governments embraced “austerity” measures (often consisting of layoffs and cuts to social programs) in order to satisfy their creditors—measures that had the side-effect of deepening the recession.

It is important to acknowledge that not all transformations of state authority in the last few decades can be attributed to globalization. For example, in response to the “regulatory crisis” mentioned earlier, many states have experimented with “new governance” approaches involving collaboration among public and private actors. In some areas, “command and control” regulation has been replaced with flexible practices such as standard-setting, information-sharing, peer monitoring, and evaluation. Some aspects of the new governance are descended

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from neoliberalism and from related ideas about privatization, deregulation, and streamlining public administration on the basis of competition and incentives. But the new governance is not justified in terms of efficiency alone. Proponents of the new governance argue that it can facilitate the achievement of public purposes while also fostering innovation. Some scholars see new governance practices as encouraging citizen deliberation about the goals of public action. In view of such transformations, Peer Zumbansen has argued that “law’s self-destruction began long before globalization.” But even if this is correct, it is clear that globalization has added to and intensified the changes already underway.

It is also important to acknowledge the variable impact of globalization among states. As Stephen Gill has noted, vulnerability to the pressures of globalization varies “according to the size, economic strength, form of state and civil society, and prevailing national and regional institutional capabilities, as well as the degree of integration into global capital and money markets.” How globalization is manifested is thus partly a function of socio-economic factors, including inequalities of wealth, power, and status.

Some of these disparities follow longstanding global cleavages. When Europeans colonized much of the rest of the world, they established a hierarchical distinction between “civilized” European nations and “uncivilized” peoples whose lands and resources were subject to appropriation. When the remaining European colonial empires collapsed in the mid-twentieth century, the new states of Asia, Africa, and the Pacific were recognized as sovereign equals.


152 Zumbansen, supra note 72.

153 Gill, supra note 125 at 415.

154 Charter of the United Nations, 26 June 1945, Can TS 1945 No. 7, Art. 2(1).
However, a new global cleavage between “developed” and “developing” countries took the place of the older, cultural distinction between Europe and its others.  

Although changing economic fortunes have complicated this “North-South” dichotomy, the differential impact of globalization still corresponds to a considerable degree with these older distinctions. Globalization has constrained Southern states in dramatic ways. Northern states, international organizations, and NGOs have frequently combined neoliberalism and human rights with the discourse of economic development. Through formal conditionalities attached to development financing, or through more subtle forms of pressure, these outside actors have acquired enormous leverage over Southern states’ domestic laws and policies.  

Other variations in the ways globalization affects states may be attributed to these states’ laws and institutions. For example, the United Kingdom’s tradition of parliamentary sovereignty inhibited the domestic adoption of human rights-based judicial review of legislation until 1998.  

Finally, variations are also due to ideational factors. The external relations of state and society are not something people simply do. People also tell stories about and construct theories about these relations. These stories and theories may coalesce into political traditions, with their own power to influence people’s actions. Describing national variations in globalization presents a challenge, similar to the challenge of describing globalization: Neither the socio-economic, nor the institutional, nor the discursive dimensions are conceptually prior to the others.  

On the whole, globalization challenges a state-centred understanding of law. In some respects, state law provides the ground rules for globalization. But in other respects, globalized processes now furnish the basic assumptions of state lawmaking. The ability of domestic legal systems to provide rights, democracy, or distributive justice seems far from assured. However, the intensity of these challenges varies from sector to sector and from place to place.


156 Gathii, *supra* note 114; Rajagopal, *supra* note 115.

2.4.5 Globalization and International Law

The relationship between globalization and international law, like the relationship between globalization and domestic law, has given rise to a number of standard narratives. Perhaps the most common of these is a narrative of expansion: the notion that an ever-greater range of subject-matters are coming under the purview of international law. However, alongside this narrative of expansion, it is also widely acknowledged that public international law has become deformed and juxtaposed with other forms of governance involving both public and private actors.

2.4.5.1 Expansion

The tone of the “expansion” narrative is often celebratory. This narrative emphasizes that international law has progressively developed to address new issues and respond to new claims of injustice. For example, Antonio Cassese’s 2005 textbook presents international law as engaged in the pursuit of peace and security, disarmament, human rights, restraints on violence in armed conflict, accountability for international crimes, the prevention of terrorism, the protection of the environment, and the reduction of global inequalities.\(^\text{158}\)

Human rights play a special role in the expansion narrative. Human rights agreements establish processes of monitoring, reporting, and in some cases (as with the Optional Protocol to the ICCPR), individual petitions. Even where these mechanisms are not backed by economic measures or physical force, they may have discursive effects. They serve to reiterate and reinforce the norms of particular treaties, to place non-compliant states on the defensive vis-à-vis international organizations. The growth of international human rights law appears to confirm that international law is not merely the law of states (as in the Westphalian paradigm), but that it is also concerned with individuals (a hallmark of liberal internationalism).

International humanitarian law and international criminal law also contribute to the narrative of expansion by directly imposing liabilities on individuals. International lawyers now generally

accept that individuals have some limited international legal status. Some international lawyers also consider the normative force of human rights to be so strong as to negate the requirement of state consent. For example, in the *Furundžija* case, the International Criminal Tribunal for the Former Yugoslavia held that the prohibition on torture had acquired the status of *jus cogens*: i.e., it had become a peremptory norm of international law. In the same spirit, the Human Rights Committee (established under the ICCPR to monitor state compliance) has taken the position that a many provisions of the ICCPR constitute peremptory norms, and that these provisions may not be the subject of state reservations.

Within the expansion narrative, the establishment of the WTO is generally considered a step forward for the expansion of international law. Trade lawyers like John H. Jackson advocated for the creation of WTO as a way of bringing law to bear on the chaos of international economic relations. The expansion narrative can thus be seen as the flipside to domestic law’s narrative of constraint. From the perspective of international law, the constraints imposed by multilateral treaties are in fact cooperative arrangements among sovereigns, meant to protect private rights and further the (global) public good. For this reason, some public international lawyers have represented the expansion of international law in constitutional terms. Like Schneiderman and other scholars who have used constitutionalism to explain constraints on domestic law, these international constitutionalists emphasize the growth of international governance at the expense of state sovereignty. However, in contrast to the critical perspective taken by some scholars of domestic law, these international constitutionalists have tended to view these developments in a positive, even celebratory light.

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159 See e.g. *ibid.* at 142-150; see also John H. Currie, *Public International Law*, 2d ed. (Toronto: Irwin Law, 2008) at 73-75.


161 UN Human Rights Committee, General Comment 24(52), *General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994) at para. 8.


The expansion narrative is not entirely new. Since the early twentieth century, international lawyers have argued that the growing interdependence of a global society necessitates a greater role for international law. However, the Cold War was generally understood to have inhibited such a progressive development of international law. The expansion narrative became increasingly popular after the fall of the Berlin Wall. For example, Christine Gray notes that superpower conflict generally inhibited UN Security Council activity during the Cold War, but that the post-Cold War era has seen a major increase in Security Council resolutions authorizing economic sanctions or the use of military force (including peacekeeping).

2.4.5.2 Deformalization and “Governance”

The narrative of expansion coexists with a number of other accounts of the transformation of public international law in an era of globalization. Alongside the expansion narrative, some scholars have noted a corresponding tendency toward the deformalization of international law—a reliance on vague standards and guidelines (combined with institutions and processes) rather than rules. Likewise, other scholars have described the rise of global governance processes incorporating a variety of public and private entities, not just states and their representatives. These approaches to global governance are often justified in instrumental terms, as more effective ways of solving global problems. However, they problematize the claim, implicit in the expansion narrative, that the contemporary global order is increasingly governed by law.

As Martti Koskenniemi notes, some newer international treaties dispense with formal rules, instead listing factors to be considered, as in the ILC’s Draft Articles on Transboundary Damage from Hazardous Activities. Even where they do provide for clear obligations and rules, some contemporary international treaties appear to anticipate breaches of the rules and provide for “non-adversarial” processes designed to “facilitate the implementation” of the rules, as in the

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164 See e.g. Hudson, supra note 15.
Kyoto Protocol to the United Nations Framework Convention on Climate Change. Koskenniemi suggests that formal international dispute-settlement has also become deformalized: in the 1997 Gabčíkovo Dam case, the International Court of Justice described a treaty between Hungary and Slovakia concerning a dam on the Danube river as a “regime,” and saw its role as facilitating the continuation of the regime. In other words, says Koskenniemi, rather than imagining public international law as a system of formal rules, international lawyers frequently see their discipline as a practice of “‘balancing’ the interests with a view of attaining ‘optimal’ results to be calculated on a case-by-case basis.”

This tendency toward global governance through informal means is not limited to formal international organizations. Indeed, the last few decades have seen the emergence of many different forms of international cooperation, some of them operating entirely outside the formal framework of international law. For example, Anne-Marie Slaughter has described the creation of global networks among government officials, designed to coordinate national responses to issues such as financial instability, corruption, pollution and terrorism. Some of these networks come together under the auspices of formal international organizations, such as the OECD, which helps to produce expert knowledge, to facilitate interaction among government officials, and to issue non-binding standards. But other networks have no formal legal basis. Slaughter’s leading example is the Basel Committee on Banking Supervision, established in 1974. As members of this committee, the central bankers of 27 countries meet to coordinate their national standards for the capital adequacy of private banks. But as with the OECD, the standards created by the Basel Committee have no formal legal status.

State officials are not the only ones involved in making rules and setting standards to address global issues. The political scientists Kenneth Abbott and Duncan Snidal have described how non-state actors such as businesses and NGOs have engaged in processes of “regulatory

\[167\] Ibid. at 13.
\[168\] Ibid. at 13-14.
\[169\] Ibid. at 9.
standard-setting” in order to control the social and environmental effects of transnational business. While states participate in such initiatives, others proceed without overt state involvement. Abbott and Snidal see such arrangements as a way of overcoming the limitations of state-based international law.\textsuperscript{172}

Globalization’s impact on public international law is therefore as ambivalent as its impact on domestic law. On one hand, the changes associated with globalization have made public international law appear relevant to a wider range of issues and actors. On the other hand, global governance also proceeds through a host of informal mechanisms, diminishing the formal qualities of public international law.

2.4.6 Canadian Particularities

Globalization has affected Canadian law in many of the same ways it has affected the laws of other states. The narratives of constraint, competition, and complicity that describe globalization’s effects on domestic legal systems all may be—and have been—applied in Canada. However, as I have noted, globalization’s effects on state law also vary from state to state. In Canada’s case, one major manifestation of neoliberalism has been in the form of a project of North American economic integration. This project has imposed important constraints on Canadian lawmaking; however, Canadian government actors have also highly complicit in this project. On the whole, Canadian state law has exhibited a relatively high degree of complicity in globalization, and only intermediate degrees of constraint and competition.

Canadian society is highly globalized in a number of ways. Over the last decade, international trade in goods and services has accounted for 30 to 40 percent of Canada’s economic output.\textsuperscript{173} Moreover, many Canadians have familial and cultural ties to other parts of the world: almost one-fifth of Canada’s population consists of persons born outside Canada.\textsuperscript{174}

\begin{footnotesize}
\begin{enumerate}
\item Ibid. at 41.
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However, Canada’s geography also dictates a particularly close relationship with the United States. According to the economist Paul Krugman, “Canada is essentially closer to the United States than it is to itself.”\footnote{Paul Krugman, \textit{Geography and Trade} (Cambridge, Mass.: MIT Press, 1991) at 2.} An important manifestation of the neoliberal project in Canada has been the institutionalization of North American economic integration. In 1988, the U.S. and Canadian governments signed the Canada-U.S. Free Trade Agreement,\footnote{Canada and United States, \textit{Free Trade Agreement}, 2 January 1988, 27 ILM 281 (entered into force 1 January 1989).} which was later expanded to include Mexico in the North American Free Trade Agreement.\footnote{\textit{North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States}, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [NAFTA].} NAFTA liberalizes trade and investment flows among all three countries. The official rationale for these agreements, from a Canadian standpoint, was to guarantee Canadian businesses access to the U.S. market.\footnote{Canada, Royal Commission on the Economic Union and Development Prospects for Canada, \textit{Report of the Royal Commission on the Economic Union and Development Prospects for Canada} (Ottawa: Minister of Supply and Services, 1985).} Over half of Canada’s merchandise imports come from the United States, and almost three-quarters of Canada’s exports go to the United States.\footnote{Statistics Canada, \textit{International Merchandise Trade: Annual Review 2010}, Catalogue no. 65-208-X (Ottawa: Statistics Canada, 2010).}

The extent to which NAFTA and its institutions constrain Canadian lawmaking is widely debated. A number of foreign investors have sued Canada under NAFTA, or threatened to sue, in response to Canadian regulations that had adverse effects on their business.\footnote{Schneiderman, \textit{Constitutionalizing}, supra note 86 at 78-82, 86-92, 129-130.} These claims have sometimes dissuaded Canadian governments from pursuing particular public policies. For example, in 1994-95, arguments based on NAFTA’s investment provisions helped persuade the Canadian government to abandon a plan that would have required the plain packaging of cigarettes.\footnote{\textit{Ibid.} at 120-129.} Likewise, in 2003-04, the government of New Brunswick abandoned a plan to introduce a public automobile insurance program; pressure from U.S. insurance companies arguing that this would constitute a taking of their investment may have contributed to this
decision.\textsuperscript{182} Some commentators identify NAFTA, along with the WTO agreements and other international trade and investment agreements, as elements in an external “constitution” that constrains Canadian law-making.\textsuperscript{183}

While recognizing that neoliberalism has constrained Canadian lawmaking, it is also important to acknowledge that Canadian governments have been complicit in this project. Canadian governments did, after all, negotiate and sign NAFTA. Moreover, developments such as the abandonment of plain packaging for cigarettes suggest that domestic lawmakers have internalized the neoliberal disciplines of NAFTA.\textsuperscript{184} Canadian governments have also been active proponents of neoliberalism beyond North America. NAFTA gave Canada an experience of negotiating and implementing trade and investment agreements, which it then sought to replicate in other contexts. For example, until 2004, Canada used NAFTA’s investment provisions as a model for bilateral investment treaties it negotiated with other countries.\textsuperscript{185}

The global human rights project has also taken a particular form in Canada. In the late 1970s, Canada’s federal government undertook a nationalist project of “patriating” Canada’s constitution: taking it out of the hands of the U.K. Parliament and enabling Canadians to amend it. In the process, the federal government (and its provincial counterparts) added a \textit{Canadian Charter of Rights and Freedoms}. The content of this \textit{Charter} was derived from a number of sources, including British constitutional traditions, the U.S. Bill of Rights, European human rights jurisprudence, and international human rights law. Since 1982, \textit{Charter} rights have become a pervasive concern within the Canadian legal system. Besides applying the \textit{Charter} to legislation and executive action, Canadian courts have displayed a concern for developing the common law in a manner consistent with \textit{Charter} “values.”\textsuperscript{186}

\textsuperscript{182} \textit{Ibid.} at 71.

\textsuperscript{183} Clarkson, \textit{supra} note 125.

\textsuperscript{184} Schneiderman, \textit{Constitutionalizing}, \textit{supra} note 86 at 114-120.

\textsuperscript{185} \textit{Ibid.} at 135-138.

However, the formal relationship between these Canadian legal developments and the international law of human rights has remained unclear. Although Canada has ratified the ICCPR, the ICESCR, and other important human rights treaties, Parliament has never explicitly implemented them. The uncertainty created by Canada’s ambiguous approach to the implementation of international human rights law is illustrated by Baker, a case that was decided on administrative law grounds. In this case, the Supreme Court of Canada reviewed a discretionary ministerial decision in which an immigrant had been refused permission to stay in Canada. The Court unanimously held that the decision had been unreasonable. In her assessment of the reasonableness of the decision, L’Heureux-Dubé J., writing for the majority of the Court, drew on the (ratified but not explicitly implemented) United Nations Convention on the Rights of the Child. L’Heureux-Dubé J. suggested that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.” However, in a concurring opinion, Iacobucci J., objected to this reasoning on grounds that it departed from the general principle that treaties must be implemented through legislation before they can have domestic effects. Human rights have thus added another layer of ambiguity to the relationship between international and domestic law in Canada.

Canadian governments have also worked to promote human rights outside Canada. In 1988, Prime Minister Brian Mulroney announced in 1988 the creation of International Centre for Human Rights and Democratic Development (ICHRDD, better known as Rights and Democracy). Lloyd Axworthy, Canada’s Minister of Foreign Affairs from 1996 to 2000, borrowed the UN’s concept of “human security” and made it the central theme of Canadian diplomacy. Axworthy championed a variety of humanitarian initiatives, including the banning of

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188 Ibid. at para. 70.
189 Ibid. at paras. 78-81.
190 International Centre for Human Rights and Democratic Development Act, R.S.C., 1985, c. 54 (4th Supp.). This centre was subsequently dismantled by the government of Prime Minister Stephen Harper. Foreign Affairs and International Trade Canada, News Release, “Minister Baird Announces Closing of International Centre for Human Rights and Democratic Development” (3 April 2012).
landmines,\textsuperscript{191} the establishment of an International Criminal Court,\textsuperscript{192} and the elaboration a
document of military intervention based on “the responsibility to protect.”\textsuperscript{193} Observers at the time
hailed these initiatives as continuations of Canada’s tradition of liberal internationalism.\textsuperscript{194}

Canada has thus been subject to important global pressures. Many of Canada’s domestic laws
have been reformed to bring them into line with the global projects of neoliberalism and human
rights. But Canada’s size and relative wealth, its geographical location, and its ethnic and
linguistic ties to other sites of global power have spared it from some of the more acute pressures
of globalization. And Canadian governments have also actively promoted the neoliberal and
human rights projects. Globalization has thus helped to fragment Canadian laws and institutions,
orienting some of them outward, while leaving others inward-looking.

\section*{2.5 Post-Realist Legal Analysis}

As I have explained, my analysis of the case studies in this dissertation involves situating them in
global context. However, my methodology also entails the careful analysis of legal texts. In this
undertaking, I employ techniques descended from those pioneered in the United States by the
early-twentieth-century legal realists. These include an awareness of the indeterminacy of legal
rules, an attention to the distributive and constitutive qualities of law, an acknowledgment of the
“background” role of private law and of the contested nature of the public/private distinction,
and an alertness to historical antecedents.

In section 2.5.1, I explain the significance of legal realism for subsequent legal scholarship. The
legal realists of the early twentieth century launched a progressive attack on the conservative
formalism that had dominated the U.S. legal academy in the late nineteenth century. They
demonstrated the logical incoherence (or circularity) of many legal doctrines, and proposed that

\begin{itemize}
  \item \textsuperscript{191} Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on
  their Destruction, 18 September 1997, 2056 UNTS 211.
  \item \textsuperscript{192} Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, 37 ILM 1002.
  \item \textsuperscript{193} International Commission on Intervention and State Sovereignty, The Responsibility to Protect (Ottawa:
  International Development Research Centre, 2001).
  \item \textsuperscript{194} Fen Osler Hampson, Norman Hillmer & Maureen Appel Molot, Canada Among Nations 2001: The Axworthy
  Legacy (Don Mills, Ont.: Oxford University Press, 2001).
\end{itemize}
law should be understood as a social and political phenomenon. These insights were subsequently taken (and elaborated) by subsequent generations of legal scholars. In section 2.5.2, I describe the principal analytic techniques developed in post-realist scholarship and explain how I apply these in my dissertation.

Finally, in section 2.5.3, I consider the possible normative implications of such an analysis. I draw a distinction between critique and reconstruction. In this dissertation, my main goal is to critically analyze the laws I describe, and not to propose solutions or alternatives. Nevertheless, this type of analysis may help to destabilize aspects of law that are otherwise taken for granted, and may thereby contribute to progressive legal change.

2.5.1 The Realist Legacy

Many aspects of this dissertation’s methodology can be traced to the work of the U.S. legal realists of the early twentieth century. Legal realism involved an intellectual revolt against the late nineteenth century’s dominant mode of legal knowledge—what Duncan Kennedy has called “classical legal thought.” In classical legal thought, official state law was imagined both as an expression of morality and as an autonomous system of logic. On one hand, classical legal thought was influenced by theories of natural law; the rules of state law were assumed to reflect moral values. On the other hand, classical legal thought involved a mode of legal reasoning known as “formalism.” Formalist judges and legal scholars would induce rules and principles from individual cases, classify them into a general system, and deduce new decisions from the categories of this system.

The legal realists showed that the formal concepts of classical legal thought could not support the claims of logical inevitability that were being made on behalf of judicial decisions. An early expression of this view came from Oliver Wendell Holmes, in his observation that judicial

195 Note that the “realist” movement in legal scholarship is to be distinguished from a “realist” approach to international relations (such as the “realist” view of development assistance discussed in Chapter 3). These two uses of “realism” are unrelated.

decisions were guided by “experience” rather than “logic.” Another early critical perspective came from Wesley Newcomb Hohfeld, whose precise methods for analyzing and classifying rules revealed inconsistencies in the formal categories of legal doctrine. Later legal realists, like Felix Cohen, pointed out that formalist reasoning was often circular and self-referential: judges defined legal concepts (such as private property or the corporation) so as to justify particular conclusions. Cohen famously described such reasoning as “transcendental nonsense.” Cohen explicitly linked the realist outlook to the pragmatist movement in philosophy, claiming that a thing is what it does, and that an idea is equivalent to its practical consequences.

The realists were particularly critical of judges’ appeals to concepts of private property and freedom of contract. The realists highlighted the role of state institutions in elaborating (and enforcing) these concepts. For example, Robert Hale showed how state law served to structure economic relations. Most “private” economic transactions could be explained as functions of the state’s enforcement of property rights. Hale used this observation to challenge claims that the state ought not to “intervene” in markets; in effect, Hale showed that state “intervention” was itself a prerequisite for the existence of most markets. Likewise, Morris Cohen argued that by constitutionalizing contract rights, the state had effectively delegated some of its sovereign power to property holders. The realists thus challenged the classical liberal public/private distinction and the idea of the self-regulating market.

197 Oliver Wendell Holmes, Jr., The Common Law (Boston: Little, Brown, 1881) at 1.
200 Ibid. at 826.
Hale also pioneered the distributive analysis of legal rules.\textsuperscript{205} He showed how law served to allocate coercive authority, or “bargaining power,” to some groups (e.g. property owners) rather than others (e.g. workers). He observed that the law’s protection of certain economic interests had the effect of making other interests more vulnerable.\textsuperscript{206} Hale speculated that the income or “productivity” of each person in the community is likely to be a function of his or her relative ability to coerce others in a legally authorized manner.\textsuperscript{207} (Hale showed how market-based economic exchanges, typically described as “voluntary,” could instead be explained in terms of “coercion.”\textsuperscript{208})

The realists emphasized that law was a product of its social and institutional context. Holmes declared that “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”\textsuperscript{209} In the early twentieth century, what U.S. courts were doing in fact was siding with the owners of capital against labour and against “progressive” social reforms.\textsuperscript{210} The realists of the 1920s and ’30s, many of whom subscribed to progressive views, were critical of the way judges used formalistic reasoning in service of a conservative agenda.

In rejecting the abstract formalism of classical legal thought, the realists argued for an approach to law that would be more reflective of social needs and policy goals. Karl Llewellyn, for example, argued that judges should consider the “policy” effects of their decisions.\textsuperscript{211} Many of

\begin{itemize}
  \item Polanyi, who pointed out that the “laissez-faire” policies of the nineteenth century had been made possible by new forms of regulation: Polanyi, \textit{supra} note 22).
  \item Hale, “Bargaining,” \textit{supra} note 202 at 626-627.
  \item Hale, “Coercion,” \textit{supra} note 201 at 490.
  \item \textit{Ibid.} at 477.
  \item Oliver Wendell Holmes, Jr., “The Path of the Law” (1897) 10 Harv. L. Rev 457 at 461.
  \item The classic example is of course \textit{Lochner v. New York}, 198 U.S. 45 (1905).
  \item Karl Llewellyn, “Some Realism about Realism—Responding to Dean Pound” (1931) 44 Harv. L. Rev. 1222 at 1254.
\end{itemize}
the legal realists looked to social science as basis for progressive law reform. Having abandoned the intellectual certainty of formalism, many of the realists imagined that the social sciences could provide an alternative source of certainty. Eventually, thanks to the New Deal and subsequent reforms, the realists’ views became part of mainstream understandings of law in the United States. Some of the realists, such as Jerome Frank, became judges themselves.

By the time of the Second World War, realist methods had been integrated into the mainstream of U.S. legal scholarship. During the mid-twentieth century, the legal process school assumed a position of dominance in the U.S. legal academy, establishing a new orthodoxy. Legal process scholars sought to explain diverse laws and institutions as functional responses to social needs. However, a number of other academic movements also continued along paths that the realists had opened. In the 1960s, progressive “law and society” scholars began to apply empirical, social-scientific research methods to the study of law and legal institutions. Likewise, from the centre-right, there were bold attempts to analyze law in terms of economic efficiency. Contributors to each of these schools understood law as a product of social context and as a potential tool of social reform.

In the 1970s, the “critical legal studies” (CLS) movement took up the realist themes of indeterminacy and the critique of the public/private distinction, and combined them with a wide range of intellectual sources, including the Hegelian philosophical tradition, critical strands of Marxist thought, as well as structuralist and post-structuralist thought (such as the work of Michel Foucault). Some critical legal scholars described their work as a challenge to law’s legitimating qualities.


CLS was initially developed by scholars who were preoccupied with domestic law. However, beginning in the late 1980s, international lawyers (notably David Kennedy and Martti Koskenniemi) showed how critical legal methods could be applied to the study of public international law. Since that time, these methods have been used to generate a “new stream” of critical research on international law and globalization. Collectively, scholars of this stream have developed an account of international legal indeterminacy, an analysis of international institutions, an explanation of the global role of “background rules,” and an alternative history of international law.

One current within this stream has called attention to international law’s relationship with European colonialism. Under the banner of “Third World Approaches to International Law” (TWAIL), scholars such as Antony Anghie, B.S. Chimni, and Balakrishnan Rajagopal have combined post-colonial studies with the techniques of CLS. TWAIL scholars argue that international law has been shaped by colonial encounters between European and non-European peoples, and that international law perpetuates neo-colonial relationships.

2.5.2 Analytic Techniques

In the following sections, I identify a number of analytic techniques that have been important to post-realist legal scholarship, and explain their relevance to my dissertation.

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2.5.2.1 The Indeterminacy of Legal Concepts

As I have noted, the critique of formalistic legal concepts was central to legal realism. Realists rejected the proposition that legal concepts had “transcendental” qualities; many of them insisted that the meanings of legal texts could only be determined with reference to their practical operation.

Building on the work of the realists, critical legal scholars have emphasized that legal concepts are indeterminate. Indeterminacy not only means that law is semantically vague, but that it accommodates conflicting values.\(^\text{220}\) For example, Duncan Kennedy has shown how U.S. contract law incorporates a tension between individualism and altruism that is, in principle, unresolvable.\(^\text{221}\) However, legal doctrine normally mediates such tensions, using formalism, functionalism, and categorical schemes to present a semblance of coherence and rationality.\(^\text{222}\)

In the context of public international law, Martti Koskenniemi has shown that international legal arguments contain a tension between “concreteness” and “normativity.” On one hand, legal arguments have to be derived from “facts” (i.e., what states do). On the other hand, they have to persuade their audience that they indicate what states should do.\(^\text{223}\) International legal indeterminacy means that one can construct a sound international legal argument to justify any possible decision. According to Koskenniemi, international legal indeterminacy is not an accident. Rather, it serves to mediate political conflicts among the various actors involved in making international law.\(^\text{224}\)

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\(^{220}\) Koskenniemi, *Apology*, supra note 217 at 590-591.

\(^{221}\) Duncan Kennedy, “Form and Substance in Private Law Adjudication” (1976) 89 Harv. L. Rev. 1685.

\(^{222}\) Duncan Kennedy, “Blackstone,” supra note 216 at 214-217.

\(^{223}\) Koskenniemi, *Apology*, supra note 217 at 573-574. This tension is played out most clearly in attempts to explain international law in terms of sovereignty/subjects (concrete) or sources (normative). Most textbook introductions to international law start with one of these, but then quickly have to explain how it is dependent on/related to the other. This tensions are replicated once again within each of these categories. In disputes about sovereignty (often about disputed territory), arguments oscillate between “title” (law, normativity) and “effectivités” (fact, concreteness): *Ibid.* at 580. In disputes about sources (often about the validity of treaties), arguments oscillate between “consent” (concreteness) and “justice” (normativity): *Ibid.* at 588.

\(^{224}\) *Ibid.* at 590-591. Koskenniemi notes that the absence of a supreme international legal authority adds to international law’s indeterminacy. Whereas the indeterminate meanings of domestic legal rules are stabilized
Despite law’s indeterminacy, legal actors and institutions give law practical meaning in particular instances. An important strand of critical scholarship has therefore focused on describing such actors and institutions. In *A Critique of Adjudication*, Duncan Kennedy observes that the answer to any legal question depends on the actors who will answer it and the institutional context in which they work.\(^{225}\)

Likewise, Koskenniemi explains that his analysis of international legal indeterminacy refers only to the way decisions are *justified*. Indeterminacy does not help explain how legal decisions are actually *made*. In fact, just the opposite: indeterminacy demonstrates that legal decisions cannot be explained by the formal arguments made to justify them. Something else is needed to explain them.\(^{226}\)

To explain how international legal decisions are made, Koskenniemi argues, it is necessary to examine the actors and institutions responsible for making these decisions. International legal actors frequently understand that a particular institution will resolve indeterminacies in a particular way. For example, although the WTO treaties refer to both trade liberalization and social protections, the WTO generally prioritizes trade liberalization. Koskenniemi calls this kind of institutional orientation a “structural bias.”\(^{227}\) Koskenniemi and other critical international lawyers have undertaken detailed studies of particular international organizations and functional regimes to identify their structural biases. For example, in one of the earliest such studies, David Kennedy showed how the establishment of the League of Nations “universalize[d] the nineteenth-century system of interlocking treaties of security” and marginalized the work of more radical pacifists who had endorsed the creation of the institution.\(^{228}\)

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\(^{227}\) Koskenniemi, *Apology*, supra note 217 at 600-615.

\(^{228}\) David Kennedy, “Institutions,” *supra* note 15 at 890.
I use the concept of indeterminacy to explain at least three aspects of my case studies. First, in all three cases, I describe how Canadian legislation with regard to international issues has been influenced by competing claims of non-discrimination and sovereignty (or non-intervention). Indeed, in the studies of environmental assessment (chapter 4) and Canada’s Access to Medicines Regime (chapter 5), such claims were explicitly invoked by government officials and parliamentarians during the corresponding legislative debates. Nevertheless, the analysis of indeterminacy helps to remind us that ideas such as “sovereignty” have no fixed content; instead, their meaning is a function of the entire panoply of laws and institutions through which they are operationalized.

Second, indeterminacy helps explain why the government’s interpretation of the Official Development Assistance Accountability Act differed so dramatically from that of its proponents (chapter 3). Many proponents of the Act believed that its reference to human rights implied a “social” approach to development assistance. However, the government interpreted this provision minimally, to render it consistent with an aid policy centred on security, economic growth, and commercial relationships. This case study shows how the meaning of human rights depends on the institutions charged with implementing them.

Third and finally, in my case study of Canada’s Access to Medicines Regime (chapter 5), I use the concept of indeterminacy to critically examine rights claims advanced by two sets of actors. On one side, patent-holding pharmaceutical companies (and their government allies) portrayed themselves as upholding intellectual property rights. On the other side, NGOs argued for access to medicines in terms of the right to health. However, as we have seen, the meaning of such rights depends on the legal and institutional context in which they are elaborated. And in the case of Canada’s Access to Medicines Regime, Canadian government actors had already internalized certain ideas about innovation, competitiveness, and incentives, which made them prioritize the interests of patent holders. The right to health therefore carried little weight in this context.

2.5.2.2 The Distributive Effects of Legal Rules

Another analytic technique that emerges from the work of the legal realists is an attention to law’s distributive consequences. As I have noted, Robert Hale analyzed law in terms of how it
enabled certain social groups to “coerce” others or endowed them with “bargaining power.” The creation and the application of law gives rise to conflicts in which there are winners and losers.

Distributive analyses of law are not the exclusive preserve of legal scholars; they are frequently undertaken, for example, by practicing lawyers, as well as by economists, political scientists, policy makers, and politicians. Nevertheless, in a post-realist era, they have come to play an important role in legal scholarship. Critical legal scholars, for example, have expanded on Hale’s approach by analyzing law in political-economic terms, showing how it effectively allocates costs, benefits, risks, and bargaining endowments.²²⁹

Distributive analyses require certain basic elements. First, they require the identification of some good (e.g., wealth, income, or property rights) or bad (e.g., costs or risks). Second, they require the identification of a relevant community or frame of reference within which the distribution of this good or bad can be analyzed (e.g. within a family or firm, within a national society, on a global scale). A third potentially relevant element is the identification of axes of distribution within such a frame of reference (e.g. gender, class, geographic region, generation).

Distributive analyses of law’s practical operation can be complex. One difficulty is that the distributive effects of a given rule do not operate in isolation. The potentially egalitarian effects of one rule (e.g., a labour law that allows a union to represent workers) may be neutralized by the effects of another (e.g., a property law that allows an employer to prevent union organizers from entering the workplace). A rule that equalizes distribution of some good within one frame of reference, or along one axis, may produce inequalities in terms of another.

Nevertheless, it is often possible to analyze particular rules and to identify how they allocate distributive stakes, for example between producers or consumers, capital or labour, husbands or wives. In Chapter 5, for example, I discuss the TRIPS Agreement, which gave effect to the global project of intellectual property rights. I cite distributive analyses conducted by other

²²⁹ Duncan Kennedy, “Hale and Foucault,” supra note 208. Some critical legal scholars have drawn on Marxist accounts of political economy, including an attention to class relations. However, critical legal scholars have generally rejected the classical Marxist notion that law is merely a “superstructure” reflecting and reproducing an economic “base.” Instead, they have argued that law helps to create the economic base, including its classes: Klare, “Praxis,” supra note 216.
scholars that show how this new set of rules produced a massive transfer of resources and wealth from people in the global South to large corporations in the United States and western Europe.

An awareness of conflict over resources and advantages has led some legal scholars to suggest that law can provide institutions or processes that can protect weaker parties while ensuring peace. Such ideas of equality, fairness, and social harmony were central to the jurisprudential vision of the 1950s legal process school. Since the end of the Cold War, similar ideas have been invoked by some international lawyers seeking to imagine a global order that is more cooperative as well as more just. Procedures are thus seen as a way of overcoming, or at least sidestepping, substantive political conflicts.

However, a recurring insight in post-realist legal scholarship is that procedural rules, too, have distributive consequences. They tend to allocate advantages and disadvantages, and thus bargaining power, to particular individuals or groups. For example, in the 1970s, Marc Galanter described how the structure of litigation in the United States tended to work to the advantage of “repeat players” (usually large, well-resourced organizations) at the expense of those who had only occasional reasons to go to court. Where there are deep social and economic inequalities, legal processes rarely “level the playing field”; sometimes they tilt it even more steeply.

Procedural rules feature heavily in the laws I examine in this dissertation. In all three of my case studies, Canadian legislators have established procedures that assign rights and obligations to various parties. These procedures can be understood as one way of managing the diverse moral and political claims made on behalf of persons outside Canada.

By applying a distributive analysis, I show that these procedures are not neutral. They work to the advantage of some actors rather than others. The procedures of Canada’s Access to Medicines Regime, for example, were designed to discourage its use by certain actors (generic


pharmaceutical companies), and thus to protect the interests of other actors (patent-holding pharmaceutical companies).

2.5.2.3 A Constitutive Understanding of Law

As I have noted, legal realists such as Robert Hale, Felix Cohen, and Morris Cohen analyzed legal concepts to show that these were, in theory, much more malleable and unstable than was generally assumed. They were critical of the fact that judges and lawyers often treated legal concepts as if these had an independent, natural existence. However, subsequent legal scholars have noted that indeterminate legal concepts may nevertheless permeate society’s common sense. For example, Robert Gordon has observed that it is difficult to describe society without employing legal concepts and distinctions such as employer/employee, landlord/tenant, shareholder/officer. Such insights suggest that law helps to constitute society itself; there is no such thing as a pre-existing social reality to which law is subsequently applied.

For some legal scholars, this constitutive understanding has meant analyzing law as a form of discourse: a form of symbolic communication that helps to shape what is understood as social reality. As Karl Klare writes, “Legal discourse shapes our beliefs about the experiences and capacities of the human species, our conceptions of justice, freedom and fulfillment, and our visions of the future. It informs our beliefs about how people learn about and treat themselves and others, how we come to hold values, and how we might construct the institutions through which we govern ourselves.” The analysis of law as discourse—how legal language implicitly endorses certain social arrangements and renders others unthinkable—thus plays an important role in post-realist legal scholarship.

Some legal scholars have also taken up Michel Foucault’s invitation to examine the practices of institutions as forms of discourse. Much of Foucault’s work was concerned with particular kinds of institutions—asylums, hospitals, prisons. Foucault showed how the concept of discourse can be expanded to include institutional practices of information-gathering, analysis, administration,

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and so on. These, too, may be seen as constitutive forms of symbolic communication. Foucault’s approaches can be seen as expanding the potential reach of a constitutive understanding of law. (However, some caution is in order here. Foucault adopted a radically decentralized—and reciprocal—understanding of power.234 His accounts of institutions were meant to show the dispersed and productive nature of power, not the pervasiveness of state authority. A certain tension therefore exists between Foucault’s account of institutions and disciplinary power and some legal scholars’ accounts of the constitutive role of law.235)

Foucault’s understanding of the power/knowledge nexus also led him into an exploration of the relationship between institutions and forms of knowledge: for example, the relationship between the creation of penitentiaries and the science of criminology.236 Following Foucault, some scholars have therefore explored how legal decisions are often informed by other forms of expert knowledge (e.g., medical, psychiatric, economic or financial). They have also explored how legal institutions generate their own kinds of knowledge. For example, Mariana Valverde describes how institutions combine legal expertise with what is posited as “common knowledge,” giving rise to hybrid forms of “administrative knowledge,” conferring epistemological authority on low-level officials.237

Some post-realist international lawyers have also considered the constitutive effects of international law and organizations. Certain international legal concepts, such as territorial sovereignty and human rights, have entered into popular consciousness and helped to shape people’s understandings of the world and of themselves. Moreover, as international organizations undertake a wide range of governance activities, ranging from scientific research to economic assistance to military invasion, their discourses and their practices also have constitutive qualities.238

238 See e.g. David Kennedy, Dark Sides, supra note 118.
Along similar lines, Martti Koskenniemi suggests that the diversification and expansion of public international law has been accompanied by a trend toward “managerialism” in international governance. A managerial approach replaces the formal application of law with problem-solving on the basis of “interests” and “objectives.” But as Koskenniemi argues, notions such as “interests” and “objectives” are indeterminate. And in order to resolve these indeterminacies, managerial governance relies on certain forms of expertise, such as those related to economics, health, environment, or security—and is shaped by the assumptions that inform each of these kinds of expertise.  

David Kennedy has provided a detailed model for analyzing the role of expert decision-making in global governance. Kennedy starts from the proposition that most people imagine global governance in terms of law- and decision-making by politicians, diplomats, and other high officials. Kennedy refers to this as the “foreground” of global governance. Kennedy notes that this foreground is generally thought to be situated within a “context” of objects and circumstances: laypersons, culture, facts, public opinion, the real world. However, between foreground and context, Kennedy identifies the existence of an intermediate level, which he identifies as the “background.” According to Kennedy, this background consists of experts and their practices of knowledge and representation. These practices may appear in the guise of research, recommendations, or policy advice. As Kennedy notes, it is part of these experts’ professional ethos to deny that their work is “political.” However, experts within a given field or discipline share common assumptions about the “context,” and through their knowledge practices, they are often able to shape others’ understandings accordingly. Experts are thus often able to structure the possibilities for decision-makers in the “foreground.”

In this dissertation, I have applied such analyses of discourse and knowledge practices to the Canadian laws I study. These forms of analysis are most salient in my case study of the Official Development Assistance Accountability Act (chapter 3). In this case study, I consider how discourses such as “development” and “poverty reduction,” combined with the knowledge


practices of international organizations, have helped to define possibilities for social change in the global South. I argue that the ODA Accountability Act reflects a localized Canadian expression of these global forms of managerial governance. I build on this analysis in my case study of environmental assessment (chapter 4), where I describe environmental assessment as an additional expert-driven knowledge practice that has been grafted onto processes of development assistance.

Discourse analysis also plays a role in my discussion of Canada’s Access to Medicines Regime (chapter 5). As I have noted, I argue in this case study that patent law is indeterminate. However, I also argue that the discourse of “intellectual property rights” nevertheless played an important role in shaping the outcome of the legislative process in question. Although there is nothing transcendent or natural about patents, many Canadian legislators and government officials acted as if there were.

### 2.5.2.4 “Background” Rules and the Public/Private Distinction

The insight that law both allocates material stakes and helps to constitute social relations implies that laws that are explicitly declared to address a particular issue (such as immigration law or education law) are not the only laws relevant to that issue—perhaps not even the most important ones. Other laws that remain taken for granted—lingering as it were in the “background”—may have more profound effects. In particular, the rules of private law (property, contract, etc.) may have important social and economic consequences. For this reason, post-realist legal scholars have often brought these “background” rules into the foreground so that they can be critically examined. They have also challenged the public/private distinction that tends to portray these laws as neutral and apolitical.

Early twentieth-century realists like Robert Hale brought the “background” rules of private law into the foreground by highlighting their distributive consequences. Post-realist legal scholars have analyzed private law rules in both distributive and constitutive terms. They have also problematized the public/private distinction itself. For example, Frances Olsen has shown how law helps to structure both the market and the family as “private” spheres which are meant to be
In this way, law reproduces the public/private distinction and shapes its practical meaning. Likewise, Karl Klare has shown how key doctrines of U.S. labour law turn on the characterization of certain activities as “public” or “private.” Although some doctrines appear to favour workers while others seem pro-management, the ultimate prerogative of management rights is never questioned. The public/private distinction thus reinforces an assumption that management must have the power to determine the organization of production.

Post-realist scholars of international law have combined distributive and constitutive approaches in their analyses of international law’s “background rules.” They have shown how international law operates in tandem with other legal structures—most notably, the “private” law of property and commercial transactions—that have important distributive and constitutive effects. Formal international legal institutions often treat these “private” matters as if they were natural features of the landscape, having little in common with important political questions. But this, too is a political choice, with a legitimating effect of its own.

International lawyers have also shown that the location of the public/private boundary has important distributive and constitutive implications. For example, Dan Danielsen has described the relationship between “private” regulation by corporations and “public” regulation by governments, showing how corporate legal strategies can have an influence on official lawmaking as well as a direct impact on consumers. Conversely, Robert Wai has described how the “commercial activity” exception to the doctrine of sovereign immunity effectively “privatizes” state-owned enterprises for the purposes of litigation, aligning them with the market rather than the state. Because this exception is often invoked by Northern corporations doing business with Southern states, it is consistent with Northern economic domination.

242 Klare, “Public/Private,” supra note 233.
international law have thus shown the ambiguities of the public/private distinction, while also highlighting ways in which it continues to be recruited and mobilized. At the international scale, as at the domestic scale, the public/private distinction appears to be at once obsolete and yet strangely resilient.

The analysis of “background” rules, and the critique of the public/private distinction, plays a small but significant role in my dissertation. In my case study of environmental assessment laws (chapter 4), I show how these laws assume, and reproduce, a sharp distinction between publicly-sponsored projects and those located in the private sector. Publicly-sponsored projects have generally been subject to requirements of disclosure and transparency from which “private” projects are exempt. In this and in other ways, the applicable legislative regimes draw attention to the politics of public projects while portraying private projects as apolitical and consensual.

2.5.2.5 Alternative Histories

Another important analytic technique of post-realist legal scholarship has been an attention to history. Legal discourse is often informed by historical narratives; these narratives are sometimes misleading. Post-realist legal scholars have tried to offer more accurate historical perspectives by calling attention to anomalous data or by constructing alternative histories.\textsuperscript{246}

This technique has also been used in public international law. For example, in \textit{The Gentle Civilizer of Nations}, Martti Koskenniemi showed how a small group of European liberal intellectuals invented the discipline and the profession of international law in the late nineteenth century. Koskenniemi suggests that international legal doctrines and institutions have been shaped by the political views of these individuals and their followers. Koskenniemi also suggests that the European liberal vision of international law has largely been displaced, since the 1960s, by U.S. managerialism and the discipline of international relations.\textsuperscript{247}

TWAIL scholars have likewise provided an alternative history of international law. In the mainstream liberal narrative, international law is said to have been invented to ensure peace

\textsuperscript{246} Gordon, "Histories," \textit{supra} note 232.

among European sovereigns and only subsequently universalized. However, TWAIL scholars argue that colonial encounters have been central to the development of international law since the sixteenth century. TWAIL scholars contend that international law has always been concerned with the management of cultural difference, and that the inequalities inscribed in colonial versions of international law are still present in today’s international law, albeit in subtler forms.\(^{248}\)

I have emphasized history in my case studies in this dissertation. In particular, in my analysis of the Official Development Assistance Accountability Act (chapter 3), I have drawn on the work of TWAIL scholars to consider the colonial origins of development assistance. I have also drawn on the work of historians who have charted successive shifts in aid policy, and on the work of anthropologists who have explored the practical operation of development assistance. I suggest that a proper understanding of the Act requires an awareness of its historical antecedents. The terms it uses have a long history. And past uses of these terms provide clues as to their contemporary significance.

2.5.3 Normative Implications

My dissertation thus subjects Canadian internationalist law reforms to multiple forms of legal analysis. However, these analyses are not purely descriptive. They also carry normative implications. In general, all of these forms of analysis imply that the current legal and institutional configuration is not natural or inevitable, and that other arrangements are possible.

The demonstration of indeterminacy shows that legal concepts (such as sovereignty or human rights) should not be understood as obstacles to legal and political change. The politics of law come from the way legal concepts are interpreted and applied, not from the concepts themselves. It is possible to reinterpret these concepts, to assign them other meanings. (However, challenging the meanings of such concepts will likely require challenging the institutions that interpret and apply them.)

\(^{248}\) See generally Anghie, supra note 155.
The analysis of law’s distributive effects also has potentially destabilizing consequences. Legal rules are frequently justified in terms of “efficiency” or “public policy,” implying a societally optimal result. By identifying how these rules nevertheless produce winners and losers, legal analysis can challenge the sense of inevitability that accompanies such justifications. Such an analysis can also be applied to procedural arrangements, calling into question the neutrality of procedural rules.

The analysis of law’s constitutive effects can help to demonstrate the artificial and contingent nature of particular social categories. Legal analysis can help to “expose obviously ideological contrivances for what they are and develop arguments based on utopian counterpossibilities of the system.” Legal analysis may serve as a form of ideology critique, seeking to uncover the hidden assumptions of legal discourse and expose them to closer scrutiny. Likewise, the analysis of “background” rules, and the critique of the public/private distinction, can help to challenge the assumption—implicit in a great deal of liberal political and economic thought—that “private” economic relations are politically neutral.

Finally, the retelling of history can also entail a challenge to the status quo. As Robert Gordon has noted, popular legal-historical narratives often take the form of “evolutionary functionalism”: the notion that societies have needs, that societies evolve along a progressive path, and that the law adapts to meet these changing needs. Legal scholars’ alternative histories may problematize “evolutionary functionalism” by demonstrating the contingency of current social, political, and economic arrangements.

250 See e.g. Klare, “Praxis,” supra note 216.
251 Gordon, “Histories,” supra note 232 at 96-100. This approach to history bears affinities with Foucault’s method of “genealogy.” Foucault rejected the impulse to identify the “origins” of particular discourses and practices. Instead, he offered a mode of research and writing that sought to identify the diverse and chaotic sources of the present moment. Foucault often highlighted marginal events and characters in order to show the contingency of those that had been accorded a central place in mainstream narratives. Foucault pleaded for an “effective” approach to history, which would seek to relativize current arrangements and destabilize them by highlighting their injustices: Michel Foucault, “Nietzsche, Genealogy, History” in Paul Rabinow, ed., The Foucault Reader (New York: Pantheon, 1984) 76.
In short, all of the analytic techniques I employ can help to recover the political dimensions of law. They may help to highlight latent injustices. And they show that such injustices can, in principle, be overcome.

However, I do not employ these techniques with a specific political outcome in mind. Instead, I have imagined this study as a critical enterprise, in keeping with the account of critique offered by Wendy Brown and Janet Halley. As Brown and Halley explain, the purpose of critique is not to solve a problem but to uncover background assumptions and other hidden factors that might help to explain how the problem arose.252

Although I hope that the ideas in this dissertation might help to inform political action, I do not offer any detailed proposals for law reform. This reluctance to offer prepared solutions is partly what I have in mind when I identify this dissertation as a critical enterprise. As Brown and Halley note, political activists often make the mistake of grabbing hold of whatever legal and institutional tools are most readily available. Such a use of established laws and institutions often requires activists to translate political grievances into terms that correspond to those of existing laws and that are intelligible to people in positions of power. This translation process often has the effect of distorting unique and important aspects of the initial political grievance—leading to a sense of futility and frustration.253

There is no necessary contradiction between critical analysis and political mobilization. The kind of understanding achieved through critique can sometimes be deployed in reconstructive efforts. But how it might be deployed is a separate question: a question of political strategy. The choice of a political strategy involves political judgment; it is a question of agency, power, interests, timing, and legitimacy.254 And the feasibility of any political strategy depends on one’s social location. As James Ferguson has observed, the question of “what is to be done?” always invites


253 Ibid. at 16-19.

254 Geuss, supra note 11 at 21-36.
another question: “By whom?” Proposals for law reform must therefore be addressed—implicitly or explicitly—to some audience.

I have no special insight to offer in matters of political strategy. Moreover, even if I thought I knew how to overcome the injustices described here, I would loath to say who should do it. Instead, I offer my analysis for the purpose of reflection. I hope that this reflection may contribute to progressive change, but I leave it to others to determine how.

Chapter 3:

The Official Development Assistance Accountability Act

3.1 Introduction

In 2008, Canada’s Parliament enacted the Official Development Assistance Accountability Act, the first statute to deal explicitly with the substance of Canadian foreign aid programs.¹ This law requires cabinet ministers responsible for the provision of Canadian aid to be of the opinion that this aid contributes to poverty reduction, takes into account the perspectives of the poor, and conforms to international human rights standards. It also mandates a series of reports in which the government is meant to document its compliance with these requirements.

Proponents of the ODA Accountability Act argued that this legislation required the government to focus aid on social issues and to direct it toward the poorest countries and people.² However, since the Act has come into force, the government has shifted Canadian aid policies in the opposite direction, using aid to promote economic growth and to advance Canadian economic and security interests. Aid policies have changed, but not in the ways the Act’s proponents had hoped. Nevertheless, the government maintains that its policies are, and have always been, fully compliant with the Act.

This chapter describes how these various actors understood the design of the ODA Accountability Act and explains what is at stake in its interpretation. It does this by situating the ODA Accountability Act within a global “field” of development assistance. The Act’s proponents borrowed discourses and norms from this field, hoping to push Canadian aid policy in a more “social” direction. At the same time, the proponents also imagined social development as an essentially technical, expert-driven enterprise. This case study of the ODA Accountability Act therefore highlights some of the primary themes of this dissertation: the use of imported models

to structure Canadian responses to international issues, and the reliance on expert-led governance.

I begin my analysis in part 3.2 by describing development assistance as a field of global governance in which wealthier nations provide material resources and technical knowledge to poorer countries. I also outline major policy debates that have occurred within this field, concerning the substance of aid as well as the governance of aid institutions and processes of aid delivery. Finally, I discuss the role of scientific knowledge and technical expertise in development assistance. The expert-led nature of development assistance raises certain distributive and democratic concerns, as well as concerns about the way concepts such as “development” are constituted.

In part 3.3, I take a closer look at three global trends that influenced the creation of the *ODA Accountability Act*. First, since the late 1990s, the OECD’s Development Assistance Committee has led a campaign to focus aid on certain social and economic priorities and to improve the “effectiveness” of aid processes. Second, aid reforms in the United Kingdom, including the use of domestic legislation, have been celebrated as a success story. Third, in 2005, NGOs had led a global campaign to mobilize public opinion around the issue of poverty. All of these trends can be understood as efforts to defend social and economic priorities from attempts to diminish aid or divert it for other purposes.

In part 3.4, I set the domestic stage for the drama surrounding the *ODA Accountability Act*. Within the Canadian federal government, responsibility for aid is divided among several institutions. Reformers have long sought to enact legislation to give a clearer mandate to the institutions they favour. Between 2006 and 2008, an unusual set of political circumstances—a minority government elected on a platform of “accountability”—created a limited opening for such reformers.

In part 3.5, I explain how these trends coalesced in the creation and subsequent interpretation of the *ODA Accountability Act*. The campaign for the *ODA Accountability Act* was led by NGOs who hoped to push aid policy in a more “social” direction. They tried to express their views through the use of terms such as “poverty reduction,” which they borrowed from the development assistance field. On some level, the proponents imagined the meanings of these elements to be rather certain. However, on another level, the proponents fully understood that...
these discourses and norms were highly indeterminate—that they could equally be interpreted to favour other policy choices. They therefore looked to expert-led forms of governance to safeguard their preferred policy approaches.

The data in this chapter is derived from a variety of documentary sources, including legislation, parliamentary debates, government reports, NGO advocacy materials, and newspaper articles. It is also derived from two dozen semi-structured interviews. Between March and September 2009, I interviewed three current or former members of Parliament, eight NGO staff members or volunteers, and thirteen government officials. I initially solicited interviews with people who had been publicly involved in the creation of the Act. I asked these participants to recommend others, and I followed some of their leads. Most of the interviews took place in Ottawa-Gatineau, at the offices of the participants. I conducted telephone interviews in two cases where arranging a face-to-face meeting proved impossible.

3.2 The Development Assistance Field

Development assistance consists of a set of practices whereby the people and governments of wealthier countries provide money and goods, technical expertise, and policy prescriptions to the people and governments of poorer countries. These practices are explicitly linked to the goals of fostering economic growth and reducing poverty—both understood as components of “development.” The actors participating in development assistance are extremely diverse, including government bureaucracies, international organizations, and NGOs. However, many of these actors understand themselves as part of a common enterprise. The constant interactions among these actors—including their shared discourses and their reliance on similar kinds of knowledge—make it appropriate to speak of them as a single “field.”

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3 My use of the term “field” is loosely borrowed from the work of Pierre Bourdieu, although it is not my intention to adhere to a Bourdieuan methodology. For Bourdieu, a field meant a socially patterned set of practices: Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field” (1987) 38 Hastings L.J. 814. Actors within a field often disagree about policies and compete with one another for influence, but they share certain values, concepts, forms of expertise, characteristic behaviours, and understandings of what they are doing. To describe a given field, it is important to consider all of these elements as well as the relations among them. A good illustration can be found in Nicolas Guilhot’s application of Bourdieu’s concept of the “field” to human rights and democracy promotion: Nicolas Guilhot, The Democracy Makers: Human Rights and International Order. (New York: Columbia University Press, 2005) at 23.
I begin this part of the chapter by describing this development assistance field (in section 3.2.1). I locate the historical origins of “development” discourse. I note the range of actors involved in development assistance, including governments, international organizations, and NGOs. I outline how these actors’ policies have shifted over the decades. Finally, I examine how these actors have generated certain explicit norms.

In the following sections, I explain two normative debates that frequently arise within and around the development assistance field. One set of debates, which I analyze in section 3.2.2, has to do with the distributive orientation of development assistance: Who should benefit from aid? Globally? Locally? What principles should inform these allocations? Should aid be purely altruistic, or should donor countries be able to benefit from their provision of aid? The other set of debates, which I examine in section 3.2.3, has to do with the way aid is governed: Who should be in charge of development assistance? What kind of relationship should donor institutions have with the people affected by their activities? To what extent are democratic principles applicable to the provision of aid?

In section 3.2.4, I examine the role of scientific knowledge and technical expertise in development assistance. Using David Kennedy’s distinction between “foreground” and “background” aspects of global governance, I observe that many important political choices in the development assistance field are made by experts ostensibly applying their knowledge in an impartial manner. I suggest that this expert-led nature of development assistance raises normative questions related to the distributive and democratic issues discussed in the previous section. However, I also argue that this reliance on expertise raises its own, distinct set of normative concerns. Although development experts disagree on many issues, they tend to share a professional vocabulary as well as certain assumptions about the nature of economic and social change. I argue that this vocabulary and these assumptions have the effect of constraining possible ways of thinking about global justice.

The different types of normative concerns I identify are interrelated in complex ways. Paradoxically, those who have championed “social” approaches to development, which are seen

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as most equitable in distributive terms, have often been the most enthusiastic supporters of the application of expert knowledge—an approach which raises doubts about development’s democratic credentials. (To be fair, proponents of “economic” development have also relied heavily on expert knowledge.) It can therefore be difficult to say which approach to aid policy is the most consistent with values of democracy and distribution.

Before proceeding, a note on terminology. The concept of “development” is much broader than the concept of “development assistance.” “Development” is used in discussions of economic activity at every conceivable scale; it may have an international dimension, or it may not. “Development assistance,” however, refers to a particular field of global governance, one of whose defining features is the international transfer of resources. I have tried to be consistent in my use of these terms. For the sake of brevity, I sometimes use the term “aid” as a substitute for “development assistance,” and I sometimes refer to “donor institutions” rather than “development assistance institutions.” However, it is my intention to treat these latter terms as synonyms.

### 3.2.1 Actors, Practices, Policies, and Norms

Development is a metaphor. Etymologically, development refers to the release of a stored-up potential. Its root is “the opposite of wrapping or bundling – thus unfold, unroll.” In the late nineteenth century, Europeans began to apply this metaphor to economic matters. They also began to use it transitively: economic development was something that could be actively promoted.

Antecedents to development assistance can be found in European attempts to pursue economic development in their colonial territories. For example, Frederick Lugard, an important British official in Africa in the late nineteenth and early twentieth centuries, called for long-term investments in plantations, mines, railways, and ports. He argued that such investments would ultimately benefit both Africans and Europeans. Lugard theorized colonial development as serving a “dual mandate”: it was meant to enhance commerce while also spreading the benefits

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5 Raymond Williams, *Keywords: A Vocabulary of Culture and Society*, rev’d ed. (New York: Oxford University Press, 1983) at 102.
This turn to development implied a rejection of earlier forms of colonialism based on plunder (or mere trade). As Antony Anghie has summarized it, “the native was no longer merely to be conquered and dispossessed; rather, he was to be made more productive.”

Lugard’s idea of a “dual mandate” was formalized after the First World War in the Covenant of the League of Nations. The Covenant declared that “[t]he wellbeing and development” of “peoples not yet able to stand by themselves under the strenuous conditions of the modern world….form a sacred trust of civilisation.” It thus established a system of mandates whereby the victorious powers would assume the administration of colonial territories seized from Germany and Turkey. The League of Nations also set up a Permanent Mandates Commission (PMC) to supervise the mandatory powers. (Lugard served as the British representative on the PMC.) The establishment of the PMC foreshadowed a much broader international institutionalization of development that would occur after the Second World War. The PMC’s practices of information-gathering, statistical analysis, and representation would later be imitated by other international development institutions.

Following the Second World War, this idea of development was applied outside the colonial context, in the form of aid to sovereign states: in other words, “development assistance.” In his 1949 inaugural address, U.S. President Harry Truman announced a program of “technical assistance” for “underdeveloped areas.” Most of this assistance would go to independent states in Latin America, Asia, and Africa (many of which had just recently acquired formal sovereignty). U.S. technical assistance was clearly motivated by Cold War strategy. It was meant to induce other countries to adopt a capitalist economic model and to align themselves with the U.S. against the Soviet Union. Nevertheless, states were categorized according to their levels of development, and aid was described as a remedy for “underdevelopment.”

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8 *Covenant of the League of Nations*, 29 April 1919, UKTS 1919 No 4, Art. 22.


One corollary of this concept of “development assistance” was that development acquired a humanitarian quality; it was associated with the relief of poverty. Underdeveloped countries were identified as those with an annual per capita income of less than US$100. Economic development was thus assumed to be the means to reduce poverty. Whereas the League Covenant had distinguished between “development” and “wellbeing,” the two parts of the dual mandate were now merged.

From the 1940s onward, development assistance was massively expanded, globalized, and institutionalized. The World Bank, founded at Bretton Woods in 1944 along with the International Monetary Fund (IMF), came to play an important role in development assistance. The United Nations joined in the effort as well. Many of the UN’s specialized agencies, such as the Food and Agriculture Organisation (FAO), the World Health Organisation (WHO), and the United Nations Children’s Fund (Unicef), became important channels of development assistance. Most Western countries (including Canada) also established their own bilateral aid agencies during the 1950s and ’60s. Private foundations, academic research institutes, and NGOs (such as World Vision and Oxfam) also became significant actors in the development assistance field.

As the development assistance field expanded, the types of practices pursued in its name became more varied. During the immediate postwar era, “technical assistance” had largely been directed toward modernization, industrialization, and the accumulation of capital. It focused on economic planning and the construction of heavy infrastructure such as hydroelectric dams and railways. Although this effort was oriented toward the relief of poverty, economic growth was assumed to be the means to reduce poverty. Development was measured in terms of concepts such as gross national product (GNP) and per capita income.

However, during the 1960s and ’70s, development assistance acquired a more explicit “social” dimension. The United Nations and the World Bank began to fund programs meant to improve

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education, health, and nutrition—and to measure development in terms of corresponding statistics. Under the leadership of Robert McNamara, World Bank policies emphasized the fulfillment of “basic human needs.” Some donor institutions also began to pay attention to issues of population growth, gender, and the environment. This turn to “social” development was partly a response to Third World demands for a more just and equitable global economic order. From the perspective of donor countries, the “social” turn was also based on a projection of domestic political values. As these countries became more prosperous and consolidated their national welfare states, some domestic political constituencies argued that democratic and distributive principles should apply internationally.14

In the 1980s, the development assistance field was transformed by the neoliberal project of market-led economic growth. As discussed in Chapter 2, neoliberals argued that economic development depended on the efficient operation of markets, underpinned by a standard package of economic policies: the “Washington consensus.”15 The World Bank and the IMF imposed these policies on many Southern countries as conditions for financial assistance.

During the 1990s, the failure of neoliberal policies to produce economic growth led to a “post-Washington consensus,” reflecting a kind of “chastened” neoliberalism.16 Post-Washington consensus policies often included the promotion of law reforms, especially in areas such as property law, contract law, and the organization of courts.17 This turn to law reform initially reflected economic concerns, as economists began to acknowledge that markets (and market-led economic growth) depend on “governance” through laws and other institutions.18

16 David Kennedy, “Common Sense,” supra note 13 at 150.  
18 Ibrahim Shihata, The World Bank in A Changing World: Selected Essays (Dordrecht: Martinus Nijhoff, 1991). This turn was influenced by the work of Douglass North and other practitioners of the “new institutional
Around the mid-1990s, this “governance” agenda converged with a renewed emphasis on “social” concerns. In practical terms, economists and social development advocates agreed on such matters as the protection of civil and political rights, the independence of the judiciary, and the elimination of corruption. The convergence of these agendas had the effect of broadening the range of law reform programs; in the late 1990s, the World Bank expanded its governance agenda to include social issues such as gender equality, labour standards, and the environment. But this convergence also helped to moderate the social agenda.\(^{19}\)

As discussed in Chapter 2, the 1970s and 1980s had seen the growth and consolidation of an international human rights movement. By the late 1990s, when social concerns acquired renewed prominence within the development assistance field, many development actors understood these concerns in terms of human rights. Some donor institutions approached the social agenda in terms of “human rights mainstreaming.” In 1997, UN Secretary General Kofi Annan directed all UN agencies to “mainstream” human rights into their work. In 2003, UN agencies reached a “Common Understanding” on human rights-based approaches to development.\(^{20}\) Many national and international development agencies have also embraced this concept. “Human rights-based approaches” are said to include attention to inclusivity and non-discrimination in the provision of aid, participation in decision-making, and accountability through national and international mechanisms.

During the 1990s, donor institutions also became more involved in security-related activities. Security, understood in terms of diplomatic alliances, had been a major rationale for aid since the 1940s. However, after the Cold War, the people and governments of donor countries became more anxious about “failed states,” refugee flows, and the threat of terrorism. The September

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2001 attacks in the United States gave these concerns overwhelming political force. On one hand, development institutions became heavily implicated in the re-establishment of civil order in post-conflict societies, strengthening police forces and criminal courts. At the same time, economic development and social programs (and accompanying law reform programs) were justified as security measures, necessary to stave off state failure.²¹

Alongside their policies and practices, development assistance institutions have also generated explicit norms and standards. These norms have often taken the form of international declarations. Some of them are also accompanied by mechanisms for monitoring compliance.

Perhaps the most widely recognized norm in the development assistance field is the notion that donor countries should provide aid worth at least 0.7 percent of their gross national income (GNI). This figure was recommended in 1969 by the World Bank’s Commission on International Development, chaired by Lester B. Pearson. At the time, donor countries’ total aid flows represented approximately 0.39 percent of their gross national product. The Pearson Commission urged donor countries to attain the 0.7 percent target by 1975.²² Donor and recipient countries subsequently endorsed this target in a UN General Assembly resolution.²³ Only a few donor countries have ever attained this 0.7 percent target, and the deadline for achieving it has been extended many times.²⁴ Nevertheless, advocates for development assistance continue to invoke the 0.7 percent figure as a common standard.

One of the development assistance field’s most widely-accepted standards is the definition of “official development assistance.” OECD donor countries have defined this term to refer to official aid flows that are “administered with the promotion of the economic development and welfare of developing countries as its main objective” and are “concessional in character,” with a

²⁴ Sweden, the Netherlands, Norway, Denmark, and Luxembourg are the only DAC donor countries to have consistently reached this target. Canada’s aid peaked at 0.53 percent of gross national income in 1975-76: David R. Morrison, Aid and Ebb Tide: A History of CIDA and Canadian Development Assistance (Waterloo, Ont.: Wilfrid Laurier University Press, 1998) at 453.
grant element of at least 25%. Under this definition, ODA can come in almost any form; the most significant exclusion is military aid. This definition is used to measure donor countries’ progress toward the 0.7 percent target.

The most influential norms to emerge from the development assistance field in recent years originated in a 1996 report by the OECD’s Development Assistance Committee (DAC), entitled “Shaping the 21st Century.” In this report, the DAC argued that aid should be focused on a limited list of quantifiable goals: halving the number of people living in poverty, universalizing primary education, eliminating gender disparities in primary and secondary education, reducing child mortality, improving maternal health, and achieving environmental sustainability. In 2000, these goals (along with two others: halting the spread of HIV/AIDS, malaria, and tuberculosis, and creating a global partnership for development) were incorporated into the United Nations Millennium Declaration. The governments of 189 countries thus declared their intention to achieve these goals by 2015. Since 2000, governments and development institutions have frequently referred to these Millennium Development Goals (MDGs) as setting a direction for development policy. The MDGs are also accompanied by several dozen “targets” and “indicators,” which the UN has used as the basis for annual progress reports.

In addition to these substantive goals, the DAC’s “Shaping the 21st Century” report proposed a series of reforms to aid institutions and processes. These reforms were later enshrined in another


normative instrument, the Paris Declaration on Aid Effectiveness, which I describe in section 3.3.1, below.

The development assistance field thus consists of a loose assortment of institutions undertaking a variety of policy priorities. Moreover, the policy goals pursued by donor institutions are often in tension. Methods of achieving these goals, their relative priority, the relationship among them, and their relationship to other values have been subjects of considerable debate. Nevertheless, development assistance institutions work out these differences through a common set of discourses, practices, and norms.

### 3.2.2 Substantive Aid Policy Debates

The diversity of goals pursued by different actors within the development assistance field has given rise to a number of classic policy debates. One of these debates concerns substantive issues. Who should receive aid? And to what extent is it acceptable for donors to use aid to advance their own interests? Positions in these debates within Western donor countries have historically mapped onto a left-right spectrum. Social democrats have generally argued for a needs-based and altruistic approach to aid. Conservatives have argued that aid should serve the commercial and security interests of the donor country. Liberals have been somewhere in between.

One basic choice facing aid donors is where to send their aid. If aid is seen as a mechanism for redistribution, it would make sense to channel aid to the poorest countries (such as those on the UN’s list of “least developed countries”). However, as we have seen, donor countries also provide aid for security reasons. For this reason, many donor countries direct their aid to strategic allies, or to governments that they wish to support. Donor countries also use aid to build trade and investment relationships. For this reason, many donor countries direct their aid toward middle-income countries (i.e., “emerging markets”), which generally provide greater commercial opportunities than the poorest countries. Geographical proximity and historical ties (such as previous colonial relationships) also influence the allocation of aid.

Within a given recipient country, there are further choices to make. What form should aid take, and how should it benefit particular groups within a national society? Such choices have important distributive consequences. As I noted earlier, the development assistance projects of
the 1940s and ’50s were largely oriented toward economic growth. Such projects do not necessarily produce more equal distributions. To take a classic example, the building of a dam may bring aggregate benefits to a national economy in terms of hydroelectricity or irrigation, but it imposes severe costs on people and communities whose homes are flooded. Likewise, the “structural adjustment programs” of the 1980s and ’90s, while ostensibly meant to create the conditions for market-led economic growth, deprived many poor people of jobs and social benefits.31 “Social” development policies, which provide direct benefits to the poor (often in the form of services such as health care or education), are generally thought to have more progressive outcomes.

Aid policy choices therefore have important distributive consequences for recipients. They also have distributive consequences for donors. One ongoing policy debate in the development assistance field has concerned the ways donor countries may benefit from the aid they provide. I have already mentioned how donor countries use aid to promote their national interests, understood in terms of security or commercial advantage. However, aid may also provide benefits in a much more direct sense. Donor countries often use aid to subsidize domestic firms. (Much aid has historically been “tied” to procurement from donor country producers.) Aid also provides lucrative and prestigious employment for technical experts from donor countries.

Different positions in these distributive debates have historically corresponded to different points on the political spectrum.32 Those on the political right have generally been indifferent to questions of distribution among countries, groups, and individuals. Instead, adopting a “realist” approach to foreign policy, they have argued that aid should serve the commercial and security interests of the donor country.33 They have therefore favoured the use of aid for propping up friendly regimes, securing commercial advantages, or providing symbolic expressions of wealth, power, and benevolence.


33 See e.g. Keith Spicer, A Samaritan State? External Aid in Canada’s Foreign Policy (Toronto: University of Toronto Press, 1966); Samuel P. Huntington, “Foreign Aid for What and for Whom” (Winter 1970-71) Foreign Policy 161; Samuel P. Huntington, “Foreign Aid for What and for Whom (II)” (Spring 1971) Foreign Policy 114.
Closer to the political centre, liberal internationalists have generally seen aid as a way of promoting economic growth, which they imagine will benefit donor as well as recipient countries through expanded trade. However, liberal internationalists have generally acknowledged that prosperity depends on economic participation, and that the poor may require aid during the initial stages of economic growth. They have therefore supported a modestly redistributive approach to aid (at a global as well as a local scale). In principle, liberal internationalists oppose the use of aid as a subsidy to particular firms or industries, seeing these as market distortions.

To the left of centre, social-democratic internationalists have championed the idea that aid should be allocated according to need. Unlike liberal internationalists, they have explicitly associated aid with the reduction of international economic inequalities, and drawn an analogy between aid and the redistributive institutions of the welfare state. They have therefore promoted “social” forms of aid and argued that these should be undertaken primarily in the poorest countries. They have also argued that donors should behave altruistically. They are critical of the pursuit of commercial and security interests through aid, because they see these as likely to involve departures from a needs-based allocation. However, in some sense, social-democratic internationalists share liberal internationalists’ view that aid is in the long-term self-interest of donor countries. Projecting the domestic politics of social democracy onto the international scale, social-democratic internationalists endorse redistribution because it is the right thing to do and because it might help to stave off depression, war, and revolution.

The different political orientations I have identified—international realism, liberal internationalism, and social-democratic internationalism—are meant as ideal types; they are not mutually exclusive. In practice, different orientations frequently overlap. On one hand, international realists and liberal internationalists share a belief that aid should strengthen trading relationships, and that specific aid allocations can legitimately make both donors and recipients better off. On the other hand, liberal internationalists and social-democratic internationalists share a sense that wealthy countries should be concerned with the welfare of the poor, and that poverty reduction is in the long-term self-interest of the rich countries. This appearance of a

consensus between liberal and social-democratic internationalists is also enhanced by the discursive conflation of economic growth and poverty reduction. Liberal and social-democratic internationalists agree on the goal of “development,” even if they define it differently.

In practice, development assistance policies have reflected elements of each of these visions. Aid has gone to poor countries as well as middle-income countries; it has been used for status symbols as well as social programs (sometimes both at once). Moreover, due to the diffuse, heterogeneous nature of the development assistance field, it is difficult to generalize about the distributive effects of aid. For example, in a study of a rural development project in India, the anthropologist David Mosse concluded that this project did produce tangible benefits for thousands of poor villagers—but largely in “unscripted” ways. The distributive effects of development assistance practices must be considered at this “micro” level as well as at a global scale.

### 3.2.3 Institutional and Procedural Debates

Another important set of debates within the development assistance field concerns the governance of aid institutions and the processes of aid delivery. The institutions that manage development assistance are largely controlled by donor countries. Critics inside and outside the field have argued that such arrangements are undemocratic. However, when actors within the development assistance field acknowledge such critiques, their responses often tend to blur these process issues with substantive debates discussed in the previous section. Instead of treating process issues as intrinsically important, donor institutions have often treated such issues as if they were simply proxies for debates about the proper uses of aid. This blurring of process and substance can be observed in donor institutions’ reliance on informal mechanisms for “participation.”

Donor country control of development institutions is most obvious in the case of the national agencies that provide “bilateral” aid to Southern countries. Aid transfers have often enabled donor countries to intervene in recipient countries’ domestic policies. Some donors are able to

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exert enormous influence over recipient states’ domestic policies, through formal conditionalities or more subtle modes of influence. In some Southern countries, development assistance has contributed to long-term patterns of dependency and deference.  

The delivery of aid through international organizations is sometimes portrayed as more neutral—less politicized—than bilateral aid. However, many international development assistance organizations are dominated by donor countries. For example, on the governing bodies of World Bank—the largest multilateral development agency in terms of amounts disbursed—voting shares are allocated according to a complex formula loosely based on countries’ levels of investment in the Bank. On the Executive Board of the International Bank for Reconstruction and Development (the Bank’s largest lending arm), the United States controls over 16% of the vote, whereas the countries of sub-Saharan Africa collectively have just over 5% of the vote. Moreover, the U.S. government is able to influence the World Bank’s policies and lending decisions through informal contacts or threats of political retaliation. And since the World Bank was founded, its presidents have always been U.S. citizens, nominated by the U.S. government.

Another important donor-controlled organization is the OECD’s Development Assistance Committee. Headquartered in Paris, the OECD is an association of 34 (mainly Western)


countries “committed to democracy and the market economy.”[^41] The OECD conducts technical analyses, sets standards, and issues recommendations on a wide variety of policy issues. With its decentralized administrative structure, it has been described as “an amalgam of a rich man’s club, a management consulting firm for governments, and a legislative body.”[^42] Within the OECD, the Development Assistance Committee (DAC) is the main point of intersection among Western countries’ bilateral aid agencies.[^43] The DAC provides a forum where donor countries can discuss aid policies and try to reach consensus, resulting in non-binding policy recommendations. DAC members submit their aid programs to detailed “peer reviews,” conducted by development experts from other donor countries. The DAC is also where donor countries negotiate their common definition of “official development assistance.”

I noted earlier that development assistance has been institutionalized through the United Nations and its specialized agencies. The governance of the UN of course combines widely representative structures (such as the General Assembly) with more exclusive, hierarchical ones (such as the Security Council).

These institutional arrangements have sometimes been contested in terms of democracy or representation. For example, during the 1960s and 70s, Southern countries led a campaign to establish more equitable institutions for global economic governance. This campaign, known as the movement for a New International Economic Order (NIEO), sought to expand the UN’s role in development, including the establishment of a UN-administered Special Fund for Development. NIEO reformers also demanded changes in the governance of the World Bank.

However, actors within the development assistance field are generally reluctant to respond directly to such institutional critiques. Instead, they tend to sidestep such issues by collapsing them into substantive debates. Thus, institutional democracy deficits are only acknowledged to be problematic insofar as these give rise to misuses and maldistributions of aid. Better aid is

[^41]: OECD, “Members and Partners” online: <http://www.oecd.org/document/25/0,3746,en_36734052_36761800_36999961_1_1_1_1,00.html>.


[^43]: OECD, “The Development Assistance Committee (DAC)’s Mandate,” online: <http://www.oecd.org/document/62/0,3343,en_2649_33721_1918654_1_1_1_1,00.html>. 
presented as the answer. Participants in the field also sidestep such critiques by appealing to the
good intentions behind aid programs. It is revealing that donor institutions seldom describe aid
programs as interventions with consequent implications for recipient countries’ sovereignty. This
relaxed attitude stands in sharp contrast to the careful attention paid to sovereignty in other
policy areas, such as military intervention.⁴⁴

Of course, in formal terms, development interventions are consistent with recipient country
sovereignty—they are premised on recipient countries’ consent. Some recipient states have
signed bilateral treaties with donor countries.⁴⁵ Recipient states (as well as donor states) have
also signed multilateral treaties establishing international organizations such as the World Bank.
Recipient states have concluded agreements with such international organizations specifying the
terms of loans and other forms of development assistance. (Because such international
organizations have international legal personality, these agreements have the status of treaties
under public international law.⁴⁶) Development projects carried out by “private” entities such as
NGOs are subject to recipient countries’ domestic laws.

But in practice, the concept of sovereignty is rarely invoked in the development assistance field,
except when a recipient country’s government strongly objects to a donor country’s policy. It is
widely recognized that the vast sums of money wielded by donor institutions make it difficult for
some Southern countries’ peoples and governments to express their sovereignty too vigorously—
or to exercise genuine autonomy over their policy choices. A formal concept of consent only
serves to mask enormous differences in bargaining power.

A more common response to institutional and procedural concerns within the development
assistance field has been to solicit the informal “participation” of aid recipients. The discourse of
participation became prominent in the early 1980s. It was initially associated with a “social”

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⁴⁴ See e.g. International Commission on Intervention and State Sovereignty, The Responsibility to Protect (Ottawa:
International Development Research Centre, 2001); see also Philip Alston & Euan Macdonald, eds., Human Rights,

⁴⁵ See e.g. Canada and Jamaica, Development Co-operation Agreement, 5 May 1975, Can TS 1975 No 13; General
Agreement on development co-operation between the Government of Canada and the Government of the Republic of
South Africa, 23 November 2006.

Cours 9 at 113-117.
approach to aid. It was promoted by actors who were critical of bureaucratic practices and sought to reform development assistance by dispersing power to its beneficiaries. As the anthropologists Andrea Cornwall and Karen Brock explain, subsequent approaches to development assistance, including neoliberal market-based reforms and the “good governance” agenda, have also invoked the idea of participation in various ways.

Development assistance organizations now employ a range of participatory methodologies with names such as Participatory Rural Appraisal, Rapid Rural Appraisal, and Participatory Action Research. These methods frequently involve surveys, public meetings, and other activities designed to gather input from individuals and communities affected by aid interventions. These methods are justified on a number of grounds. They are imagined to give aid recipients a meaningful voice in aid projects. They also supply donor institutions with useful information, and they are thought to increase recipients’ level of commitment to aid projects.

However, participatory methods have also been heavily criticized. One concern is that participatory methods may produce a façade of consensus, masking power relations and political conflicts within the recipient community. Another concern is that participatory methods are unlikely to alter the underlying relationship between donors and recipients. Donor institutions using participatory methods usually retain ultimate decision-making authority. Participatory methods are often highly informal; they rely heavily on experts and leave important matters up to their discretion. There are therefore concerns that participatory methods may serve as rituals to produce an appearance of democratization while in fact reinforcing existing power relations.

Similar criticisms have been leveled at attempts to democratize aid through human-rights-based approaches. Taken at face value, human rights-based approaches would seem to incorporate egalitarianism as well a challenge to power structures. However, critics have also warned that human rights mainstreaming may have the effect of subordinating human rights to other

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Development assistance therefore generally suffers from a democratic deficit. This democratic deficit is linked to distributive concerns. However, for analytic purposes, it is important to separate the two—something participants in the field are often reluctant to do.

However, as in the preceding discussion of distributive debates, it is important to add a disclaimer. Most of this analysis of donor institutions is based on official practices and representations. But David Mosse warns us not to take development institutions’ policy statements at face value, arguing that these may serve less to direct action than to validate ongoing activities and maintain relationships.\footnote{Mosse, \textit{Cultivating}, supra note 36 at 153-156} As Mosse explains, large development organizations have only a limited ability to exercise centralized, hierarchical forms of power. Mosse suggests that the development field contains myriad opportunities for agency and resistance.\footnote{Ibid. at 6-11; see also James Ferguson, \textit{The Anti-Politics Machine: “Development,” Depoliticization, and Bureaucratic Power in Lesotho} (Minneapolis: University of Minnesota Press, 1994) at 280-282.} Or, as Mosse puts it, “the hegemonic potential of international aid is always limited by this autonomy of practice from policy (and policy from practice).”\footnote{David Mosse, “Global Governance and the Ethnography of International Aid” in David Mosse & David Lewis, eds., \textit{The Aid Effect: Giving and Governing in International Development} (London: Pluto Press, 2005) at 23.}

3.2.4 In the Background: Knowledge and Expertise

The use of specialized forms of knowledge in the development assistance field raises an additional set of issues. Donor institutions have historically produced, and relied upon, various kinds of specialized knowledge. Such uses of knowledge give rise to distributive and democratic
concerns similar to those I have just highlighted. However, the expert-driven nature of development assistance also gives rise to its own set of concerns, having to do with the way social and economic issues and problems are constructed. For most actors in the development assistance field, such concerns remain in the “background”: They are taken for granted and rarely confronted.

Specialized forms of knowledge have always played an important role in development assistance.\footnote{For a brief history of the uses of knowledge in development assistance, see David Kennedy, “Common Sense,” supra note 13.} During the immediate postwar era, when aid was based on planning and modernization theory, donor institutions relied heavily on macroeconomics. Within the economics discipline, a specialized subfield of “development economics” was created. Engineers also held a prominent role: They were needed to build dams, highways, and other infrastructure.

The expansion of development assistance into “social” concerns in the 1960s and ’70s implied the relevance of additional kinds of expertise, including medical doctors, public health specialists, biologists, demographers, statisticians, sociologists, and anthropologists. Within the academy, new interdisciplinary “development studies” programs reflected this holistic approach. In the neoliberal revolution of the 1980s, microeconomics became dominant. The “governance” agenda of the 1990s made room for lawyers, and so on.

Development assistance institutions not only rely on disciplinary expertise, they also generate their own, technical forms of knowledge. In some respects, development knowledge is diverse and localized. Donor institutions maintain offices around the world and send their professional staff on visits to remote locations. They employ locally-hired staff who are able act as mediators between “headquarters” and “the field.” They also celebrate the idea of diversity. For example, at the end of the 1990s, the World Bank’s chief economist, Joseph Stiglitz, criticized the “one size fits all” nature of structural adjustment reforms and argued for policies that would be more tailored to local society, politics, and institutions.\footnote{Joseph E. Stiglitz, “Whither Reform? Ten Years of the Transition” (Paper prepared for the Annual Bank Conference on Development Economics, Washington, D.C., 28-30 April 1999), online: <http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814010799/stiglitz.pdf>; see also David Kennedy “Common Sense,” supra note 13 at 154-155.} Likewise, CIDA’s 2002 Policy on
Strengthening Aid Effectiveness condemned structural adjustment for failing “to recognize the cultural and political context in which development takes place” and declared that “there is no single path to development.”

However, donor institutions also produce (and rely upon) standardized, universalistic forms of knowledge. Donor institutions generate macro-level statistical measures, such as per capita income, infant mortality rates, daily caloric intake, life expectancy, and literacy. In recent years, development institutions have aggregated such quantitative, statistical information into a variety of indicators, indices, and rankings. Perhaps the best known is the UNDP’s Human Development Index, which aggregates data for income, education and life expectancy. Such forms of knowledge create a sense that disparate local circumstances are essentially commensurable. They also imply the possibility of policy models and “best practices”: If a policy is considered successful, development institutions may attempt to “scale it up” or replicate it elsewhere. Policy debates within the development assistance field often occur at this more general level. Such forms of knowledge imply a devaluation of particularistic, local knowledge.

Within the development assistance field, there is a close relationship between the use of specialized knowledge, on one hand, and the pursuit of economic or social policy goals. If aid is understood in realist terms, as a way of cementing alliances or obtaining access to markets and

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61 See e.g. UN Millennium Project, online: <http://www.unmillenniumproject.org/>.
62 British colonial officials who stayed on in Africa to assist with development experienced a devaluation of the particularistic knowledge that colonial governments had prized (e.g. knowledge of specific societies, peoples, and languages). This knowledge ceded its place to more general economic and statistical knowledge: Uma Kothari, “From Colonialism to Development: Reflections of Former Colonial Officers” (2006) 44 Commonwealth & Comparative Politics 118. At times, donor institutions have pretended to take local society and culture seriously, only to subordinate these to a broader narrative of development and modernization. For example, a World Bank study portrayed Lesotho as an aboriginal, peasant society, entirely disregarding Lesotho’s economic reliance on remittances from migrant workers: Ferguson, supra note 54 at 25-73.
resources for the donor country, then scientific knowledge is relatively unimportant. But to the extent that aid has been understood as a means of generating economic growth, reducing poverty, responding to needs, or fulfilling rights, it has relied upon specialized expertise.

Aid institutions’ uses of specialized knowledge, and the role of experts within them, give rise to certain normative concerns. Some of these concerns are linked to the distributive issues already discussed. For example, acquisition of the kinds of knowledge required by development assistance institutions requires training in elite universities, most of which are located in Northern countries. Access to such universities is unevenly distributed. Reliance on specialized knowledge may therefore exacerbate certain forms of maldistribution.

Likewise, the centralization of knowledge production in unrepresentative institutions may exacerbate concerns about these institutions’ democratic deficits. For example, the influence of the World Bank goes far beyond its disbursement of funds. The World Bank is also a global trendsetter for development policy. Together, the World Bank and the IMF employ several thousand economists. As the political scientist Ngaire Woods has observed, “All this collective brain power, applied to a wealth of information about most economies in the world, and state-of-the-art theorizing about economics cannot fail to have a dynamism of its own.”63 (Conversely, it is widely understood that many recipient country governments lack “policy-making capacity” and are therefore dependent on donor institutions for expertise as well as money. 64)

Moreover, the specialized knowledge produced by donor institutions may have important disciplinary effects. I have already noted that the use of aggregate statistical data tends to promote the sense that disparate local circumstances are commensurable. However, it may also send an implicit message that some countries’ policies are better than others, and thus deserve to be emulated. The identification of “models” and “best practices” also creates a sense that recipient countries must follow certain paths to development. The UNDP’s Human Development Index (HDI) provides a good example of a such a disciplinary practice. The HDI implicitly endorses the policies of countries that rank higher on the list and recommends these policies as

64 De Renzio, Whitfield & Bergamaschi, supra note 37 at 2-3.
models. Donor institutions with undemocratic governance structures may exercise a great deal of power through their ability to generate standardized forms of knowledge (and thus standard policy models).

Another way in which expert knowledge raises democratic concerns is the possibility that the gathering of local, particularistic data may serve as a form of surveillance. From the right wing of the political spectrum, some have even advanced surveillance as a justification for aid. For example, in the 1960s, the Canadian political scientist Keith Spicer argued that aid programs should lead:

…to understanding of the developing nations’ real needs, hopes, fears, prejudices, interests and expectations; to understanding of their mentality, their culture, their society, their government; to understanding, in sum, of their peoples—at every level of life, humble and exalted, to which the day-to-day operations of aid assure a donor access. For aid is the ideal door to dialogue with the peoples of developing nations; it offers a natural, believable excuse to study them at close hand; it provides, through shared experience in their most fundamental long-range preoccupation, concrete and varied opportunities to assess their motivations.

Some critics on the left have concluded that surveillance is a principal motivation for aid. Balakrishnan Rajagopal, for example, has suggested that donor institutions’ turn to social issues, rural development, and “basic human needs” in the 1960s and ’70s was a part a counter-insurgency strategy meant to anticipate and pre-empt such peasant uprisings as had occurred in Cuba and Vietnam. (Moreover, by the 1970s, many Third World governments were actively engaged in the New International Economic Order project. For both of these reasons, it suited donors to bypass Third World governments and work more directly with the poor.)

However, the knowledge involved in development assistance also raises normative concerns that are independent of concerns about distribution or democracy. In explaining this additional set of

65 Merry, supra note 59.
66 Spicer, supra note 33 at 51.
67 Rajagopal, supra note 9 at 104-106.
68 David Kennedy, “Common Sense,” supra note 13 at 115-117.
normative concerns, I find it helpful to invoke David Kennedy’s distinction between “foreground” and “background” aspects of global governance, discussed in Chapter 2. As David Kennedy has himself demonstrated, this model of thinking about global governance is highly applicable to development assistance. The politics of development assistance do not only occur at the “foreground” level of budgetary allocations or of struggles for institutional control. The specialized knowledge created and deployed by development experts also has important political implications—even if the normal practice of development assistance experts is to deny the political nature of their work.

The most important political dimension of development knowledge arises from its discursive effects: how it constructs the universe of social and economic issues, what it renders visible, and what it obscures. Development knowledge, and development “common sense,” makes some kinds of political choices easy and others hard, even unthinkable.

Some discursive effects of development assistance flow from the very idea of “development.” The metaphor of development implies a narrative of evolutionary progress or maturation. It therefore presumes a fundamental inequality: some countries are more developed than others. As post-colonial scholars like Antony Anghie have observed, the inequality inherent in the concept of development was mapped onto an older, Eurocentric distinction between “civilized” and “uncivilized” peoples.

However, as we have seen, the discourse of “development” is also rather indeterminate. Donor institutions pursue a wide range of policy approaches. The practical meaning of development is a function of the way these institutions generate and rely upon policies, norms, and decisions, as well as specialized forms of knowledge.

71 See e.g. W.W. Rostow, The Stages of Economic Growth: A Non-Communist Manifesto (Cambridge: Cambridge University Press, 1960); Sachs, supra note 34 at 18-20 (using the metaphor of a “ladder of economic development”).
72 In the development assistance field, countries are typically categorized according to stages of development: See e.g. United Nations, “Least Developed Countries: Historical Background” online: <http://www.un.org/events/ldc3/prepcom/history.htm>.
73 Anghie, supra note 7 at 203-204.
One well-known discursive effect of development knowledge is a kind of “methodological nationalism.” Development institutions normally aggregate social and economic statistics at the scale of the nation-state. In development discourse, wealth or poverty are frequently explained as consequences of national policies. Such explanations focus development interventions on local or domestic policies and practices. They obscure the causal role of global economic forces, and they divert attention from proposals to address poverty and inequality through global economic regulation or redistribution.

Another important discursive quality of development knowledge is its sense of time. As the anthropologist David Lewis has observed, donor institutions tend to emphasize the present and to look toward the future. They pay little attention to the past. Project cycles and staff postings operate according to short time-frames. Ahistoricism is characteristic of particular development programs (which discount local histories and contexts) as well as the development field as a whole (which ignores its own history). This ahistoricism is related to what the anthropologist James C. Scott calls “high modernism”: the past is seen as an obstacle to be overcome on the way to a better future. However, one effect of this ahistoricism is to exclude any consideration of colonial history, or the possibility that international transfers should be take such past injustices into account.

Another concern about development assistance knowledge is that its standard measures of social and economic development tend to use the countries of Western Europe and North America as baselines. Through such knowledge practices, donor institutions tend to enshrine Western-style economic growth and modernization as a universal model. These practices have the effect of

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75 Thomas Pogge, World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms (Cambridge: Polity, 2002) at 139-144.


77 Ibid. at 33-34.

excluding alternative social visions rooted in identity, culture, or tradition, as well as alternative economic visions based on solidarity and collectivism.\textsuperscript{79}

There is one additional reason to be concerned about the expert-led nature of development assistance. As David Kennedy has observed, the practice of expert governance normally involves a denial of responsibility, a sense that the most important political choices lie elsewhere. Such a professional sensibility may inhibit experts from confronting the consequences of their actions; it may even prevent them from understanding basic political realities.\textsuperscript{80} For example, in a study of a livestock program in Lesotho, the anthropologist James Ferguson describes how donor agencies were willfully blind to the fact that aid funds were being directed so as to strengthen the apparatus of the state and the ruling party. Aid officials recognized the “failure” of the project, but they were unable to acknowledge, much less confront, the fact that some actors succeeded in getting exactly what they wanted.\textsuperscript{81} Such distortions of political energy and initiative are a final reason for normative concern about the development assistance enterprise.

### 3.3 Aid Reforms, Accountability, and Effectiveness

Since the mid-1990s, certain actors within the development assistance field—most notably in the OECD’s Development Assistance Committee—have led a movement for the reform of donor institutions and aid practices. In general, these reformers have sought to defend the development assistance field’s “social” and “economic” priorities. In doing so, however, reformers have embraced a discourse of “effectiveness,” firmly aligning themselves with an expert-led approach to development. Occasional references to “accountability” have been comparatively weak.

During roughly the same period, a similar process occurred within the domestic politics of the United Kingdom. The use of aid as an inducement for the purchase of weapons gave rise to a backlash, strengthening the position of those promoting a “social” approach to aid. These

\textsuperscript{79} The idea of “development” has in fact been appropriated and syncretistically reinvented in many different cultural and political contexts: Escobar, \textit{supra} note 11 at 47-52; Rajagopal, \textit{supra} note 9 at 233-271. But these are not necessarily part of the development \textit{assistance} field.


\textsuperscript{81} Ferguson, \textit{supra} note 54 at 255-256.
reformers sought and obtained legislation enshrining “poverty reduction” as the purpose of aid. However, these reformers largely ignored democratic questions or “background” issues.

These reform processes had a direct influence on the *ODA Accountability Act*. The DAC’s reform agenda boosted attention to management processes, as well as the appeal of discourses such as “accountability,” within the development assistance field. The British legislation was widely praised as a model for aid reform, and served as a blueprint for the Canadian legislation. In order to understand the *ODA Accountability Act*, it is therefore helpful to understand these antecedents.

It is also helpful to understand a third trend. In 2005, NGOs from around the world launched a “Global Call to Action Against Poverty.” This campaign mobilized millions of people around the world to participate in activities meant to highlight the issue of poverty. It also emboldened NGOs to demand reforms to aid practices. This exuberant moment also led indirectly to Canada’s *ODA Accountability Act*.

### 3.3.1 The DAC’s Reform Agenda

In the mid-1990s, there was a widespread sense of malaise in the development assistance field. Although the shortcomings of the 1980s neoliberal structural adjustment model were becoming apparent, no clear alternative paradigm had emerged to take its place. Furthermore, around the same time, many donor country governments slashed their aid budgets, leaving development assistance institutions with difficult programming decisions. These cuts were partly attributable to the recession of the early 1990s. They were also an indirect result of the collapse of the Soviet Union, which eliminated a major security rationale for Western donors.

The OECD’s Development Assistance Committee (DAC) responded to these circumstances in a report entitled “Shaping the 21st Century.” In this report, it proposed a series of reforms. The first part of this reform agenda involved focusing aid on a limited set of measurable outcomes

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82 David Kennedy, “Common Sense,” *supra* note 13 at 165.

(which would later be enshrined as the UN’s Millennium Development Goals). The second part of the DAC’s agenda consisted of reforms to the ways aid was managed. The DAC argued that development policies should be “locally owned” and that donors should work in “partnership” with recipient-country governments and NGOs. More specifically, it recommended a shift from small, specific “projects” to large-scale, multi-year “programs”; better coordination among donors to reduce overlap; and mechanisms to monitor the effects of aid.

The DAC’s reform agenda can be explained as an attempt to defend development assistance from outside threats—in particular, the threat of budget cuts. The DAC expressed its “deep concern that domestic preoccupations and budgetary pressures in some Member countries seriously jeopardise the international co-operation effort at a critical juncture.” The DAC sought to justify aid above all by demonstrating its effectiveness—i.e., that aid could achieve tangible outcomes, mainly in the “social” realm.

The DAC pursued its reform agenda throughout the late 1990s and early 2000s. Along the way, its proposals acquired more detail. This process culminated in the 2005 Paris Declaration on Aid Effectiveness. The Paris Declaration urges the delivery of aid through programs rather than projects. It exhorts donor countries to increase their reliance on recipient countries’ systems for procurement and financial management, to reduce the number of parallel implementation structures, and to undertake more joint field missions. It recommends mechanisms for transparency and reporting. It also endorses the untying of aid. The implementation of these and other reforms is to be measured according to a schedule of twelve progress indicators.

These detailed reform proposals are accompanied by discursive elements that convey the impression of equality between donors and recipients—or even of recipient-country leadership. Although not a legally binding instrument, the Paris Declaration mimics the form of a collective contract between aid donors and recipients (the latter referred to as “partner countries”). It is

85 Ibid. at 17.
86 Ibid. at 16.
87 OECD, “Paris Declaration on Aid Effectiveness,” online: <http://www.oecd.org/dataoecd/12/38/38245246.pdf> [Paris Declaration].
structured around five general principles: “ownership” (recipient countries are to “exercise effective leadership over their development policies”); “alignment” (donors are to “base their overall support on partner countries’ national development strategies, institutions and procedures”); “harmonization” (donors are to coordinate their activities to ensure their complementarity and avoid duplication); “managing for results” (“implementing aid in a way that focuses on the desired results and uses information to improve decision-making”); and finally, “mutual accountability” (“[d]onors and partners are accountable for development results”).

Upon closer examination, these principles are somewhat vague and potentially contradictory. They certainly do not point to an overall democratization of aid. The most evident tension is that between “harmonization,” on one hand, and “alignment” and “ownership,” on the other. For example, in Zambia and in Mozambique, donor countries have joined together to coordinate their dealings with recipient governments (in keeping with the principle of harmonization). But the collective power of donors may make it even more difficult for recipient governments to make indigenous policy choices. Harmonization may therefore be achieved at the expense of ownership and alignment.

The concept of “ownership” is itself ambiguous. On one hand, “ownership” sounds like a stronger version of “alignment”; it might even express values similar to sovereignty. On the other hand, “[o]wnership is often used by donors to mean commitment to policies, regardless of how those policies were chosen.” In the current understanding of country ownership, the IMF’s Poverty Reduction Strategy Papers (PRSPs) are taken to represent indigenous policy choices, even though the IMF is controlled by donor countries and the PRSP process is dominated by a small group of actors who have internalized certain policy models. The Paris Declaration relies on the existence of a PRSP as an indicator of country ownership.

91 Cornwall & Brock, *supra* note 48 at 1051-55.
The Paris Declaration mediates these tensions through concepts such as “partnership” and “mutual accountability.” “Partnership” evokes a sense of equality; it downplays the unequal power relations between donors and recipients. “Mutual accountability” implies that all forms of accountability are mutually supportive; it glosses over the possibility of conflict. Thus, the 2008 Accra Agenda for Action—the follow-up to the Paris Declaration—declared that “citizens and taxpayers of all countries expect to see the tangible results of development efforts… We will be accountable to each other and to our respective parliaments and governing bodies for these outcomes.”

But the most powerful way of mediating the tensions among all of these principles has been to instrumentalize them, to subordinate all of them to the overriding goal of “effectiveness.” As I have noted, concepts of “accountability,” “harmonization,” “alignment,” and “ownership” were united—alongside the concept of “managing for results”—in the 2005 Paris Declaration on Aid Effectiveness. The DAC’s aid effectiveness agenda has found widespread acceptance within the development assistance field. Over 100 countries, including both donors and recipients, now adhere to the Paris Declaration. Some have taken steps to integrate the DAC’s “aid effectiveness” ideas—or at least the discourse of effectiveness—into their domestic laws and policies. Canada’s CIDA, for example, announced a “Policy Statement on Strengthening Aid Effectiveness” in 2002. In a major policy speech in May 2009, Minister Beverley J. Oda declared that she had made effectiveness CIDA’s “top priority.”

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93 OECD, “Countries, Territories and Organisations Adhering to the Paris Declaration and AAA,” online: <http://www.oecd.org/document/22/0,3343,en_2649_3236398_36074966_1_1_1_1,00.html>.

94 CIDA effectiveness policy, supra note 58.

95 Oda explained effectiveness as “Efficiency to squeeze the most out of every dollar; Focus and priorities to maximize impact and results; and Greater transparency and accountability so that Canadians see how their tax dollars make a difference in the developing world: Canadian International Development Agency: “A New Effective Approach to Canadian Aid: Speaking Notes for the Honourable Beverley J. Oda Minister of International Cooperation at the Munk Centre for International Studies,” online: <http://www.acdi-cida.gc.ca/acdi-cida/acdi-cida.nsf/eng/NAT-5208469-GYW> [Oda Toronto speech].

Ineffectiveness is the most common source of popular doubt about aid in Canada: see OECD, “Canada: Development Assistance Committee (DAC) Peer Review,” online: <http://www.oecd.org/dataoecd/48/61/39515510.pdf> [DAC 2007 peer review of Canada] at 27. Canada stands out among donor countries for the proportion of people (67%) who both support aid programs and consider them a
review of CIDA was entitled “Strengthening Aid Effectiveness” and used CIDA’s 2002 Policy Statement on Strengthening Aid Effectiveness as its standard of measurement. Finally, the ODA Accountability Act contains an explicit reference to the Paris Declaration.

I have noted that the DAC’s reform agenda sidesteps the question of the democratization of aid. This is partly because of its vague and potentially contradictory appeals to a wide variety of principles. But it is also because its appeal to “effectiveness,” in the context of the development assistance field, implies an endorsement of expert-led governance. “Effectiveness” implies instrumental rationality, the achievement of mutually agreed goals. To speak of effectiveness is to assume that political questions have been settled and that only technical questions remain.

While largely instrumental, the DAC’s effectiveness agenda is also to some extent self-referential, emphasizing procedural changes without any clear link to purported outcomes. Most of the Paris Declaration’s indicators measure the implementation of bureaucratic changes rather than social or economic outcomes. For example, indicators include increasing the use of program-based approaches, increasing the use of recipient countries’ systems for procurement and financial management, reducing the number of parallel implementation structures, and undertaking more joint field missions and analysis. These procedural aspects of the aid effectiveness agenda confirm that development is the domain of a particular community of experts who know how to manage these processes.

The DAC’s reform agenda has been widely praised for helping to focus aid on core “social” priorities and for defending aid from budget cuts by restoring a sense of purpose to the

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97 Moreover, the DAC’s aid effectiveness agenda does little to challenge the “background” assumptions that have historically informed development assistance. Interestingly, “Shaping the 21st Century” did challenge these background assumptions in subtle ways. It raised questions about the “coherence” of donor countries’ policies toward the global South, hinting that donor countries bore some responsibility for global poverty and inequality; it implied that Northern countries should consider reducing their trade barriers and curtailing their arms exports: OECD, “Shaping,” supra note 27 at 18. However, these themes were dropped from subsequent DAC publications.
development assistance field. However, it did so by hewing closely to an expert-led model of development assistance. While it paid lip service to democracy in the form of values such as “accountability,” it largely subordinated these to instrumental goals.

3.3.2 Aid Reforms in the United Kingdom

Another prominent series of aid reforms occurred in the United Kingdom in the late 1990s and early 2000s. In this case, public outrage about an episode in which aid had been linked to arms sales provided a political opening for reformers who wanted to push aid in a more “social” direction. These actors undertook a variety of reforms, including the enactment of legislation specifying that aid must be used for the purpose of poverty reduction. However, as with the DAC, these reformers chose to sidestep issues of democracy, and to perpetuate an expert-driven model of development assistance. The U.K. experience is particularly relevant for this chapter because U.K. legislation served as the model for the ODA Accountability Act.

In the mid-1990s, a scandal involving the misuse of aid funds galvanized British public opinion about aid. In the late 1980s, the U.K. government had agreed to contribute £234 million toward the construction of a hydroelectric station in Malaysia, in spite of reports indicating that the dam would be inefficient. Around the same time, Malaysia purchased over £1 billion worth of weapons from the United Kingdom. An NGO, the World Development Movement, applied for judicial review of the aid decision, arguing that the true purpose of the aid funding was to provide an inducement for the sale of weapons. The High Court held that the funding for the dam did not qualify as a “sound development project” and thus failed to meet the statutory criteria for aid funding; it was, therefore, illegal. This “Pergau Dam affair,” as it came to be known, was a serious embarrassment to the Conservative government of John Major.

When Tony Blair’s Labour party came to power in 1997, it promised sweeping development assistance reforms. Clare Short, the new Secretary of State for International Development, insisted on full ministerial status and a voice in all British policies toward developing countries. The aid administration was separated from the Foreign Office and re-named the Department for International Development (DFID). A 1997 White Paper declared poverty reduction to be the

overall goal of aid policy. The U.K. also fully untied its aid from national procurement requirements, and increased the size of its aid programs.

During Blair’s second term, the U.K. Parliament enacted the *International Development Act 2002*. The *International Development Act 2002* is centred on the concept of poverty reduction. It empowers the Secretary of State to provide development assistance “if he is satisfied that the provision of the assistance is likely to contribute to a reduction in poverty.”\(^99\) This provision was meant to clarify the purpose of aid, to exclude extraneous considerations such as the arms sales that led to the Pergau Dam funding. Clare Short accordingly used the *International Development Act 2002* to convince her Cabinet colleagues to abandon a plan to make aid conditional on recipient countries’ acceptance of the return of asylum seekers.\(^100\) This legislation has been widely praised within the development assistance field. It is said to have boosted the morale of DFID staff by providing a clear sense of purpose.\(^101\) (A few years later, the government introduced legislation enshrining the goal of spending 0.7% of gross national income on aid by 2013.\(^102\))

The *International Development Act 2002* (and the accompanying package of aid reforms) can be seen as an attempt to promote a “social” (or redistributive) concept of aid. However, like the DAC’s reforms, the *International Development Act 2002* is largely indifferent to issues of democracy in the delivery of aid. As Patrick McAuslan has observed, the International Development Act 2002 centralizes authority in the office of the Secretary of State for International Development. It leaves most aid decisions up to her discretion, and makes it more difficult for courts to review these decisions.\(^103\)

The *International Development Act 2002* is also largely confined to “foreground” issues of development assistance. For example, it focuses on the provision and the use of aid, and is silent

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\(^99\) *International Development Act 2002* (U.K.), 2002, c. 1, s. 1(1).

\(^100\) Owen Barder, “Reforming Development Assistance: Lessons from the UK Experience,” online: Center for Global Development <http://www.cgdev.org/content/publications/detail/4371> at 19.

\(^101\) *Ibid* at 23.


on other kinds of political-economic relations between North and South. This limitation was vividly illustrated in 2002 when the government of Tanzania sought to buy an air traffic control system from the British company BAE Systems. From Clare Short’s perspective, this represented a wasteful use of money that should have been directed toward poverty reduction. Short unsuccessfully tried to convince her cabinet colleagues to block the sale. Defeated at the cabinet table, Short “punished” the Tanzanian government by withholding £10 million in promised aid.  

The Tanzanian air traffic control episode confirms Patrick McAuslan’s observations about centralized authority for aid funding under the International Development Act 2002. However, McAuslan’s critique of the International Development Act 2002 also revealingly illustrates the tensions among values within the development assistance field. Although McAuslan is critical of the Secretary of State’s centralized authority, he stops short of calling for democratization. Instead, he calls for more expert-led management. McAuslan argues that the International Development Act 2002 should have specified that British aid would be conditional on recipient governments’ commitment to poverty reduction, good governance and human rights. He explains:

Rather than just confer power on the Secretary of State to make subjective judgements about whether the provision of any particular form of development assistance will or will not contribute to a reduction in poverty, the Act should have made much more explicit the basic ground rules which will govern the provision and the withdrawal of assistance; the criteria which will be taken into account in determining whether to attach conditions to development assistance; and the duties of the Secretary of State to be accountable to Parliament for the manner in which assistance is provided and its effectiveness measured and evaluated.

McAuslan thus endorses the use of formal legal rules, but he sees these rules largely as bases for disciplinary practices, as ways of strengthening the U.K. government’s bargaining power when it

104 Ibid. at 597.
105 Ibid. at 587-595.
106 Ibid. at 600.
deals with recalcitrant Southern country governments. For government and critics alike, then, the ends justify the means; poverty reduction is thought to obviate concerns about power.

In the U.K., as in other donor countries, the main practical significance of development assistance legislation appears to be its ability to define the scope of the aid program vis-à-vis other government functions. If legislation defines aid in terms of redistribution or other “social” priorities, it may act as a firewall to protect aid funds from being diverted for uses that have more to do with security or commercial interests. In a 2005 report entitled Managing Aid, the DAC examined the arguments for and against donor country legislation for development:

A well-developed legislative basis has the advantages of transparency and of clarifying responsibilities among the various government entities that may be involved, as well as establishing development objectives as the main thrust of development cooperation for the whole system. On the other hand, countries with a less formalised legal basis may have more flexibility to act and this could be an advantage when trying to build coalitions between development agencies and other government entities whose policies and actions have an impact on development prospects in developing countries. 107

The DAC’s ambivalence with regard to donor country legislation is revealing. Although it appears that donor country legislation can help improve development assistance under some circumstances, there is no necessary relationship between legislation and better aid. As we have seen, the key discourses used in development assistance, such as “development” and “poverty reduction,” can be understood in many different ways, and development assistance actors have historically pursued a wide variety of policy purposes through aid. In the case of the U.K. reforms, “poverty reduction” served as a rallying cry for actors who shared a “social” vision of aid. But under other circumstances, and for other actors, “poverty reduction” could have quite different policy implications.

107 OECD, Managing Aid, supra note 88 at 24.
3.3.3 The Global Call to Action Against Poverty

Another international episode that helped to stimulate the creation of the ODA Accountability Act was a major 2005 NGO-led campaign, the “Global Call to Action against Poverty.” This campaign drew a surge of public and media attention to issues of global poverty, and it placed world leaders (including Canada’s Prime Minister Paul Martin) on the defensive. It also emboldened NGO representatives seeking to reform donor institutions.

The idea for a Global Call to Action Against Poverty came from the British NGO Oxfam. Oxfam sought a way to put pressure on governments in anticipation of two key events in 2005. The first of these was the July 2005 G8 summit in Gleneagles, Scotland. The summit would be hosted by British Prime Minister Tony Blair, a politician regarded as sympathetic to aid issues. The second was the September 2005 meeting of world leaders at the opening of the United Nations General Assembly in New York. At this meeting, world leaders planned to assess progress toward the Millennium Development Goals and agree on a future course of action.

Oxfam therefore convened a meeting of civil society representatives from around the world in Johannesburg, South Africa in September 2004. These NGOs prepared a statement calling not only for increased aid levels, but also for global institutional reforms such as unconditional debt cancellation and fairer terms of trade. The statement decried the Millennium Development Goals as an overly timid compromise. It called for enhanced global solidarity while also affirming Southern countries’ sovereignty. While invoking vast human needs to be met, the statement also mobilized the discourse of human rights.

The NGOs at the Johannesburg meeting devised a federal structure in which nationally organized campaigns would proceed in the context of a global campaign. The use of the slogan “Make Poverty History“ and the White Band symbol were also discussed, and later taken up by many national campaigns. The NGOs also selected a 15-member International Facilitation Group, a majority of whose members came from the Global South.

Over the next twelve months, the Global Call to Action Against Poverty brought about an impressive international mobilization and helped to foster public debate on the issue of global poverty. The NGOs involved in the campaign positioned themselves as outsiders, seeking to mobilize a “grassroots” consciousness. But they also aimed to bring about policy changes within
the development assistance field, seeking to maximize their influence on those in positions of power.

### 3.4 The Canadian Context

Development assistance has been part of Canadian official policy since the 1950s. Development assistance has also been institutionalized within the federal government—most importantly in the form of the Canadian International Development Agency (CIDA), established in 1968. Canada’s aid policies have historically been aligned with general trends in the development assistance field. However, the domestic institutional configuration has often meant that Canadian aid policy debates have taken the form of debates about institutional roles.

I begin this part of the chapter by describing this domestic setting (in section 3.4.1). Authority over Canadian development assistance is shared among several federal government departments and agencies. CIDA, the Canadian government’s main centre for development knowledge, also controls the largest share of the aid budget. However, the open-endedness of CIDA’s mandate has meant that other, more powerful departments have often sought to pressure CIDA to use its funds to promote Canadian commercial and security interests. Actors within the development assistance field have therefore frequently argued that CIDA requires a clearer statutory mandate to defend its focus on economic and/or social development.

In section 3.4.2, I briefly recount the conjunction of domestic political circumstances that enabled such a law reform to proceed. In the late 1990s, Jean Chrétien’s Liberal government sought to promote the visibility of the federal government in Quebec through a program of sponsorship for local events. The loose spending practices associated with this program gave rise to a scandal that tarnished the Liberal party with a reputation for corruption. In the 2006 election, the Conservative party, led by Stephen Harper, campaigned on a platform of “accountability,” portraying itself as an honest alternative to the Liberals. The Conservatives won the election, but they remained short of a majority in the House of Commons. This made it possible for other parties’ MPs to carry out legislative projects that clashed with the government’s agenda.
3.4.1 Canadian Aid Institutions and Policies

The story of Canadian development assistance conventionally begins with a 1950 summit in Colombo, attended by representatives of Canada, Britain, Australia, and New Zealand as well as the newly independent nations of India, Pakistan and Ceylon. Under the Colombo Plan, Commonwealth countries agreed to cooperate in programs of capital and technical assistance. The first Canadian aid program began the following year. During the 1950s, responsibility for aid was shared among a number of departments, including External Affairs and Trade and Commerce. In 1960, responsibility was transferred to a new External Aid Office, reporting to External Affairs. In 1968, the EAO’s name was changed to the Canadian International Development Agency (CIDA), reflecting aspirations for increased independence and a broader mandate.\(^\text{108}\)

CIDA, represented in Cabinet by the minister for international cooperation, is responsible for most of Canada’s aid budget (over $3.5 billion in ODA disbursements in 2009-10). In particular, CIDA oversees most of Canada’s bilateral aid (over $2.6 billion in 2009-10).\(^\text{109}\) CIDA has a staff of approximately 1,800.\(^\text{110}\) These workers are members of the federal civil service, and they may rotate to jobs in other government departments over the course of their careers. However, a large number of them choose to stay within CIDA, rotating instead between headquarters in Gatineau and overseas postings. CIDA is thus the Canadian government’s main centre for development knowledge and expertise.\(^\text{111}\) CIDA is also the Canadian government’s main link to the development assistance field. As the Auditor-General put it in her 2009 report on CIDA:

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\(^{\text{108}}\) Morrison, supra note 24 at 27-64.


\(^{\text{110}}\) Auditor General 2009 report on CIDA, supra note 96 at 5.

CIDA does not act alone. It is part of a larger development community, globally and at a country-specific level—a community that also influences CIDA’s programming. This community includes aid agencies from other donor countries, development banks, United Nations and other multilateral institutions, civil society and nongovernment organizations, and the governments of recipient countries.  

CIDA’s policies and practices have thus historically resembled those pursued by other donor institutions: they have been informed by liberal and/or social-democratic approaches to aid’s distributive questions; they have prioritized the achievement of economic and/or social development through the application of expert knowledge.

However, a number of other Canadian government actors and institutions also play key roles in development assistance. Historically, Canadian prime ministers have set the general direction of government policy, including aid policy. The Department of Finance determines the overall size of the aid budget. It is also responsible for Canada’s contributions to the Bretton Woods Institutions. The Department of Foreign Affairs and International Trade (DFAIT) runs certain bilateral programs, primarily in areas pertaining to security and post-conflict reconstruction. Multilaterally, DFAIT handles Canada’s relations with UN agencies. Canada’s contributions to the regional development banks are jointly managed by the Department of Finance, DFAIT and CIDA. The Department of National Defence is closely involved in the delivery of Canadian aid to Afghanistan and other conflict areas.

Unlike CIDA, these other government institutions have only loose relationships with the development assistance field. They have not always shared CIDA’s priorities for aid. They have pursued a variety of other priorities. The Department of Finance is responsible for Canada’s

112 Auditor General 2009 report on CIDA, supra note 96 at 8.
116 CIDA, 2008-09 summary report, supra note 111 at 22.
overall fiscal policy. DFAIT is in charge of Canadian foreign policy. When it comes to
development assistance, many of these other institutions prioritize the pursuit of Canadian
commercial or security interests. These departments have often tried to pressure CIDA to
channel its funding toward such goals—and they have often succeeded.

CIDA’s formal legal framework makes it vulnerable to such pressures. For one thing, like any
other federal cabinet minister, the minister for international cooperation holds office during
pleasure and can thus be removed by the prime minister at any time. 117 Likewise, if she 118 is to
maintain CIDA’s budgetary allocations, the minister for international cooperation must
cooperate with the minister of finance and other colleagues in cabinet. However, the minister for
international cooperation faces a unique set of constraints. The Department of Foreign Affairs
and International Trade Act makes it clear that CIDA is formally subordinate to the foreign
ministry. It assigns the minister of foreign affairs “control and supervision” over CIDA. 119 It also
states that the minister for international cooperation’s role is “to assist the Minister [of Foreign
Affairs] in carrying out the Minister’s responsibilities relating to the conduct of Canada’s
international relations.” 120

CIDA was established by order-in-council and does not have an enabling statute of its own.
CIDA’s legal mandate is therefore primarily a function of the spending authority it receives each
year in the annual Appropriation Acts—the budget. And the standard budgetary formulation is
extremely open-ended: CIDA is empowered to provide grants, contributions, and payments “for
international development assistance, international humanitarian assistance and other specified
purposes.” 121 CIDA therefore has discretionary spending authority over a large amount of

117 Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22 [DFAIT Act], s. 4.
118 From 1997 to 2012, Canada had six international cooperation ministers, all of them female. While this may
appear progressive, it also reinforces a gendered division of foreign policy labour: Kim Richard Nossal, Stéphane
Roussel & Stéphane Paquin, International Policy and Politics in Canada (Toronto: Pearson, 2011) at 221. This
series of female ministers ended with the appointment of Julian Fantino in 2012.
119 DFAIT Act, supra note 117, s. 10(2)(f).
120 Ibid., s. 4.
121 See e.g. Bill C-49, An Act for granting to Her Majesty certain sums of money for the federal public
administration for the financial year ending March 31, 2010, 2nd Sess., 40th Parl., 2009 (as passed by the House of
Commons, 19 June 2009) at 21.
money. Ministers and officials from other departments have often wanted a say in how this money is spent.

Intragovernmental pressures on CIDA have also taken the form of procedural requirements. CIDA is subject to many of the federal government’s standard financial controls, such as regulations on contracts, grants, and contributions. CIDA is also subject to periodic visits from the Auditor General. Some of CIDA’s procedural rigour is also self-imposed. Critics describe CIDA as bureaucratic, centralized and top-heavy, and preoccupied with reporting, auditing and evaluation.

Within this (substantively) loose framework, CIDA has at times exercised a considerable degree of autonomy, shaping aid policy according to its specialized expertise. Maurice Strong, the first president of CIDA, told a parliamentary committee in 1971:

> Again I learned—I was very naive in those days about government—that we were still a weak instrument compared to the strong departments. As soon as we started to crystallize legislation, I sensed that this was going to draw an awful lot of fire. Immediately we started to make our mandate explicit, the other departments were going to be operating to whittle it down…. I finally realized that the vague status we had was perhaps the best we could hope for at that time…. Although it’s true that we couldn’t state absolutely that our mandate gave us the right to do x or y, nor could anyone else say that our mandate did not give us that right.

More than twenty years later, Phillip Rawkins argued that CIDA officials were still fairly successful in resisting pressures from elsewhere in government:

> In the absence of a clear and realistic definition of policy, and because politicians and central agencies alike are not much

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122 Interestingly, the Treasury Board’s Government Contracts Regulations (issued under the Financial Administration Act) make certain allowances for CIDA. These rules generally require competitive bidding on any contract over $25,000, but allow CIDA to procure services up to $100,000 without a competition: Government Contracts Regulations, S.O.R./87-402, s. 6(b)(iii).

123 Morrison recounts how CIDA was for a time placed in a state of “virtual receivership” following an audit in 1976: Morrison, supra note 24 at 144.


125 Quoted in Morrison, supra note 24 at 63.
interested in the results of development assistance, middle-level and operating managers have enjoyed a wide measure of freedom in determining objectives and formulating guidelines for making things work.\textsuperscript{126}

Nevertheless, there is a widely shared sense that interdepartmental pressures prevent CIDA from making the best use of its expertise for the purposes of economic and/or social development. It is revealing that CIDA has never been able to articulate a comprehensive policy statement for Canadian development assistance. CIDA officials have tried to do so on at least three occasions (in 1975, 1988, and 1991). But in each case, these reforms were defeated or marginalized by opposition from elsewhere in government, especially from the foreign ministry.\textsuperscript{127}

For this reason, various actors seeking to defend CIDA’s emphasis on economic and/or social priorities have suggested that this objective could be achieved through legislative reforms. In 1987, a House of Commons committee called for legislation that would declare that “the primary purpose of Canadian official development assistance is to help the poorest countries and people of the world” and that “development objectives” must prevail over “other important foreign policy objectives.”\textsuperscript{128} This call for legislation was repeated in 1995 by a parliamentary Special Joint Committee.\textsuperscript{129} Finally, in 2007, a Senate Committee chaired by Hugh Segal issued a report containing a scathing critique of Canadian policies toward Africa, largely informed by liberal internationalist principles. This report recommended that CIDA should either be abolished, or given a clear statutory mandate.\textsuperscript{130}


\textsuperscript{127} Morisson, \textit{supra} note 24 at 119, 311-312, 339-342; Pratt, \textit{supra} note 32 at 343, 350, 358-359.


\textsuperscript{129} Morrison, \textit{supra} note 24 at 388, 395.

\textsuperscript{130} Standing Senate Committee on Foreign Affairs and International Trade, “Overcoming 40 Years of Failure: A New Road Map for Sub-Saharan Africa” online: <http://www.parl.gc.ca/39/1/palbus/commbus/senate/com-e/fore-e/rep-e/repafrie Feb07-e.pdf>.
3.4.2 The Sponsorship Scandal and Minority Government

In the early 2000s, the Canadian political establishment was rocked by a scandal. The scandal was an indirect result of the 1995 referendum in which the Quebec electorate had come close to voting for secession from Canada. In response, Jean Chrétien’s Liberal government had undertaken a massive campaign to ensure the visibility of federal symbols in Quebec, most notably through the sponsorship of community events. However, by the early 2000s, it was becoming clear that a great deal of money allocated for this purpose had been misspent or misdirected, and that high-ranking officials had overstepped their authority. Public and media attention became fixated on the scandal after a scathing report from Auditor General Sheila Fraser, delivered in February 2004.131

The sponsorship scandal led the Canadian electorate to deprive the Liberal party (now led by Prime Minister Paul Martin) of its Parliamentary majority in the 2004 elections, and to the victory of the Conservative party in the 2006 elections. Conservative politicians campaigned on a platform of “accountability,” and presented themselves as a clean alternative to a Liberal party stained with corruption. The first legislation introduced into Parliament by Stephen Harper’s government was Bill C-2, the Federal Accountability Act.132

However, despite the Conservatives’ strategy, they were unable to gain a majority of seats in Parliament in 2006. Large numbers of seats also went to the Liberal Party, the Bloc Québécois, and the New Democratic Party. Because of its minority position, the Conservative government did not have exclusive control of the legislative agenda. It was also possible for opposition parties and MPs to bring legislation forward. As I explain in the next section, this is precisely what happened with the ODA Accountability Act.

3.5 The ODA Accountability Act

The ODA Accountability Act emerged from an attempt by Canadian development assistance NGOs to shift Canadian aid policy in a more “social” direction—and away from the pursuit of Canadian commercial and security interests. In pursuit of this change, these actors relied on discourses, models, and norms borrowed from the development assistance field. The government, however, interpreted these discourses, models, and norms differently, and thus arrived at an interpretation of the Act that diverged significantly from that of the proponents.

Some of the Act’s proponents have described this outcome as a kind of betrayal. They have accused the government of failing to properly implement the legislation, thwarting the will of Parliament. However, the proponents fully anticipated the government’s interpretation of the ODA Accountability Act. While they publicly argued that the Act required a social development agenda, they understood very well that the Act could be read in other ways. They nevertheless pursued their legislative project because they thought it would help to bolster the autonomy of development assistance experts. And they imagined these experts as the protagonists of a social development agenda.

In this part of the chapter, I analyze these legal and political dimensions of the ODA Accountability Act. I begin, in section 3.5.1, with a brief account of the legislative process, identifying the key actors and their normative orientations. In section 3.5.2, I summarize the text of the Act itself. In section 3.5.3, I explain how the Act’s provisions express the proponents’ hopes for a more “social” (or redistributive) approach to aid policy, and how they are derived from discourses, models, and norms circulating in the development assistance field. In section 3.5.4, I describe the government’s response to the Act. I explain how the government was able to interpret the Act to permit policies oriented toward Canadian commercial and security interests—or at least in the direction of economic rather than social development. In the final section, 3.5.5, I show how the proponents of the Act anticipated this response, but pushed ahead

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with the Act nonetheless in order to safeguard the role of experts (as well as their own role) in the development assistance process.

3.5.1 The Legislative Process

The widespread publicity around aid issues occasioned by the 2005 Global Campaign Against Poverty emboldened Canadian NGOs involved in development assistance. They called for reforms to Canadian aid processes. Thanks to genuine commitment as well as political expediency, Canadian politicians also joined in the chorus. In February 2005, the three Parliamentary opposition leaders (including Stephen Harper) signed an open letter calling on Prime Minister Paul Martin to increase aid levels and to introduce aid legislation. In June 2005, the House of Commons Standing Committee on Foreign Affairs and International Trade reiterated these recommendations.

The Canadian Council for International Cooperation (CCIC) led this law reform movement. Established in 1968, the CCIC is the principal coalition of Canadian NGOs involved in development assistance. The CCIC’s leadership has generally championed social-democratic approaches to aid policy. However, the CCIC has approximately 100 member organizations (including Canadian chapters of large international NGOs, local community initiatives, religious groups, and labour unions), and the CCIC sometimes struggles to maintain a consensus among these groups.

The CCIC’s then-President-CEO, Gerry Barr, played a key role in the legislative process. The CCIC also enlisted several legally-trained individuals to help draft the legislation. Among these drafters was Vicky Edgecombe, a law student at the University of Ottawa who had written a paper comparing other donor countries’ legislation. Vicky Edgecombe’s research focused on the International Development Act 2002 as a “starting point for crafting Canadian legislation.”

(Later, during the Senate hearings, supporters of the bill would arrange for a senior British aid official to appear by videoconference to tout the benefits of the British model.\textsuperscript{137})

The CCIC then approached members of Parliament, asking them to sponsor their legislation as a private member’s bill. Four private member’s bills based on the CCIC’s model were introduced in 2005 and 2006.\textsuperscript{138} The version that would ultimately pass was introduced as Bill C-293 on May 17, 2006 by Liberal MP John McKay. McKay had practiced real estate law in Scarborough, Ontario before entering politics in 1997. His first significant experience with aid issues came when he served as Parliamentary Secretary to the Minister of Finance from 2003 to 2006. McKay’s own views on aid mingled liberal internationalism with Christian (Baptist) humanitarianism.

Bill C-293 was initially supported by the Liberals, New Democrats, and the Bloc Québécois, but opposed by Prime Minister Stephen Harper’s Conservative minority government. The proponents’ choice of a title for Bill C-293 was strategic. They used the word “accountability” to mirror the government’s rhetoric and to shame the government into supporting it.

During the Bill’s passage through the House of Commons, the Standing Committee on Foreign Affairs and International Development amended the bill to remove certain features that would have required fiscal allocations, and thus could not have proceeded without government support. Most importantly, the provisions for an advisory committee and a petition process were replaced with consultation requirements (see 3.5.5, below). With the support of the three opposition parties, Bill C-293 passed its third reading in the House of Commons on March 28, 2007.

The Senate then spent over a year debating Bill C-293. The main protagonists in the Senate were Liberal Senator Roméo Dallaire and Conservative Senator Hugh Segal. Dallaire, famous for his experience as a UN peacekeeper in Rwanda, had later become an advocate for humanitarian

\textsuperscript{137} Senate, Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade, Issue No. 18, (13 June 2007).

\textsuperscript{138} Canada, Bill C-446, An Act respecting the provision of development assistance by the Canadian International Development Agency and other federal bodies, 1st Sess., 38th Parl., 2005 (first reading, 16 November 2005); Canada, Bill C-204, An Act respecting the provision of development assistance by the Canadian International Development Agency and other federal bodies, 1st Sess., 38th Parl., 2005 (first reading, 16 November 2005); Canada, Bill C-243, An Act respecting the provision of development assistance by the Canadian International Development Agency and other federal bodies, 1st Sess., 39th Parl., 2006 (first reading, 6 April 2006); Canada, Bill C-243, An Act respecting the provision of development assistance by the Canadian International Development Agency and other federal bodies, 1st Sess., 39th Parl., 2006 (first reading, 1 May 2006).
intervention in Darfur.\textsuperscript{139} Segal’s committee report on African development issues suggests a (small-l) liberal internationalist vision of aid policy. Although Segal and his Conservative colleagues initially opposed the bill, they relented after the Liberals agreed to certain amendments: the insertion of a reference to the Paris Declaration on Aid Effectiveness, more modest consultation requirements, and a provision ensuring the confidentiality of discussions at the Bretton Woods Institutions. The Senate passed the amended Bill C-293 on April 16, 2008. The amended bill received unanimous approval from the House of Commons shortly thereafter and came into force on June 30, 2008.

3.5.2 The Legislative Text

The text of the \textit{ODA Accountability Act} begins by declaring poverty reduction to be the “focus” of Canadian aid:

\begin{quotation}
2. (1) The purpose of this Act is to ensure that all Canadian official development assistance abroad is provided with a central focus on poverty reduction and in a manner that is consistent with Canadian values, Canadian foreign policy, the principles of the Paris Declaration on Aid Effectiveness of March 2, 2005, sustainable development and democracy promotion and that promotes international human rights standards.
\end{quotation}

The statute’s substantive provisions, subsections 4(1) and (1.1), are also concerned with defining aid’s purpose:

\begin{quotation}
4. (1) Official development assistance may be provided only if the competent minister is of the opinion that it

(a) contributes to poverty reduction;

(b) takes into account the perspectives of the poor; and

(c) is consistent with international human rights standards.

(1.1) Notwithstanding subsection (1), official development assistance may be provided for the purposes of alleviating the effects of a natural or artificial disaster or other emergency occurring outside Canada.
\end{quotation}

The law therefore requires at least a subjective sense of a poverty reduction purpose, except in cases of disaster relief.

Subsections 4(1) and (1.1) provide a set of criteria to guide the exercise of ministerial discretion. However, the test is subjective—“if the competent minister is of the opinion.” The legislation also contains a circularity. The limits set by section 4 only apply to “official development assistance,” which is a term defined in section 3 to mean international assistance that meets the criteria set out in section 4.

Subsection 4(2) specifies that this ministerial opinion cannot arise in a vacuum, but must be the result of consultations with certain groups:

(2) The competent minister shall consult with governments, international agencies and Canadian civil society organizations at least once every two years, and shall take their views and recommendations into consideration when forming an opinion described in subsection (1).

Subsection 4(3) specifies that only projects that meet the criteria in subsections (1) and (1.1) can be labeled “official development assistance” in Government of Canada publications.

The remaining provisions of the Act have to do with consultation and reporting. Subsection 4(2) requires ministers providing aid to consult with governments, international agencies and Canadian civil society organizations. Section 5 requires ministers to report to Parliament on Canada’s aid spending.

3.5.3 The Intentions of the Proponents

The proponents of the ODA Accountability Act intended it to mandate a social approach to aid policy, with some concessions to an economic approach. Above all, they intended it to exclude the use of aid for the pursuit of Canadian commercial and security interests. In order to enshrine these policy goals in legislation, they drew on discourses, models, and norms borrowed from the development assistance field.

From the proponents’ perspective, the lynchpin of the ODA Accountability Act is paragraph 4(1)(a), which requires Canadian aid to be focused on poverty reduction. Poverty reduction is also given top billing in the Act’s statement of purpose. As I have explained, the idea of poverty
reduction as a goal of development assistance has a long history, dating back at least to the 1940s. Poverty reduction regained prominence in the development assistance field in the late 1990s and early 2000s thanks to the Millennium Development Goals and the Global Call to Action against Poverty. The U.K.’s *International Development Act 2002* is centred on the concept of poverty reduction. By invoking poverty reduction, the Act’s proponents implicitly referred to this legacy of aid policies and practices.

Some proponents of the Act understood poverty reduction in “social” terms, linking it to the provision of social services such as “clean wells” and “schools for kids.” Others linked poverty reduction to economic development. But all of them understood poverty reduction to *exclude* certain forms of aid, most notably security-related forms of aid such as those linked to the NATO campaign in Afghanistan. Many proponents also argued that tied aid, or the use of aid to promote Canadian commercial objectives, would be prohibited under the Act. As John McKay put it, the Act was meant to “protect development money from being redirected towards Canadian security projects and business interests and from ever changing ‘flavour of the week’ policies.”

Proponents of the Act also argued that the “perspectives of the poor” requirement in paragraph 4(1)(b) lends weight to a “social” interpretation of poverty reduction. The “perspectives of the poor” requirement implicitly invokes discourses and models of “participation” that have been in favour in the development assistance field since the 1980s. It is linked to “social” development; it also hints at the democratization of aid processes. Thus, according to the CCIC, paragraph 4(1)(b) means that “Canadian ODA must be delivered in a manner that builds capacity of affected populations to participate in all dimensions of development affecting their lives.”

Proponents of the Act also read the “poverty reduction” and “perspectives of the poor” provisions in combination with the requirement in paragraph 4(1)(c) that Canadian aid be “consistent with international human rights standards.” Testifying before the Senate Committee,


Molly Kane, Executive Director of the NGO Inter Pares, admitted that she and her colleagues had initially been skeptical about Bill C-293’s emphasis on poverty reduction. She nevertheless expressed support for the bill on the understanding that poverty reduction should be read in conjunction with human rights and the perspectives of the poor.  

From the perspective of some of the Act’s proponents, paragraph 4(1)(c) refers not only to civil and political rights but also to economic, social, and cultural rights such as the rights to food, water, education, and health. This interpretation links human rights to social development, as aid policies must be designed to fulfill these rights, and must not contribute to their violation. The CCIC’s Brian Tomlinson argues that “Policies and practices in Canadian ODA must, as required by international human rights standards, fully respect, but also, protect and promote international human rights.”

For the CCIC, paragraph 4(1)(c) also implicitly invokes various models of human rights mainstreaming that have been elaborated in the development assistance field since the late 1990s. According to the CCIC’s Gerry Barr, “a human rights approach to aid spending, and only a human rights approach, will meet the requirements of the Act.”

142 Senate, *Standing Senate Committee on Foreign Affairs and International Trade, Proceedings*, 17 (6 June 2007) at 40 (Molly Kane).

143 To the annoyance of some of the Act’s proponents, the first legal challenge to be filed under the Act had to do with civil and political rights. During its 2006 military intervention in Somalia, the government of Ethiopia had arrested a Canadian citizen, Bashir Makhtal, and charged him with terrorism-related offences for his alleged involvement in a Somali separatist movement in Ethiopia. Mr. Makhtal initially faced the death penalty; he was convicted in July 2009 and sentenced instead to life imprisonment. In April 2009, Mr. Makhtal’s Canadian lawyer, Lorne Waldman, filed an application for judicial review alleging that Ethiopia was violating Makhtal’s human rights and consequently calling for the withholding of Canadian aid to Ethiopia. The application was subsequently discontinued. Michelle Shephard, “Lawsuit Challenges Aid to Ethiopia: Imprisoned Canadian’s lawyer accuses Ottawa of giving relief to state that doesn’t respect rights” *Toronto Star* (3 April 2009) A18; David McDougall, “How a business trip ruined a man’s life” *The Globe and Mail* (1 August 2009) A14.


145 Barr, “Remarkable Legislation,” *supra* note 133 at 5. However, in his legal opinion in the same publication, Sylvain Beauchamp is more circumspect, arguing that a human rights-based approach to s. 4(1) would have “the merit of addressing all relevant grounds of the ODA Accountability Act through a single analytical framework” but stopping short of claiming that this is the only approach that would satisfy the requirements of the law: Sylvain Beauchamp, “The Official Development Assistance Accountability Act: Legal Rationale for Applying a Human Rights Framework to ODA” in CCIC, “A Time to Act: Implementing the ODA Accountability Act: A Canadian
requires the integration of human rights into all programming decisions as well as the process of aid delivery. Procedurally, a human rights-based approach would mean exercising due diligence to ensure that Canada’s ODA is not undermining human rights.

The proponents tried to bring about these policy changes by legislating a particular definition of aid. In drafting this definition, the proponents of the ODA Accountability Act did not start with a clean slate; instead, they used the DAC definition of ODA as a starting point. As discussed in section 3.2.1, above, this is the definition OECD donor countries use to measure and compare the amounts of aid they provide:

Official development assistance is defined as those flows to countries and territories on the DAC List of ODA Recipients … and to multilateral development institutions which are:

i. provided by official agencies, including state and local governments, or by their executing agencies; and

ii. each transaction of which:

a) is administered with the promotion of the economic development and welfare of developing countries as its main objective; and

b) is concessional in character and conveys a grant element of at least 25% (calculated at a discount rate of 10 per cent).

The DAC definition of ODA contains some items that rile social-democratic internationalists (as well as some liberal internationalists). For example, when donor countries cancel developing countries’ debts, the amount of the write-off is counted as ODA—meaning that ODA figures can be inflated through the accumulation of interest. The DAC definition also allows donor countries to include the cost of supporting and integrating refugees during their first year in the donor country. Finally, in 2005, DAC donors agreed to recognize certain security-related activities as

CSO Agenda for Aid Reform” online: <http://www.ccic.ca/_files/en/what_we_do/002_aid_2010_05_a_time_to_act_e.pdf> at 47.


147 Ibid. at 7.

ODA, such as civilian oversight of military institutions and programs to reduce the proliferation of light weapons.\textsuperscript{149}

Supporters of Bill C-293 argued that these activities should not count as ODA. They tried to narrow the concept of ODA by legislating a new definition.\textsuperscript{150} Section 3 of the Act states that:

\begin{quote}
“official development assistance” means international assistance

(a) that is administered with the principal objective of promoting the economic development and welfare of developing countries, that is concessional in character, that conveys a grant element of at least 25%, and that meets the requirements set out in section 4; or

(b) that is provided for the purpose of alleviating the effects of a natural or artificial disaster or other emergency occurring outside Canada.
\end{quote}

The \textit{ODA Accountability Act}’s definition is based on the DAC definition, but it adds the criteria listed in section 4 (i.e., poverty reduction, perspectives of the poor, and international human rights, except in cases of disaster relief). The proponents hoped that this definition would ensure a social (or at least an economic) approach to aid.

Another difference between the two definitions is that the \textit{ODA Accountability Act}’s definition does not specify which countries can be aid recipients. This appears to have been the result of an oversight by the legislation’s drafters. The proponents of the Act were more preoccupied with specifying the purposes and motivations for aid than dictating where it should go. Although many of them, especially those inclined toward a redistributive approach to aid, were inclined to argue that Canadian aid should generally go to the poorest countries, they were not inclined to make this a legislative requirement.

\section*{3.5.4 The Government’s Response}

The government of Prime Minister Stephen Harper initially opposed Bill C-293. However, it later relented, and later tepidly endorsed the bill. The amendments secured by Senator Hugh

\footnote{\textsuperscript{149} OECD, “Conflict Prevention and Peace Building: What Counts as ODA?” online: \url{<http://www.oecd.org/dataoecd/32/32/34535173.pdf>}.}

\footnote{\textsuperscript{150} In French, however, the two terms are different: The \textit{ODA Accountability Act}’s term is “aide au développement officielle,” whereas the DAC’s is “aide publique au développement.”}
Segal, discussed earlier, facilitated this about-face. But so did the government’s realization that the terms of the ODA Accountability Act could be interpreted to be consistent with its policy preferences: economic development and to the pursuit of Canadian commercial and security interests. The government’s response to the ODA Accountability Act demonstrates the indeterminacy of the discourses, models, and norms upon which the Act’s proponents relied.

Before proceeding with this analysis, it is important to acknowledge that “the government” is not monolithic. A wide range of views on aid policy can be found among Canadian government officials. In particular, the views of CIDA’s bureaucrats (generally aligned with current ideas in the development assistance field) are not necessarily the same as those of the political leadership. However, for the purposes of simplification, I refer to the position of “the government” when summarizing the general policy direction adopted by the Harper cabinet. I specify particular governmental actors where it is necessary to explain divergences.

While the ODA Accountability Act was in Parliament, the new government’s approach to aid policy remained somewhat unclear. The government’s foreign policy agenda was focused on the war in Afghanistan. However, after the bill was passed, CIDA (and Minister for International Cooperation Beverley J. Oda) introduced policy changes reflecting a concern for the pursuit of Canadian commercial and security interests, the projection of conservative moral values, and to some extent, economic development.

For example, in February 2009, CIDA announced that its previous list of 25 “countries of concentration” would be narrowed to 20 “countries of focus.” The number of African countries on the list was halved, whereas Latin American countries were added.\footnote{151} This shift was widely regarded as motivated by Canadian commercial and security interests. An aide to Minister Oda called the decision “a function of need, of the capacity to deliver aid effectively, and supporting Canada’s foreign policy.”\footnote{152} One country added to the list was Colombia; at the time of the

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announcement, the government was seeking parliamentary approval for a new bilateral trade agreement with Colombia.

In May 2009, Minister Oda announced that CIDA’s work would henceforth focus on the themes of “food security,” “sustainable economic growth,” and “children and youth.” Later, “security and stability” and “democracy” were added. CIDA also adopted a more directive stance toward NGOs. In November 2009, CIDA terminated its funding of Kairos, a church-based NGO that had supported civil society groups in many Southern countries. Officially, CIDA merely stated that Kairos’s work no longer fit with its programming priorities. But unofficially, the government made it clear that Kairos had been singled out for its (allegedly) critical stance toward Israeli policies. It was later revealed that Oda had flouted the advice of her own officials in deciding to “de-fund” Kairos. Over the next few months, government officials directly or indirectly warned other NGOs that their advocacy activities might cost them their CIDA funding.

In January 2010, Prime Minister Stephen Harper announced that he would use Canada’s hosting of the 2010 G8 and G20 summits to promote maternal and child health in developing countries—but categorically declared that Canadian funds would not be used to provide access to abortion. Finally, in March 2010, Finance Minister Jim Flaherty announced the first of a series of cuts to the aid budget.

153 Oda Toronto speech, supra note 95.
154 Speaking at a conference in Jerusalem in December 2009, Immigration Minister Jason Kenney said that the government had cut Kairos’s funding because of its alleged involvement in a campaign to boycott Israel. Jeff Davis, “Kenney’s Combative Christmas” Embassy (6 January 2010) 2. In arguing that CIDA should have maintained its funding, Kairos’s executive director cited the ODA Accountability Act: Mary Corkery, “The Truth about KAIROS, NGO Monitor” Embassy (20 January 2010) 9.
157 See e.g. Joanna Smith, “No support for funding abortion: PM; Harper says Canadians don’t want to be split over use of foreign aid” Toronto Star (28 April 2010) A10.
158 The international assistance envelope (the budgetary category used for aid and related outlays) continued to grow in 2009 and 2010. But Finance Minister Jim Flaherty announced in March 2010 that it would be frozen at $5 billion in 2011 and beyond. In the 2011 and 2012 budgets, CIDA was singled out for disproportionate cuts: Clark Campbell, “Ambassadors' residences, foreign aid, diplomats' pay subject to cuts” The Globe and Mail (30 March 2012) A11.
In November 2012, a new CIDA minister, Julian Fantino, confirmed a shift in policy toward “partnership” with the private sector. He cited examples of education projects operating alongside Canadian mining companies. He also spoke of aid as a way of opening markets for Canadian firms, declaring, “CIDA takes an upstream approach to economic growth. We help to make countries and people trade and investment ready.” Fantino also underlined the ongoing relevance of security goals, stating that aid “safeguards Canadian security by addressing sources of instability and preventing threats before they reach our borders.”

This account of the government’s approach to aid helps shed light on its interpretation of the ODA Accountability Act. In general, the government has seen aid as a way of pursuing Canadian commercial and security goals. At the same time, the government accepts that aid can help to support economic development. The government has also seen aid as a screen upon which to project domestic political debates.

In 2008, when it became clear that Bill C-293 would pass, CIDA began an internal process of deliberation on how to implement it. An “ODA Accountability Act Implementation Steering Committee” was formed. Officials at CIDA and other government departments consulted lawyers from the Department of Justice. A small group of CIDA officials became experts on the Act and helped guide officials from other departments through the implementation process.

The government responded to the “poverty reduction” requirement in paragraph 4(1)(a) in two ways. On one hand, it argued for an economic rather than a social understanding of this requirement, maintaining that economic growth was the means to reduce poverty. Second, it often simply tried to minimize the significance of this requirement, or to emphasize its vagueness and open-endedness. In interviews, some officials emphasized that poverty reduction should include both “direct” and “indirect” approaches. One referred to poverty reduction as a “comprehensive concept” that can include economic growth, education, health, or justice sector reform. Some specified that poverty reduction should also be understood to include security-related aid and peacekeeping. According to one official, poverty reduction is merely a “semantic

game”: one can argue that anything does or does not reduce poverty. Generally, CIDA officials have taken the position that the poverty reduction provisions merely confirm CIDA’s existing priorities.160

The government’s first four summary reports under the Act reflect both of these approaches to poverty reduction. These documents describe the kinds of aid provided in the previous fiscal year, implying that ministers are of the opinion that these contribute to poverty reduction. But few reasons are given for these opinions; contributions to poverty reduction are generally asserted rather than explained or justified. For example, the word “poverty” appears only twice in CIDA’s section of the first summary report, once as part of the blanket assertion that “CIDA supports programs and projects with poverty reduction as their primary objective.”161 The second, third, and fourth summary reports contain more references to poverty, but for CIDA, poverty is increasingly subsumed under the heading of “sustainable economic growth.”

Other departments have been even more explicit about their economic approach to poverty reduction. For example, the Department of Finance argues that debt relief for poor countries reduces poverty by freeing up resources “for use in more productive investments (e.g. health, education, infrastructure, etc.) that support long-term economic growth and development.”162 DFAIT argues that its program of scholarships for foreign students “contributes to poverty reduction by developing a skilled workforce, leading to economic growth and development” and that its Investment Cooperation Program “supports responsible, developmentally beneficial, private sector investments in developing countries leading to sustained economic growth and poverty reduction.”163

In implementing the Act, CIDA officials have distanced themselves from their agency’s Policy on Poverty Reduction. This policy, in force since 1996, reflects a more social vision of development assistance. Not only does it declare that “programming at CIDA will be consistent with the goal of poverty reduction,” it also defines poverty reduction: “Poverty reduction means

161 CIDA, 2008-09 summary report, supra note 111 at 3.
162 CIDA, 2009-10 summary report, supra note 109 at 11.
163 Ibid. at 16.
a sustained decrease in the number of poor and the extent of their deprivation. This requires that the root causes and structural factors of poverty be addressed. Reducing poverty places a focus on people’s capabilities to avoid, or limit, their deprivation.”\textsuperscript{164} Although the policy connects poverty reduction to the concept of sustainable development, it is also careful to specify that “There is no automatic link between economic growth and poverty reduction.”\textsuperscript{165} In interviews, CIDA staff acknowledged that the policy is formally applicable to their assessment of poverty reduction under the \textit{ODA Accountability Act}. However, senior officials at CIDA have expressed misgivings about the policy and suggested that it may need to be “updated.”\textsuperscript{166}

NGOs criticized the government’s decision to focus aid on certain Latin American countries (and to de-emphasize Africa) on grounds that this was a departure from the \textit{ODA Accountability Act}’s poverty reduction requirement. In interviews, however, CIDA officials also defended this shift by observing that there is plenty of poverty in Latin America; aid to Latin America can therefore contribute to poverty reduction. Indeed, there is nothing in the Act to require the minister or her officials to compare one aid program against another, and to choose the program that would reduce poverty the most. The Act only deals with one aid allocation decision at a time.

Government officials have also adopted a minimalist, procedural reading of the “perspectives of the poor” requirement. The government has generally taken a position that its practices were always compliant with the Act. Indeed, internal discussions at CIDA have focused on \textit{documenting} the fact that the perspectives of the poor have been ascertained.\textsuperscript{167} In a document released shortly after the Act came into force, CIDA declared:

\begin{quote}
CIDA has long considered the perspectives of the poor as part of its normal design and management processes. Officials typically have used a range of options to gather the perspectives of the poor for international assistance activities. The options may include: reviews of relevant research material, reports from other donor organizations, site visits, consultations with the intended recipients,
\end{quote}

\begin{footnotes}
\item[165] \textit{Ibid.} at 8.
\item[166] CIDA, “ODA Accountability Act Implementation Steering Committee (29 October 2008): Record of Discussion” (on file with author).
\item[167] \textit{Ibid.}
\end{footnotes}
relevant civil society organizations, individuals with particular expertise, or with officials of democratically elected partner governments. In order to demonstrate compliance with the Act, the perspectives of the poor that are taken into account via these mechanisms should be documented as appropriate.\(^{168}\)

The government’s first summary report under the Act contained no references whatsoever to the perspectives of the poor. The second summary report contained a single reference, in which CIDA asserted that it takes into account the perspectives of the poor through “[a] variety of formal and informal processes… such as consultations with local partners and beneficiaries, participatory approaches, project review processes and policy dialogue.”\(^{169}\) In the third report, CIDA simply stated that each of its substantive programming themes “is linked to poverty reduction and takes into account the perspectives of the poor.”\(^{170}\) The fourth report merely acknowledged that taking into account the perspectives of the poor is a requirement of the act.\(^{171}\)

The government’s response to the “international human rights standards” provision of the Act has been similarly curt. The government’s approach to human rights is strictly limited to civil and political rights. Host country governments are identified as the sole bearers of corresponding duties. In interviews, some government officials expressed the opinion that Canadian aid would only run afoul of paragraph 4(1)(c) if Canada were funding a specific activity that violated human rights, or if Canada were giving direct budget support to an oppressive regime. CIDA has also taken the position that it satisfies the human rights requirement through its attention to gender equality and participation, and through its governance programming. In its portion of the government’s second summary report under the Act, CIDA summed up its human rights position

\(^{168}\) CIDA’s Business Process RoadMap version 3.3 (July 2008) (on file with author). This paragraph was dropped from subsequent versions of this document.

\(^{169}\) CIDA, 2009-10 summary report, supra note 109 at 3.


as follows: “CIDA supports several human rights activities in many countries, and ensures that its programs do not contribute, directly or indirectly, to violations of human rights.”

In internal legal opinions, the government has also taken the position that its own human rights obligations are territorially bounded. Some CIDA officials argue that, as a government institution, CIDA is already bound by Canada’s international human rights obligations, and that paragraph 4(1)(c) is therefore redundant. The CIDA Steering Committee on the Implementation of the Act concluded that “current compliance with [paragraph] 4(1)(c) of the Act presents communications, not compliance challenges.”

Given this approach to the ODA Accountability Act’s substantive provisions, it should not be surprising that the government has sought to distance itself from the Act’s definition of “official development assistance.” Government officials were concerned that a narrower definition of ODA would deny Canada the opportunity to take credit for some of its expenditures. (Indeed, this is precisely what the Act’s proponents sought.) Officials from CIDA were also concerned that a “made-in-Canada” definition would place Canada out of step with other DAC donor countries. One official testifying in Parliament called it “awkward” that some aid expenditures would be reportable as ODA under the DAC definition but not under the ODA Accountability Act definition, and vice-versa.

Once the Act came into force, CIDA faced the challenge of reconciling the two definitions. At first, an internal guide was circulated to help CIDA staff distinguish between them. CIDA officials recognized that some expenditures, such as refugee resettlement costs, would be harder to justify under the ODA Accountability Act definition. But CIDA officials also noted that the

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172 CIDA, 2009-10 summary report, supra note 109 at 3.
174 Ibid.
175 House of Commons, Standing Committee on Foreign Affairs and International Development, Evidence, 032 (28 November 2006) at 2 (Michael Small).
176 See CIDA, Business Process RoadMap version 3.3 (July 2008) (on file with author). Subsequent versions of this document have omitted the distinction.
177 CIDA’s Statistical Analysis and Reporting Unit argued that refugee resettlement should not count as ODA under the ODA Accountability Act definition, “because it is an imputed cost and the poverty reduction function in the
ODA Accountability Act definition could actually be broader than the DAC definition in other respects. Most significantly, it could include aid to Russia and some other Eastern European countries that are not on the DAC list of ODA recipients. CIDA officials also mused that military and security-related aid could arguably be justified in terms of poverty reduction.

Ultimately, however, a CIDA committee decided to interpret the ODA Accountability Act definition to be as close as possible to the DAC definition. (The ODA Accountability Act and DAC figures for ODA cannot be identical, because the DAC definition also includes amounts provided by (or imputed to) provincial and municipal governments, whereas the Act definition does not.) The committee’s explicit reasoning was that the DAC definition was “a known approach” and its use would “reduce confusion about differences in the OECD-DAC and Act numbers for ODA.”¹⁷⁸ There were also concerns that CIDA might otherwise be accused of artificially inflating aid statistics.¹⁷⁹ CIDA then convinced other departments to adopt the same approach. Officials from some departments, notably the Department of Finance, were in favour of broadening what was counted as ODA. But CIDA and DFAIT officials prevailed in their view that the ODA Accountability Act definition should be “aligned” with the DAC definition.¹⁸⁰ This approach meant that some of the more controversial inclusions under the DAC definition, such as refugee resettlement costs, were ultimately included under the ODA Accountability Act definition as well.¹⁸¹

The government decision to rely on the DAC definition demonstrates the influence of the development assistance field: the global standard trumped the domestic statute. However, it also

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¹⁷⁸ Ibid.
¹⁷⁹ Ibid.; CIDA, “Meeting Summary: Third ODA Accountability Act Interdepartmental Meeting: 7 April 2009” (on file with author).
¹⁸⁰ CIDA, “Meeting Summary: Third ODA Accountability Act Interdepartmental Meeting: 7 April 2009” (on file with author); CIDA, “ODA Accountability Act Implementation Steering Committee (20 April 2009): Meeting Summary” (on file with author).
demonstrates the indeterminacy of the discourses and standards imported from this field. Although the proponents of the ODA Accountability Act hoped that “poverty reduction,” “perspectives of the poor,” and “human rights” would dictate a social approach to development, the government’s response showed that these concepts are compatible with other policy visions.

3.5.5 Proceduralism and Expertise

Some of the ODA Accountability Act’s proponents argue that the government’s recent policy changes are inconsistent with the Act. However, these proponents have generally refrained from accusing the government of breaking the law; rather, they argue that the government is violating the “spirit” of the law or failing to implement it properly. In effect, these proponents largely anticipated the government’s response. They saw very well that the discourses, models, and norms they were promulgating could be interpreted in various ways. They therefore inserted procedural mechanisms into the legislation. These mechanisms were assigned a key role in ensuring a “social” approach to development, poverty reduction, and human rights.

The design of these mechanisms reveals a great deal about the proponents’ vision of development assistance. The proponents sought to reorient aid policies toward social priorities and redistribution. But they largely looked to donor institutions and their experts as the source of these policy changes. Some of the procedural mechanisms they established were meant to encourage transparency and to invite broader participation. These mechanisms could potentially have a democratizing effect. But the Act’s procedures were also designed to promote the independence of development assistance institutions. In effect, the design of the ODA Accountability Act reveals its proponents’ mixed attitude toward the democratization of development assistance and their sympathies for a managerial, expert-led approach to aid.

Several mechanisms established by the ODA Accountability Act seem designed to increase transparency and participation in aid practices. The clearest examples of this tendency can be observed in the Act’s reporting requirements. Section 5 of the Act requires ministers to submit two reports to Parliament each year. In the first of these reports, unofficially known as summary report, each department must state the total amount of its aid disbursements and provide “a

\[\text{Barr, “Remarkable Legislation,” supra note 133 at 5.}\]
summary of any activity or initiative taken under this Act.”\textsuperscript{183} In the second report, CIDA must provide a full statistical account of Canadian aid.\textsuperscript{184}

CIDA was already in the habit of publishing a number of annual reports, including a detailed annual statistical report. CIDA officials have therefore seized on the Act’s reporting requirements as an invitation to tell their story to the public. The government’s first four summary reports have been remarkably user-friendly documents, providing quantitative information about Canadian aid while also supplying a sense of background and context—something that has often been missing from CIDA’s previous annual statistical reports. Also thanks to the Act, CIDA and other departments now have firm reporting deadlines. The “summary report” is due six months after the end of each fiscal year (i.e., September 30). The statistical report is due one year after the end of each fiscal year (March 31). The reporting requirements thus appear to have improved the transparency of Canadian aid.

Another potentially democratizing feature of the Act is its provision for consultations. As we have seen, subsection 4(2) requires any minister providing development assistance to have consulted with “governments, international agencies and Canadian civil society organizations at least once every two years” in forming his or her opinion.

Finally, it is also worth noting that some of the potentially democratizing provisions of the ODA Accountability Act are aimed beyond the Canadian government at international donor institutions. The attempt to legislate a made-in-Canada definition of “official development assistance” can be interpreted as an implicit challenge to the expert authority of the OECD’s Development Assistance Committee. Likewise, subsection 5(3) requires the Minister of Finance to disclose “the position taken by Canada on any resolution that is adopted by the Board of Governors of the Bretton Woods Institutions,” and to justify Canada’s activities vis-à-vis the Bretton Woods Institutions (BWIs) in terms of the substantive values of the ODA Accountability Act. These provisions were intended as challenges to the authority of the BWIs, and they were widely understood as such. Critics of Bill C-293 insisted on the insertion of subsection 5(4), which ensures respect for the confidentiality of discussions held at the BWIs.

\textsuperscript{183} ODA Accountability Act, s. 5(1).
\textsuperscript{184} ODA Accountability Act, s. 5(2).
Although these provisions point toward the democratization of aid, they are vulnerable to criticism in that they draw the boundaries of their constituency rather narrowly. The government must report to the Canadian Parliament. It must consult with “governments, international agencies and Canadian civil society organizations”—but not necessarily with civil society organizations in recipient countries, or with aid recipients themselves. By contrast, the “perspectives of the poor” and “international human rights standards” requirements suggest a more broadly democratized approach to aid—one in which individuals and communities receiving aid have a voice. But there remains a stark contrast between procedures for accountability to Canadian constituencies and those for accountability toward poor people in the global South. During the Parliamentary hearings, when Senator Raynell Andreychuk suggested that the consultation requirements in subsection 4(3) should include the poor, John McKay replied, “Senator Andreychuk you argued that it should be a right of the poor to have their perspectives taken into account. That is a bridge too far. This is still the discretion of the Canadian people as represented by their minister and government.”

Another indication of the limits of democratization envisioned by the ODA Accountability Act can be inferred from the legislative process itself. The Canadians who initiated the legislative campaign had strong international ties, and they were closely monitoring events elsewhere. But poor people from the global South played no direct role in the campaign.

Beyond the geographic boundaries of the Act’s democratic constituency, another limitation on the Act’s democratizing potential stems from its reliance on expert-driven processes. The proponents of the Act prioritized the social dimensions of development assistance. They saw CIDA and other donor institutions as best placed to promote these social priorities. They identified other government departments, such as DFAIT and Finance, as the main threats. They therefore established mechanisms designed to insulate the provision of aid from intragovernmental political pressure. But in doing so, they endorsed an expert-led vision of development assistance.

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185 Senate, *Standing Senate Committee on Foreign Affairs and International Trade, Proceedings*, 17 (6 June 2007) at 24 (John McKay).
Deference to expertise can be observed in subsection 4(1)—the substantive core of the Act. Although the Act stipulates certain criteria for the provision of aid, the relevant question is whether the minister is of the opinion that the aid meets these criteria. The test is entirely subjective, and practically unreviewable. The Act’s proponents deliberately avoided stipulating objective criteria, because they did not want to hamper the flexibility of aid practices, especially those of CIDA. One CCIC staff member expressed the view that NGOs would prefer not go to court over the interpretation of the Act, because this might lead to an overly precise interpretation.

The consultation requirements in subsection 4(3) can also be read as a way of enhancing the independence of aid practices from intragovernmental pressures. By stipulating that CIDA (and other departments) carry out consultations, the proponents of the Act sought to enlist a wider constituency—including non-governmental actors—in the project of interpreting the legislation. They imagined an alternative community of interpretation for the Act that would help fend off pressures coming from elsewhere in government.

In fact, the proponents of the Act initially sought to establish a formal role for non-governmental actors in the administration of the Act. The original version of Bill C-293 would have required the Minister of International Cooperation to appoint an advisory committee, including representatives from NGOs, religious organizations, the private sector and Parliament. This committee would have been able to receive petitions from developing-country residents, should they wish to complain that Canadian aid was inconsistent with the purposes of the Act. The committee would have decided whether to forward these petitions to the minister; if it had done so, the minister would have been obliged to respond. But this feature was removed at the Committee stage because it would have required fiscal allocations, and thus could not have proceeded without government support. In place of the advisory committee, Bill C-293’s sponsors settled for consultation requirements.

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186 Canada, Bill C-293, An Act respecting the provision of development assistance abroad, 1st Sess., 39th Parl., 2006, cl. 6-8 (first reading, 17 May 2006). It is interesting to compare this imagined petition process with the process that existed under the League of Nations Mandate System: see Rajagopal, supra note 9 at 67-71.
As I have noted, the main proponents of the *ODA Accountability Act* were NGOs. By attempting to establish an advisory committee or consultation requirements, these NGOs were effectively trying to ensure an ongoing role for themselves in the interpretation of the Act. These NGOs positioned themselves as outsiders vis-à-vis government, representatives of a “grassroots” constituency in Canada. But with their links to the global South, they also saw themselves as insiders in development assistance field, able to bring their knowledge to bear on shaping policy.

As it happens, the government’s interpretation of the consultation requirements has confirmed the NGOs’ outsider status. Most government departments have adopted a minimalist reading of the consultation requirements. Anecdotal evidence suggests that CIDA’s practices of consulting with NGOs have in fact declined in recent years, a trend consistent with the “defunding” of prominent NGOs. In 2010, after 40 years of continuous funding, CIDA cut off its support for the CCIC.

The provisions of the *ODA Accountability Act* stipulating that aid allocations must take into account the perspectives of the poor, or that they must be consistent with international human rights standards, could potentially be understood as providing a democratizing counterweight to an expert-led approach to development assistance. However, as we have seen, ideas about participation and human rights are equally susceptible of being mobilized as grounds for managerial, expert-led forms of governance, rather than as genuine democratizations. Indeed, some proponents of the Act appear to endorse such managerial approaches.

The “social” vision championed by the proponents of the *ODA Accountability Act* was thus intimately linked to an expert-led model of development assistance. Some of the ostensibly democratizing features of the Act privilege the participation of Canadians rather than that of aid recipients. Others try to strike a balance between wider participation and specialized expertise. The Act only weakly gestures in the direction of accountability toward aid recipients.

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188 Lee Berthiaume, “Cutting out the development NGO ‘heart’” *Embassy* (9 June 2010) 1.

3.6 Conclusion

The *ODA Accountability Act* represents a Canadian instantiation of certain discourses, models, and norms circulating in the development assistance field. Its proponents drew on these elements to try to legislate a particular approach to aid policy. The experience of the *ODA Accountability Act* thus shows how domestic law’s approach to international issues may be derived from the informal practices of global governance. Canadians’ internationalist commitments are thus connected to global projects and share in the politics of these projects. Whereas domestic legislative debates often appear to pit nationalists against internationalists, we would in fact do better to understand these debates as clashes among competing global projects in which domestic actors have different international affiliations as well as different normative aspirations.

The relationship between global governance and domestic law reforms and also suggests that these domestic arrangements are likely to share some features of the corresponding global field. In the case of development assistance, the design of the Canadian legislation reveals certain assumptions about the expert-led nature of aid. Managerialism, characteristic of the way development assistance is governed at a global scale, has thus become integral to Canadian law’s approach to the international.

Such an expert-driven model raises certain normative concerns in the context of the global governance of development assistance. As I have explained, it raises question about who really stands to benefit from aid and about who is in charge. It also implies drawing boundaries around the possible forms of social and economic change—for instance, attributing the causes of national wealth or poverty to indigenous factors, and assuming that poverty must be alleviated through growth rather than redistribution. The implementation of this model in Canadian legislation makes Canadian law potentially vulnerable to the same criticisms.
Chapter 4:
The Environmental Assessment
of Projects Outside Canada

4.1 Introduction

When Canadian federal authorities provide financial support for projects outside Canada, they are legally required to ensure that the environmental effects of these projects are taken into account. This obligation flows from two sets of domestic laws. First, it is found in the newly enacted Canadian Environmental Assessment Act, 2012, the general federal environmental assessment statute.¹ It also appeared in that statute’s predecessor, the Canadian Environmental Assessment Act,² and in an accompanying set of regulations.³ Second, it is found in the Export Development Act, and applies to the activities of Export Development Canada (EDC), the federal export credit agency.⁴

These laws have their origins in Canada’s response to the global surges of public attention to environmental issues that occurred in the early 1970s and again in the late 1980s. With regard to the environment, as with other matters, Canadian lawmakers drew on a repertoire of tools and techniques that had been developed elsewhere. Certain aspects of CEAA 1992, CEAA 2012, and of the EDC’s Environmental and Social Review Directive respond to the Canadian social and economic context or to domestic political events. But for the most part, these laws represent the Canadian instantiation of forms of environmental governance that have become standard around the world.

³ Projects Outside Canada Environmental Assessment Regulations, SOR/96-491 [POC Regulations].
⁴ Export Development Act, R.S.C. 1985, c. E-20, s. 10.1.
These laws also illustrate some of the general trends that have characterized Canadian internationalist lawmaking. Environmental assessment (EA) tends to be managerialisitic. It is a form of environmental governance that privileges specialized technical knowledge and expert decision-making, despite overtures to public participation. EA is also organized on the basis of highly formalized procedures. These aspects of the EA model, initially developed in a domestic setting, have made it highly suited for transnational application as well.

The recent enactment of CEAA 2012, however, calls these trends into question. CEAA 2012 narrows the applicability of the federal environmental assessment regime, reducing the role of scientific expertise. It effectively places more environmental decision-making power in the hands of political authorities as well as private actors. CEAA 2012 also radically simplifies the procedures applicable to the Canadian environmental assessment of projects outside Canada. CEAA 2012 may therefore be understood as a counter-example to some of the general trends identified in this dissertation.

A further tendency observable in the case of EA laws is the tendency to imagine internationalist lawmaking in terms of a choice between the extraterritorial application of Canadian law and respect for other countries’ sovereignty. The transnational provisions of CEAA 1992 were structured around the nondiscrimination principle: the idea that Canadians should be held to the same environmental standards abroad as at home. Nevertheless, CEAA 1992 also provided a number of exceptions and modifications to this principle—including through the use of special procedures. Canadian governments frequently justified these exceptions and modifications in terms of respect for other countries’ sovereignty.

Finally, the public/private distinction also plays an important role in the way Canadian lawmakers have approached the transnational application of EA requirements. While CEAA 2012 applies to the Canadian government’s “public” projects abroad (as did CEAA 1992), a different set of standards have been articulated for “private” projects financed by Export Development Canada. Moreover, in the context of these “private” projects, arguments about nondiscrimination and sovereignty are far less prominent. Instead, the dominant arguments are framed in economic terms.

I begin this discussion, in part 4.2, by exploring some fundamental issues in environmental law. Environmental issues have certain unique qualities, including the fact that they generally arise as
consequences of economic activity and involve a high degree of scientific complexity and uncertainty. These aspects of environmental issues have made them the primary object of new forms of governance designed to be more flexible and responsive than previous approaches. They have also led to attempts to reconcile economic and environmental imperatives through discourses (such as “sustainable development”) and through procedures such as EA.

In the next two parts of the chapter, I focus on EA as a policy model. In part 4.3, I discuss the model itself. EA is a process whereby some actor (often a state authority) integrates environmental considerations into its decision-making process. However, the design of EA processes is not politically neutral; EA in fact helps to constitute environmental issues and to assign environmental authority to certain decision-makers. In part 4.4, I discuss the globalization of the EA model. EA originated in the United States at the end of the 1960s. It has since been reproduced around the world, among national governments as well as international organizations and private actors.

In the subsequent parts of the chapter, I describe the Canadian instantiation of EA law, including its extraterritorial dimensions. I begin in part 4.5 by setting the scene: I explain how Canadian approaches to environmental regulation have been shaped by domestic economic, social, and legal factors, as well as by the proximity of the United States. In part 4.6, I turn to CEAA 1992, to CEAA 2012, and to EDC’s Environmental and Social Review Directive. I show how each set of rules is a product of globalized processes. I also show how these rules illustrate (or call into question) the general tendencies of Canadian internationalist lawmaking that I have identified.

4.2 Law and the Environment

Since the 1960s, governments in Canada and other countries have identified “the environment” as a major policy issue. They have enacted a great deal of domestic environmental legislation, and they have collaborated to create international environmental instruments. However, environmental issues raise a number of conceptual challenges, including their scientific complexity as well as their links to economic activity. These challenges have given rise to new forms of governance as well as attempts to reconcile economic and environmental priorities through discourses and processes.
4.2.1 Environmental Issues

Before discussing environmental assessment and other forms of environmental regulation, it is helpful to identify certain distinctive qualities of environmental issues. Most basically, environmental issues generally arise from economic activity, but they also involve complex natural phenomena. These aspects of the environment are fundamental to the way environmental issues have been conceptualized—politically as well as legally.

In contemporary society, the most significant environmental problems generally arise from economic activities, such as resource extraction, industry, agriculture, or transport. While these activities are generally considered socially beneficial, they also consume resources whose supply is limited, and they pollute the air, water, and soil. Environmental law is therefore frequently concerned with economic activities, including their inputs, processes, and outputs. (In economic terms, the adverse environmental effects of economic activity are understood as “externalities”: costs that economic actors are able to impose on others. A great deal of environmental regulation aims to make economic actors internalize these costs.)

However, environmental issues also involve natural phenomena. Environmental issues typically entail the depletion of natural resources, the release of pollutants, or the destruction of ecosystems. Many of these natural phenomena are complex, and scientific knowledge is required to detect their occurrence or to grasp their significance. Moreover, these natural phenomena are frequently interrelated, contributing additional layers of scientific complexity. Major environmental issues such as global warming or biodiversity loss involve a vast number of interconnected physical and biological changes. While scientists can offer a great deal of insight into environmental issues, scientific knowledge of the environment is never complete; there are always areas of scientific uncertainty. This is especially true where environmental policy aims to anticipate and prevent environmental harm from occurring in the first place. While attractive in principle, such a preventive approach requires scientists to predict the probable future consequences of various policy options—an inherently uncertain exercise.

4.2.2 Environmental Discourses and Politics

The economic and natural components of environmental issues provide the basis for a number of distinct political approaches to the environment. These political approaches are informed by different understandings of economics, of nature, or of the relationship between the two. These political approaches have also been fostered by, or have helped to foster, certain powerful discourses about environmental issues. Since the 1980s, the discourse of “sustainable development” has played a key role in mediating the tension between economic priorities and environmental protection.

In North America and Europe during the nineteenth and early twentieth centuries, the dominant understanding of nature was an instrumental one. Nature was seen as providing a store of resources that could be mobilized for human use, including industrial development. Awareness that natural resources were limited led to some efforts at “conservation.” But conservation was generally consistent with an instrumental approach to nature; it was intended to safeguard economically valuable resources for future use.⁶

However, environmental ideas changed dramatically in North America and Western Europe during the 1960s. This decade saw the rise of a popular movement emphasizing “ecology” or “environmental protection” rather than resource conservation.⁷ The environmentalism of the 1960s was informed by new scientific findings about dangers caused by industrial waste and by consumer products; it was particularly focused on the issue of pollution. Rachel Carson’s best-selling book *Silent Spring* (1962), which describing the harmful effects of DDT and other pesticides, epitomized this new outlook.⁸ Environmentalists of the 1960s promoted an ecological worldview; they emphasized humanity’s connections with the natural world.⁹ In a departure

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⁷ Ibid. at 66-67.
from earlier ideas about conservation, many 1960s environmentalists argued that humanity should protect nature for its own sake, quite apart from its economic value.

As the social and political theorist John Dryzek has explained, 1960s environmentalism contained a number of distinct ideational strands. One of these strands was survivalism, a discourse suggesting that industrialization and population growth would exhaust the planet’s resources and strain its ability to support human life. This discourse is most closely associated with a group of industrialists and academics calling themselves the Club of Rome. In its 1972 report, *The Limits to Growth*, the Club of Rome called for technocratic approaches to avert ecological catastrophe. Alongside survivalism, there was also a discourse of green radicalism. Green radicals shared survivalists’ sense of the instability of modern industrial society. However, they saw environmental issues as one component of larger struggles for economic, social, and cultural transformation.

Survivalism and green radicalism generally found little support among those in positions of power. Instead, governments of North American and Western European countries generally adopted a more moderate, problem-solving discourse. They acknowledged that economic activity caused environmental harm, but they argued that such harms could be managed through state-directed regulation, economic incentives, or greater public participation. State authorities thus enacted laws to address environmental issues. In the United States, the years 1969 to 1972 saw the enactment of major environmental statutes (including one containing the world’s first EA requirements) as well as the establishment of the Environmental Protection Agency. Whereas OECD countries had collectively passed only five major environmental statutes between 1956 and 1960, this number increased to ten between 1961 and 1965, to 18 between 1966 and 1970, and to 31 between 1971 and 1975.

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13 McCormick, *supra* note 6 at 125.
During the late 1960s and into the 1970s, the governments of North American and Western European countries began to consider the global dimensions of environmental issues, and they sought to globalize this problem-solving approach. A proposal from the government of Sweden led to the United Nations Conference on the Human Environment, held in Stockholm in 1972. The Stockholm conference has been called “the single most influential event in the evolution of the international environmental movement.”\(^{14}\) It confirmed the status of the environment as a universal issue, and led to the establishment of the United Nations Environment Programme (UNEP), the principal international environmental organization.

However, this globalization of environmental problem-solving clashed with competing agendas from the global South. People and governments in Southern countries observed that the environmental issues they faced were different from those in the North. For many of them, industrial pollution was relatively insignificant, whereas other issues—such as malnutrition, lack of access to clean water and sanitation, the spread of disease—were much more pressing. And economic development appeared necessary to overcome these problems. Southern countries sought to situate environmental issues within a larger “development” agenda.\(^{15}\) The governments of Southern countries were thus suspicious of attempts to value nature for its own sake, and they were firmly opposed to proposals for curtailing economic growth. In response to Northern attempts to include Southern countries in environment problem-solving, Southern countries frequently characterized the environment as a domestic issue, subject to the “sovereign” control of national governments.\(^{16}\)

During the 1970s, the Southern countries’ development agenda included not only the pursuit of economic growth, but also questions of political recognition and attempts to reduce North-South inequalities. In their linking of concerns about nature to struggles for economic and social justice, Southern approaches to the environment had certain affinities with Northern “green radical” approaches. Indeed, during the same period, activists in Southern countries had begun to

\(^{14}\) Ibid. at 104.


\(^{16}\) Many Southern countries soon created national laws and institutions devoted to environmental issues. Whereas only 11 Southern states had official environment departments or agencies in 1972, this number had increased to 102 by 1980: McCormick, supra note 6 at 158.
form environmental organizations and movements, many of which had radical agendas in the context of local political struggles. Nevertheless, the governments of most Southern countries adopted more reformist approaches to global political economy. Under the banner of the movement for a New International Economic Order, they sought global economic reforms that would allow them to industrialize and attain living standards comparable to those in the North—while also accommodating environmental concerns.

The Stockholm conference’s Canadian Secretary General, Maurice Strong, skillfully oversaw several years of preparatory meetings in which Northern and Southern countries were required to consider one another’s views. Nevertheless, the Stockholm conference produced an uneasy coexistence of views rather than a genuine synthesis. Northerners have often perceived Southern countries’ insistence on development as evidence of a lack of genuine commitment to the environment. The combination of environment and development has often been characterized as a political compromise necessary to purchase Southern participation, rather than a sincere integration of social and environmental concerns.

Evidence of this uneasy coexistence can be found in Principle 21 of the Stockholm declaration, which establishes that “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.”

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19 As Karin Mickelson explains, this lack of understanding is partly a corollary of an intrinsic valuing of the environment: “one might argue that the environmentalism of the rich has the luxury of valuing the environment for its own sake quite apart from its value to humans. It then takes this idea one step further and defines environmentalism in those terms. Any perspective that focuses on the interrelationships between human beings and nature then becomes suspect”: Karin Mickelson, “South, North, International Environmental Law, and International Environmental Lawyers” (2000) 11 Y.B. Int’l Envtl. L. 52 at 65.
20 Declaration of the United Nations Conference on the Human Environment, UN Doc A/Conf/48/14/Rev.1, Principle 21 [Stockholm Declaration]. This principle was repeated in the 1992 Rio Declaration (with the addition of
of a customary duty to refrain from causing transboundary environmental harm. However, read as a whole, Principle 21 is more ambiguous: It combines a prohibition on transboundary harm with a sovereign right to exploit resources.  

In the 1980s, a new discourse of “sustainable development” appeared to bridge the gap between Northern and Southern approaches to the environment. This discourse was popularized by the World Commission on Environment and Development, chaired by former Norwegian Prime Minister Gro Harlem Brundtland. The Brundtland Commission’s report, released in 1987, provides the most commonly used definition of sustainable development. The definition is worth quoting in full:

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.

The Brundtland Commission’s approach to sustainable development concept was deliberately crafted to transcend North-South (as well as left-right) conflict on environmental issues. Although it implies the possibility of ecological limits, its reference to economic development appeals to notions of progress that are attractive around the world and across the political spectrum. As Dryzek writes, “sustainable development rests on the assumption that environmental conservation and economic growth can be mutually reinforcing rather than


22 Bodansky, supra note 12 at 30-31; Caldwell, supra note 17 at 91-103.

23 World Commission on Environment and Development, Our Common Future (Oxford: Oxford University Press, 1987) at 43; see also McCormick, supra note 6 at 192-194. The first sentence of this definition is reproduced word for word the definition sections of both CEAA 1992 and CEAA 2012.

conflicting values.” Its reference to human “needs” and to the particular needs of the world’s poor hints at concerns for distributive justice (among individuals or among nations) without clearly specifying them; it is more explicit about intergenerational distributive justice. Finally, sustainable development seems to imply an instrumental approach to nature, but it does not explicitly exclude the possibility of protecting nature for its own sake.

The popularization of sustainable development discourse occurred in the context of a second wave of global environmental politics, which began in the mid-1980s and lasted into the early 1990s. This renewal of environmental politics can be attributed to several factors, including the scientific discovery of a hole in the atmospheric ozone layer and the beginnings of public concern about climate change. This second wave culminated with the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992, intended to mark the twentieth anniversary of the Stockholm conference. The Rio Declaration contains a dozen references to sustainable development. Around the world, sustainable development also became a central discourse in domestic environmental laws and policies.

However, the vagueness that made sustainable development politically successful also made this discourse extremely malleable. During the 1990s, actors and institutions promoting the neoliberal projects of trade and market liberalization began to frame their agenda in terms of sustainable development. Neoliberal approaches to political economy were premised on the possibility of unlimited economic growth. Such ideas might have faced resistance on environmental grounds; but sustainable development helped to portray economic growth and environmental protection as essentially consistent. In the neoliberal version of sustainable development, concerns about economic inequalities have been sidelined. Neoliberal ideas have thus helped reshape understandings of sustainable development among the general public in

25 Dryzek, supra note 10 at 56-56.
26 Meadowcroft, supra note 24 at 382-383.
27 Rio Declaration, supra note 20.
28 Meadowcroft, supra note 24 at 374-379.
30 Ibid. at 102-105; Meadowcroft, supra note 24 at 379; Dryzek, supra note 10 at 57.
Northern countries—and among some scholars. For example, a recent article on sustainable development by two U.S. international environmental lawyers states categorically that “equity between developed and developing countries… is not a core element of sustainable development, which is concerned with equity between generations and between individuals, rather than countries.”

Environmental issues thus have a basis in economic activities and natural phenomena. But there is nothing straightforward about the way these activities and phenomena are understood. Instead, political conflicts over environmental issues have helped to generate a number of discourses, implying different understandings of economics, nature, or the relationship between the two.

4.2.3 Environmental Law and Governance

The scientific complexity and economic importance of environmental issues, and their contested discursive framing, have had important consequences for the design of law and legal institutions. In response to environmental issues, governments around the world have sought to institute more flexible and responsive forms of governance. These new forms of governance have sometimes been proposed as “win-win” solutions that can avoid the messiness of environmental politics. However, even these forms of environmental governance potentially have important distributive and constitutive effects.

As we have seen, most forms of environmental harm arise from economic activity. The economic nature of these activities has posed challenges for environmental regulation. Economic actors (producers as well as consumers) often object to laws that would force them to bear the costs of environmental stewardship. Governments and citizens often fear that environmental laws will diminish productivity and thus overall welfare.

These economic aspects of environmental regulation invariably have a distributive aspect. When governments regulate economic activity to protect the environment, they impose costs on some and confer benefits on others. These costs and benefits may fall disproportionately on particular

groups: for example, farmers rather than city dwellers, manufacturers rather than producers of raw materials, women rather than men, firms in Mexico rather than firms in the United States. Depending on one’s perspective, environmental regulation may appear not only inefficient but unfair.\textsuperscript{32}

Scientific complexity poses a further challenge to environmental regulation. It may be very difficult for regulators to identify the source of an environmental problem. Even if the source can be identified, it may be very difficult and costly for regulators to monitor compliance with environmental regulations.

Moreover, scientific complexity combines with economic complexity to produce further informational challenges. Even where regulators understand an environmental issue and are able to monitor compliance, it may be difficult for them to foresee the economic impact of a particular regulation. Businesses that are subject to the regulation are usually in a better position than regulators to estimate the cost of compliance. This means that the economic impact of environmental regulation—in terms of efficiency as well as distribution—is seldom transparent and often highly contested.

For all of these reasons, many governments around the world have sought to move away from environmental regulations based on prohibitions and penalties—so-called “command and control” methods—toward more flexible and responsive approaches. At an extreme, this has led to “deregulation.” However, it has also produced specialized economic instruments, such as tax incentives, tradable pollution credits, and forms of regulation based on risk analysis.\textsuperscript{33} And it has produced governance approaches based on the disclosure and sharing of information. Indeed, environmental issues have provided the quintessential examples of regulatory approaches known

\textsuperscript{32} The distributive consequences of economic law and regulation must be distinguished from the issue of economic efficiency. The connection between economic activity and environmental degradation has led to a widespread perception that environmental protection is inimical to economic growth. In principle, there is no necessary trade-off between the environment and the economy. Economic growth is concerned with the value of goods and services traded in an economy. If people pay for goods or services that are environmentally neutral, or even beneficial, growth does not harm the environment. However, in practice, environmental laws and regulations inevitably have a greater impact on some than on others.

as “the new governance”: approaches designed to foster ongoing dialogue and learning about the optimal means and ends of public action.34

However, even such flexible and responsive approaches do not represent an escape from environmental law’s distributive dilemmas. Distributive choices are present no matter what mode of governance is employed. The calculation of risks may proceed on a technical basis, but risk-based regulation necessarily entails a political choice about the societally acceptable level of risk. Market-based mechanisms, such as tradeable pollution credits, are based on legally-structured entitlements. Even the option of “deregulation”—leaving polluters and their neighbours to work it out—implies recourse to the rights and entitlements of private law.

Environmental law may also have important constitutive effects. The constitutive effects of environmental law can arise from the way it approaches the relationship between nature and economic activity. For example, many classic forms of environmental law, such as regulatory limits on pollution, posit an opposition between environmental and economic goals. However, other governance approaches, such as informational mechanisms, may promote a sense that economic growth and environmental protection are essentially compatible. Environmental assessment processes, in which environmental considerations are integrated into all kinds of decision-making processes, share in this latter approach; they are consistent with the discourse of “sustainable development.”35

Environmental law’s constitutive effects can also arise from the way it deals with different kinds of knowledge. As I have noted, the biophysical basis of environmental issues is often startlingly complex, and specialized scientific knowledge is usually required to understand these issues. Such scientific knowledge has served to frame public understandings of some environmental issues, such as ozone depletion; environmental law has then been designed in response to these understandings. Law may thus serve to reproduce and legitimate a scientific understanding of environmental issues.


35 Meadowcroft, supra note 24 at 379.
But environmental law also deals with issues involving significant scientific uncertainty. Lawmakers have formulated a variety of responses to scientific uncertainty, such as risk-based approaches, or the precautionary principle.\(^\text{36}\) These responses have certain constitutive qualities: The precautionary principle, for example, promotes an understanding of environmental issues as complex and interconnected; it is consistent with a holistic, ecological view of nature.

Environmental law also deals with other, non-scientific forms of knowledge, such as the orally-transmitted traditions of indigenous peoples. Such traditional knowledge may be valued as a form of public participation in decision-making. However, the recognition of “traditional environmental knowledge” in formal legal processes could potentially challenge physical and biological understandings of environmental issues.

Environmental law may also help to constitute environmental issues by framing them at various geographical scales. As I have noted, environmental issues arise at various scales, from the global to the local. But the scale of an environmental issue also depends on how it is characterized. Many local environmental problems are the result of economic activities that span great distances. For example, local deforestation may be linked to a global market for wood or paper products. Local soil and water pollution may be caused by effluents from export-oriented industries. Environmental law may treat these as matters of local concern, or it may try to address them globally.\(^\text{37}\) In doing so, environmental law may shape popular understandings of the issue in question.

Finally, it is important to emphasize that the pervasiveness of environmental issues also means that laws that are explicitly identified as “environmental law” form only a small subset of the laws that shape human beings’ relationship with nature. The economic activities that cause environmental problems are also constituted by law, ranging from the private law of property and contract; to regulations regarding labour, competition, and consumer protection; to the international law of trade and investment. A full account of the relationship between law and the

\(^{36}\) The precautionary principle, holds that policy makers should not use the absence of conclusive scientific evidence as a basis for refusing to take action to prevent serious or irreversible environmental damage: see e.g. Rio Declaration, \textit{supra} note 20, Principle 15.

\(^{37}\) Bodansky, \textit{supra} note 12 at 11-13..
environment must also include an analysis of the environmental effects of these “background” rules.

4.3 The Environmental Assessment Model

Environmental assessment is a practice whereby some actor (often a government department or agency) tries to anticipate the environmental effects of a future course of action. Like other forms of environmental law, EA deals with the relationship between nature and economic activity, and it relies heavily on scientific knowledge. What is special about EA is the way it inserts environmental considerations into official decision-making processes whose primary focus is something other than the environment. This model of environmental regulation empowers certain actors to allocate environmental costs and benefits according to their priorities. EA also helps to frame environmental issues in terms of the consequences of specific projects, and to promote a sense that environmental protection is essentially compatible with these projects.

The practice of EA originated in the United States at the end of the 1960s. The first legally mandated EA process was instituted by the U.S. National Environmental Policy Act, which was enacted in 1969 and came into force on January 1, 1970. As its title indicates, the main purpose of NEPA was to declare a national environmental policy, a policy “which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”

NEPA contained both procedural and substantive provisions. Procedurally, NEPA required federal authorities to prepare “environmental impact” statements on any significant action affecting the environment, and to consider these statements in making their decisions. Substantively, NEPA declared that federal agencies should “use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources” in order to make them compatible with environmental

39 Ibid., Sec. 2.
40 Ibid., Sec. 102(C).
objectives.\textsuperscript{41} However, U.S. courts soon held that the substantive provisions were too vague to be enforceable.\textsuperscript{42} But they upheld the procedural requirement and strictly reviewed authorities’ compliance.\textsuperscript{43} In practice, environmental impact statements became the central feature of NEPA.

This U.S. innovation was soon imitated around the world. Although the terminology varies,\textsuperscript{44} it is possible to identify a standard global model of EA. EA invariably begins with a \textit{screening} process, in which the responsible authority must decide whether the project in question requires EA at all. This decision almost always depends on whether the project will have “significant” environmental effects. EA laws generally specify types of projects that are subject to (or exempted from) EA; they also provide for abbreviated assessments aimed at determining whether or not the project meets the threshold criterion of “significance.” In making this determination, authorities may be able to consider efforts to mitigate adverse environmental effects; mitigation may therefore bring a project below the threshold and allow it to avoid a full EA.\textsuperscript{45}

If the screening process determines that a project will have significant environmental effects, the next stage of the EA involves \textit{scoping}: setting the terms of reference for the full assessment; defining what kinds of effects will be considered. Next comes the actual \textit{assessment}: a thorough study of the likely environmental impacts of the project and ways of mitigating any environmental harm. Following the assessment comes \textit{decision making}. Finally, if the authority decides to approve the project, the EA process also involves measures for \textit{monitoring}

\begin{itemize}
\item \textsuperscript{41} \textit{Ibid.}, Sec. 101(b).
\item \textit{Calvert Cliffs Coordinating Committee v. Atomic Energy Commission}, 449 F. 2d, 1109 (D.C. Cir. 1971).
\item In the United States, where EA originated, the process is known as “environmental impact assessment” (EIA), whereas “environmental assessment” (EA) refers specifically to an initial, abbreviated version of the assessment (what is elsewhere known as a “screening”). The U.S. terminology is replicated in some international materials, such as the Rio Declaration and the Espoo Convention. However, other international organizations (such as the World Bank) use environmental assessment to refer to the process in general. Some authors specify that EIA refers only to project-level assessments, whereas EA is a more general term that also includes the strategic environmental assessment (SEA) of programs, plans, and policies. In this chapter I generally follow the Canadian statutory language and use EA to refer to the entire assessment process; I distinguish project-level assessments from SEA where necessary. I avoid using the EIA terminology except where referring to particular national instantiations of EA (as in the United States) or where quoting authors who use this terminology.
\end{itemize}
environmental effects to verify the accuracy of predictions and to ensure that necessary mitigation measures are carried out.

Scientific knowledge plays an important role in EA. Hydrologists, climate and soil scientists, and biologists are often called upon to examine the potential effects of a project on the environment. The integration of EA with project design means that engineers are also needed, to compare the anticipated environmental effects (and other costs and benefits) of various design modifications and mitigation techniques. All of these forms of analysis can produce vast amounts of technical data. However, since environmental assessment is a future-oriented type of environmental regulation—designed to anticipate environmental problems rather than react to them—it necessarily involves scientific uncertainty as well.

EA processes also generally involve elements of public participation. On one hand, they usually provide the public with access to detailed information about a proposed project, either in printed form or via the Internet. On the other hand, EA processes frequently give members of the public a chance to express their views. This participation can occur in many different ways, ranging from informal conversations with officials undertaking site visits, to written submissions, to formal hearings resembling a public inquiry. Some EA processes provide community groups with training or funding to help them cope with the cost and complexity involved in acting as “intervenors.” Public participation may occur at various points in the EA process. Public participation sometimes occurs during the scoping stage; it may also be part of the assessment itself, or the public may be given an opportunity to comment on the EA report before a decision is made.

The complexity of EA processes gives government authorities and project proponents a great deal of flexibility. Decisions about particular projects are seldom straightforward yes/no propositions. Instead, they occur at multiple stages, with multiple opportunities for revisiting prior conclusions. If unacceptable adverse effects become apparent, the proposal is likely to be sent back for modifications or adjusted through follow-up programs.  

Advocates for the use of EA procedures tend to justify them on instrumental as well as intrinsic grounds. In instrumental terms, it is often argued that EA leads to better decisions. By ensuring that public authorities are well-informed about the possible environmental effects of their decisions, and that they take environmental considerations into account, EA processes are imagined to produce policy outcomes that are better for the environment.

There are reasons to doubt the accuracy of this instrumental argument. It is difficult to find empirical evidence of a correlation between EA processes and enhanced environmental protection. EA is a process; it ensures that environmental decision-making will be well-informed, but in principle, it does not favour any particular substantive outcome. Moreover, EA processes overwhelmingly result in project approvals: EA seldom leads public authorities to cancel projects altogether.

However, the instrumental argument makes sense if one considers that EA processes are often lengthy, complex, and costly. The costs of EA-related delays (and the resulting economic uncertainty) are largely borne by project proponents. Regardless of their outcome, EA processes thus represent an additional cost for anyone seeking to undertake an economic activity that has the potential for environmental harm. Those seeking to force economic actors to internalize their environmental costs may therefore favour rigorous EA requirements as a substitute for substantive environmental regulation. (Businesses seeking to undertake economic activities often allege that EA processes serve as a delay tactic for environmentalists. They are partly right.)

Alternatively, advocates for EA processes tend to claim that these are intrinsically valuable. EA is thought to foster liberal-democratic values such as transparency and public deliberation. EA may require government to disclose important information about environmental hazards. Ideally, it gives members of the public a chance to contribute to decisions that affect them; some


specialists describe EA as a “learning process” through which the public can discover its own values. 49

In policy-oriented discussions of EA, the instrumental and intrinsic purposes of EA are frequently blurred. For example, in a discussion of Canadian EA processes, the environmental specialist Robert Gibson writes that the purpose of EA is to “encourage, and where necessary force, decision makers to be open and environmentally responsible.” 50

Nevertheless, it is important to recognize that EA, as practised, usually takes a managerial form. EA assigns power over environmental governance to particular actors, placing them in a privileged position to make environmental decisions. Many public EA regimes are based on the principle of “self-assessment”: If a public authority is involved in a project (for example, if it provides funding, or issues a licence), it must consider the environmental effects of the project. This self-assessment model is a corollary of the idea of integrating environmental considerations into existing decision-making processes. It is essentially a form of “mainstreaming,” analogous to the mainstreaming of human rights and gender in international organizations. 51

How environmental concerns fare in such arrangements depends largely on the organization in question. The self-assessment model effectively grants a measure of jurisdiction over the environment to organizations that would otherwise have no environmental mandate. In doing so, it requires institutions to reconcile environmental considerations with their other priorities and values. If environmental considerations are perceived to conflict with other priorities, there is no guarantee that environmental considerations will prevail. In order to correct for the perceived pro-development bias of institutions responsible for carrying out EAs, some countries subject EA to the supervision of environment ministries or specialized agencies. Other countries (notably the United States) have created legally binding EA requirements that have the effect of subjecting the EA process to judicial oversight. However, external review of EA processes often focuses on

50 Ibid. at 13 [emphasis added].
procedural correctness, leaving substantive decisions about environmental costs and benefits in
the hands of the government department or agency responsible for the original decision.

In practice, even where laws impose EA requirements on public authorities, the EAs themselves
are frequently carried out by private actors. In many projects that require EAs, state authorities
are merely implicated as funders, or as regulators. The actual “proponent” of the project is often
a business corporation or an NGO. In such cases, the conduct of the EA is normally downloaded
onto this project proponent. The proponent defines the scope of the project and conducts the
research that will anticipate its environmental effects. In many cases, the actual research is
carried out by an environmental consultant. The relevant state authority requires this EA process
as a condition of its decision to provide funding or regulatory approval, and ultimately takes
responsibility for this decision. Nevertheless, it plays a rather supervisory role, leaving the details
of the assessment in the hands of the (private sector) proponent.

As David Szablowski has argued in the context of mining projects in developing countries, EA
processes allow governments to offload responsibility for environmental issues (as well as their
costs) onto private actors, while maintaining an appearance of regulating the environment.
“Government responsibilities are limited to the oversight of these processes and the making of
decisions based upon the information that they provide… In essence, [EA] constitutes a self-
regulatory regime in which government is called on to assess, approve and enforce the findings
and recommendations made by a project proponent.”52

In other words, whether the EA is carried out by a public or private entity, there is rarely any
meaningful institutional separation between the project proponent and the person conducting the
EA. Where the EA is conducted by an environmental consultant, this consultant may depend on
the proponent for future contracts, and is unlikely to enjoy the kind of independence that would
permit it to contradict official policies.

EA processes are thus frequently shaped by the perspectives of public authorities and other
project proponents. They may therefore marginalize other perspectives, such as those of people

52 David Szablowski, Transnational Law and Local Struggles: Mining, Communities and the World Bank (Oxford:
Hart, 2007) at 56-57.
living in the local area who might be affected by the project. While many EA processes provide for some form of public consultation—and sometimes provide members of the affected public with participatory rights, or even intervenor funding—it is rarely clear what weight is given to environmental concerns expressed by the local population in the area affected by the project. EA processes seldom require project proponents or responsible authorities to provide reasons for their assessments or their decisions. Moreover, although public opinion on development projects is often divided (partly because the environmental costs of such projects are unevenly distributed), EA processes do not necessarily confront or even acknowledge such divisions. Public participation in EA processes may therefore be understood as a way for authorities and proponents to gather relevant data—including local knowledge about the biophysical environment—rather than as a form of democratic deliberation.53

The managerial nature of EA means that such processes may have important distributive consequences. The distributive effects of EA are difficult to analyze, because EA is, after all, procedural. It is primarily an informational tool, and it does not itself allocate tangible costs and benefits. Nevertheless, procedural design has an impact on the ability of differently placed individuals and groups to participate in ways that are conducive to having their claims recognized and upheld.54 In practice, EA processes (and the situations in which they are used) vary considerably, and the distributive effects of these processes are likely to vary accordingly.

EA processes may also have important constitutive effects. Depending on how they are structured, they may promote an understanding of environmental issues as essentially scientific and technical phenomena, distinct from economic, social, and cultural concerns. Public authorities and project proponents conducting EAs also tend to conceptualize environmental issues at a particular scale—the scale of the “project.”

As part of the EA process, public authorities and project proponents often conduct, or commission, detailed scientific reports. The deployment of scientific knowledge in EA processes promotes a sense that environmental issues are essentially scientific issues—effectively


depoliticizing them. The scientific and technical knowledge involved in EA processes is often unintelligible to laypersons. Heavy reliance on this kind of knowledge therefore poses a problem for understandings of EA as a form of public deliberation. The technical nature of EA documents has even been cited by the Supreme Court of Canada as a reason for withholding them from the public altogether. In the Sierra Club of Canada case (discussed in footnote 204, below), the Court upheld a confidentiality order with regard to EA documents, stating that “The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case.”

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EA processes may also have constitutive effects in the ways that they define their subject-matter. Many EA processes are concerned with the environmental effects of “projects,” usually equated with physical constructions or other activities that have tangible effects on the biophysical environment in a particular place. A lot may depend on how a particular project is “scoped,” i.e. how its limits are defined for the purposes of the EA. 56 But more importantly, by dealing with environmental issues one project at a time, EA may promote a sense that environmental issues are essentially local, discrete, and manageable. Reviews of EA practices have sometimes pointed out that these processes do a poor job of considering the cumulative environmental effects of large numbers of development projects. 57 In response to such concerns, environmental scientists and policy-makers have also developed methods for the “strategic environmental assessment” (SEA) of policies, plans, or programs. In some cases, SEA is used to assess a general policy framework, while specific projects within the framework are also subject to their own EAs. However, SEA practices are far less widespread than project-level EA practices.

Most fundamentally, by purporting to integrate environmental considerations into the design and decision-making surrounding particular projects, EA promotes a sense that these projects are


56 For an illustration of how much can be at stake at the scoping stage, see MiningWatch Canada v. Canada (Fisheries and Oceans), 2010 SCC 2, [2010] 1 S.C.R. 6.

compatible with environmental goals. For this reason, EA is essentially consistent with a “sustainable development” approach to environmental issues. Although EA practices predate the discourse of sustainable development, many authors on the topic identify EA as part of the sustainable development policy apparatus.\textsuperscript{58} Similarly, Tuomas Kuokkanen identifies EA as part of a “post-modern” era in international environmental law: a period characterized by efforts to overcome the tension between economic and environmental priorities—efforts in which the discourse of sustainable development also plays a key role.\textsuperscript{59}

EA processes are far from uniform, and the preceding discussion represents an attempt to describe a generalized model of EA as it has appeared in many settings. In practice, the distributive and constitutive effects of EA are likely to vary depending on the actors involved, the interests at stake, and the details of the legally mandated process.\textsuperscript{60} But to the extent that EA processes adhere to this global model, they are likely to share the managerial tendencies described here: their tendency to centralize environmental authority in the hands of those responsible for development projects, and their tendency to promote an understanding of environmental goals as essentially compatible with these projects.

4.4 The Globalization of Environmental Assessment

The practice of EA, which originated in the United States at the end of the 1960s, has since been globalized, in at least three ways. First, countries around the world have enacted laws derived from the U.S. model. Second, EA has been applied in a “transboundary” context: where economic activities in one country threaten to affect the environment in a neighbouring country. Third, EA practices have been adopted and applied by international organizations as well as non-state actors in the fields of international development, trade, and investment.

\textsuperscript{58} See e.g. Meadowcroft, \textit{supra} note 24 at 378; Magraw & Hawke, \textit{supra} note 31 at 635-636.

\textsuperscript{59} Kuokkanen, \textit{supra} note 21 at 238.

EA has been globalized largely through emulation. The procedural nature of the EA model has made it attractive to a wide variety of actors. EA has made it possible for authorities to declare their commitment to environmental protection without specifying what concrete measures this might entail.

However, international organizations (such as the United Nations Environment Programme) have also played a key role in the globalization of EA. Likewise, EA has become the subject of formal international lawmaking processes. The environmental assessment of transboundary effects is now required under a number of international treaties, and arguably under customary international law. However, the widespread adoption of the EA model has gone far beyond the requirements of international law.

4.4.1 The Diffusion of EA among National Legal Systems

Soon after the United States established its EA process under NEPA, countries around the world began to establish their own domestic EA processes. Australia, Canada, and New Zealand instituted EA practices in the early 1970s. In 1974, Australia became the first country other than the U.S. to legally require EA for some activities. Northern and Southern countries soon adopted EA either in legislative or policy form, including Colombia (1974), Thailand (1975), France (1976), West Germany (1976), the Philippines (1978), and the Netherlands (1979). Sub-national jurisdictions also established EA processes, beginning with California in 1970.

This globalization of EA occurred partly through a process of emulation, as national governments (sometimes spurred on by domestic environmental activists) found EA to be an attractive model and adopted it for their own purposes. As I have noted, environmental NGOs have promoted EA because of the hope that it will produce more environmentally responsible outcomes as well as a democratization of decision-making. But national governments have also been attracted to EA because it allows them to publicly commit to environmental protection while leaving its detailed implications to be worked out through processes that can be managed in a top-down fashion.

However, this globalization of EA was also the result of interactions among officials in international fora, who shared ideas about EA, and eventually generated informal norms regarding it. These global interactions concerned environmental policy in general. As the political scientist Lynton Keith Caldwell has explained, “during the years immediately preceding the Stockholm Conference, the example of new environmental laws and agencies established in France, Sweden, the United Kingdom, and the United States (among other countries) and the request of the United Nations Preparatory Commission for status reports from all countries on environmental policy, made possession of an environmental policy a status symbol.”  

The sociologists David John Frank, Ann Hironaka, and Evan Schofer have argued that the 1970s saw “growing agreement [among national governments] that the nation-state is by definition responsible for the continued vitality of the natural environment.”

These global interactions referred to EA in particular. During the preparatory process leading to the Stockholm conference, the EA model was widely discussed by environmental experts as well as representatives of national governments. At the time of the Stockholm conference, there was no global consensus around the use of EA; the Stockholm declaration contained no references to EA. But international organizations and fora soon began to generate formal and informal norms regarding EA. For example, in 1974, the OECD recommended that its member governments adopt EA practices. In 1982, the UN General Assembly approved a World Charter for Nature, which mandated environmental assessments of activities that could disturb, or pose a significant risk to, nature. In 1985, the European Economic Community issued a directive requiring its

62 Caldwell, supra note 17 at 57.
64 For example, the report of the Founex panel on development and environment contained a number of references to environmental assessment or “project appraisal”: Founex report, supra note 15 at 21-27.
member states to implement EA measures.\textsuperscript{67} In 1987, UNEP produced a set of Goals and Principles of Environmental Impact Assessment, which were subsequently endorsed by the UN General Assembly.\textsuperscript{68}

International recognition of the EA model culminated in the 1992 Rio Declaration on Environment and Development, which included a stipulation that “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”\textsuperscript{69} A worldwide study in 1996 concluded that over 100 countries had national EA systems in place.\textsuperscript{70} The global diffusion of the EA model from the 1970s to the 1990s was partly the result of these informal epistemic and normative processes.

### 4.4.2 Transboundary EA

The globalization of environmental politics during the 1970s also led to the use of EA in a “transboundary” context: where a project in one country threatens to affect the environment in a neighbouring country. The global diffusion of transboundary EA has come about through formal as well as informal processes. Because it involves multiple countries, transboundary EA is a more obvious candidate for formal international juridification than purely local or domestic EA. Indeed, a considerable body of conventional and customary international law has developed surrounding the practice of transboundary EA. However, transboundary EA has also been globalized through informal norms and practices generated in international organizations and expert networks.


\textsuperscript{69} Rio Declaration, supra note 20, Principle 17.

\textsuperscript{70} Sadler, supra note 48 at 25.
International disputes over transboundary environmental issues date back to the late nineteenth century.\textsuperscript{71} Even before the modern era of environmental politics began during the 1960s, these disputes had generated specialized principles of international law. Since the 1970s, these general principles of international environmental law have been combined with modern EA techniques, so that transboundary EA is now said to be a requirement of customary international law.

The general legal principles implicated in transboundary EA are often traced back to the \textit{Trail Smelter} arbitration, which settled a dispute between the United States and Canada during the 1920s. This dispute concerned a smelter in British Columbia whose sulphur dioxide fumes harmed crops in Washington state.\textsuperscript{72} The \textit{Trail Smelter} arbitral panel declared that “no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”\textsuperscript{73} Besides ordering Canada to pay damages, the arbitral tribunal established a regulatory regime designed to control the amount of pollution emanating from the smelter. The \textit{Trail Smelter} arbitration is generally taken to stand for a customary duty to prevent and control transboundary environmental harm. This customary duty was recognized in the second half of Principle 21 of the Stockholm declaration (quoted above).\textsuperscript{74}

Transboundary EA’s normative pedigree may also be traced to the \textit{Lake Lanoux} arbitration, which resolved a dispute between France and Spain in the mid-twentieth century. This dispute arose out of a French plan to divert water from a lake on the French-Spanish border for hydroelectric purposes. Although France planned to return an equal amount of water to the lake through an underground tunnel, Spain objected to the plan. The arbitrator held that the plan was a valid exercise of French sovereignty, and that France had fulfilled its obligations toward Spain.

\textsuperscript{71} See generally Kuokkanen, \textit{supra} note 21.

\textsuperscript{72} \textit{Trail Smelter case} (1938), 3 UNRIAA 1911.

\textsuperscript{73} \textit{Trail Smelter case} (1941), 3 UNRIAA 1938 at 1965; see also Rebecca M. Bratspies & Russell A. Miller, eds., \textit{Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration} (New York: Cambridge University Press, 2006).

\textsuperscript{74} Stockholm Declaration, \textit{supra} note 20.
by taking Spanish interests into account and trying to satisfy them as far as possible.\textsuperscript{75} The *Lac Lanoux* arbitration established an international legal precedent for an obligation to *consider* transboundary environmental effects.

In the 1970s, some states started taking transboundary effects into account as part of their domestic EA processes. In the United States, where EA originated, courts were quick to affirm that government authorities are required to consider the transboundary effects of domestic projects. As early as 1972, a U.S. court held that Canadians (in this case, B.C. politician David Anderson and the Canadian Wildlife Federation) had the right to intervene in proceedings determining whether the Secretary of the Interior had properly applied NEPA in the environmental assessment of an oil pipeline in Alaska.\textsuperscript{76}

Around the same time, states also began to make transboundary EA a requirement under a number of international treaties.\textsuperscript{77} The first multilateral treaty to include an EA requirement was the 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution.\textsuperscript{78} The United Nations Convention on the Law of the Sea, signed in 1982, also contains a provision for transboundary EA: States are required, “as far as practicable,” to assess the effects of potentially polluting activities, and to share the results of their assessments with other states.\textsuperscript{79}

There is also one multilateral treaty devoted entirely to transboundary EA: the *Convention on Environmental Impact Assessment in a Transboundary Context*, also known as the Espoo Convention.\textsuperscript{80} The idea for this treaty originated in the Conference on Security and Cooperation in Europe, meeting in Helsinki from 1973 to 1975; it was part of the process of Cold War

\textsuperscript{75} *Affaire du Lac Lanoux* (1957), 12 UNRIAA 281.
\textsuperscript{76} *Wilderness Society v. Morton*, 463 F2d 1261 (D.C. Cir. 1972).
\textsuperscript{78} *Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution*, 24 April 1978, 1140 UNTS 133, 17 ILM 511.
détente, and was meant to facilitate East-West cooperation.\footnote{Robert G. Connelly, “The UN Convention on EIA in a Transboundary Context: A Historical Perspective” (1999) 19 Envtl. Impact Assessment Rev. 37.} The Helsinki accords referred the issue of EA to the United Nations Economic Commission for Europe (UNECE), which also includes the United States and Canada. Negotiations began in the late 1980s, and the treaty was signed at Espoo, Finland, in 1991. The Espoo Convention requires parties to conduct EAs of projects that could have significant transboundary effects, to notify other parties that could be affected, and to allow other parties (as well as the affected public) to participate in national EA processes. It also establishes minimum standards for the application of EA, specifying a list of activities for which EA is mandatory.

The establishment of transboundary EA requirements under formal international treaties has also been accompanied by the creation of non-binding international norms. For example, in 1978, the OECD issued a recommendation on environmental cooperation, including transboundary EA. The recommendation directed member states to keep each other’s nationals informed about potential transfrontier pollution and to grant each other’s nationals access to administrative proceedings.\footnote{OECD, Recommendation of the Council for Strengthening International Co-operation on Environmental Protection in Frontier Regions, C(78)77 Final, at II.2.} The recommendation also specified that member states must share information and consult with one another when conducting EAs of projects in “frontier regions,” and it directed member states to consider transboundary effects “on an equivalent basis.”\footnote{Ibid. at II.3.}

Such developments in the area of transboundary EA have led some scholars to conclude that transboundary EA has become an obligation of customary international law.\footnote{Patricia Birnie, Alan Boyle & Catherine Redgwell, International Law & the Environment, 3d ed. (Oxford: Oxford University Press, 2009) at 137; Kees Bastmeijer & Timo Koivurova, “Transboundary Environmental Impact Assessment: An Introduction” in Kees Bastmeijer & Timo Koivurova, eds., Theory and Practice of Transboundary Environmental Impact Assessment (Leiden: Martinus Nijhoff, 2008) 1 at 3.} Some scholars associate transboundary EA with a substantive obligation to avoid causing significant transboundary harm, as articulated in the \textit{Trail Smelter} arbitration and Principle 21 of the Stockholm declaration. But this analysis is vulnerable to two important objections. First, it assumes that the EA process actually has a substantive orientation: that it leads to more
environmentally-oriented decision-making, rather than simply requiring national authorities to consider potential adverse environmental effects. Second, there may be insufficient state practice to support a prohibition on transboundary harm. States pollute across borders all the time. As John Knox has argued, if there is such a rule, it must be expressed in a much more qualified form: as a duty to prevent significant or substantial harm, or a duty to exercise due diligence in minimizing harm.\(^{85}\) Knox argues that transboundary EA is better justified in terms of a nondiscrimination principle, requiring national authorities to give equal weight to adverse effects on other countries’ environments, and to allow foreign nationals to participate in national EA processes on an equal basis.\(^{86}\)

In order to ground transboundary EA in customary principles, other international environmental lawyers have relied on a blend of process and substance. Neil Craik argues that the (substantive) no-significant-harm principle can be read together with a procedural duty to notify affected states of potential transboundary harm and to cooperate in mitigating such harm, as articulated in the \textit{Lac Lanoux} arbitration. This procedural duty was expressed more definitively in Principle 19 of the Rio Declaration, which stipulated that “States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.”\(^{87}\)

In any event, a transboundary EA requirement has been recognized in the International Law Commission’s 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, which are considered an authoritative restatement of customary law. The Draft Articles set out a number of procedural obligations: they require states to cooperate in good faith, to provide timely notification of risks, and to consult one another on preventive measures.\(^{88}\) Alongside these requirements, they stipulate that decisions about activities that pose a danger of

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\(^{86}\) Ibid. at 300-301.

\(^{87}\) Rio Declaration, \textit{supra} note 19, Principle 19.

transboundary harm “shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.”89

Transboundary EA has thus become a formal international legal requirement, and many states have incorporated transboundary EA into their domestic law. However, the diffusion of transboundary EA practices is not only a product of formal international lawmaking, but is also due to more informal processes, such as the OECD’s recommendations. Moreover, as I shall explain in the next section, the legal principles surrounding transboundary EA, such as non-discrimination, consultation, and a duty to prevent significant harm, have also been influential in the context of international development, trade, and investment.

4.4.3 EA in Development Assistance and Export Promotion

A third way EA has been globalized is through its application in the context of international economic activities, such as development assistance, trade, and investment. In these contexts, a state authority, an international organization, or a private bank may require an EA for a project that it helps to finance. The authority mandating the EA is thus someone other than government of the state in whose territory the project is located.

The globalization of EA in these contexts reveals the influence of informal norms specifically pertaining to EA. However, the use of EA in these contexts is also tied to neoliberal-inspired changes in economic governance, changes that have constrained the authority of Southern states and heralded competition as well as complicity among Northern states. Moreover, the way in which these processes have been globalized reveals assumptions about the differences between “public” and “private” projects, with different kinds of EA processes mandated for each.

I argue that the application of EA in these contexts is based on a number of factual and normative propositions. First, it reflects empirical claims about the poor quality of environmental governance in host countries. Second, it implies a recognition that external project sponsors may contribute to environmental harm. Third, it implies that project sponsors have a responsibility to help prevent or mitigate such harm.

89 Ibid., Arts. 4, 8, 9.
However, the extent of this responsibility to prevent or mitigate harm is widely contested. On one hand, some argue that environmental issues are universal, and that EA should be applied according to the principle of non-discrimination. In other words, governments, legally required to carry out EAs at home, should be subject to similar requirements when they undertake projects elsewhere—and by extension, the same standards should be applied to international organizations in which they participate.

On the other hand, others have argued that environmental issues are primordially local, and that they should be subject to policies developed at the local or national level. This argument for national control over environmental policies is frequently encapsulated in terms of the concept of “sovereignty.” This argument has often been mobilized by the governments of Southern countries, rejecting the application of Northern countries’ environmental standards to activities within their territory; they have argued that they must have the freedom to formulate standards appropriate to their particular context.\(^\text{90}\)

Despite pressure from Northern activists, most development assistance agencies avoided environmental issues during the 1970s. The World Bank was a partial exception: As early as 1970, the World Bank created an Office of Environmental Affairs\(^\text{91}\) and articulated an environmental policy.\(^\text{92}\) However, even the World Bank did not produce a formal EA process during this period, and conducted EAs only on a flexible, ad hoc basis.\(^\text{93}\) At the World Bank and elsewhere, it appears that staff took seriously the notion that environmental issues were the responsibility of host states. At the end of the decade, UNEP and the World Bank collaborated to produce a Declaration of Environmental Policies and Procedures Related to Economic Development, calling for the EA of development projects; the declaration was signed by these

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\(^{90}\) Founex report, supra note 15 at 24-25, 32-33.

\(^{91}\) Le Prestre, supra note 18 at 15-19.

\(^{92}\) Ibid. at 27-28

\(^{93}\) Ibid. at 55.
agencies as well as the major regional development banks.\textsuperscript{94} However, most of these institutions were slow to implement the reforms specified in the Declaration.

A turning point in the field of development assistance occurred in the early 1980s, when Northern as well as Southern environment NGOs launched a campaign criticizing the World Bank for financing dams and other environmentally destructive projects. Much of the criticism focused on two particular projects: the Brazilian government’s plans for development in the Amazon rainforest (the Polonoroeste project) and the Indonesian government’s plans to resettle people from Java to other islands. Environmental NGOs found allies in the U.S. Congress, who held congressional hearings on the World Bank’s environmental record.\textsuperscript{95}

Discursive and institutional factors combined in the 1980s to make the EA of development assistance projects by donor agencies more politically acceptable. Discursively, the popularization of “sustainable development” promoted a sense that economic and environmental goals were essentially compatible. Institutionally, this was the time of the Third World debt crisis and structural adjustment. Southern governments were forced to accept a wide range of conditions in exchange for aid, making the imposition of environmental standards less exceptional. Moreover, the dismantling of state structures in many Southern countries ensured that local capacity for environmental regulation remained rudimentary. Neoliberal changes in economic law and governance thus provided a new set of “background” rules for environmental governance. From the perspective of the environment, this changing background included not only private law structures of property and contract, but also public regulation in the form of international trade and investment law, as well as the terms of international development assistance.

In 1987, the World Bank abandoned its restrained approach and announced a series of environmental reforms. These included the creation of an Environment Department with 30 full-

\textsuperscript{94} Declaration of Environmental Policies and Procedures Related to Economic Development, reprinted in Le Prestre, \textit{ibid.} at 208-209.

\textsuperscript{95} Le Prestre, \textit{supra} note 18 at 167-197; Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics (Ithaca, N.Y.: Cornell University Press, 1998) at 135-150.
time staff. These also included a directive requiring EA for large projects financed by the IBRD and the IDA (the Bank branches providing funding for state-led, public-sector projects). This directive put forward a “triage” model, in which projects were to be sorted into categories A, B, or C, with different levels of scrutiny depending on the anticipated risk of environmental harm. EAs were to be carried out by the borrowing country under the Bank’s supervision.

National bilateral aid agencies, also under pressure to consider the environmental effects of their work during the 1980s, began to discuss this issue at the OECD. In 1992, OECD countries’ aid agencies collectively agreed they should carry out EAs of any overseas development projects that could have significant environmental effects. By the late 1990s, all OECD development donor countries had established systems for the EA of development programs—although most had done so through policy or administrative arrangements rather than legally binding requirements.

In the context of official development projects, donor institutions are often careful to specify that their EA processes must defer to host state requirements. For example, the most recent version of the World Bank’s EA directive states that EA “takes into account the variations in project and country conditions; the findings of country environmental studies; national environmental action plans; the country's overall policy framework, national legislation, and institutional capabilities related to the environment and social aspects; and obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements.” The OECD Recommendations firmly declare that “[t]he governments of the developing countries bear the ultimate responsibility for the state of the environment in their respective countries and for the design of the development projects.”

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96 Le Prestre, *ibid.* at 199-201.
97 *World Bank, Operational Directive 4.00—Annex A: Environmental Assessment (1989); replaced by Operational Policy 4.01—Environmental Assessment (1999).*
99 *OECD, Task Force on Coherence of Environmental Assessment for International Bilateral Aid, *Coherence in Environmental Assessment* (1999).*
100 *World Bank, Operational Policy 4.01—Environmental Assessment (1999), version of February 2011, para. 3.
101 *OECD, DAC Guidelines, supra* note 98 at 10.
Nevertheless, these donor institutions also make it clear that the freedom of host countries to devise their own EA systems is limited. The World Bank makes the borrowing country responsible for carrying out the EA, but stipulates specific requirements for an adequate EA, and warns that the Bank will not release funding unless it is satisfied with the EA.\(^\text{102}\) The OECD Recommendations state that “donors need to ensure that an EIA of the aid-assisted project takes into account the environmental laws and regulations of recipient governments and also the donor’s development co-operation standards.”

Recognizing that host states may not have EA systems that measure up to their standards, donor institutions have also connected the EA of development projects to a process of “capacity building.”\(^\text{103}\) A 1997 World Bank internal review recommended increased funding for capacity building in its borrower countries, while also admitting that “Capacity building is a long-term process and many borrowers still have limited EA capabilities both on the administrative side and in terms of preparing EAs.”\(^\text{104}\) The World Bank’s EA policy states that “[w]hen the borrower has inadequate legal or technical capacity to carry out key EA-related functions (such as review of EA, environmental monitoring, inspections, or management of mitigatory measures) for a proposed project, the project includes components to strengthen that capacity.”\(^\text{105}\) The OECD’s Guidelines for EA of development projects states that “The environmental institutions of the developing country should be involved to the greatest extent possible,” and that the process “should also aim at strengthening the capabilities of the developing country in the environmental field.”\(^\text{106}\)

In the 1980s, environmental activists in a number of countries, but especially in the United States, also began to campaign for the application of EA requirements to export credit agencies (ECAs). ECAs are public institutions that provide loans and insurance (and sometimes equity financing) to firms involved in international trade and investment. ECAs frequently subsidize

\(^{102}\) World Bank, Operational Policy 4.01—Environmental Assessment (1999), version of February 2011, paras. 4-5.


\(^{106}\) OECD, DAC Guidelines, supra note 98 at 12.
Northern business ventures in Southern countries. ECA financing is not generally seen as a form of development assistance; it is meant to help national firms undertake international trade and investment. ECA-funded projects therefore involve a mixture of public and private elements. In the 1990s, activists also began to target World Bank institutions that perform similar functions: the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA). 107

Northern governments initially resisted proposals to impose environmental standards on ECA financing. However, unlike in the case of (public) development assistance, this refusal was rarely linked to ideas about host state sovereignty. Instead, Northern governments expressed fear that such standards would place their own countries’ firms at a competitive disadvantage vis-à-vis other countries’ firms. The U.S. government succumbed to environmental pressure, and agreed to impose environmental standards (derived from the World Bank’s environmental directive) on its own Ex-Im Bank in 1995. At the same time, the U.S. government pressured the IFC to adopt an environmental directive, which it did in 1998.

The U.S. government and the IFC eventually worked to persuade other countries to adopt environmental directives for their ECAs, using the World Bank’s policy as a global standard. The U.S. raised the issue at the OECD. However, OECD governments were slow to accept EA requirements for their ECAs; many of them shared the U.S. concern that such processes would disadvantage their firms. Some governments also expressed concerns that EA processes would compromise the secrecy of commercial information. OECD countries eventually reached a compromise, and in December 2003, the OECD Council issued a Recommendation on Common Approaches on Environment and Officially Supported Export Credits. 108 This Recommendation was updated in 2007 to more closely correspond to the IFC’s Performance Standard. 109 The OECD recommendations are not binding; however, they provide a basis for coordinated action.

107 Szabowski, supra note 51 at 92-94.
among member states. In 2010, an OECD survey of its members’ ECAs revealed that these organizations used a variety of formal and informal approaches for ensuring that the projects they fund comply with host country standards.

The issue of host state sovereignty is mentioned far less frequently in the context of ECAs than in the context of development assistance. The preambles to the 2003 and 2007 versions of the OECD Recommendations both contain the line, “Recognising the sovereign right of buyers’ countries to make decisions regarding projects within their jurisdictions…” The 2007 Recommendations instruct ECAs to benchmark the projects they fund against the host country’s environmental standards, but they insist that ECAs should also benchmark their projects against international standards, such as the World Bank’s safeguard policies (including its operational policy on Environmental Assessment) or the IFC Performance Standards. Projects should meet host country standards, but projects should also meet international standards if these are more stringent.

EA processes have also been taken up by private institutions that provide loans and other financial support for projects in developing countries. In 2003, at the instigation of the IFC, an international group of large commercial banks created the Equator Principles. These principles set out environmental and social criteria that financial institutions should consider when lending money to support projects in developing countries. Private financial institutions therefore impose these environmental and social criteria on their borrowers. Among the Equator Principles is the requirement of a “social and environmental assessment” for projects that have the potential to cause adverse social or environmental effects. EA processes under the Equator Principles are based on the IFC’s Performance Standard.

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111 Ibid. at 19-20.

112 OECD, 2007 Recommendation, supra note 109 at para. 12 (pp. 5-6).

113 Ibid. at para. 13 (p. 6).

In the context of private investment, the issue of host country “sovereignty” is hardly discussed. The Equator Principles make repeated references to the necessity of complying with host country laws. They also insist on the importance of public consultation in the case of projects that could potentially have significant environmental or social impacts. But they do not contain the least suggestion that the application of IFC standards might compromise the host country’s self-government of its environment.

The globalization of the EA process in the context of development assistance thus shows how ideas and models of environmental regulation can travel: through conscious emulation by national policy makers as well as through informal guidelines, recommendations, and standards. But it also shows how changing approaches to economic law can affect the governance of the environment. While subjecting development projects to donor countries’ environmental assessment procedures had been politically impossible in the 1970s, it became possible in the late 1980s and ‘90s. This was partly due to the changing context of economic law.

One effect of these changes was to reinforce the distinction between “public” and “private” projects. The “extraterritorial” label (and the anxieties associated with it) was generally reserved for situations where EA was mandated by state authorities. If an EA was mandated by the Equator Principles or some other “private” source of authority, this would be understood as a function of the investor’s property interests. It would not be understood to conflict with the host state’s territorial integrity.

4.5 The Canadian Context

Canadian EA law is generally a product of the globalization of the EA model during the 1970s and 80s. However, at least four domestic factors have also shaped Canadian approaches to EA—and, by extension, Canadian approaches to EA abroad. First, the resource-based nature of Canada’s economy (and the potentially serious consequences of environmental regulation) has generated a preference among Canadian lawmakers for informal or negotiated approaches to environmental protection. Second, Canada’s constitutional divisions have produced domestic models of interjurisdictional cooperation, which have subsequently been applied internationally. Third, Canada’s relationship with the United States, including a long history of environmental conflict as well as cooperation, has made Canadian lawmakers especially sensitive to the
international dimensions of environmental issues. Fourth, lawsuits over EA processes gave rise
to a period of rigorous proceduralism with regard to EA—quite distinct from Canadian
approaches to other forms of environmental law. However, the recent enactment of the Canadian
Environmental Assessment Act, 2012 suggests a return to simplicity and informality.

4.5.1 Resource Extraction and Political Conflict

Prior to the 1970s, Canadian governments generally sought to foster the exploitation of Canada’s
vast forests, rivers, and mineral resources with little regard for environmental consequences.
Federal and provincial governments promoted the clearing of forests, the building of roads and
railways, and the establishment of modern settlements across Canada’s territory, including the
sparsely inhabited North. As the public policy scholars Bruce Doern and Thomas Conway have
explained, “A long series of dams and diversions, mines and smelters, pipelines and paper mills,
and chemical and nuclear plants were considered first as economic-development projects.
Displacement of aboriginal peoples, destruction of animal habitat, and pollution side-effects such
as mercury contamination of fish resulting from dam diversions were simply not accounted
for.”

In the late 1960s and early 1970s, Canadian citizens and governments nevertheless
enthusiastically joined in the first wave of global environmental politics. Public opinion polls
revealed an upsurge in public concern about the environment. Canadian citizens established a
vast number of environmental groups, including Greenpeace, founded in Vancouver in 1971.
During the early 1970s, the Liberal government of Pierre Trudeau enacted a significant body of
environmental legislation, including the Arctic Waters Pollution Prevention Act, the Canada
Water Act, the Clean Air Act, the Environmental Contaminants Act, and introducing new


However, the fact that so much of Canada’s economy depended on resource extraction (e.g. forestry, fossil fuels, mining, fisheries) meant that environmental regulation posed difficult political-economic choices. These industries often posed grave threats to the natural environment; they were also immovably situated in different parts of the country. Business owners and managers resisted environmental regulation, and their resistance was often endorsed by workers and communities whose livelihood depended on investment in resource extraction. A great deal of money was thus at stake in environmental regulation; moreover, environmental regulation could have enormous inter-regional distributive consequences. The federal government therefore initially approached environmental regulation through a closed-door process of “bipartite bargaining” with industry representatives.

During the second wave of environmental politics, in the late 1980s and early 1990s, the federal government adopted a more open and consultative approach to environmental policy. It did so partly in response to the increased resources and professionalization of environmental NGOs: These could no longer be ignored. The federal government thus opened the environmental policy process to a wider variety of actors. Rather than purporting to represent the public interest, the Canadian government positioned itself as consulting and mediating among many different “stakeholders.”

In spite of this greater openness, the federal government’s preferred approach to environmental issues remained a largely informal and ad hoc one. Although Parliament enacted a number of

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120 *Clean Air Act*, S.C. 1970-71-72, c. 47.
122 MacDonald, *supra* note 117 at 143.
important environmental statutes (notably the *Canadian Environmental Protection Act*¹²⁵ and the
*Canadian Environmental Assessment Act*), the federal government approached the legislative
process in terms of bargaining among actors with disparate political and economic positions.

In 2006, Canadian voters gave Stephen Harper’s Conservative party a plurality of seats in
Parliament, followed by a majority in 2011. The period since 2006 has seen a significant shift in
Canadian environmental policy. The Harper government has clearly favoured the expansion of
Canadian mining and fossil fuel extraction. It has made no secret of the fact that it prioritizes
these economic activities over environmental protection. It has dropped the discourse of
“sustainable development” in favour of “responsible resource development.” And it has
generally portrayed environmental laws as an obstacle to economic growth.¹²⁶

The changes introduced by the *Canadian Environmental Assessment Act, 2012* are consistent
with this political orientation. CEAA 2012 drastically restricts the scope of the federal EA
regime. Perhaps most remarkably, it defines the kinds of projects that can be subject to EA much
more narrowly than these had been defined under CEAA 1992. For domestic EAs, CEAA 2012
is limited to certain kinds of “designated projects” listed in a regulation or others specially
named by ministerial order.¹²⁷ Moreover, these projects are generally only subject to a
“screening,” unless the responsible authority determines that they should be subject to a full
EA.¹²⁸ (In most cases, the Canadian Environmental Assessment Agency will be the “responsible
authority”; the National Energy Board and the Canadian Nuclear Safety Commission are also
mandated to carry out EAs of certain projects.)¹²⁹

CEAA 2012 also curtails the EA process by imposing strict timelines. Once a project proponent
presents a proposal to the Canadian Environmental Assessment Agency, this Agency has only 45

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¹²⁵ *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.).
¹²⁶ Stepan Wood, Georgia Tanner & Benjamin J. Richardson, “What Ever Happened to Canadian Environmental
¹²⁷ CEAA 2012, supra note 1, ss. 2 (“designated project”); 13, 14, 84(a).
¹²⁹ *Ibid.*, s. 15.
days to conduct a screening. Should the Agency determine that a more elaborate analysis is required, the process must nevertheless be completed within one year (in the case of a standard EA) or two years (in the case of a panel review). In its official communications, the federal government has stressed that these timelines will provide more certainty and predictability for project proponents.

It is worth noting that CEAA 2012 modifies the self-assessment principle by centralizing EA within the federal government. Whereas CEAA 1992 made each federal department or agency responsible for conducting its own EAs, CEAA 2012 assigns responsibility for the conduct of most EAs to a single administrative unit, the Canadian Environmental Assessment Agency. Moreover, it gives the Minister of the Environment the power to decide, in most cases, whether a project is “likely to cause significant adverse environmental effects.” Finally, decisions about whether to proceed with a project in spite of its environmental effects are reserved for the federal cabinet.

This last provision suggests a desire to contain the role of scientific expertise and to preserve a greater role for openly political decision-making. This change is consistent with the government’s general ideational orientation. In a number of policy areas, the Harper government has explicitly rejected the advice of its professional civil service and worked to marginalize and/or silence scientific experts. The Harper government’s modifications to Canadian federal EA laws thus represent a departure from the managerialism that has generally characterized the use of EA processes.

130 Ibid., s. 10.
131 Ibid., ss. 27, 38(3). These timelines can nevertheless be extended by the Minister of the Environment or the Federal Cabinet in certain cases.
133 Except where projects fall within the authority of the Canadian Nuclear Safety Commission, the National Energy Board, or certain other federal authorities to be designated on a case-by-case basis: CEAA 2012, supra note 1, s. 15.
134 Ibid., s. 52(1).
135 Ibid., s. 52(2)-(4).
4.5.2 Constitutional Divisions: Federalism and Aboriginal Peoples

Canadian approaches to environmental law, including EA, have also been shaped by constitutional divisions of authority over the environment. Canada’s federal government has never been in a position to unilaterally legislate its preferred environmental standards. Instead, it has had to cooperate with provincial governments and with self-governing Aboriginal nations. As a result, Canada has developed elaborate structures of interjurisdictional cooperation on environmental matters, including EA.

Canada’s constitutional division of powers, established a century before the environment was generally recognized as an issue, does not explicitly assign environmental regulation to either level of government. Instead, each level of government enjoys powers over certain environment-related matters. The federal Parliament may notably legislate in relation to trade and commerce, fisheries, interprovincial and international transport and communications, indigenous peoples, and criminal law. Parliament may also pass laws for the “Peace, Order, and Good Government” of Canada. The federal government’s taxation and spending powers also allow it to influence environmental policy through economic measures. However, the provincial legislatures have power over public lands, local works and undertakings, property and civil rights, and matters of local concern. Provincial governments also wield significant power over the environment as landowners. The Supreme Court of Canada has subsequently confirmed the status of the environment as a matter of shared legislative responsibility.137

As the first wave of environmental politics subsided in the early 1970s, the federal government became less active in the environmental sphere, effectively leaving this area to the provinces. From the mid-1970s to the mid-1980s, the federal environment department’s budget was almost constantly shrinking, and the federal government made little mention of the environment in its major policy speeches.138 Environmental assessment was a notable element of this “federal


138 Doern & Conway, supra note 115 at 66.
retreat**: The federal government made a strategic decision to leave EA in the hands of provincial governments. The federal government retreated from environmental regulation partly because it sought provincial cooperation in other matters: mainly for its economic (anti-inflation) and constitutional agendas. Indeed, as part of the bargain that produced the *Constitution Act, 1982*, the federal government agreed to an explicit grant of provincial legislative power over non-renewable natural resources, forestry resources, and electrical energy—effectively expanding formal provincial control over environmental matters.

The federal government took a renewed interest in environmental issues in the late 1980s, in tandem with the second wave of global environmental politics. The Progressive Conservative government of Brian Mulroney launched an ambitious environmental agenda, including the *Canadian Environmental Protection Act*; a $3 billion “Green Plan,” targeting waste reduction, toxics regulation, and sector-specific approaches to sustainable development; and the *Canadian Environmental Assessment Act*. However, renewed federal interest in the environment now had to coexist with well-established provincial approaches to environmental regulation. In particular, all ten Canadian provinces had EA systems in place by the mid-1990s (some were in the form of policies, while others were legally binding).

CEAA 1992 contained a number of provisions designed to keep the legislation within federal legislative powers and to accommodate provincial activity in the field of EA. It listed federal-provincial cooperation as one of its purposes. CEAA also explicitly provided certain mechanisms for federal-provincial coordination. For example, it set out conditions for the constitution of joint federal-provincial review panels. It also provided an exemption for projects whose essential details were not known, provided they were to undergo a provincial

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141 *Constitution Act, 1867*, s. 92A.
142 Sadler, *supra* note 48 at 25.
143 CEAA 1992, *supra* note 2 at s. 4(1)(b.3).
144 *Ibid.*, s. 40(1) and (2).
Perhaps most generally and most importantly, CEAA’s narrow applicability to certain physical projects with tangible biophysical effects was partly intended to ensure that its application remains within federal jurisdiction.

The coexistence of federal and provincial EA processes created the potential for overlap. In order to avoid duplication, federal and provincial governments began negotiating ad hoc agreements to share responsibility for the EA of particular projects. The federal government also established general bilateral EA agreements with particular provinces. In the 1990s, federal and provincial governments began negotiating a multilateral interjurisdictional framework for EA cooperation. In 1998, this process produced the Canada-Wide Accord on Environmental Harmonization, which includes a Sub-agreement on Environmental Assessment. Bilateral federal-provincial agreements are then negotiated under the sub-agreement. These harmonized arrangements involve “rationalizing EIA so that the requirements of each applicable piece of legislation are met through one process.”

The changes introduced by CEAA 2012 reflect a shift toward subsidiarity (i.e., deference to provincial jurisdiction) in environmental matters. For the purposes of domestic EAs under CEAA 2012, the “environmental effects” that must be considered are generally only those that fall unquestionably within the legislative authority of Parliament: effects on fish and fish habitat, aquatic species, migratory birds, federal lands, or aboriginal peoples. (Interprovincial or international transboundary effects also provide bases for federal involvement.) If the Minister of the Environment is of the opinion that a provincial government’s EA process would be an appropriate substitute, and the provincial government asks the federal government to withdraw, the federal government must defer to the outcome of the provincial process.

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145 Ibid., s. 54(1).


148 CEAA 2012, supra note 1, s. 5(1).

149 Ibid., s. 5(1)(b).

150 Ibid., s. 32(1).
From the 1970s onward, Canada’s Aboriginal peoples also became more vocal in asserting their ancestral claims to land and resources. Moreover, following the Supreme Court of Canada’s 1973 *Calder* decision, some of these claims were officially recognized under Canadian state law. The recognition of Aboriginal rights and title to land added a new dimension to economic development and environmental protection in Canada’s hinterland. Some Aboriginal peoples, such as those Justice Thomas Berger encountered during the 1974-77 Mackenzie Valley Pipeline inquiry, resisted large-scale resource projects on their traditional territories. But others, such as the Cree of northern Quebec, signed agreements allowing these projects to proceed but guaranteeing them a stake in the proceeds. These agreements also gave them a role in regulating the environmental impact of economic development; some of them established special EA regimes. Aboriginal peoples thus added another dimension to interjurisdictional environmental cooperation in Canada.

Canada’s constitutional division of powers and its recognition of Aboriginal rights have thus have important implications for Canadian approaches to EA. They have generated certain domestic models of interjurisdictional cooperation in the EA realm. And, as I shall explain in the following section, these models have shaped Canadian approaches to the EA of projects outside Canada.

### 4.5.3 The Canada-U.S. Relationship

Canada’s proximity to the United States has also had a major influence on Canadian laws relating to the environment. This proximity has influenced Canadian EA laws in at least two ways. First, cross-border environmental problems have made Canadians especially sensitive to the international dimensions of environmental issues. During the 1980s, a crucial period for the evolution of Canadian EA law, acid rain caused by cross-border pollution was the most prominent environmental issue in Canada. Second, Canada’s economic and cultural ties to the United States have often led Canadian governments to emulate U.S. environmental law—or to explicitly reject it. When it came to EA, Canada’s federal government initially sought to import

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the U.S. model while avoiding the legalism and litigiousness that had characterized the application of NEPA south of the border.

Environmental problems, including both pollution and resource depletion, have often spanned the Canada-U.S. border. The juxtaposition of Canada and the United States on the North American continent means that many resources (such as water and wildlife) are shared. Air and water pollution have also frequently crossed the border—in both directions. As a consequence, Canada and the United States have a long history of conflict as well as cooperation over environmental issues.\(^\text{153}\) An early example of cooperation is the 1909 Boundary Waters Treaty, which established the International Joint Commission to manage shared North American water resources.\(^\text{154}\) The first wave of global environment politics, in the early 1970s, also produced cooperation in the form of the Great Lakes Water Quality Agreement. Under this agreement, undertaken largely in response to phosphate pollution, Canada and the U.S. agreed to jointly pursue specific water quality objectives for the Great Lakes.\(^\text{155}\)

However, during the late 1970s and throughout the 1980s, Canada-U.S. environmental relations came to be dominated by the issue of acid rain. Caused by sulphur dioxide emissions from industry on both sides of the border, acid rain had a devastating impact on forests and freshwater fish in central Canada. Canadian officials strenuously lobbied the U.S. government to reduce U.S. sulphur emissions. However, environmental activists (and indignant U.S. lawmakers) pointed out that Canada had done little to control its own sulphur emissions. Unable to persuade the Americans, Canada tried to lead by example. In 1985, the federal government and the governments of the seven easternmost provinces announced a plan to drastically reduce sulphur emissions over the next decade.\(^\text{156}\)

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\(^{153}\) The *Trail Smelter* dispute, discussed above, is a classic example.  
Although the evidence is circumstantial, it appears that cross-border issues (and the acid rain issue in particular) may have had a determining effect on the design of the Canadian federal EA regime. At the time, Canadian lawmakers would have been particularly sensitive to the international dimensions of environmental issues, and especially to the claim that international environmental effects should be treated as equivalent to domestic ones. And, as I will explain in part 4.6, below, the Canadian Environmental Assessment Act took a particularly strong approach to international environmental effects.

The second way in which proximity to the United States has influenced Canadian environmental law is through cultural and economic ties. As the political scientist George Hoberg has explained, U.S. models of environmental governance have been transferred to Canada through a number of mechanisms.\(^{157}\) In some cases, as with automobile emissions standards, policy-making elites in Canadian government have emulated U.S. regulatory approaches. However, in other cases, as in the controversy over the pesticide EDB, Canadian environmental activists have mimicked their U.S. counterparts and created a parallel public movement for regulation in Canada. The influence of U.S. media means that environmental controversies in the United States often give rise to Canadian spin-offs. U.S. scientific research on environmental issues is also influential in Canadian policy circles.

North American economic ties also put pressure on Canada to harmonize its environmental standards with those of the United States. Canadian federal and provincial governments have historically courted U.S. investment in Canadian industry, and have looked to the U.S. as a market for Canadian exports. Canadian governments have therefore been sensitive to the need to maintain their economic relationships with the U.S. and its firms, and they have often tried to align environmental standards with those prevailing in the U.S. Of course, these economic ties are also legally constituted. The formalization of North American trade and investment ties under NAFTA has forced Canadian governments to be even more circumspect about the possible impact of environmental regulation on U.S. businesses. A number of high-profile investment

disputes under NAFTA have involved complaints by U.S. companies against Canadian environmental policies.\footnote{158}{See David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge: Cambridge University Press, 2008) at 86-95.}

The U.S. NEPA provided the model for Canadian EA law as it did for EA laws around the world. However, the Canadian government sought to pick and choose which features of NEPA to import. When the Trudeau government introduced Canada’s first federal EA process in 1973, it used non-binding administrative guidelines, known as the Environmental Assessment and Review Process (EARP), rather than legislation. It also established a modest secretariat within the Department of Environment, the Federal Environmental Assessment and Review Office (FEARO) to provide technical advice and administrative support.\footnote{159}{Doern & Conway, *supra* note 115 at 191-197.} In opting for this relatively informal process, Canadian lawmakers were clearly motivated by a desire to avoid the legalism and litigiousness that had characterized the implementation of NEPA in the United States. Hoberg calls this “a classic case of partial emulation.”\footnote{160}{Hoberg, “Elephant,” *supra* note 157 at 124.}

### 4.5.4 Domestic Litigation

As I have noted, Canada’s federal EA regime was initially established on the basis of a non-binding cabinet directive. However, certain modifications in the early 1980s gave environmental activists a basis for litigation, forcing the federal government to take a more mandatory approach to EA. This experience helped to shape subsequent Canadian approaches to EA. Reacting against the informality of EARP, the drafters of CEAA 1992 established a legalistic and procedurally rigorous approach to EA. However, they also worked to ensure that the federal government would be relatively immune to further EA-related litigation.

In 1984, the federal environment minister, Charles Caccia, succeeded in persuading his cabinet colleagues to issue a regulation regarding EARP.\footnote{161}{Guidelines Respecting the Implementation of the Federal Policy on Environmental Assessment and Review, SOR/84-467 [EARP Guidelines Order; Guidelines Order].} It appears that Caccia’s intention was merely to codify a set of practices that had emerged informally within the federal government.

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\footnote{158}{See David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge: Cambridge University Press, 2008) at 86-95.}  
\footnote{159}{Doern & Conway, *supra* note 115 at 191-197.}  
\footnote{160}{Hoberg, “Elephant,” *supra* note 157 at 124.}  
\footnote{161}{Guidelines Respecting the Implementation of the Federal Policy on Environmental Assessment and Review, SOR/84-467 [EARP Guidelines Order; Guidelines Order].}
However, Caccia rushed to prepare the regulation so that it could be approved at the final meeting of Prime Minister Pierre Trudeau’s cabinet in June 1984. The regulation was hastily drafted, and it turned out to contain more than Caccia had bargained for. The “Guidelines Order,” as it came to be known, took the form of a regulation under the *Government Organization Act*. It contained mandatory language requiring federal departments and agencies to carry out EAs of all “proposals.” It defined “proposal” as “any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.”

The Guidelines Order gave environmental groups a basis to challenge the federal government’s deference to provincial EA processes. The legal challenges centred on the construction of two dams on the Souris River in Saskatchewan (known as the Rafferty-Alameda project) as well as a dam on the Oldman River in Alberta. The federal government had a hand in both projects, granting necessary licences and regulatory approvals. However, the federal government declined to administer an EA process, instead relying on the results of provincial assessments. But in both cases, the federal courts held that the Guidelines Order created binding legal obligations for the federal government, and that provincial assessments did not displace these federal obligations. These holdings were subsequently confirmed by the Supreme Court of Canada.

By the time the Federal Court handed down these decisions, the second wave of global environmental politics was well underway, and public concern for the environment in Canada had reached an all-time high. The Mulroney government was already in the process of designing the *Canadian Environmental Protection Act* as well as the Green Plan. Its decision to pursue a legislated EA process was therefore undertaken as part of a broader “sustainable development” agenda. However, these Federal Court decisions prompted the government to introduce binding EA legislation more swiftly.

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162 Doern & Conway, *supra* note 115 at 205.
163 EARP Guidelines Order, *supra* note 163, s. 2.
In 1990, environment minister Lucien Bouchard announced the government’s intention to reform Canada’s federal EA process. These reforms were to have two components. The first was the enactment of binding legislation for the EA of “projects,” and the creation of a specialized agency to oversee this legislation. The second was the development of policy guidelines for the SEA of “policies, plans, and programs.”

The *Canadian Environmental Assessment Act* received royal assent on June 23, 1992. It was not immediately proclaimed in force, however, because the government was still drafting the regulations that would accompany it. The Liberal government that came to power in 1993 made a number of minor amendments to CEAA 1992 before finally proclaiming it in force (along with most of its regulations) on January 19, 1995.

CEAA 1992 was a long and complex statute containing hundreds of paragraphs and sub-paragraphs; its official published version was 70 pages long. CEAA 1992 was far more precise and technical than many other countries’ EA laws.166 This technicality and procedural complexity appears to have been partly attributable to the government’s desire to signal a decisive departure from the informality of EARP. However, while CEAA 1992 used mandatory language (“shall,” “shall not”) to set out procedural steps that authorities must follow, many of its substantive criteria were framed in subjective terms: “where a responsible authority is of the opinion that…”; “where the Minister is satisfied that…”; “…justified in the circumstances.” Such provisions made legal challenges to the substantive aspects of EA decisions exceedingly difficult.

CEAA 1992 was derived from the general EA model that has been globalized since the 1970s. However, the detailed approach to procedure established by CEAA 1992 was a response to domestic struggles over resource use, conservation, and pollution. CEAA 1992 was designed to provide a variety of procedural channels for environmental disputes while constraining the government as little as possible.

Some of the same tendencies can be observed in CEAA 2012. The statute mainly requires federal authorities to make subjective assessments of environmental effects and to exercise their

166 Wood, *Comparative Review*, supra note 45 at 100.
discretion in determining how to respond. The stringent nature of certain provisions, such as the strict timelines for each level of review, have the effect of holding the government accountable to project proponents (and certainly not to environmental activists).

4.6 Canadian EA of Projects Outside Canada

Canadian law provides for the environmental assessment of certain projects outside Canada. It does so through two mechanisms. First, CEAA 2012’s general EA regime, like CEAA 1992 before it, applies not only to projects within Canada, but also to projects outside Canada. Second, as required under the Export Development Act, Export Development Canada has issued an Environmental and Social Review Directive (ESRD) that applies to some of the projects it finances.

The design of each of these EA regimes reflects international influences. The extraterritorial provisions of CEAA 1992 were based on the non-discrimination principle, which is central to international law concerning transboundary EA. These provisions were also based on policies, practices, and norms drawn from the field of development assistance. CEAA 2012 largely continues the approaches initiated under its predecessor statute, albeit in a radically simplified form. EDC’s Environmental and Social Review Directive represents the Canadian adoption of a globalized model of environmental governance promoted by the World Bank and the OECD.

The split between CEAA (1992 or 2012) and the ESRD is based on a modified public/private distinction. In essence, projects that are undertaken by, or receive funding from, federal government departments—the projects to which CEAA 1992 was applicable (and to which CEAA 2012 is now applicable)—are identified as “public,” whereas projects that receive EDC financing are considered “private.” This distinction has led Canadian lawmakers to conceptualize the issues involved in the two legal regimes differently. Legislators and government officials described the application of CEAA 1992 in terms of the non-discrimination principle, modified to take host country sovereignty into account. But this paired set of arguments about sovereignty and non-discrimination is rarely thought to be applicable to the “private” projects financed through EDC. Instead, it is replaced with a set of arguments about private responsibility, state regulation, and competitiveness. In practice, this has meant that EAs conducted under the ESRD are far more secretive than those conducted under CEAA 1992.
Both regimes, however, reproduce the proceduralism and managerialism that is a standard feature of the EA model. Like other EA processes, they have the effect of allocating environmental authority to the institutions responsible for carrying them out, and subjecting environmental governance to their priorities. In the case of CEAA 1992 and the ESRD, this has meant that Canadian government authorities and the private actors whose projects they have funded have gained a certain measure of jurisdiction over environmental issues.

4.6.1 General Federal EA Legislation

CEAA 2012, like CEAA 1992 before it, is a general federal EA statute, primarily applicable to projects undertaken within Canada. However, like CEAA 1992, it also applies to projects outside Canada.

CEAA 1992 contained special provisions for EAs of projects outside Canada; indeed, a special set of regulations was issued for this purpose. Between 1995 and 2012, federal authorities carried out approximately 2,000 extraterritorial EAs pertaining to projects in at least 80 countries.\(^\text{167}\) CEAA 1992’s extraterritorial provisions exhibited characteristic features of Canadian internationalist lawmaking, including a paired set of arguments about nondiscrimination and sovereignty, as well as heavy reliance on both proceduralism and managerialism.

In some respects, the extraterritorial aspects of CEAA 1992 embodied the non-discrimination principle. Domestic EA processes provided a template to be applied internationally. These domestic processes were centred on the principle of self-assessment. CEAA 1992 applied to the work of most federal departments, agencies, and Crown corporations.\(^\text{168}\) The application of CEAA 1992 was triggered when one of these federal authorities was involved in a project, either as proponent, funder, landowner, or regulator.\(^\text{169}\) When one of these conditions was met, the

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\(^{167}\) The CEAA 1992 online registry archives, which cover the period from 2003 to 2012, provide information on 966 projects outside Canada. For the period prior to 2003, data can be gleaned from the Canadian Environmental Assessment Agency’s Departmental Performance Reports. These documents list the numbers of EAs undertaken by various federal authorities, without specifying their location. They show that CIDA conducted 1377 EAs between 1996 and 2003, and that DFAIT conducted 109 EAs during the same period. I assume that the vast majority of EAs undertaken by these two departments were located outside Canada.

\(^{168}\) CEAA 1992, supra note 2, s. 2(1) (“federal authority”).

\(^{169}\) Ibid., s. 5(1).
federal authority was designated as the “responsible authority” for the purposes of CEAA 1992.\textsuperscript{170}

The responsible authority would then assign the project to one of CEAA 1992’s “tracks,” depending on the nature and scale of the project. The vast majority of EAs under CEAA 1992 proceeded along an accelerated “screening” track.\textsuperscript{171} Projects that could have had the greatest deleterious effects on the environment—such as mines, dams, and nuclear power plants—were singled out for more rigorous procedures: comprehensive studies, mediations, and review panels.\textsuperscript{172} (Projects that were largely routine, or that were undertaken in response to a national emergency, were exempted from EA altogether.\textsuperscript{173})

CEAA 1992’s screening process required the responsible authority to determine whether the project was “likely to have significant adverse environmental effects.” If no significant adverse environmental effects were anticipated, the responsible authority could proceed with the project.\textsuperscript{174} If the responsible authority foresaw significant adverse environmental effects, the next question was whether these could be “justified in the circumstances.” If they could not be justified, the responsible authority could not go ahead with the project.\textsuperscript{175} If they could be justified, the responsible authority had to refer the project to a higher level of scrutiny: a mediation or a review panel. The responsible authority also had to refer the project to mediation or panel review if the environmental effects remained uncertain or if public concerns warranted.\textsuperscript{176}

In making these determinations, the responsible authority could take into account any mitigation measures that it considered appropriate. This implied that mitigation measures could be used to

\textsuperscript{170} Ibid., s. 2(1) (“responsible authority”), s. 11.

\textsuperscript{171} Ibid., s. 18. Note that CEAA 1992 uses “screening” to refer to a specific, statutorily-defined process. What is generally understood as a screening in the EA field also sometimes occurred as part of CEAA 1992’s process for “comprehensive study”: Ibid., s. 21.

\textsuperscript{172} Ibid., s. 21; Comprehensive Study List Regulations, SOR/94-638.

\textsuperscript{173} Ibid., s.7(1), s. 59(c); Exclusion List Regulations, 2007, SOR/2007-108.

\textsuperscript{174} Ibid., s. 20(1)(a).

\textsuperscript{175} Ibid., s. 20(1)(b).

\textsuperscript{176} Ibid., s. 20(1)(c).
reduce the environmental effects of a project below the “significant” threshold, allowing a project to proceed that would otherwise have required EA. Whether the screening process included any kind of public participation was left to the discretion of the responsible authority.\textsuperscript{177}

Although CEAA 1992 was primarily designed for application within Canada, it also applied to projects located outside Canada. It included a provision empowering cabinet to issue regulations varying the EA process for projects outside Canada.\textsuperscript{178} A special set of regulations, the \textit{Projects Outside Canada Environmental Assessment Regulations}, were issued under this provision. However, these regulations hewed closely to the domestic model. The actual text of the POC Regulations was just long enough to state that some provisions of CEAA 1992 were varied or excluded for projects outside Canada. This text was accompanied by a “schedule” that reproduced the text of CEAA 1992 itself, with certain modifications. The international application of CEAA 1992 was thus informed by the idea of non-discrimination: It was meant to ensure that the EA of projects outside Canada was up to Canadian standards. As the Canadian Environmental Assessment Agency wrote in its 1999 discussion paper, the POC Regulations were meant to ensure that extraterritorial EAs respected “the spirit and principles of the Act.”\textsuperscript{179}

CEAA 1992’s use of the non-discrimination principle was partly inspired by international legal instruments dealing with transboundary EA. At the time CEAA was enacted, Canada had already signed, and was preparing to ratify, the Espoo Convention. The principles guiding the application

\textsuperscript{177} \textit{Ibid.} s. 18(2),(3).
\textsuperscript{178} \textit{Ibid.}, s. 59(i)-(ii).
\textsuperscript{179} Canada, Canadian Environmental Assessment Agency, \textit{Review of the Canadian Environmental Assessment Act: A Discussion Paper for Public Consultation} (Ottawa: Minister of the Environment, 1999) [CEAA discussion paper]. The provisions that modified CEAA 1992 and the POC Regulations for extraterritorial application also stipulate that federal authorities must retain some fidelity to Canadian standards. For example, if a project outside Canada that received federal funding was exempt from CEAA 1992 because the essential details were not specified, the federal authority was nonetheless required, “in so far as is practicable,” to ensure that an EA would be conducted at an early stage, and that the EA would be up to Canadian standards: CEAA 1992, \textit{supra} note 1, s. 54(2). The conditions for the establishment of international joint review panels stipulated that these panels had to consider the substantive factors that a domestic review panel would have been required to consider: POC Regulations, \textit{supra} note 2, Schedule, s. 41. (Moreover, these conditions were essentially modeled on the conditions for the establishment of joint federal-provincial review panels.) Finally, if the environment minister (after consulting with the minister of foreign affairs) substituted a foreign country or international organization’s EA process for the panel review process, the substituted process would have been required to consider the same substantive factors that a domestic review panel would have considered; there would also have to have been opportunities for public participation: \textit{Ibid.}, Schedule, s. 44. In short, even where CEAA 1992 and the POC Regulations were modified for international purposes, traces of the non-discrimination principle remained.
of EA in transboundary contexts appear to have influenced Canadian legislators’ assumptions about the appropriate scope of EA, which they extended to include the EA of projects outside Canada.  

Another apparent source for the extraterritorial application of Canadian EA law is the use of EA in development assistance. Throughout the 1970s and early 1980s, Canada had no formal process for the environmental assessment of its international activities. Like other bilateral aid agencies, the Canadian International Development Agency (CIDA) came under pressure during the 1970s to consider the environmental aspects of its activities. However, its approach to environmental issues remained ad hoc and informal throughout this period.  

During the mid-1980s, however, pressure to undertake EA of overseas development projects intensified. CIDA officials were acutely aware of the campaign and controversy surrounding the environmental impact of World Bank projects. CIDA officials also participated in deliberations at the OECD that led to recommendations on EA of development projects. The work of the Brundtland Commission, which inquired into all countries’ EA practices, also had an influence on CIDA. In 1986, CIDA adopted a new policy on environment and development which required environmental screening of all bilateral projects.

In January 1992, in anticipation of the Rio Conference on Environment and Development, CIDA adopted a new Policy for Environmental Sustainability, announcing that it would henceforth

180 Unsurprisingly, then, CEAA 1992 included a number of features incorporating consideration of transboundary environmental effects. CEAA 1992’s definition of “environmental effect” stipulated that it included environmental changes “whether any such change or effect occurs within or outside Canada”: CEAA 1992, supra note 1, s. 2(1) (“environmental effect”). Moreover, one of CEAA 1992’s stated purposes was “to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out”: Ibid., s. 4(1)(c). CEAA 1992 also gave the minister of the environment and the minister of foreign affairs power to refer a project to a review panel or mediation solely on the basis of its anticipated transboundary effects: Ibid., s. 47(1). This meant that CEAA 1992 could apply to some provincial or private-sector projects with no federal involvement—projects that would have otherwise only been subject to provincial EA processes. (However, this provision was never invoked.)


consider the environmental aspects of all of its decisions. The policy declares that “CIDA’s policy is to integrate environmental considerations into its decision making and activities, and to work with its partners and developing countries at improving their capacity to promote environmentally sustainable development.” The policy also discusses the need to use host country EA processes where possible, and states that CIDA “will assist partner countries to develop and apply local environmental planning and assessment capacity.”

At roughly the same time, the federal Department of the Environment was overseeing the drafting of regulations to be issued under CEAA 1992. The Department initially planned to issue three separate regulations varying CEAA 1992 for extraterritorial application: one dealing with projects outside Canada in general; another dealing with projects conducted pursuant to international agreements; and finally a regulation dealing with EA of international development projects. However, from 1994 onwards, the Department consolidated these drafts into a single regulation—the POC Regulations.

The consolidation of the three draft regulations had the effect of taking norms applicable to development assistance activities and generalizing them across all government departments. The rationale for this consolidation has not been publicly documented. However, it seems plausible that the non-discrimination ethos, dominant in the transboundary EA field, may have also influenced ideas about extraterritorial EA.

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184 Ibid. at 2.
185 Ibid. at 6.
Nevertheless, as I have mentioned, the extraterritorial application of CEAA 1992 differed from its domestic application in certain ways. The POC regulations modified the CEAA 1992 process. The POC Regulations’ greatest departure from the CEAA 1992 was in their exclusion of comprehensive studies and the Comprehensive Study List Regulations.188 This means that all projects outside Canada, no matter how great their potential effect on the environment, had to pass through CEAA 1992’s “screening” process, in which public participation was discretionary and context-dependent. There were no extraterritorial projects for which public participation was mandatory from the outset.

The exclusion of comprehensive studies is not the only way in which CEAA 1992 and the POC Regulations modified the EA process for projects outside Canada. CEAA 1992 itself contained a provision anticipating the possibility that a federal authority might provide funding for a project outside Canada, “the essential details of which are not specified.” In such a case, CEAA 1992 did not apply.189 CEAA 1992 also contained a provision, inserted in 2003, empowering the government to make special regulations modifying the EA process for CIDA.190 However, the government never exercised this power; CIDA was thus subject to the POC Regulations until the repeal of CEAA 1992 in 2012.

The POC Regulations also contained a number of provisions contemplating the involvement of a wider range of actors in review panels and mediations. (The POC Regulations also provided for the establishment of “advisory committees,” which would essentially have been review panels without the powers and immunities of a court.191) For example, before referring an extraterritorial project to a review panel or mediation, the environment minister would have been required to consult with the minister of foreign affairs.192 The POC Regulations also set out the conditions for the establishment of joint review panels in cooperation with foreign governments.

188 POC Regulations, supra note 3, s. 3(2), Schedule, s. 14.
189 CEAA 1992, supra note 1, s. 7(2).
190 Ibid., ss. 10.1, 59(1.01)-(1.02).
191 POC Regulations, supra note 3, Schedule, s. 35.1.
192 Ibid., Schedule, ss. 25, 28.
or international organizations. These conditions also gave the minister of foreign affairs a role in establishing the panel, setting its terms of reference, and appointing its chair. Finally, the POC Regulations allowed the environment minister (after consulting with the minister of foreign affairs) to “substitute” a foreign country or international organization’s EA process for the panel review process.

Government officials generally sought to justify such modifications of the EA process in terms of the need to respect host state “sovereignty.” For example, the 1994, 1995 and 1996 editions of the Federal Regulatory Plan stated that the POC Regulations were necessary in order to ensure that “the sovereignty of foreign states is respected” and that “assessments are conducted in accordance with the principles and practice of international law.” However, appeals to “sovereignty” in this context had little to do with the formal rules of international law. Instead, they stood for values such as diversity and pragmatism: in effect, any reason for departing from the non-discrimination principle. Government officials thus explained the modifications of CEAA 1992 for application outside Canada as responding to the “cultural setting of foreign states” or to international “sensitivities.” Likewise, the 1994, 1995 and 1996 editions of the Federal Regulatory Plan stated that the POC Regulations were necessary in order to ensure “that environmental assessment procedures suit conditions present in foreign states.”

193 Ibid., Schedule, s. 40(3)).
194 Ibid., Schedule, s. 43(1).
197 CEAA discussion paper, supra note 179 at 50.
On the one occasion where a federal authority elaborated on these concerns, it expressed the view that they had more to do with diplomatic prudence than formal legal obligation. In its 1999 discussion paper for the statutory review of CEAA 1992, the Canadian Environmental Assessment Agency stated:

Some foreign countries view the request to conduct an environmental assessment under Canadian legislation as an infringement of their sovereignty, even though the assessment is the result of a request for financial assistance from Canada to allow the project to be carried out. In these instances, Canada’s approach has been viewed as paternalistic and a challenge to the partner country’s right to manage its resources and identify its needs.¹⁹⁹

However, departures from the non-discrimination principle have also been justified on much more pragmatic grounds. Government officials explained such provisions as ways of enhancing international cooperation or allowing for “flexibility.”²⁰⁰ The Canadian Environmental Assessment Agency described the POC Regulations as designed to take into account “Canada’s international relations objectives and overseas development assistance and trade.”²⁰¹ In his 2001 statutory review of CEAA 1992, Environment Minister David Anderson noted that CIDA faced special challenges in carrying out EAs in other countries, including not only the need to respect other states’ sovereignty, but also “the nature of development assistance programs.”²⁰²

Indeed, the POC Regulations’ most important departure from the non-discrimination principle—their exclusion of comprehensive studies—can be attributed to the government of Canada’s desire to proceed with one particular project. In 1996, Atomic Energy of Canada Limited (AECL), a Crown corporation, was negotiating the sale of two CANDU nuclear reactors to the government of China. The deal was to be financed by a $1.5 billion loan from the Export Development Corporation (EDC). It was not clear whether CEAA would apply to this deal. AECL and EDC were both Crown corporations, and CEAA 1992 (in its original form) did not

¹⁹⁹ CEAA discussion paper, supra note 179 at 50.
²⁰⁰ CEAA DPR 1996-97, supra note 195 at 22.
²⁰¹ CEAA discussion paper, supra note 179 at 24.
²⁰² CEAA DPR 1996-97, supra note 195 at 22.
apply to Crown corporations. However, the financing of the deal through EDC’s “Canada Account” involved an authorization from the Minister of Finance and the Minister of International Trade. This authorization could arguably have been considered a form of financial assistance, which would have triggered the application of CEAA 1992 to the sale.

CEAA 1992 was already in force at the time of the deal, but the POC Regulations had yet to be issued. Environment Canada’s Regulatory Advisory Committee had already produced an advanced draft of the POC Regulations, modifying the CEAA 1992 process in some respects, but leaving comprehensive studies intact. The comprehensive study process, however, would have required a process of public participation surrounding the sale of nuclear reactors to China, and this is what the federal cabinet sought to avoid. On November 7, 1996, the federal cabinet therefore quietly altered the draft POC Regulations to exclude comprehensive studies, and brought them into force immediately, without publishing them. On November 26, the government announced the sale of the CANDU reactors to China. The following day, the altered POC Regulations were made available to the public for the first time in the Canada Gazette.204

When it comes to the international application of Canadian EA law, arguments about “sovereignty” can therefore stand in for deference to Canadian economic priorities. However, this does not imply that arguments about sovereignty always point in this substantive direction. They do so only to the extent that it is assumed that EA processes in host countries are less favourable to environmental protection than Canadian EA processes. Were this situation to be

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204 This secretive maneuver raised the ire of environmental groups. In January 1997, the Sierra Club of Canada, then led by Executive Director Elizabeth May, brought an application in Federal Court for a declaration that the decision to fund the reactors had been illegal, and for an order of mandamus requiring the federal government to carry out an EA. In response, AECL argued that the Chinese government’s EA provided an adequate substitute for an EA conducted under CEAA 1992. Chinese authorities had provided a copy of their EA report to AECL, but they had stipulated that it be kept confidential. The litigation eventually centred on the question of access to this Chinese EA report. The Sierra Club argued that AECL should be obliged to release the report; AECL refused. The Supreme Court of Canada eventually allowed the Sierra Club to view the documents, subject to a confidentiality order, but declined to order their public release: Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522; rev’g Sierra Club of Canada v. Canada (Minister of Finance), [2000] 4 F.C. 426, 187 D.L.R. (4th) 231. This CANDU litigation remains the only instance in which the extraterritorial aspects of CEAA have been judicially considered. In the end, the courts never had the opportunity to determine whether the Chinese EA report constituted an adequate substitute for CEAA 1992, or indeed whether CEAA 1992 or the POC Regulations applied to the sale at all. The trip to the Supreme Court of Canada to determine whether it could have access to the Chinese EA documents had depleted the Sierra Club’s litigation funds. It was forced to drop the case: Elizabeth May, “Why the CANDU Case Was Dropped,” online: Sierra Club of Canada <http://www.sierraclub.ca/national/programs/atmosphere-energy/nuclear-free/candu-case/candu-case-2003.html>.

reversed, the substantive meaning of the nondiscrimination and sovereignty arguments would also be reversed. Sovereignty and nondiscrimination are empty rhetorical vessels that can be filled with various arguments—and whenever one is mobilized, the other can be used to counter it.

CEAA 1992 and the POC Regulations adapted the EA process for application outside Canada by adding to its procedures. For example, they added a role for the minister of foreign affairs in the operation of review panels and mediations, implying that the process involves an element of diplomacy. Such proceduralism should not be surprising. EA is itself a form of proceduralism, and the international application of EA fits comfortably into a broader pattern of proceduralism in Canadian internationalist lawmaking.

However, in practice, the application of CEAA 1992 to projects outside Canada involved a managerial approach to environmental issues. CEAA 1992 framed environmental issues as scientific and technical problems to be solved by experts, rather than as political issues to be resolved democratically.

This managerialism stemmed from CEAA 1992’s reliance on the self-assessment model. Canadian government departments, agencies, and Crown corporations oversaw the EAs of the projects they funded, and they retained decision-making power. They were therefore in a position to set the terms for these EAs, including their scope, their level of intensity, their timing, and their mechanisms for public participation (if any).

The Canadian International Development Agency (CIDA) was responsible for the vast majority of EAs of projects outside Canada under CEAA 1992. CIDA provides a good illustration of how departmental approaches to EA under CEAA 1992 were shaped by pragmatic concerns. Because CIDA projects frequently involve collaboration among a diverse set of actors, often in foreign cultural settings where communication is difficult, CIDA officials may have been reticent about applying CEAA 1992. A 2004 study by the Commissioner of Environment and

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205 Between 2003 and 2012, CIDA projects accounted for 86 percent of extraterritorial EAs under CEAA 1992. But a significant number of extraterritorial EAs were also carried out under the supervision of the Department of National Defence (8%), the Department of Foreign Affairs and International Trade (6%), and Natural Resources Canada (1%). Figures do not add up to 100% due to rounding. Source: CEAA Archives website, online: <http://www.ceaa.gc.ca/052/index-eng.cfm> (accessed 26 October 2012).
Sustainable Development criticized CIDA for its haphazard and inconsistent approach to EA. It found that CIDA officials often treated EA as an empty formality, sometimes not even undertaking EA until the projects themselves were well underway.\textsuperscript{206}

In most cases, the extraterritorial applicability of CEAA 1992 was triggered by the provision of government funding. This means that the EA process was also shaped by non-governmental project “proponents.” These actors were generally required to carry out (and pay for) EA as a condition of government funding. They therefore had a direct influence over the timing, scale, and methods of the EA process.

The CEAA 1992 process for EAs of projects outside Canada gave a relatively marginal role, by contrast, to people in the local area who might have been affected by a project. In practice, the EA process was based on screenings in which public participation was discretionary. When CEAA 1992 screening reports described public participation, they often referred to informal consultations with particular persons or groups in the community, combined with the informal use of mitigation and follow-up measures. Under no circumstances was the affected public accorded the right to participate. Remarkably, of the 2,000 or so CEAA 1992 screenings of projects outside Canada, none ever concluded that the project was likely to cause significant adverse environmental effects, or that a mediation, review panel, or advisory committee was warranted. CEAA 1992’s elaborate processes for extraterritorial panel reviews, mediations, advisory committees, and joint panel reviews were never used.

CEAA 1992 established a specialized agency, the Canadian Environmental Assessment Agency, to oversee the EA process.\textsuperscript{207} But this agency lacked the power to compel departments and agencies to comply with CEAA 1992. CEAA 1992 was meant to encourage federal authorities to be environmentally responsible, but it generally allowed each of these authorities to decide what


\textsuperscript{207} CEAA 1992, \textit{supra} note 2, ss. 61-70.
that meant in practice. A 2004 study by the Commissioner of Environment and Sustainable Development found that the rigour of EA processes varied widely among government authorities.  

The managerial nature of the CEAA 1992 process also flowed from the way key concepts were defined in the legislation. Importantly, CEAA 1992 defined “environment” in biophysical terms:

“environment” means the components of the Earth, and includes

(a) land, water and air, including all layers of the atmosphere,

(b) all organic and inorganic matter and living organisms, and

(c) the interacting natural systems that include components referred to in paragraphs (a) and (b).

This definition mattered because responsible authorities were required to assess their projects’ “environmental effects.” And “environmental effect” was primarily defined as “any change that the project may cause in the environment”—thus incorporating the biophysical definition of environment. The definition of “environmental effect” also referred to economic, social, and cultural effects, but only secondarily; these were relevant if and only if they were ancillary to biophysical effects. In contrast to some Southern approaches to environmental issues—which have stressed the inseparability of social and economic concerns, including distributive concerns—from environmental protection, CEAA 1992’s definition of the environment promoted a biophysical approach that privileged environmental protection through the application of specialized, technical forms of knowledge.

CEAA 1992 also promoted an expert-driven approach through its emphasis on “projects.” A “project,” for CEAA 1992’s purposes, was defined as some activity (such as construction or modification) in relation to a “physical work,” or some other “physical activity.” This project-

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208 CESD on application of CEAA, supra note 57 at 9.
209 CEAA 1992, supra note 2, s. 2(1) (“environment”).
210 Ibid., s. 2(1) (“environmental effect”).
211 Ibid., s. 2(1) (“project”). The eligible types of “physical activity” are specified in an accompanying regulation, the Inclusion List Regulation. This instrument lists a wide range of activities relating to transportation, oil and gas,
based approach served to constitute environmental issues narrowly, one project at a time. This constitutive effect was widely recognized, however. CEAA 1992 therefore required authorities conducting screenings to consider the cumulative environmental effects of multiple projects. And CEAA 1992 was also accompanied by a (non-binding) Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals. However, in a 2004 review, the Commissioner of Environment and Sustainable Development found most federal authorities had made little effort to implement this cabinet directive. Moreover, in his 2009 review of the application of CEAA 1992, the Commissioner of Environment and Sustainable Development found that responsible authorities often lacked an understanding of how to consider cumulative effects as part of their EAs.

CEAA 1992 thus provided a formal legal framework within which government departments, project proponents, and other relevant actors could negotiate their respective roles in environmental governance. The precise structure of this framework was often portrayed as a compromise between the application of Canadian standards and the need to respect other countries’ environmental sovereignty. But these reference points in fact tell us little about the nature of the CEAA 1992 process. Instead, an analysis of the process reveals that it enhanced the environmental powers of Canadian government authorities and of the recipients of Canadian funding. The process also treated environmental governance as a realm of expert knowledge. It provides few assurances to ordinary people who might be affected by development projects.

CEAA 2012 radically simplifies the legislative framework applicable to the environmental assessment of projects outside Canada, but some of the same tendencies remain. The key

nuclear energy, defence, and national parks. However, all of the activities listed are physical activities that would have tangible physical effects on nature.

212 Ibid., s. 16(1)(a), 16.2, 19(7).


214 CESD on Application of CEAA, supra note 57 at 17-18.
provision in CEAA 2012 with regard to projects outside Canada is section 68, which reads as follows:

68. A federal authority must not carry out a project outside Canada, or provide financial assistance to any person for the purpose of enabling, in whole or in part, a project to be carried out outside Canada, unless

(a) the federal authority determines that the carrying out of the project is not likely to cause significant adverse environmental effects; or

(b) the federal authority determines that the carrying out of the project is likely to cause significant adverse environmental effects and the Governor in Council decides that those effects are justified in the circumstances under subsection 69(3).

A few aspects of this provision are worth noting. First, section 68 parallels section 67, which deals with projects on “federal lands” within Canada. “Federal lands” are defined as lands that belong to the federal Crown, Indian reserves, and maritime zones that are outside the boundaries of any province. In other words, these are places where the federal government exercises complete legislative authority. CEAA 2012’s approach to projects outside Canada therefore preserves the non-discrimination principle. Projects outside Canada are treated as if they were projects within Canada, minus any competing claims of provincial jurisdiction.

For projects on federal lands as well as projects outside Canada, the application of CEAA 2012 is considerably broadened. Sections 67 and 68 are applicable to any “project”—defined as “a physical activity that is carried out in relation to a physical work”—and not just to “designated projects.” Moreover, any change to the environment that occurs on federal lands or outside Canada is considered an environmental effect for the purposes of CEAA 2012; assessments of effects in these cases are not confined to effects on fish, migratory birds, etc. (However, exceptions to sections 67 and 68 are made for emergencies and for matters of national security.)

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215 CEAA 2012, supra note 1, s. 2 (“federal lands”).
216 Ibid., s. 66 (“project”).
217 Ibid., s. 5(1)(b).
218 Ibid., s. 70.
Second, CEAA 2012’s approach to projects outside Canada (unlike its approach to most projects within Canada) is still based on the idea of self-assessment. Each federal authority that undertakes a project or provides funding for a project outside Canada is itself responsible for determining whether the project would have “significant adverse environmental effects.” The practice of self-assessment suggests an ongoing role for managerial governance based on scientific expertise.

However, should the federal authority decide that the effects are significant, the decision as to whether to proceed with the project lies with Cabinet. The assignment of decision-making power to Cabinet suggests a desire to contain the role of specialized expertise, consistent with the approach taken elsewhere in CEAA 2012.

With respect to projects outside Canada, CEAA 2012 also departs from its predecessor in its retreat from elaborate procedures. Gone are the detailed provisions specifying the decision-making process to be followed and the factors to be considered. Federal authorities appear to have complete freedom to devise their own processes for determining whether a project would have “significant adverse environmental effects.” The main procedural requirement is an obligation to report to Parliament each year on how sections 67 and 68 have been applied.  

4.6.2 Export Development Canada’s Environmental and Social Review Directive

General EA statutes such as CEAA 1992 and CEAA 2012 are not the only Canadian legislation providing for the EA of projects outside Canada. Another EA regime applies to projects financed by Canada’s export credit agency, Export Development Canada (EDC).  

EDC’s Environmental and Social Review Directive is closely aligned with the processes used by other ECAs around the world—which are themselves based on standards devised by the World Bank. The existence of this directive (and EDC’s exemption from both the 1992 and 2012 versions of CEAA) shows the imprint of a public/private distinction in Canada’s approach to international environmental

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219 Ibid., s. 71.
220 Until 2001, EDC was known as the Export Development Corporation.
issues. Whereas the EA of “public” projects under general EA legislation has been debated in terms of nondiscrimination and sovereignty, the EA of “private” projects is debated in terms of regulatory burdens and competitiveness. The design of the EDC’s Directive reflects elements of the trend that I identified with neoliberalism in chapter 2: the separation of economics from politics, and a deliberate attempt to recast the state in a facilitating role.

When CEAA 1992 came into force in 1995, Crown corporations were generally exempt. EDC thus did not carry out EAs of the projects it helped to finance. However, the controversy over the sale of CANDU reactors to China, combined with international pressure, prompted EDC to unilaterally adopt a non-binding Environmental Review Framework in 1999.

Once the IFC and the OECD began to coordinate the development of environmental review processes among member states’ ECAs, Canada joined in. In 2001, Parliament amended EDC’s enabling legislation to require EDC’s board of directors to adopt an EA directive.\(^\text{221}\) This requirement is qualified, however. It specifies that EDC’s board may choose to exempt some types of projects from EA.\(^\text{222}\) It also makes clear that EDC is not bound by the results of its EA process. EDC retains the discretion to enter into a transaction regardless of its environmental effects.\(^\text{223}\) Soon after the legislative amendments came into force, EDC issued an Environmental Review Directive, which came into force on May 1, 2002.

The Directive is essentially derived from approaches to EA discussed and agreed upon at the OECD. For example, it includes two thresholds for application: First, the Directive only applies to financing that exceeds 10 million special drawing rights (worth about C$15 million at the time of writing).\(^\text{224}\) Second, the Directive only applies to financing whose term of repayment is at least two years. These thresholds are taken directly from the OECD’s Recommendation on Common Approaches to the Environment and Officially Supported Export Credits. Moreover, the Directive includes a “triage” process derived from the World Bank’s EA policy; projects are

\(^{221}\) Export Development Act, supra note 4, s. 10.1.

\(^{222}\) Ibid., s. 10.1(2)(c).

\(^{223}\) Ibid., s. 10.1(1)(b).

\(^{224}\) A Special Drawing Right is a notional unit of currency that serves as the unit of account of the International Monetary Fund. Its value is based on a basket of four major freely useable currencies (the euro, the Japanese yen, the U.K. pound sterling, and the U.S. dollar).
sorted into categories A, B, or C depending on their apparent level of environmental risk. The Directive also specifies that the IFC’s Performance Standards are generally applicable, although EDC officials retain the discretion to use other international standards (such as those of the European Union) when appropriate.

In 2007, EDC became the second major ECA (after Denmark’s EKF) to adopt the Equator Principles. Adherence to the Equator Principles has led EDC to align its rely more heavily on the IFC Performance Standards. In 2010, the Environmental Review Directive was renamed the Environmental and Social Review Directive, reflecting the integration of environmental and social review in the IFC Performance Standards.

The establishment of a separate EA regime for EDC, distinct from CEAA 1992 and CEAA 2012, is based on a public/private distinction. Although EDC is a Crown corporation, the projects it helps to finance are generally private and commercial in nature. In fact, EDC-funded projects are not seen as entirely private; it is their public element that attracts normative concerns. But because these projects are also seen as private, they are not understood to detract from the autonomy and self-government of the host state.

The Canadian government hesitated to establish an EA process at EDC for the same reasons other governments hesitated: They feared that higher environmental standards would impose a regulatory burden on their export-oriented industries, placing them at a competitive disadvantage. Evidence of this anxiety can be found in the Canadian Environmental Assessment Agency’s 1996-97 Departmental Performance Report:

…there are outstanding questions concerning the application of environmental assessment to projects outside Canada, specifically to export development credits and loan guarantees. Better understanding of current international practices and experience would be beneficial, specifically the extent to which other countries currently subject such projects to environmental assessments and how they are conducted.225

Officials at the Agency appear to have favoured applying environmental procedures to Canadian officially-supported export credits. However, they framed their argument in terms of innovation

and competitiveness. In effect, they turned the “regulatory burden” argument on its head, suggesting that higher environmental standards would produce investments in EA expertise that would give Canada a competitive advantage. The Agency stated that

opportunities exist for employment opportunities internationally for Canadians with environmental assessment expertise. These opportunities can be exploited only if good environmental assessment legislation exists within Canada, and it is recognized and respected as such by the international community.\footnote{Ibid.}

This argument likens EA to an innovation in “green” technology; the jurisdiction with the highest environmental standards may gain a competitive advantage.\footnote{Compare Michael E. Porter, \textit{The Competitive Advantage of Nations} (New York: Free Press, 1990).}

What is remarkable about this discussion is how a new pair of arguments—arguments about regulations and competitiveness—have taken the place of arguments about non-discrimination and sovereignty. In discussions about EDC Directive, as in the ECA field around the world, arguments are seldom framed in terms of interference with the internal affairs of host states. EDC’s environmental policy and its Environmental and Social Review Directive make numerous references to compliance with host country laws. But they do not insinuate that EDC might be complicit in an overreach of Canadian law. The different argumentative strategies surrounding CEAA 1992 and the EDC Directive reveal the persistence of a public/private distinction. Different principles are thus understood to be at stake in public projects compared to private projects. In effect, public activity is considered political and potentially problematic, whereas private economic activity is treated as normal and natural.\footnote{A. Claire Cutler, \textit{Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy} (Cambridge: Cambridge University Press, 2003) at 54-59.}

This relaxed approach to ideas about sovereignty and environmental governance also reflects a North/South distinction. On one hand, the EDC Directive is based on an assumption that host countries have a low capacity for environmental governance. It even anticipates the possibility of substandard environmental \textit{conditions}. Thus, the directive specifies that EDC may enter into a project despite its adverse environmental effects in some circumstances. These include cases
where “the project represents an opportunity to improve environmental conditions in the host country above base-line conditions” as well as cases where “the project provides the opportunity to transfer environmentally sound technologies, services and knowledge to, or for the benefit of, the host country.”\textsuperscript{229} On the other hand, the Directive provides an exemption for all projects to be located in G7 countries; it is sufficient for projects in these countries to comply with the host states’ requirements.\textsuperscript{230} Global economic powers, by virtue of their membership in an annual summit process, are therefore assumed to have the capacity to manage their own environment. (An analogous provision is found in the Equator Principles, which provide an exemption for projects in “High-Income OECD Countries.”\textsuperscript{231})

These elements of the EDC Directive are consistent with the trends I identified with neoliberalism. The Directive is premised on distinction between public and private, which is also assumed to correspond to a distinction between politics and economics. Environmental issues are to be dealt with privately, so as to interfere as little as possible with the operation of the market. Issues of democracy or distribution are assumed to be less relevant. Moreover, this approach to environmental governance is seen as primarily applicable in the global South; political choices within wealthier countries are accorded greater deference.

### 4.7 Conclusion

The design of Canadian laws for the environmental assessment of projects outside Canada thus reflects most of the trends I have identified with regard to internationally-oriented Canadian legislation. First of all, these laws are not indigenous creations. They are based on models developed in other countries (in this case, the United States) and they incorporate discourses and norms borrowed from international organizations and informal global governance processes.

Second, these laws have often relied on proceduralism and managerialism to assuage the tensions that might arise from Canada applying its laws extraterritorially. EA is, after all, procedural; moreover, EA processes can be designed to include a wider range of actors, and can therefore be


\textsuperscript{230} \textit{Ibid.}, paras. 15, 29(c).

\textsuperscript{231} Equator Principles, supra note 114, Principle 3.
seen as enhancing participation rather than imposing decisions. However, the practice of EA is frequently managerial, relying heavily on inaccessible scientific and technical data. This managerialism also provides another potential escape from conflicts over environmental governance. (However, the recent changes brought about by CEAA 2012 call these trends into question.)

Third, debates over the extraterritorial application of Canadian EA laws have been framed in terms of a tension between non-discrimination and sovereignty. However, these arguments are substantively empty. Arguments about environmental sovereignty have served as proxies for the pursuit of Canadian economic goals. The non-discrimination argument has historically been linked to an assumption that Canadian environmental standards are better than those of other countries, and that non-discrimination will therefore be better for the environment. But there is no necessary reason why this should be the case (and CEAA 2012 gives cause for doubt).

Finally, this entire axis of debate (non-discrimination versus sovereignty) is largely bracketed in cases where the subject-matter of the EA is identified as private or commercial in nature. In such cases, the extraterritorial application of EA law is debated in economic rather than political terms. This public/private distinction, and the corresponding separation between politics and economics, recapitulates thought structures that are characteristic of neoliberalism.
Chapter 5:
Canada’s Access to Medicines Regime

5.1 Introduction

In 2003, the government of Canada undertook to change federal laws to facilitate the export of generic medicines to developing countries. In doing so, it explicitly cited humanitarian concerns: a desire to alleviate the suffering of vulnerable people, especially those affected by the HIV/AIDS epidemic in Africa. The government therefore introduced certain amendments to Canada’s Patent Act and Food and Drugs Act, and accompanied them with regulations. Collectively, these provisions came to be known as Canada’s Access to Medicines Regime (CAMR).

On enacting CAMR, Canada was taking advantage of certain permissions that had just been granted under international trade law. The Agreement on Trade-Related Aspects of Intellectual Property Rights, to which Canada is a party, had previously prohibited the use of compulsory licensing for export-oriented production. But the General Council of the World Trade Organization had agreed in 2003 to waive some of these restrictions in order to facilitate access to medicines.

Remarkably, however, the Canadian government declined to take full advantage of the permissions granted under the WTO texts. For example, only certain medicines are eligible for compulsory licensing under CAMR, and compulsory licences have a fixed duration of two years.

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1 Patent Act, R.S.C., c. P-4, ss. 21.01-21.2; Food and Drugs Act, R.S.C., c. F-27, ss. 30(5), 30(6), 37(2); Food and Drug Regulations, C.R.C. c. 870, ss. C.07.001-C.07.011; Medical Devices Regulations, SOR/98-282, ss. 43.2-43.6; Use of Patented Products for International Humanitarian Purposes Regulations, SOR/2005-143.
In these and other ways, the Canadian government did not interpret the General Council Decision in the way that was most favourable to access to medicines.

The legislative process that generated CAMR has already been described and explained in qualitative terms by a group of political scientists, legal scholars, and health policy specialists. In addition, a number of legal scholars and activists have thoroughly analyzed how CAMR narrows the possibilities for access to medicines that might otherwise have been permitted under the General Council Decision. This literature has largely been critical, demonstrating the gap between the Canadian government’s humanitarian rhetoric and the reality of its unwieldy legislation. Some authors have also proposed solutions as to how CAMR might be reformed.

This chapter builds on that earlier work and seeks to add to it by explaining why Canadian legislators and government officials chose to give CAMR its particular form. In essence, my argument is that key actors within the government of Canada—especially those associated with the Department of Industry—had internalized a certain package of ideas about monopolies, innovation, and competitiveness. This package of ideas was linked to a discourse about “intellectual property rights” in which patents were portrayed as quasi-natural endowments, deserving of the greatest possible degree of protection. In the face of this formalistic understanding of intellectual property rights, humanitarian concerns stood little chance.

This thesis must be contrasted with an account that has sometimes found favour among CAMR’s proponents. It is sometimes suggested that CAMR took the form that it did because Canadian officials caved under pressures from multinational pharmaceutical companies (and possibly from

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the U.S. government). While such pressures were certainly present, I argue that they were largely redundant. Advocates of a formalistic understanding of intellectual property rights had already triumphed in Ottawa, during debates over Canada’s domestic pharmaceutical patent regime in the late 1980s and early 1990s. By the time of CAMR, their ideas were taken for granted.

The story of CAMR thus illustrates several of the themes of my dissertation. Most evidently, it illustrates the triumph of neoliberalism (here in the form of the intellectual property rights project). In addition, the legislative debate surrounding CAMR shows how arguments about non-discrimination and sovereignty—arguments for and against “intervention” in other countries—arise in Canadian internationalist law-making. Remarkably, parliamentarians from the governing party used diametrically opposed arguments when talking about different aspects of CAMR, sometimes calling for the universal application of Canadian standards and at other times insisting on deference to host country governments. CAMR thus perfectly illustrates the substantive emptiness of these argumentative structures.

The theme of proceduralism is also relevant to CAMR. CAMR operates through a complex set of procedures, which appear to have been designed to discourage its use. During the legislative debates surrounding CAMR, arguments about Canada’s rights, interests, and moral obligations vis-à-vis people in other countries took the form of arguments about the appropriateness of particular procedures.

In my other two case studies, I showed how ostensibly “made in Canada” laws were in fact a product of outside discourses and policy models. In the case of CAMR, such a demonstration is unnecessary. Evidently, the WTO’s General Council Decision provided the impetus for CAMR. Canada was under no international legal obligation to enact CAMR, but its unilateral legislation fit neatly into a multilateral framework. However, to fully appreciate CAMR’s globalized nature, it is also important to acknowledge a wider set of influences. The path for CAMR was prepared by the global project of intellectual property rights, launched in the early 1980s. Moreover, the design of CAMR intersected with a wide variety of international standards and norms, ranging from the World Health Organization’s Prequalification Programme to the UNDP’s Human Development Index. I have highlighted these elements in my account.

The chapter proceeds as follows. In part 5.2, I provide a brief summary of basic issues in patent law, with particular regard to pharmaceutical products. I explain how the design of patent
Regimes—including such variables as the length of the patent term, or the availability of compulsory licensing—can have distributive consequences, favouring innovators, their competitors, or consumers. I also explain how a discourse of “intellectual property rights” has helped to entrench a particular understanding of patent law in which the interests of innovators are seen as paramount.

In part 5.3, I provide the global context for my account of CAMR. Since the 1980s, businesspeople with an interest in monopolizing the use of new technologies have promoted the discourse of “intellectual property rights” on a global scale. They achieved their greatest successes by convincing governments to incorporate intellectual property protection into mechanisms designed to regulate international trade. The TRIPS Agreement is the foremost example of this trade-intellectual property linkage. In the late 1990s, “access to medicines” activists began to criticize these outcomes. They launched a global campaign challenging the configuration of patent laws established under the TRIPS Agreement.

In part 5.4, I describe the domestic political, economic, and legal context for the legislative debates surrounding CAMR. At the centre of this story is the establishment, and then the dismantling, of Canada’s domestic system for the compulsory licensing of pharmaceutical patents. Canadian approaches to patent policy had once been driven by domestic health policy goals. But by the early 1990s, Canada had changed course and signed onto global efforts to increase patent protection. Canada’s official response to the access to medicines controversy would be coloured by this experience of policy change as well as by an outgoing prime minister’s desire to establish a humanitarian legacy.

Part 5.5 then deals with CAMR and the surrounding legislative debates. I argue that the Canadian legislation essentially moderated the effect of the WTO’s decision on access to medicines, interpreting its ambiguities so as to favour the interests of patent holders. Moreover, I argue that this moderation was largely driven by government officials and politicians who had internalized a formalistic understanding of intellectual property rights. NGOs promoting access to medicines adopted a set of discursive strategies centred on health and human rights that were ineffective in challenging this dominant structure of ideas and values.
5.2 Patent Law and Access to Medicines

Over the course of the last few generations, scientists have discovered or invented a vast array of substances that can improve human health. In doing so, they have presented governments with a complex set of policy challenges. These include how to facilitate advances in research, how to ensure that drugs are available (and affordable) for those who need them, and how to foster a pharmaceutical industry that generates jobs and economic growth. Depending on the relative importance of such policy goals, various legal instruments may be used to promote them.

The story of modern medicines is sometimes traced to the production and marketing of aspirin (acetylsalicylic acid) around the end of the nineteenth century. However, what has been called a “pharmaceutical revolution” began in the 1920s and ’30s with the production of antibiotics and sulfa drugs. Previously incurable diseases (such as tuberculosis, syphilis, and leprosy) could now be overcome through medical treatment. The extraction and purification of hormones, such as insulin, and the development of new vaccines also vastly expanded medicine’s repertory.  

Many of the early pharmaceutical breakthroughs had come about through the work of small research teams. Some discoveries, such as that of penicillin, occurred almost accidentally. However, by the late twentieth century, pharmaceutical research moved on to pursue more intractable problems including cancer, mental illness, and HIV/AIDS. Further pharmaceutical research became concentrated in university laboratories and “biotechnology” firms working with genetic material.

Governments have used a variety of policy instruments to encourage the discovery or invention of new medicines, the widespread availability of pharmaceuticals, and the growth of pharmaceutical industries. These instruments range from research grants and subsidies to insurance schemes and price controls. However, in recent debates about access to medicines, most of the attention has been focused on patents. A patent is a regulatory mechanism in which the inventor of a new technology is granted a temporary monopoly on its commercialization.

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Patents empower their holders to charge rent for the invention’s use and to receive compensation for any unauthorized copying. Patents are transferable; they can be bought and sold. Patents thus have the effect of turning knowledge into a scarce resource—indeed, a commodity—for a limited period.\(^8\)

On one hand, patents are normally justified as providing rewards or incentives for invention. On the other hand, patent laws also recognize a public interest in the dissemination of new inventions. The tension between these interests is most clearly expressed in the limited duration of the patent. (If patents were only about rewarding innovation, there would be no reason to make them expire.) This public interest in dissemination is also recognized in disclosure requirements. A patent application requires the inventor to specify the use of the invention and to describe the process of manufacturing it in such detail that others will eventually be able to reproduce it.\(^9\) Since the eighteenth century, patent law has often been theorized as a “contract” in which an inventor would receive temporary monopoly privileges in exchange for the public disclosure of her invention.\(^10\)

Patents have historically been granted by states. The earliest general patent system was enacted in Venice in 1474.\(^11\) The English Crown granted patents on a case-by-case basis beginning in the sixteenth century; a general scheme was established under the Statute of Monopolies of 1624.\(^12\) By the second half of the nineteenth century, most European countries (and their colonial offshoots) had enacted some form of patent law.\(^13\) However, patents remained subject to the territorial principle: A patent granted in one country was not recognized in any other country.

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\(^9\) *Patent Act*, supra note 3, s. 27(3).


\(^12\) *Ibid.* at 80-84.

International cooperation on patents dates from the late nineteenth century. The 1883 Paris Convention for the Protection of Industrial Property enshrined the principle of national treatment in patent protection. In other words, parties to the convention were bound to grant patents to each others’ nationals on the same basis as to their own nationals. This meant that an inventor could patent the same invention in multiple countries. However, patents remained territorial, subject to each country’s national laws. And the substance of patent law, including the length of protection and the categories of patentable subject matter, varied from country to country.

Patent laws have important distributive effects. They allow the inventor of a new technology to collect monopoly rents for the use of his invention during the life of the patent. These benefits come at the expense of two distinct groups. The first group consists of would-be imitators: those who might wish to copy the technology for their own gain, but who are legally prohibited from doing so. The second group consists of consumers or other purchasers. Consumers are likely to pay higher prices for the invention because of the producer’s monopoly position.

The various provisions of a patent regime can be relatively advantageous or disadvantageous to one or another of these groups. For example, a patent law must specify what kinds of subject-matter are patentable. (At the boundaries of patentability, recent controversies have arisen with regard to the patenting of genetically modified plants and animals.) Expanding the range of patentable subject matter favours certain innovators over would-be imitators.

The feature of a patent regime with the most general distributive consequences is the length of the patent term. Longer terms favour innovators; shorter terms favour imitators and consumers. The length of the patent term is generally a function of tradition and of political bargaining; it is not based on any calculation of a socially optimal institutional design. In 1971, discussing Canada’s patent term (which was, at the time, 17 years), the Economic Council of Canada wrote,

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“This time limit is purely arbitrary, and there is no convincing rationale justifying any specific term.”16

The distributive implications of patent law are particularly stark when it comes to pharmaceuticals. People who consume pharmaceuticals normally do so out of medical necessity. Since the mid-twentieth century, as a matter of public health policy, governments in many countries have tried to make pharmaceuticals widely available. But by endowing innovators with monopoly protection, pharmaceutical patents are likely to create higher prices for consumers. Until the 1960s and 70s, many Northern countries (including France, Germany, and Switzerland) refused to grant patents on pharmaceutical substances; only the manufacturing processes were patentable.17 Some Southern countries (including Brazil, India, and Mexico) which had previously allowed the patenting of pharmaceutical substances, changed their laws during the 1960s and 70s to exclude these from patentability.18

The distributive effects of patent law also have an international dimension. Different countries have different levels of capacity for scientific research and for industrial production. Patent laws that favour innovators over imitators, or producers over consumers, therefore have greater benefits for some countries than for others. Prior to the TRIPS Agreement, countries would often tailor their patent regimes to suit their economic circumstances. Countries with less advanced industrial technology tended to enact looser patent regimes. In doing so, they sought to encourage domestic firms to copy foreign technology, thus allowing them to catch up in terms of industrialization.19 Some states designed their patent regimes to promote investment in particular industries, granting or withholding patent protection on a sector-by-sector or case-by-case basis. Another way in which countries used patent law to encourage industrialization was by imposing “local working” requirements. Under such a system, a government would offer a patent to a

16 Economic Council of Canada, Report on Intellectual and Industrial Property (Ottawa: Department of Consumer and Corporate Affairs, 1971) at 73 (original emphasis).

17 Dutfield, supra note 6 at 294-324.


foreign inventor on the condition that they manufacture their product locally. If a foreign inventor failed to “work the patent” locally within a certain period (usually three years), the patent would be forfeited, and other producers would be free to copy the invention. By enacting such provisions, governments hoped to attract foreign investment, while holding out the possibility of imitation as an alternative. In the early twentieth century, compulsory licensing emerged as a more flexible way of pressuring foreign patentees: If the patentee failed to work the patent locally, a licence could be granted to another company that would do so. The 1925 revision to the Paris Convention made compulsory licensing the preferred tool for this objective.²⁰

Mechanisms such as compulsory licensing, initially used to promote domestic industrialization through imitation, could also be used to promote consumer interests. This was the case with Canada’s specialized regime of compulsory licensing for pharmaceuticals, which I discuss in part 5.4, below. The Canadian government introduced the scheme in 1968 primarily in response to the relatively high cost of drugs in Canada.

Advocates of strengthened patent protection often argue that patents are universally beneficial. The basic argument is that the monopoly rents associated with patents are needed as an incentive for research. Research on pharmaceuticals, for example, may be tremendously long and expensive. Private investors would not be willing to finance such research without the prospect of lucrative rewards. Patents are thus described as a prerequisite for scientific progress.

But the extent to which patents promote socially useful innovation is rather uncertain. For example, patents are generally only available for commercially applied research; “pure” scientific discoveries are not patentable. As a form of research funding, patents therefore give scientists an incentive to seek short-term profitability rather than fundamental understandings of nature.²¹ Historically, a great number of scientific breakthroughs, especially in the pharmaceutical field, have been achieved by researchers in universities and public laboratories,


guided by motives other than profit. It seems likely that many of these discoveries would have been made whether or not patents existed.22

Nevertheless, the important point is that, even if patents do promote socially useful innovation, they do not benefit everyone equally. For an initial period, they allocate most of the benefits of innovation to whoever is identified as the inventor. They impose costs on potential competitors as well as consumers. And in the case of pharmaceuticals, these consumers include those who require these drugs for medical reasons. These distributive consequences are a built-in feature of the patent model.

Patent laws also have important constitutive effects. In recent decades, patents have often been grouped together with copyrights and trademarks into a broader category of “intellectual property.”23 This discourse helps to obfuscate the relationship between patent law and the public availability of medicines.

The idea of intellectual property is based on an analogy with material forms of property. For example, in 1985, a Canadian parliamentary committee dealing with copyright reform declared that “The copyright owner owns the intellectual works in the same sense as a landowner owns land.”24 The property analogy highlights the fact that patents, copyrights, and trademarks provide their holders with the power to exclude others, to charge rents, and to trade their entitlements for money.25 However, it also does much more than this. It implicitly draws on cultural traditions surrounding land and physical objects, some of which are highly moralizing. For example, it provides a basis for equating copying with “theft” or “piracy.”

The property analogy also evokes liberal understandings of property as part of a private sphere. These privatizing effects are reinforced by the use of “rights” discourse. Since the 1980s, many advocates of strengthened monopoly protection have framed their claims in terms of “intellectual property rights.” In doing so, they have linked their claims to the liberal tradition of “rights” as

22 Dutfield, supra note 6 at 325-338.
23 Although this term first appeared in the nineteenth century, it did not come into widespread use until the late twentieth century: May & Sell, supra note 11 at 18.
24 Quoted in Vaver, supra note 21 at 125.
25 Braithwaite & Drahos, supra note 13 at 56-57.
bulwarks of liberty, designed to protect the individual from state coercion. (The preamble to the TRIPS Agreement alludes to this heritage in declaring that “intellectual property rights are private rights.”)

However, the discourse of intellectual property rights is misleading in at least two ways. First, the analogy with material forms of property is inexact. Whereas one person’s use of land or a physical object diminishes its availability for others, the subject-matter of copyrights, patents, and trademarks generally consists of information, ideas, or symbols—phenomena that can be infinitely reproduced. Although copying may deprive the originator of an economic advantage, it does not deprive her of the use of her idea itself. Claims of “theft” and “piracy” are therefore only partly accurate.

Second, patents, copyrights, and trademarks do not belong to a private sphere that somehow pre-exists the state. As we have seen, patents, copyrights, and trademarks are state-based regulatory regimes, implemented for public purposes. Historically, the details of these regimes have varied according to the particular mixture of policy objectives being pursued.

To better understand these critiques, it is helpful to recall the early twentieth-century legal realists’ critiques of property concepts. For example, Robert Hale observed that the economic value of “private property” was in large part a function of the way public institutions such as police and courts made their coercive apparatus available to protect it. Morris Cohen added to this critique by observing that the concept of “property” was itself an empty signifier—that the content of property entitlements depended on rights conferred by the state. Hale and Cohen were primarily concerned with the legal system’s treatment of land, industrial capital, and other physical things. However, their critiques are even more relevant to the legal system’s construction of property rights in ideas, information, and symbols. The scarcity of these phenomena is entirely artificial; their economic value is entirely a function of the legal protection

26 TRIPS Agreement, supra note 2, preamble.
Moreover, the legal regimes protecting these entitlements are entirely contingent. Although certain models of patent law have historically become predominant, there are no intrinsic reasons for such laws to take any particular form.

Nevertheless, the discourse of intellectual property rights achieved widespread currency during the last two decades of the twentieth century. The appeal of this discourse can be partly attributed to the way it resonated with neoliberal ideas about the primacy of private economic ordering. It may also be partly attributed to the way it resonated with claims of human rights. The late twentieth century was an especially propitious time to frame political claims in terms of rights. The international human rights project, which I described in Chapter 2, together with various national struggles for civil or constitutional rights, created a generally favourable political environment for rights claims. As Duncan Kennedy explains, “Contemporary legal consciousness is the endpoint of a long process in which the general concept of a right has risen from its historical low point in the 1930s… to become the universal legal linguistic unit.”

Under these circumstances, it became relatively easy to imagine patents, copyrights, and trademarks in terms of liberal rights.

By locating patents, copyrights, and trademarks within a “private” sphere, the discourse of intellectual property rights implies that the entitlements conferred under these regulatory regimes are in some sense pre-political. As the political scientist Claire Cutler has explained, liberal thought generally portrays private economic ordering as natural, neutral, consensual, and efficient. Intellectual property discourse implies that patents, copyrights, and trademarks share these qualities. It thus implicitly lends weight to proposals for heightened protection; it favours innovators at the expense of imitators and consumers.

Likewise, intellectual property discourse obscures the “public” aspects of patent, copyright, and trademark regimes. In the case of patents, it minimizes the fact that governments have

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29 May, supra note 8 at 32-35.


historically issued patents for a variety of policy purposes. Perhaps most importantly, it normalizes the distributive outcomes of patent law, discussed earlier. With particular regard to pharmaceutical patents, the discourse of intellectual property rights implicitly endorses the claim that innovators must be rewarded with monopoly protection. It implies that public health goals are extraneous to the regime.

The laws governing patents, copyrights, and trademarks reflect messy compromises among competing values. These legal regimes may reflect policy goals ranging from economic development to cultural expression to health. But the idea of “intellectual property” helps to obscure this messiness, instead conveying the idea that patents, trademarks, and copyrights constitute a coherent system serving a neutral purpose. And in the case of pharmaceutical patents, this discursive configuration implicitly favours innovator-monopolists and works to the detriment of copiers and consumers (i.e., sick people).

5.3 Globalized Intellectual Property Rights

Contemporary patent laws in Canada and around the world have been transformed by a political project aimed at enhancing the monopoly power of innovators. This project was initially launched by a small group of U.S. corporate CEOs. It expanded through the active participation of U.S. government officials as well as firms and governments from other countries, especially in Western Europe. The project has had both institutional and discursive dimensions. Institutionally, its proponents succeeded in attaching intellectual property to processes of trade liberalization and harnessing the power of trade institutions to further their agenda, thus making intellectual property an important element of the larger project of neoliberalism. Discursively, its proponents mobilized “property” and “rights” concepts (as discussed in the previous section) and combined them with ideas about trade, investment, and competition.

This project has enabled large companies based in the richest countries to extract monopoly rents from around the world. It has made pharmaceuticals more expensive, with especially grave consequences for sick people in the poorest countries. This particular aspect of globalized

32 Vaver, supra note 21.
intellectual property rights has provoked a backlash in the form of an “access to medicines” campaign. This campaign has yielded some minor reforms in international laws related to patents. But it has also had to contend with ongoing efforts to ratchet patent protection even higher.

### 5.3.1 Trade Liberalization and the Intellectual Property Project

During the 1970s and 80s, U.S. business owners and managers became increasingly concerned about practices of imitation occurring in other countries. Producers in Asia, Latin America, and Eastern Europe were copying patented technologies, copyrighted media, and trademarked goods—and successfully marketing them. These practices posed a particular challenge to U.S. pharmaceutical and computer companies, film and music studios, and brand-name fashion producers (respectively). Stopping these practices became a priority for those who controlled these enterprises. They therefore launched a global project of intellectual property rights. This project gradually became entwined with neoliberal efforts to create and expand markets.

These owners and managers portrayed unauthorized copying as a threat, not only to their respective businesses, but also to the U.S. economy as a whole. During this period, competition from Japan (as well as the newly industrializing countries of East Asia) was taking an enormous toll on the U.S. manufacturing sector. These changes gave credence to the idea that the United States was becoming a “knowledge economy” or a “post-industrial society” where research, education, and communication would displace manufacturing as the primary productive activity. Under such circumstances, national wealth was imagined to depend on the ability to generate new ideas and inventions—and to control their use.

On the basis of such ideas, business owners and managers found allies in the U.S. government and Congress who sympathized with their predicament. These public and private actors agreed that Asian and Latin American countries should be obliged to implement stronger patent, copyright, and trademark laws. They chose trade law as their instrument, and they began to claim

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that intellectual property protection was inseparable from trade. They also began to use trade institutions to pursue intellectual property protection, on a unilateral, bilateral, and multilateral basis. In essence, the U.S. made intellectual property part of its multilateral trade agenda; when other countries resisted this agenda, the U.S. used unilateral trade sanctions and bilateral inducements to bring them into line.  

In 1984, at the behest of business lobbyists, the U.S. Congress introduced legislative changes mandating the inclusion of intellectual property in U.S. trade policy. They did so by amending section 301 of the Trade Act of 1974. This provision authorizes the U.S. president to take action against countries whose trade policies or laws are perceived to unjustifiably restrict U.S. commerce. It essentially establishes a flexible system of unilateral trade sanctions (or threats), administered by the office of the U.S. Trade Representative (USTR). The size of the U.S. market means that these sanctions can have a major impact on target countries—no other state would be able to wield unilateral trade sanctions so effectively.

The 1984 amendments added inadequate intellectual property protection to the grounds for applying section 301. They also made intellectual property protection one of the criteria for assessing developing countries’ eligibility for preferences under the Generalized System of Preferences (GSP). A further set of amendments in 1988 gave rise to what is known as the “Special 301” process. Through this process, the USTR is required to investigate other countries’ intellectual property practices and to issue annual reports publicly identifying alleged violators. The USTR applied section 301 on intellectual property grounds for the first time against South Korea in 1985. As a result of this pressure, South Korea agreed in 1986 to extend patent protection to pharmaceuticals.

The creation of these unilateral mechanisms coincided with the negotiation of important international trade agreements. In 1986, trade ministers of the General Agreement on Tariffs and

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37 Sell, supra note 35 at 86.

38 Ibid. at 90.
Trade (GATT) member countries met in Punta del Este, Uruguay, to launch a new round of negotiations. Prodded by lobbyists, the U.S. put intellectual property onto the agenda for the round. The U.S. struggled at first to persuade other countries that intellectual property belonged in a trade deal. However, twelve U.S. corporate CEOs, calling themselves the Intellectual Property Committee (IPC), advanced this agenda internationally. Working behind the scenes with European and Japanese business associations, the IPC helped to forge a consensus among U.S., European and Japanese trade negotiators about the importance of intellectual property rights to trade.  

The GATT negotiations soon divided along North-South lines, with Brazil and India leading the resistance against the inclusion of intellectual property. However, the U.S. used unilateral measures to pressure these countries. For example, the U.S. imposed retaliatory tariffs on Brazilian products for Brazil’s failure to offer patent protection for pharmaceuticals. By 1989, Southern countries had largely capitulated. However, the U.S. continued to use unilateral trade sanctions, targeting both Thailand and India in 1991 for their failure to extend patent protection to pharmaceuticals. Eventually, the U.S. and its Northern allies succeeded in enshrining intellectual property in the TRIPS Agreement, part of the package of treaties establishing the World Trade Organization.

In some respects, the intellectual property project was consistent with the neoliberal ideas that dominated the Uruguay round of GATT. After all, trade presupposes some form of property. Liberal theorists of international economic order, such as Wilhelm Röpke, have historically championed the idea of property as a sphere of private autonomy, free from state intervention. The protection intellectual property rights may thus be described as an expansion (or a reinforcement) of this private sphere, without necessarily contradicting fundamental liberal principles.

Moreover, as Andrew Lang has observed, a key element of neoliberalism was its conception of politics. Neoliberals have generally denied that politics can or should be about the pursuit of collective purposes; instead, neoliberals have suggested that institutional structures should be designed to facilitate competition among self-interested actors. Neoliberals have thus treated politics as a game in which each person or organization seeks to fulfill its private interests. In such a game, the use of law to strengthen private property rights makes perfect sense, if one can get away with it.

However, in other respects, intellectual property fits poorly with trade liberalization. To begin with, from the perspective of international trade law, property has historically been seen as a matter to be dealt with by national laws. During the GATT’s “embedded liberal” era, international trade law was primarily concerned with the reduction of tariffs, quotas, and other explicit trade barriers. During the era or neoliberalism, the scope of trade law has been expanded to include the trade-related effects of many kinds of government regulation. But this expansion of trade law has generally left untouched national property laws pertaining to land or physical objects. The characterization of patents, copyrights, and trademarks as “trade-related” is therefore rather exceptional.

Moreover, the arguments about economic efficiency that are conventionally used to justify international trade liberalization cannot be extended to intellectual property protection. In classical liberal trade theories such as that of Adam Smith, it was generally imagined that the reduction of trade barriers would benefit both importing and exporting states. Although international competition may ruin some producers, it is thought to ensure lower prices for consumers, and thus increase aggregate welfare in each state (as well as in the trading community overall). But intellectual property laws do not enhance competition. They establish

monopolies.\textsuperscript{47} Such monopolies are not necessarily efficient; they enable their holders to earn additional rents by restricting the supply of the good in question. (And then there are distributive concerns. Even if the monopolist sells an optimal quantity of the pertinent good, intellectual property laws ensure that the benefits go to the monopolist, rather than to potential competitors.)

Nevertheless, the firms and governments that promoted intellectual property protection claimed that it would benefit Northern and Southern countries alike. They arrived at this claim by universalizing the idea of the “knowledge economy”: They suggested that national wealth would depend on the ability to generate and exploit innovations, and that innovations would only arise in the context of strong intellectual property protection.

This claim bears a family resemblance to the idea that national laws and institutions play an important role in facilitating (or hindering) economic development. This idea has a heritage dating at least as far back as the work of Max Weber.\textsuperscript{48} As I discussed in Chapter 3, this idea also underwent a revival within the field of development assistance during the 1990s. One inspiration for this revival was the work of Douglass North and other practitioners of the “new institutional economics.” These scholars argued that the wealth or poverty of nations could be significantly attributed to the qualities of their institutions, including the formal and informal laws governing business practices.\textsuperscript{49} The idea of heightened patent protection appears to be consistent with this set of ideas.

Nevertheless, some countries are in a better position to benefit from intellectual property protection than others. Countries have different levels of capacity for scientific research—and thus different levels of ability to generate technological innovations. (Historically, many Northern countries had loose patent regimes during the early stages of their industrial development, freely copying technologies from other countries before establishing their own

\textsuperscript{47} As David Vaver put it, “IP is mostly about insulating large sectors of the economy from free trade. It is about restricting trade and competition both within the country and across borders”: David Vaver, “Need Intellectual Property Be Everywhere? Against Ubiquity and Uniformity” (2002) 25 Dalhousie L.J. 1 at 19.


research capacity.\textsuperscript{50} Moreover, the overwhelming majority of existing patents are held by companies based in the global North. At least in the short term, universalizing patent protection means augmenting the rents that these patent holders can extract from around the world. In fact, the economist Phillip McCalman calculated that only six countries—the United States, Germany, France, Italy, Sweden, and Switzerland—would see a net benefit from TRIPS based on their existing patents.\textsuperscript{51}

The primary purpose for linking intellectual property to trade, from the perspective of Northern countries’ pharmaceutical, computer, entertainment, and fashion industries, was that it contained economic mechanisms that could be used to discipline other countries. As we have seen, the United States has employed unilateral trade sanctions (or threats of sanctions) against countries perceived to have inadequate intellectual property protection. The Uruguay Round negotiations also created a dynamic of multilateral economic pressure. Once the United States, the European Communities, and Japan had agreed to link trade to intellectual property, Southern countries understood that they had to acquiesce or else risk exclusion from an eventual trade deal (and consequent loss of market access). Finally, the inclusion of intellectual property in the WTO agreements regularized the use of trade sanctions in response to perceived violations of intellectual property rights.

The relationship between intellectual property and neoliberalism was therefore somewhat contingent. The project of intellectual property rights was tacked onto the project of neoliberalism; it was pursued by some of the same actors through many of the same fora, especially the GATT negotiations that led to the creation of the WTO.

Proponents of the intellectual property project have also combined these economic mechanisms with discursive pressures. One of these has been the claim that strengthened patent protection would benefit Southern countries. As I have noted, the empirical basis for claim is questionable.

\textsuperscript{50} Ha-Joon Chang, \textit{Kicking Away the Ladder: Development Strategy in Historical Perspective} (London: Anthem Press, 2003) at 83-85.

However, this claim has been accompanied by heavy use of the discourses of “property” and “rights” (and their corollary discourses of “theft” and “piracy”), discussed earlier.

This claim has also been accompanied by a discourse of inclusion and exclusion. Higher standards of intellectual property protection have been identified with participation in a global community of research, development, and innovation. Countries that failed to enforce intellectual property rights were to be excluded from this community. (And public health was identified with innovation, so that patent protection of pharmaceuticals was seen as necessary for participation in an “innovative community of health.”)52 This sense of inclusion and exclusion was superimposed on an established set of dichotomies between traditional and modern, developed and developing, North and South. Proponents of the intellectual property project claimed that strengthened intellectual property protection was characteristic of a “modern” state. For example, in 1996, the president of the Pharmaceutical Manufacturers’ Association of Canada praised Canada’s elimination of compulsory licensing, a regulatory technique that he stigmatized as being more typical of a “Third World” country.53

The inclusion of intellectual property rights in the TRIPS Agreement and other trade deals was therefore due to a mixture of economic pressure and ideational proselytizing. It also helped, in turn, to promote general acceptance of certain ideas about intellectual property. In this new configuration of ideas, innovation was imagined as a strategic national resource and the commodification of innovation was understood to be the basis for participation in a global economy. The TRIPS Agreement gave formal expression to these ideas, so that intellectual property protection in fact became a formal condition for important trade advantages.

5.3.2 The TRIPS Agreement

The global project of intellectual property rights culminated in the TRIPS Agreement. The TRIPS Agreement generally sets minimum standards of monopoly protection for patents, copyrights, trademarks, and other entitlements. The TRIPS Agreement leaves many details of

52 Doern & Sharaput, supra note 19 at 141.
53 Ibid. at 139
these regulatory regimes up to member states. However, when it comes to compulsory licensing of patented technologies, the TRIPS Agreement imposes strict limits.

The TRIPS Agreement is part of the Marrakech Agreement establishing the World Trade Organization. Any country joining the WTO must therefore accept its terms. If parties fail to implement the TRIPS Agreement, they are liable to face complaints from other members—and the possibility of retaliatory trade sanctions—in keeping with the WTO’s Dispute Settlement Understanding.  

Along with the other parts of the Marrakech Agreement, the TRIPS Agreement came into effect on January 1, 1995. However, it gave all WTO member states an additional year to achieve compliance, and it gave developing countries a further four years. It also allowed developing countries an additional five years (i.e., until 2005) to extend product patents to technologies that were not previously patentable (which, for many countries, included pharmaceuticals). It provided a general ten-year transition period (i.e., until 2005) for least-developed countries (LDCs).

The TRIPS Agreement concerns patents, copyrights, and trademarks, as well as geographical indications, industrial designs, semiconductor chip rights, and trade secrets. The TRIPS Agreement also establishes minimum standards for many aspects of these regulatory regimes. Parties must incorporate these standards into their national laws. Parties must also provide effective enforcement mechanisms, including criminal penalties.

Despite these strictures, laws governing intellectual property remain national laws. And parties to the TRIPS Agreement retain a certain amount of flexibility to shape their own regulatory

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54 TRIPS Agreement, supra note 2, Art. 64.
55 Ibid., Art. 65.
56 Ibid., Art. 65.4
57 Ibid., Art. 66.
58 Ibid., Art. 1.1.
59 Ibid., Arts. 41, 61.
regimes.\textsuperscript{60} The TRIPS Agreement also explicitly states that parties may take necessary measures to promote public health and other social objectives, provided these are compatible with the purposes of the agreement.\textsuperscript{61} 

With particular regard to patents, the TRIPS Agreement requires parties to make patents available for any invention that involves an inventive step and capable of industrial application.\textsuperscript{62} It stipulates that “patents shall be available… in all fields of technology” and goes on to specify that “patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.”\textsuperscript{63} Pharmaceuticals must therefore be patentable on the same basis as other forms of technology. Patents are to last a minimum of 20 years from the date of filing.\textsuperscript{64} 

However, the TRIPS Agreement also explicitly provides for certain flexibilities with regard to patents. Article 30 provides that “Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.” 

Article 31 of the TRIPS Agreement recognizes the possibility of compulsory licensing of patented inventions. However, it attaches a detailed set of conditions. Under paragraph 31(b), before a compulsory license can be issued, the user must make efforts to obtain a voluntary license on “reasonable commercial terms.” This requirement can be waived in “situations of national emergency or other circumstances of extreme urgency.” Paragraph 31(h) requires that the patentee receive “adequate remuneration” whenever a compulsory license is issued. 

Finally, Article 31 of the TRIPS Agreement contains a provision making it especially difficult for countries to use compulsory licensing to produce drugs for other countries. Paragraph 31(f) requires that compulsory licences be issued “predominantly for the supply of the domestic 

\textsuperscript{60} Ibid., Art. 1.1.  
\textsuperscript{61} Ibid., Art. 8.1.  
\textsuperscript{62} Ibid., Art. 27.  
\textsuperscript{63} Ibid.  
\textsuperscript{64} Ibid., Art. 33.
market.” This paragraph has generally been interpreted to mean that at least 50 percent of the drugs manufactured under a compulsory licence must be sold in the country issuing the licence.

This paragraph poses a particular challenge for countries (like most of those in sub-Saharan Africa) that have historically imported generic drugs from elsewhere. Southern countries with sophisticated domestic pharmaceutical industries, such as India, Brazil, or Argentina, may continue to manufacture generic drugs under compulsory licences for domestic purposes. But these countries are prohibited from issuing compulsory licenses to produce generic drugs for export. Countries that lack domestic manufacturing capacity are therefore required to purchase more expensive, brand-name versions of patented drugs.

By entrenching minimum standards for patent protection, the TRIPS Agreement generally favours innovators at the expense of imitators and consumers, and Northern countries (where the majority of patents are held) at the expense of the South. Nowhere are these distributive effects more dramatic than in the realm of pharmaceuticals, where consumers’ interests largely correspond to public health concerns.

5.3.3 The Access to Medicines Controversy

In 1996, shortly after the entry into force of the TRIPS Agreement, anti-retrovirals (ARVs) for the treatment of HIV/AIDS became commercially available for the first time. But the prices of these drugs, manufactured by companies in the United States and Europe, were astronomical compared to the incomes of those affected by HIV/AIDS, primarily in Africa and Asia. The unaffordability of ARVs vividly illustrated the distributive effects of patent laws, especially in the form these had taken under the TRIPS Agreement. In response, NGOs and Southern country governments mobilized around the issue of “access to medicines.”

The issue of access to medicines first gained widespread publicity in 1997, when the government of South Africa introduced a new Medicines And Related Substances Amendment Act (Act 90 of 1997). Meant to take advantage of the flexibilities of the TRIPS Agreement, the Act provided for the broad-based use of compulsory licensing. However, the South African pharmaceutical industry association (representing subsidiaries of U.S. and European multinationals) challenged
the Act’s constitutionality, arguing (among other things) that it violated their property rights. The U.S. government backed this lawsuit with diplomatic and economic pressure.65

The South African litigation helped to dramatize the access to medicines issue. Large transnational NGOs, notably Médecins Sans Frontières (MSF) and Oxfam, joined the campaign. By September 1999, following protests at Vice-President Al Gore’s presidential campaign appearances, the U.S. government reversed course and agreed to withdraw the measures it had taken against South Africa. In May 2000, U.S. President Bill Clinton issued an executive order renouncing the use of trade sanctions against all sub-Saharan African countries seeking to address their HIV/AIDS epidemics. By March 2001, when the lawsuit went to trial, the negative publicity was so great that the pharmaceutical companies chose to abandon their claim.66

For a time, the U.S. government continued to oppose compulsory licensing for ARVs by countries outside Africa. The USTR’s biggest target at this time was Brazil. Brazil had made pharmaceutical products patentable in 1996 following the entry into force of the TRIPS Agreement. But it had retained a “local working” requirement, accompanied by the threat of compulsory licensing if patentees failed to work their patent locally within three years. Brazil used this threat of compulsory licensing to negotiate reduced prices for bulk purchases of HIV/AIDS drugs. The U.S. initiated a WTO complaint against Brazil in 2000, only to withdraw it in 2001.67

Countries such as South Africa and Brazil, which possessed domestic pharmaceutical manufacturing capacity, were able to use compulsory licensing to produce HIV/AIDS drugs for domestic use. But other countries, especially those in intertropical Africa, faced an obstacle in the form of Article 31(f)—the stipulation that drugs produced under compulsory licence must be primarily for the supply of the domestic market. This provision meant that they could not issue compulsory licences for the import of drugs; nor could other countries issue compulsory licenses for export to them. In 2001, Southern country governments placed the access to medicines issue onto the agenda for the upcoming round of multilateral trade negotiations. The African countries,

65 Sell, supra note 35 at 146-162.
66 Ibid.
67 Ibid. at 136-137.
Brazil, and India formed a cohesive bloc on this issue. However, the governments of Northern countries (including Canada) were cool to the notion of amending the TRIPS Agreement. Faced with a firm Northern stance on this issue as well as the key issue of agricultural subsidies, many Southern countries appeared ready to abandon the talks entirely. Only when the collapse of the talks seemed likely did Northern countries begin to offer concessions.68

The November 2001 ministerial meeting in Doha, Qatar therefore produced a non-binding consensus statement, the Doha Declaration on the TRIPS Agreement and Public Health.69 The Doha Declaration recognizes “the gravity of the public health problems afflicting many developing and least developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.” In view of the special circumstances facing least-developed countries, the it delays the implementation of their TRIPS obligations regarding pharmaceutical patents until January 1, 2016.

The Doha Declaration also endorsed an interpretation of the TRIPS Agreement “supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.” In particular, it recognizes the right of each member to issue compulsory licences and to unilaterally determine the grounds for issuing such licences. It also acknowledged that Article 31(f) of the TRIPS Agreement could limit access to medicines for countries without domestic pharmaceutical manufacturing capacity. It therefore directed WTO members and the WTO Secretariat to find an “expeditious solution” to this problem by the end of 2002.

The Doha Declaration was thus followed by an intense round of negotiations over compulsory licensing for export. Brazil and Africa countries argued that compulsory licensing for export should be allowed as an “exception” under the open-ended language of Article 30. But the EU insisted that compulsory licensing for export would have to be based on changes to the much


69 World Trade Organization, “Declaration on the TRIPS Agreement and Public Health,” online: <http://www.wto.org/english/tratop_e/minist_e/min01_e/mindecl_trips_e.htm>. [Doha Declaration]
more precise language of Article 31. The U.S. held out for an exception that would be limited to certain medicines, particularly those used to treat HIV/AIDS, malaria, and tuberculosis.

WTO members finally reached a consensus in August 2003. (Again, the impending collapse of a WTO ministerial meeting, this one at Cancún, Mexico, prompted a compromise.) In the Decision of August 30, 2003, the General Council of the WTO agreed to waive members’ obligations under Article 31(f) of the TRIPS Agreement. The waiver applies to “any” pharmaceutical product needed to address “the public health problems as recognized” in the Doha Declaration. The General Council Decision also establishes an administrative process for countries wishing to take advantage of this waiver. Under the General Council Decision, importing countries are required to file notifications with the WTO, declaring, among other things, the expected type and quantity of drugs required. They must also file a declaration of their (self-assessed) lack of manufacturing capacity. The exporting country’s compulsory licence must be limited to the type and quantity of drugs requested by the importing country. The Decision also specifies that the “adequate remuneration” required under Article 31(h) should be paid by the exporting country rather than the importing country. And it stipulated that the drugs produced under a compulsory licence for export must bear distinctive packaging or marking.

The Decision leaves intact the requirement in Article 31(b) that before issuing a compulsory licence, parties must try to obtain the consent of the patentee on reasonable commercial terms within a reasonable period of time, except in cases of “national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.” However, the Decision clarifies that it is up to each country to decide for itself what constitutes a national emergency. The Decision also invites WTO member states to individually renounce their right to take advantage of its flexibilities. Most Northern countries immediately declared that they would never import medicines under the regime. Many Southern countries declared that they would only do so in the event of a “national emergency or other circumstances of extreme urgency.”


72 General Council Decision, supra note 3.
The General Council Decision was accompanied by a Chairperson’s Statement emphasizing its humanitarian nature and asserting that it was not to be used for “industrial or commercial policy objectives.”

The General Council also agreed to pursue an amendment to the TRIPS Agreement that would make these changes permanent. (The General Council agreed on a protocol to this effect in December 2005. However, two-thirds of WTO members must formally accept this protocol before it can take effect. By 2012, only about one-third of WTO members had done so.)

### 5.3.4 TRIPS-Plus

Alongside these concessions on the specific issue of access to medicines, the Northern project of ratcheting up intellectual property standards continued. Many commentators have referred to this project as a “TRIPS-Plus” agenda. For example, both the U.S. and EU, in negotiating bilateral trade agreements with developing countries, have pressured developing countries to accept provisions extending patent protection to previously exempt subject matters, lengthening the terms of protection, or waiving the transition periods allowed under TRIPS.73 The U.S. has also continued to take unilateral measures against countries seen as insufficiently committed to intellectual property rights. While the WTO agreements restrict the USTR’s ability to impose retaliatory tariffs unilaterally, the U.S. can still withhold unilaterally-granted trade preferences. The USTR also continues to publish its annual Special 301 report, placing suspect countries onto a “watch list.”

The World Intellectual Property Organization has also contributed to the TRIPS-plus project. New multilateral treaties dealing with particular areas of intellectual property are being negotiated at WIPO. One of these, the Substantive Patent Law Treaty, would push countries to harmonize their criteria for patentability. WIPO also provides developing countries with technical assistance, including such activities as training programs for government officials, public education on intellectual property issues, and legislative drafting. These practices help to

73 Sell, supra note 35 at 140-146; Dutfield & Suthersanen, supra note 18 at 41
further the project of intellectual property protection by promoting a standardized approach to intellectual property issues.\(^{74}\)

The access to medicines campaign’s breakthrough (in the form of the General Council Decision) thus remains an exception to the general trend of ever-higher intellectual property standards. Northern countries and their patent-holding industries have continued to change the rules (and interpret the existing ones) in ways that favour their own interests at the expense of potential competitors, consumers, and countries of the global South. The Doha Declaration and the General Council Decision provided a narrow exception to this trend, but they never reversed it.

5.4 The Canadian Context

Canada’s response to the access to medicines issue was shaped by a number of domestic factors. Long before the global access to medicines campaign, Canada had instituted its own regime of compulsory licensing designed to make pharmaceuticals more affordable. However, due to pressure from trading partners and multinational pharmaceutical companies, Canada had dismantled this regime in the early 1990s. (While the regime had certain unique features, its demise was quite common.) The political controversy over this regime meant that compulsory licensing was decidedly out of favour in Ottawa by the 1990s. Many government actors, especially those affiliated with the Department of Industry, had internalized the structure of ideas and values associated with the global intellectual property project. Nevertheless, at the height the access to medicines campaign, Canada was governed by a prime minister who was personally committed to international humanitarianism, especially vis-à-vis Africa. This combination of circumstances helped to give Canada’s Access to Medicines Regime its particular shape.

5.4.1 The Rise and Fall of Compulsory Licensing

Canada’s patent laws have not always moved in lockstep with globalized trends. From 1969 to 1993, Canada employed a special regime of compulsory licensing for pharmaceuticals. This regime was designed to ensure lower prices for domestic consumers. It also helped to foster the growth of a domestic generic drug industry. Canada’s history of compulsory licensing vividly

\(^{74}\) May, supra note 8 at 99-106.
illustrates how patent law may be configured to pursue various policy goals. Moreover, it shows that Canadian lawmakers were already familiar with compulsory licensing as a mechanism for making drugs more affordable. However, it also shows that, by the time of the access to medicines campaign, compulsory licensing was a model that had fallen out of political favour in Canada.

In Canada, as in many other countries, compulsory licensing was introduced early in the twentieth century as a way of fostering industrial development. Canada’s original federal Patent Act, introduced in 1869, had provided that a foreign patentee who failed to “work” his patent in Canada within a three-year period would forfeit the patent. Compulsory licensing provided a more flexible means of pursuing the same policy. In 1935, Parliament amended the Patent Act to specify that failure to work the patent locally would be considered an “abuse” of the patent. The amendment provided for compulsory licensing—accompanied by payment of a reasonable royalty—as the standard remedy for such an abuse. (Patent forfeiture also remained possible as a last resort.) Between 1935 and 1970, the Commissioner of Patents received 53 applications for compulsory licences under these provisions, of which 11 were granted.

However, prior to these general changes, Canada had already introduced a special system of compulsory licensing for food and pharmaceuticals. In 1923, imitating recent changes to British patent laws, Parliament had amended Canada’s Patent Act to make patents available for processes of manufacturing food and medicines, but not for the products themselves. At the same time, Parliament had introduced a system of compulsory licensing for patented food and pharmaceutical processes. Between 1935 and 1969, the Commissioner of Patents received 49 applications for compulsory licences under these provisions, and granted 22 of them. These provisions reflected a mixture of innovation, industrial development, and consumer welfare goals: They instructed the Commissioner of Patents to “have regard for the desirability of

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75 Economic Council of Canada, supra note 16 at 55.
76 Ibid. at 68.
77 Ibid. at 70.
making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.\textsuperscript{78}

Canada never became a major centre for pharmaceutical research or manufacturing. The Royal Commission on Health Services, reporting in 1964, found that the Canadian drug industry was dominated by subsidiaries of U.S. and European firms.\textsuperscript{79} These foreign firms also held the vast majority of Canadian pharmaceutical patents.\textsuperscript{80} A survey by the Canadian Pharmaceutical Manufacturers Association found that major drug companies’ expenditures on research in Canada in 1960 amounted to only 2.8 percent of their Canadian sales that year.\textsuperscript{81} These companies also produced most of their medicinal chemical ingredients outside Canada.\textsuperscript{82} Their Canadian operations consisted of processing these ingredients into their dosage forms, testing them, and marketing them.

During the 1960s, the high cost of these imported pharmaceutical products became politically controversial. The Royal Commission on Patents, Copyrights, Trade Marks and Industrial Designs, which reported in 1960, concluded that drug prices were excessively high due to the monopoly protection offered by patents.\textsuperscript{83} The Restrictive Trade Practices Commission, reporting in 1963, concluded that drug patents disproportionately benefitted foreign patentees and imposed costs on Canadian consumers, and recommended that such patents should be abolished entirely.\textsuperscript{84} A year later, the Royal Commission on Health Services noted that Canadian drug prices were high compared to those in other industrialized countries.\textsuperscript{85} It also noted that

\textsuperscript{78} Canada, Commission of Inquiry on the Pharmaceutical Industry, \textit{Commission of Inquiry on the Pharmaceutical Industry} (Ottawa: Minister of Supply and Services Canada, 1985) at 11.

\textsuperscript{79} Canada, Royal Commission on Health Services, \textit{Report of the Royal Commission on Health Services}, vol. 1 (Ottawa: Queen’s Printer, 1964) at 655.

\textsuperscript{80} \textit{Ibid.} at 656.

\textsuperscript{81} \textit{Ibid.} at 667; 678-79.

\textsuperscript{82} \textit{Ibid.} at 657-658.


\textsuperscript{85} Canada, Royal Commission on Health Services, \textit{supra} note 79 at 696-701.
pharmaceutical companies in Canada were highly profitable: In fact, their average rate of profit was almost twice the average rate in the manufacturing sector as a whole. It declared that high drug prices were a public health issue, and that drug companies were expected to serve the public interest by making drugs more affordable.

In 1968, the Liberal government of Lester Pearson introduced a set of amendments to the *Patent Act* intended to reduce drug prices for consumers. The key feature of these amendments was a provision allowing Canadian companies to obtain compulsory licences for the import of pharmaceuticals. Compulsory licensing for pharmaceuticals was thus de-linked from industrial policy goals. Instead of manufacturing drugs in Canada, licensees could import the active ingredients and process them into separate doses in Canada. This new system vastly expanded the use of compulsory licensing. From 1969 to 1993, the Commissioner of Patents issued 613 compulsory licenses under this scheme.

The Commission of Inquiry on the Pharmaceutical Industry, chaired by the economist Harry Eastman, carried out an independent assessment of this compulsory licensing regime in the early 1980s. The Eastman Commission concluded that the regime was fulfilling its purpose: It estimated that compulsory licensing had saved Canadian consumers $211 million in 1983 alone. It also noted that the regime had helped foster the growth of a Canadian generic drug industry. And it found that compulsory licensing had not had any significant adverse effect on the patent-holding firms. It noted that the patent-holding firms’ profits had remained relatively high (compared to other Canadian industries) since 1969.

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86 Ibid. at 679-681.
87 Ibid. at 709.
88 Doern & Sharaput, supra note 19 at 46-53.
90 Canada, Commission of Inquiry on the Pharmaceutical Industry, supra note 78 at 316.
91 Ibid. at 349.
92 Ibid. at 349.
93 Ibid. at 257-261
By the time the Eastman Commission delivered its report, however, Brian Mulroney and the Progressive Conservative party had come to power. The new government was ideologically committed to neoliberalism, and was sympathetic to the idea that the protection of intellectual property rights would foster economic growth. During the election, it had promised to “review the Patent Act to ensure that intellectual capital is protected and to allow innovating companies to profit from the investment made in research and development.”  

Soon after the government came to power, multinational pharmaceutical companies launched an enormous lobbying campaign, spending tens of millions of dollars to convince the government to enhance patent protection.

In 1986, the Mulroney government introduced Bill C-22, which modified the compulsory licensing system to the benefit of patent holders. Bill C-22 contained a number of provisions strengthening patent protection and ostensibly providing incentives for research and development. First, it changed the length of patent terms in general. Patents had previously lasted 17 years from the date of issue; now they would last 20 years from the date of filing. Second, it made pharmaceutical products (as opposed to processes) patentable once again. Third, it introduced a period of exclusivity: Compulsory licences for domestic manufacturing would only be issued after seven years of patent protection. Compulsory licences for import would only be issued after ten years. No compulsory licences whatsoever would be introduced for technologies invented or discovered in Canada. Acknowledging that these changes could affect drug prices, the government also included provisions establishing a Patented Medicines Prices Review Board. This agency—which still exists today—was given the power to investigate drug prices and, if necessary, order manufacturers to lower them.

At the same time as the Mulroney government was creating Bill C-22, it was also negotiating the Canada-U.S. Free Trade Agreement. U.S. negotiators pressured Canada to include intellectual property rights in the treaty. At one point, Canadian negotiators agreed to make Bill C-22 a

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94 Quoted in Campbell & Pal, supra note 83 at 37.
95 Campbell & Pal, supra note 83 at 38.
96 Patent Act, supra note 1, ss. 79-103.
formal treaty commitment; however, this provision was removed at the last minute.⁹⁷ The text of the agreement ultimately omitted intellectual property. Nevertheless, Bill C-22 was widely understood as “a de facto side-deal to the treaty.”⁹⁸

Bill C-22 produced a major political confrontation. The multinational patent-holding pharmaceutical companies threw the full weight of their lobbying and public relations efforts behind the bill. They promised to double their Canadian research budgets if the bill was enacted—a pledge worth $1.4 billion.⁹⁹ The bill also received support from the government of Quebec (where most multinational pharmaceutical companies based their Canadian operations) and from scientific and medical groups. The bill was opposed by generic drug companies, the governments of the other nine provinces, labour unions, social welfare groups, churches, seniors’ organizations, and consumer advocates.¹⁰⁰ Beyond these political dynamics, the bill was widely understood to symbolize a shift from Keynesian economics to neoliberalism.¹⁰¹ The Liberal party vigorously resisted the bill in the House of Commons and in the Senate. However, due to the overwhelming Progressive Conservative majority in the House of Commons, the bill was eventually passed, and came into force in December 1987.¹⁰²

Although Bill C-22 limited the use of compulsory licensing, it left the outlines of the regime in place. However, the United States and the multinational pharmaceutical companies maintained pressure on Canada to eliminate compulsory licensing altogether. From 1989 to 1991, the Office of the U.S. Trade Representative placed Canada on its Section 301 “watch list.”

Canada also faced continuing opposition to its compulsory licensing regime in trade negotiations. By the end of 1991, it was clear that the GATT negotiations would lead to higher standards of intellectual property protection. One draft text, circulated by GATT director general

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⁹⁸ Doern & Sharaput, supra note 19 at 134.

⁹⁹ Campbell & Pal, supra note 83 at 39, 46, 48.

¹⁰⁰ Ibid. at 41.

¹⁰¹ Ibid. at 62.

¹⁰² Ibid. at 46.
Arthur Dunkel in an attempt to broker a compromise, called for exclusive patent protection for 20 years from the date of filing or 17 years from the date of grant, in all areas of technology. Meanwhile, Canada, the United States, and Mexico were also negotiating NAFTA. Pharmaceutical patents were high on the U.S. agenda for NAFTA. The U.S. had already targeted Mexico for its failure to offer patents on pharmaceuticals, suspending Mexico’s GSP benefits in the late 1980s. The U.S. unofficially made it clear that pharmaceutical patents would be a precondition for Mexican participation in NAFTA. Mexico accordingly implemented a system of pharmaceutical patents in 1991. Mexico’s concessions on pharmaceuticals left Canada isolated in the NAFTA negotiations.

In 1992, the Mulroney government conceded the defeat of compulsory licensing. In a dramatic shift, it adopted the Dunkel draft text from GATT as a basis for its NAFTA negotiating position. It then introduced Bill C-91, which would eliminate compulsory licensing altogether. Ratcheting up intellectual property protection, as required by NAFTA and GATT/TRIPS, was not in Canada’s economic interest. As I noted earlier, the economist Phillip McCalman predicted that only six countries would be net winners from TRIPS. Incidentally, McCalman also predicted that, based on existing patents, Canada would be the largest loser from TRIPS, with a net loss of over $1 billion per year. Canada’s decision to accept such terms can best be attributed to two factors: first, the give and take of international trade negotiations, and second, the ideational changes that accompanied the discourse of intellectual property rights.

As the political scientists Robert M. Campbell and Leslie A. Pal have observed, the political debate surrounding Bill C-91 (in the early 1990s) was mild compared to the one that had engulfed Bill C-22 (in the late 1980s). Campbell and Pal attribute this dominance of a neoliberal discourse of market-led globalization. Whereas this discourse had been politically

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103 Sell, supra note 35 at 90-91.
104 Maryse Robert, Negotiating NAFTA: Explaining the Outcome in Culture, Textiles, Autos, and Pharmaceuticals (Toronto: University of Toronto Press, 2000) at 234-238.
105 Ibid. at 238-242. The Dunkel draft text ultimately formed the basis for NAFTA’s intellectual property provisions.
106 Ibid.
107 Campbell & Pal, supra note 83 at 46-62.
contested in the 1980s, by the 1990s it had become a normal feature of Canadian political life.\textsuperscript{108} Whereas the government had been unwilling to admit any link between Bill C-22 and the Canada-U.S. Free Trade Agreement, the government explicitly cited NAFTA and GATT as reasons for enacting Bill C-91.\textsuperscript{109}

Moreover, by the early 1990s, neoliberal discourse not only dominated Canadian politics; it had also become dominant within key parts of the federal bureaucracy.\textsuperscript{110} In 1987, the Mulroney government had announced the formation of a new Department of Industry, Science, and Technology. This reorganization reflected a shift in the government’s approach to microeconomic policy: A shift from “industrial policy” (often based on economic planning, and wielding firm- and sector-specific subsidies) to “framework policy” (in which government would play a more subtle, “enabling” role).\textsuperscript{111} In 1993, the Campbell government assigned this department a number of functions taken from other departments, and renamed it Industry Canada. The new department was given a mandate to “foster Canadian business development, efficient markets, and Canadian competitiveness.”\textsuperscript{112} Among its acquisitions was the Canadian Intellectual Property Office, formerly under the jurisdiction of Consumer and Corporate Affairs. The administration of patent law was thus assigned to a department oriented toward facilitating private economic initiative and enhancing international competitiveness—and away from nurturing particular firms or industries. The idea of protecting “intellectual property rights” was consistent with this orientation.

Soon after the TRIPS Agreement came into force, the United States and the European Communities initiated legal challenges at the WTO targeting remaining peculiarities of Canada’s patent laws for pharmaceuticals. The first of these challenges, brought by the European Communities, concerned Canada’s laws surrounding the manufacture of generic drugs. The

\begin{itemize}
  \item \textsuperscript{108} \textit{Ibid.} at 52-55, 62-65; see also Doern & Sharaput, \textit{supra} note 19 at 138-157.
  \item \textsuperscript{109} Campbell & Pal, \textit{supra} note 83 at 52.
  \item \textsuperscript{110} \textit{Ibid.} at 59-60, 129-130.
\end{itemize}
Patent Act and accompanying regulations allowed generic companies to develop their products and submit them for regulatory review while the original remained under patent. It also allowed generic companies to produce large quantities of generic drugs and to stockpile them so that they would be ready for sale on the day the patent expired. The WTO panel held the “stockpiling” provision to be inconsistent with the TRIPS Agreement but did not interfere with the regulatory review provision.  

The second challenge, brought by the United States, concerned the length of Canada’s patent terms (for all inventions, not just pharmaceuticals). Prior to Bill C-22, Canadian patents had been issued for a period of 17 years from the date of issue. Bill C-22 changed the patent term to a period of 20 years from the date of filing, but only for patents issued on or after October 1, 1989. The TRIPS Agreement stipulated a minimum patent term of 20 years from the date of filing. This meant that some older Canadian patents—those whose applications the Patent Office had processed in less than three years—had patent terms whose length was shorter than that required by the TRIPS Agreement. The WTO panel found Canada’s legislation to be inconsistent with the requirements of the TRIPS Agreement. Canada amended the Patent Act accordingly.

Canada’s domestic use of compulsory licensing for pharmaceuticals from the 1960s to the 1990s is relevant to the later story of CAMR because it shows that debates over the multiple purposes of patent law were well understood by Canadian political and legal actors. However, it also shows that, by the 1990s, one side in this debate—that favouring enhanced patent protection in the name of investment and innovation—had become dominant. Concerns about drug prices and their public health effects had been pushed aside.

5.4.2 Jean Chrétien’s African Agenda

Canada’s Access to Medicines Regime is also the product of one prime minister’s idiosyncratic engagement with issues of poverty and development in Africa. During the last 2½ years of his

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114 TRIPS Agreement, supra note 1, Art. 33.

tenure, Jean Chrétien chose to make Africa the centrepiece of his foreign policy. He used his position as chair of the 2002 G-8 summit to bring other world leaders together in a series of multilateral meetings devoted to Africa. This process left Chrétien personally committed to humanitarianism vis-à-vis Africa, and searching for ways of expressing this commitment.

 Chrétien’s public engagement with African issues began with the 2001 G-8 summit in Genoa, Italy, when he called on the G-8 countries to draw up an “Africa Action Plan.” It happened that, around the same time, a group of African leaders (notably Presidents Thabo Mbeki of South Africa and Abdoulaye Wade of Senegal) were developing their own, coordinated economic development proposal, which would come to be known as the New Partnership for African Development (NEPAD). This proposal called for African governments to adhere to the post-Washington consensus agenda of economic liberalization, good governance, and poverty reduction. In exchange, they would receive debt relief, private investment, and a massive infusion of new aid money.

 Chrétien’s African initiative involved a year-long process of preparatory meetings. Throughout the second half of 2001 and the first half of 2002, diplomats and experts from G-8 countries met repeatedly with their African counterparts in an attempt to draw up the Africa Action Plan. Chrétien personally traveled to six African countries in April of 2002.116 Throughout these processes, Chrétien and the Canadian government endorsed and promoted NEPAD so vigorously that some African parliamentarians and NGO representatives mistakenly thought that NEPAD was in fact a Canadian proposal.117

 During the same period, donor countries made a series of new aid pledges. In December 2001, the Chrétien government announced the creation of a $500 million “Canada Fund for Africa.” In doing so, Chrétien hoped to set an example for other G-8 countries.118 However, the most

118 Fowler, supra note 116 at 231.
significant aid pledges during this period emerged from the UN Conference on Financing for Development (which was unrelated to the G-8 process). This conference, held in Monterrey, Mexico, in March 2002, produced $16 billion in new aid commitments from Western donor countries. Canada pledged to increase its aid budget by 8 percent per year, doubling its overall aid level by 2010.

When Chrétien hosted the G-8 summit in Kananaskis, Alberta in June 2002, he devoted an entire day of the two-day agenda to African issues. Chrétien also invited a select group of African leaders to attend. Chrétien’s African agenda was supported by British Prime Minister Tony Blair and French President Jacques Chirac. However, it received a lukewarm response from U.S. President George W. Bush, who was preoccupied with terrorism and war in the Middle East.

At the end of the summit, the G-8 countries issued their Africa Action Plan. This plan contained “more than 100 specific commitments” related to African development. However, it contained almost no promises of new resources beyond what the G-8 leaders had already pledged at Monterrey.

Prior to 2001, Jean Chrétien had not been known as an internationalist prime minister. In fact, during the 1990s, Chrétien had presided over drastic cuts to Canada’s aid budget. During his first two terms of office, Chrétien’s most visible foreign policy initiative was his leadership of “Team Canada” trade-promotion tours. (Lloyd Axworthy, Chrétien’s foreign minister from 1996 to 2000, had taken up a highly visible “human security” agenda, but had done so on his own initiative.) The African agenda therefore represented a shift in Chrétien’s priorities. This shift

120 Langdon, ibid. at 250-252.
121 Fowler, supra note 118 at 228.
122 Black, supra note 119 at 142-143.
may have had to do with Chrétien’s search for a political “legacy.” However, by 2002, Chrétien apparently felt a sincere personal commitment to issues of African development.

In the early 2000s, Jean Chrétien thus made African development one of the signature themes of his foreign policy. He was personally identified with the African agenda he had championed. In 2003, as his popularity waned among the Canadian public and among the Liberal caucus, he continued to seek ways to express this humanitarian commitment. The WTO General Council’s Decision on access to medicines arrived just in time for Chrétien to make a humanitarian gesture before leaving office in December 2003.

5.5 Canada’s Access to Medicines Regime

Less than a month after the General Council Decision, the government of Prime Minister Jean Chrétien announced its intention to implement it. On November 6, 2003, the government introduced Bill C-56, the Canadian Medicines Export Act. Although Chrétien was absent from Parliament that day, he was personally named as the sponsor of the bill. Bill C-56 died when Parliament was prorogued on November 12. But when Parliament resumed in February 2004, with Paul Martin as prime minister, his government reintroduced the legislation as Bill C-9, the Jean Chrétien Pledge to Africa Act. This Act received royal assent in May 2004, and came into force (with accompanying regulations) in May 2005. After the election of Stephen Harper’s Conservative government in 2006, it became standard to refer to this legislation as Canada’s Access to Medicines Regime (CAMR).

CAMR adds a number of restrictions, conditions, and procedures to framework set out in the General Council Decision. On the whole, these added provisions make CAMR difficult for would-be licensees to use. Through CAMR, Canada’s government and Parliament moderated the General Council Decision, interpreting it in such a way as to protect existing patent entitlements.

125 Black, supra note 119 at 141
126 Langdon, supra note 117 at 251
I argue that this decision to moderate the General Council Decision can be primarily attributed to the set of ideas about innovation, competition, and monopoly protection that had inspired the global intellectual property project. These ideas had already been internalized by politicians in Ottawa as well as officials from Industry Canada and other departments. In the legislative debates surrounding CAMR, this discourse of intellectual property rights was largely taken for granted. Although access to medicines advocates made competing claims (framed in terms of the welfare of sick people in poor countries, or in terms of human rights), the government was able to contain these challenges through a discourse of “balancing.”

The moderation of the General Council Decision illustrates one of the main themes of this dissertation—the triumph of neoliberalism in Canadian internationalist lawmaking. However, several other themes are also present. First, the debates surrounding the enactment of CAMR provide an example of the use of paired arguments about non-discrimination and sovereignty—and show the versatility of this argumentative structure. Second, CAMR generally illustrates the importance of proceduralism for mediating competing claims about Canada’s role vis-à-vis the international. However, it also clearly demonstrates the political nature of procedures.

5.5.1 The Moderation of the General Council Decision

When the Canadian government announced that it would introduce legislation to establish a system of compulsory licensing for export, Canadian NGOs hailed this as a breakthrough for access to medicines. However, the legislative scheme that Canada eventually adopted departed from the General Council Decision in a number of ways. On the whole, these changes made compulsory licences more difficult to obtain. CAMR has been used on only one occasion since it came into force: from 2007 to 2009, the generic manufacturer Apotex produced a version of the HIV/AIDS medicine Triavir for export to Rwanda.

As the political scientist Jean-Frédéric Morin has explained, the drafting of CAMR was shaped by the interaction of four “networks” consisting of government institutions, patent-holding pharmaceutical companies, NGOs, and generic pharmaceutical companies.129 Actors from each network tried to shape the compulsory licensing regime in ways that reflected their own values.

129 Morin, “Two-Level Game,” supra note 4.
and interests. The patent-holding pharmaceutical companies argued that intellectual property rights were necessary for socially useful innovation. The NGOs, informally led by Médecins Sans Frontières (MSF) and the Canadian HIV/AIDS Legal Network (CHLN), campaigned for access to medicines.\footnote{Bubela & Morin, supra note 4 at 131-135.} The generic manufacturers expressed their support for compulsory licensing, but maintained a low profile during the legislative debates; their profit-driven orientation set them apart from NGOs.\footnote{Morin, “Two-Level Game,” supra note 4 at 319-320.}

The participants in these networks were largely Canadian, but many also had international ties.\footnote{Ibid. at 322-323; Bubela & Morin, supra note 4 at 129-131.} Although the patent-holding pharmaceutical companies were generally represented by their Canadian industry association, Rx&D, all of them were in fact subsidiaries of U.S. and European firms. Some of the NGOs—notably MSF—were Canadian chapters of global civil society organizations. (Nevertheless, as Jean-Frédéric Morin has observed, the Canadian instantiation of the access to medicines campaign was effectively directed by a coalition of domestic NGOs, among which CHLN exhibited informal leadership.\footnote{Morin, “Two-Level Game,” supra note 4 at 322, 327.})

Within government, the dominant role in the legislative process belonged to Industry Canada. Four other government departments—Foreign Affairs, Health, International Trade, and the Canadian International Development Agency—also had a hand in drafting CAMR. These departments held a variety of perspectives on trade, patents, health, and development. However, as the department responsible for administering the Patent Act, Industry Canada had a solid institutional basis for leadership on the file.\footnote{Morin, “Two-Level Game,” supra note 4 at 322, 327.} As a result, the government’s position largely reflected Industry Canada’s views, which prioritized the protection of existing patent entitlements.

The Canadian government responded to the access to medicines issue by implementing some of the permissions granted under the General Council Decision, but not all of them. This response can best be explained in terms of a political preference for ideas and values associated with
innovation, competitiveness, and property rights. Government actors’ views on these issues were by no means homogeneous. However, Industry Canada’s dominance within the government “network” enabled the views of its officials to prevail.

The Canadian government’s response to the access to medicines issue thus resembled what Duncan Kennedy has called the “moderation effect.” The moderation effect is one of Duncan Kennedy’s explanations for how judges can act upon their ideological preferences while resolutely denying any political agenda. When explaining the moderation effect, Kennedy posits that progressive, majoritarian political changes are more likely to come from elected legislatures than from elite judges. However, according to Kennedy, the interpretation and application of law always gives rise to indeterminacies and leaves room for value judgments. A judge who is politically opposed to a given statute can therefore find ways to read its provisions minimally, so as to contain any threat it might pose to the ruling elite.\textsuperscript{135}

In a parallel operation, Canadian government actors who were opposed to compulsory licensing found ways to read the General Council Decision to minimize its use. The Canadian government was able to do this because the TRIPS Agreement, the Doha Declaration, and the General Council Decision are indeterminate. These texts reflect political compromises among parties with radically different views about pharmaceuticals, innovation, consumer welfare, and public health. Although these texts appear to have crystallized a consensus in the form of rules, these rules can still be interpreted in ways that favour different interests, principles, or values.\textsuperscript{136}

The clearest illustration of the government’s moderation of the General Council Decision can be found in its proposal for a “right of first refusal.” The government’s bill initially contained a provision stipulating that, after a generic drug company had negotiated a contract to supply medicines under a compulsory licence, the patentee would have had the option of stepping in and taking over the contract, filling the order on the same terms. This provision would have worked to the advantage of patent holders, and to the detriment of generic drug manufacturers. Moreover, critics pointed out that this provision was likely to thwart the operation of the entire

\textsuperscript{135} Duncan Kennedy, \textit{A Critique of Adjudication (Fin de Siècle)} (Cambridge, Mass.: Harvard University Press, 1997) at 217-221.

scheme, because it would have undercut generic companies’ (profit-based) incentives for negotiating contracts with potential buyers.

Industry Minister Lucienne Robillard justified this right of first refusal provision with reference to Article 31(b) of the TRIPS Agreement.\textsuperscript{137} However, strictly speaking, Article 31(b) of the TRIPS Agreement is considerably more modest. All it requires is that the “proposed user” have “made efforts to obtain authorization from the right holder on reasonable commercial terms” before proceeding with a compulsory licence. And even this requirement can be waived in cases of “national emergency or other circumstances of extreme urgency.” Article 31(b) of the TRIPS Agreement therefore does not, on its own, provide a satisfactory rationale for the right of first refusal.

Faced with intense public criticism of the right of first refusal, especially from NGOs, the government eventually replaced it with a provision requiring the generic manufacturer, before applying for a compulsory license, to request a voluntary licence from the patentee. Only if the generic manufacturer fails to obtain a voluntary license from the patentee after 30 days can it apply for a compulsory license.\textsuperscript{138} This provision more closely tracks the requirements of Article 31(b). However, unlike Article 31(b), it specifies a definite time period for the request for a voluntary licence. Also unlike Article 31(b), it makes no provision for waiving this requirement in cases of “national emergency or other circumstances of extreme urgency.” Nevertheless, in its 2007 report on the statutory review, Industry Canada defended this provision, asserting that “Canada believes this measure was necessary to implement Article 31(b) of the TRIPS Agreement.”\textsuperscript{139}

A second example of the government’s moderation of the General Council Decision can be seen in its approach to the range of eligible medicines under CAMR. As we have seen, paragraph 1 of the Doha Declaration refers to “the public health problems afflicting many developing and least

\textsuperscript{137} House of Commons, \textit{Standing Committee on Industry, Science and Technology, Evidence}, 002 (24 February 2004) (Hon. Lucienne Robillard) [Robillard, committee testimony].

\textsuperscript{138} \textit{Patent Act, supra} note 1, s. 21.04(3)(c).

developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other
epidemics.” The General Council Decision specifies that it is applicable to “any” pharmaceutical
product needed to address these public health problems. This formulation was the outcome of a
difficult set of negotiations. Indeed, as we have seen, U.S. insistence that compulsory licensing
for export should only be available for drugs needed to treat HIV/AIDS, tuberculosis, and
malaria was for a time the key stumbling block to a consensus in the WTO.

During the drafting of the Canadian legislation, government actors initially floated the idea that
compulsory licensing might only be available for drugs used to treat HIV/AIDS, malaria, and
tuberculosis.\textsuperscript{140} The legislation the government eventually introduced contained no such
restriction. However, the government did introduce a provision limiting the applicability of
CAMR to a list of drugs specified in Schedule 1 of the \textit{Patent Act}.\textsuperscript{141} This content of this list was
originally derived from the World Health Organization’s Model List of Essential Medicines,
which the WHO publishes as “a guide for the development of national and institutional essential
medicine lists.”\textsuperscript{142} The legislation also provides a mechanism allowing Cabinet to add other
medicines to the Schedule, in response to a joint recommendation from the Minister of Industry
and the Minister of Health.\textsuperscript{143} And it requires these ministers to establish a committee to advise
them on any such recommendations they might make.\textsuperscript{144}

In her presentation to the Parliamentary committee charged with reviewing Bill C-9, Robillard
justified this approach partly through an interpretation of the General Council Decision.
Robillard took the position that the General Council Decision was “somewhat vague” with
regard to eligible medicines. She noted that “[s]ome contend that it is limited to those
[medicines] needed to treat HIV/AIDS, tuberculosis, and malaria only, while others insist that no
restrictions whatsoever apply.” Robillard claimed that the government’s use of a specific list of

\textsuperscript{140} Steven Chase & Heather Scoffield, “Ottawa leans toward limits on cheap-drug distribution; Export of generics to
poor countries likely to target only AIDS, malaria, TB for now”, \textit{The Globe and Mail} (16 October 2003) A9.

\textsuperscript{141} \textit{Patent Act, supra} note 1, s. 21.02 (”pharmaceutical product”).

\textsuperscript{142} World Health Organization, “Essential Medicines,” online:

\textsuperscript{143} \textit{Patent Act, supra} note 1, s. 21.03(1)(a).

\textsuperscript{144} \textit{Ibid.}, s. 21.18.
medicines represented a compromise between these two divergent interpretations. (Robillard also appealed to the expertise of the WHO as a neutral way of brokering this compromise, stating that “The WHO list provides a sound guide to the most efficacious, safe and cost-effective medicines for priority conditions in a basic health care system.”)\textsuperscript{145}

While Robillard’s interpretation of the General Council Decision is plausible, it is not the interpretation most favourable to access to medicines. Indeed, access to medicines campaigners (and many observers) had understood the General Council Decision to be applicable to any medicine whatsoever. The government’s approach to the issue of eligible medicines thus represents a moderation of the General Council Decision in favour of the interest of patent holders.

A third example of the government of Canada’s moderation of the General Council Decision can be found in CAMR’s provisions governing the duration of compulsory licences and the quantity of medicines to be produced under them. The General Council Decision requires the importing country to specify “the names and expected quantities of the product(s) needed.”\textsuperscript{146} It also stipulates that “only the amount necessary to meet the needs” of the importing country may be manufactured under the exporting country’s compulsory licence.\textsuperscript{147}

In implementing these aspects of the General Council Decision, the Canadian government established a system whereby each licence is issued only for a single drug in a fixed maximum quantity, to be shipped to a specified country.\textsuperscript{148} The quantity cannot be varied without a new licence. This provision has a basis in the General Council Decision; however, it is more detailed and specific than the terms of the WTO texts. The Canadian government also stipulated that a licence would be valid for a fixed term of two years.\textsuperscript{149} This term may be renewed once, but only

\textsuperscript{145} Robillard, committee testimony, \textit{supra} note 137.
\textsuperscript{146} General Council Decision, \textit{supra} note 3, s. 2(a)(i).
\textsuperscript{147} \textit{Ibid.}, s. 2(b)(i).
\textsuperscript{148} \textit{Patent Act, supra} note 1, ss. 21.04(2), 21.05(2).
\textsuperscript{149} \textit{Ibid.}, s. 21.09.
to allow for the shipment of any remaining medicines from the initial licence.\textsuperscript{150} This provision is entirely a Canadian invention; the General Council Decision contains nothing of the sort.

A fourth way in which the Canadian legislation moderates the General Council Decision is through its requirements for the appearance and packaging of drugs produced under compulsory licence. The General Council Decision requires that medicines produced under compulsory licence for export shall be clearly identified as such, “through specific labelling or marking.”\textsuperscript{151} CAMR adds detail to this requirement, specifying that medicines produced under compulsory licence must be a different colour from their brand-name counterparts and that they must be stamped with the letters “XCL.”\textsuperscript{152}

A fifth demonstration of the government’s interpretive approach can be seen in its refusal to consider an “exception” under Article 30 of the TRIPS Agreement. The General Council Decision is explicitly concerned with paragraphs 31(f) and (h) of the TRIPS Agreement; it does not refer to Article 30, which provides the possibility of “exceptions” to patent rights in much more general terms. Nevertheless, some international trade law scholars have argued that compulsory licensing for export would be permissible under Article 30.\textsuperscript{153} During the 2006-07 statutory review, some NGOs likewise argued that Canada could rely on Article 30 to support a more flexible approach to access to medicines.

However, the Department of Industry refused to consider this possibility. The Department offered a much narrower interpretation of Article 30. It reasoned that if the meaning of Article 30 had been broad enough to permit compulsory licensing for export, there would have been no need for the General Council to modify the requirements of paragraphs 31(f) and (h). The Department’s legal reasoning appears to be formally sound. However, it remains the case that the Department declined to take advantage of an ambiguous provision of the TRIPS Agreement that could have been interpreted to permit broader use of compulsory licensing. The government’s interpretive priorities were again made clear.

\textsuperscript{150} Ibid., s. 21.12.
\textsuperscript{151} General Council Decision, supra note 3, s. 2(b)(ii).
\textsuperscript{152} Food and Drug Regulations, supra note 1, s. C.07.008.
\textsuperscript{153} See e.g. Trebilcock & Howse, supra note 45 at 430-431.
The government thus chose to interpret the TRIPS Agreement as an instrument for ratcheting up levels of patent protection. For example, rather than merely seeking to ensure Canada’s compliance with the TRIPS Agreement, Industry Minister Lucienne Robillard spoke of “maximizing compliance with TRIPS.”\(^{154}\) There is a plausible textual argument in favour of such an approach. The structure of the TRIPS Agreement implies that it should be interpreted in favour of higher levels of patent protection—i.e., in a way that favours the interests of innovators rather than those of imitators and consumers. This is because many of the requirements of the TRIPS Agreement are framed as minimum standards. Article 1.1 of the TRIPS Agreement states that “Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.”

Moreover, the Doha Declaration and General Council Decision, which purport to favour access to medicines, are framed as limited “waivers” of the TRIPS Agreement’s minimum standards. They thus do not detract from the general sense that the TRIPS Agreement should be interpreted in favour of higher intellectual property protection. And although the General Council Decision modifies states’ obligations under the TRIPS Agreement, states are under no obligation to take advantage of the permissions granted under the General Council Decision. (Indeed, many states renounced these permissions from the very start.)

NGOs campaigning for access to medicines emphasized the formal flexibilities of WTO law. They criticized the government for not taking full advantage of the permissions allowed under the TRIPS Agreement and the General Council Decision. As Bubela and Morin note, NGOs adopted a relatively formalistic legal vocabulary, using words such as “amendment,” “act,” “provision,” “rules,” “treaty,” and “regulation” more frequently than any of the other actors in the legislative process.\(^ {155}\) However, these arguments were lost on the general public, and they failed to dissuade the government from reading the TRIPS Agreement as a mechanism for enhancing patent protection.

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\(^{154}\) Robillard, committee testimony, supra note 137 (emphasis added).

\(^{155}\) Bubela & Morin, supra note 4 at 133.
The outcome of this process was legislation that moderated the potential effects of the General Council Decision in terms of access to medicines. The official Canadian interpretation of the WTO texts thus amounted a self-imposed version of “TRIPS-plus.” Canadian government actors took it upon themselves to maintain higher standards of patent protection than those that the WTO texts required.

5.5.2 Rights, Welfare, and “Balancing”

The government of Canada could thus have interpreted the WTO legal texts in such a way as to favour greater access to medicines, but it declined to do so. What explains the government’s approach? I argue that, the primary determinant of the government’s position was a formalistic understanding of intellectual property rights, as promoted by the global intellectual property project. The government treated intellectual property entitlements as quasi-natural rights that it was bound to respect. Although the government and the large pharmaceutical companies adopted a discourse of “balancing,” the structure of the arguments surrounding CAMR was such that intellectual property rights served as “trumps” over competing claims framed in terms of public health. Meanwhile, NGOs’ attempts to reframe the access to medicines issue in terms of an alternative set of rights—notably, the right to health—were simply ignored.

In Parliament and before parliamentary committees, government ministers and officials frequently relied on a formalistic understanding of intellectual property rights. For example, when justifying the “right of first refusal” provision, Lucienne Robillard cited not only Art. 31(b) of the TRIPS Agreement, but also invoked efficiency, procedural fairness, and “due regard for the property rights of patentees.” Officials from the Department of Industry and the Department of International Trade later repeated these justifications.

To take an even clearer example, when introducing Bill C-9 to the Commons committee, Robillard declared, “We must be true to the humanitarian nature of this initiative. At the same time, we must never forget the importance of intellectual property rights, such as those embodied in patents. After all, such protection supports the continued advancements in medical science

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156 Robillard, committee testimony, supra note 137.
upon which we all depend.”¹⁵⁷ By characterizing intellectual property rights as “embodied in patents,” Robillard implied that intellectual property rights are somehow natural—that they have an existence independent of positive law.

A final example of the government’s adoption of a formalistic approach to intellectual property rights can be seen in its justification of CAMR’s packaging and labelling requirements. Government officials acknowledged that these provisions were largely meant to alleviate the concern, expressed by the patent-holding pharmaceutical companies, that medicines produced for export would be surreptitiously diverted back onto the Canadian market. In explaining these diversion concerns, the government used language that portrayed patent law as an integral “system.” In presenting Bill C-9 to the House of Commons Standing Committee on Industry, Science and Technology, Minister of Industry Lucienne Robillard stated that “Ultimately, the government was confronted with the need to ensure that these amendments maintain the integrity of Canada’s intellectual property regime for pharmaceuticals, while at the same time facilitating the flow of low-cost medicines to countries in need.”¹⁵⁸ Three years later, in the Department of Industry’s review of CAMR, this language was repeated, with subtle variations: “In developing the framework for CAMR, Canada faced the unique challenge of fashioning an unprecedented compulsory licensing for export regime which would advance the waiver’s humanitarian objectives, while respecting international trade rules and maintaining the integrity of the domestic patent system.”¹⁵⁹

Such references to “integrity” and “system” imply that patent law is principled and coherent. They suggest that patent law has a single essential purpose, namely that of rewarding innovation with monopoly protection. They help to obscure the fact that patent law is based on a heterogeneous assortment of policy goals. They make competition and consumer protection seem like deviations from patent law’s true nature, when in fact these goals are inherent in the design of any patent system.

¹⁵⁷ Ibid. Aileen Carroll would later demonstrate the value of imitation by copying Robillard’s words, telling the House of Commons, “We must not forget the importance of intellectual property rights, such as those protected by patents. After all, such protection stimulates continued progress in medicine, progress for the good of every one of us”: House of Commons Debates, 044 (29 April 2004) at 2567 (Hon. Aileen Carroll).

¹⁵⁸ Robillard, committee testimony, supra note 137.

¹⁵⁹ Canada, Statutory Review Report, supra note 139 at 5.
This insistence on the inviolability of patents clashed, of course, with the government’s other stated goal: that of providing access to medicines. The government was keen to present CAMR as responding to the needs of sick people in poor countries. Indeed, all participants in the legislative debate, including NGOs as well as pharmaceutical companies, acknowledged the importance of this policy goal. Canadian government officials and parliamentarians persistently invoked the suffering of vulnerable groups (such as women and children) who were meant to benefit from the initiative.¹⁶⁰ Media coverage of the debate also emphasized the idea of responding to genuine human needs, often linking CAMR to images and stories from the HIV/AIDS pandemic, especially from Africa.¹⁶¹

To respond to these competing claims, the government adopted a discourse of “balancing.” Throughout the legislative process, government actors avoided stating that they were taking a strong stand in favour of intellectual property protection. Instead, they portrayed the legislative process as an attempt to balance competing principles and policy goals. For example, speaking to the House of Commons upon the third reading of Bill C-9, Minister of International Cooperation Aileen Carroll stated:

Bill C-9 is based on a balance of interests. On one side, there are the great humanitarian objectives, to send vital pharmaceuticals to developing countries. On the other side, we must protect the integrity of our intellectual property system and ensure that we respect our international obligations in this matter.¹⁶²

At other times, government actors spoke of balancing stakeholder interests. Introducing Bill C-9 to the House of Commons committee, Robillard stated:

I would urge the committee to accord each stakeholder group the time to fully air its views on this matter. Only in this way can we be assured of doing justice to this most important cause. Of course,

¹⁶⁰ Bubela & Morin, supra note 4 at 133.
¹⁶¹ Ibid. at 137.
¹⁶² House of Commons Debates, 044 (29 April 2004) at 2567 (Hon. Aileen Carroll). Ironically, cabinet ministers displayed little concern for originality in their public statements about CAMR. Two weeks later, Industry Minister Lucienne Robillard would use almost identical language in her remarks to the Senate Foreign Affairs Committee: Senate, Standing Senate Committee on Foreign Affairs and International Trade, Proceedings, 4 (12 May 2004) at 15 (Lucienne Robillard).
as I have mentioned, we have tried to strike a sound balance between sometimes competing interests in order to have a workable regime. I hope that committee members keep this in mind while listening to stakeholder views, and take into consideration how the various proposals that you will hear will either support or upset this balance.\textsuperscript{163}

She continued:

I think, the work of your committee is going to be very important in order to see, not only with the generic drug industry but also with the brand name industry how we could arrive at a balance that would allow the participation of both industries.\textsuperscript{164}

In some respects, then, the process of amending Bill C-9 thus took on the quality of a bargaining process. While the government largely favoured the interests of patentholders, it also accommodated the views of NGOs and generic manufacturers on some points, such as eliminating the right of first refusal.

Indeed, the government’s “balancing” approach even generated one set of provisions broadening the availability of compulsory licensing beyond the terms of the General Council Decision. These provisions make compulsory licensing available for exports of pharmaceuticals to non-WTO countries. The General Council Decision represents an arrangement among WTO member countries; it says nothing about the question of access to medicines elsewhere. However, the Canadian government’s original bill stipulated that eligible importing countries would include all WTO-member developing countries, as well as all countries that are identified by the United Nations as “least developed countries” (LDCs), regardless of WTO membership. After lobbying and advocacy by NGOs, the government later expanded this eligibility to include developing countries that are neither LDCs nor WTO members. For the purposes of CAMR, developing countries are defined according to the list established by the OECD’s Development Assistance

\textsuperscript{163} Robillard, committee testimony, supra note 137.

\textsuperscript{164} Ibid.
Committee. Eligible importing countries are now named in schedules 2, 3, and 4 to the *Patent Act*.\(^{166}\)

On the whole, however, the design of CAMR emphasized safeguarding patent entitlements rather than ensuring access to medicines. In the “balancing” exercise, arguments based on health, or humanitarian concerns, were no match for a formalist understanding of intellectual property rights. These rights thus took on the quality of “trumps.” It was almost impossible to argue that they should be qualified in light of competing policy goals. Once the issue came to be framed in terms of “balancing” humanitarian objectives against pre-existing intellectual property rights, the outcome was already determined.

The government’s “balancing” discourse was thus integral to the moderation effect. The General Council Decision had already been the product of intense global negotiations. Subjecting Canada’s implementation of this decision to a domestic balancing process meant reopening these negotiations, striking a different balance. While neutral on its face, “balancing” discourse in fact provided a way for the government to prioritize of patent protection without explicitly saying so. (As the political scientists Jean-Frédéric Morin and the health law scholar Tania Bubela have noted, along with the government, the patent-holding pharmaceutical companies embraced the language of balancing; they used it far more than any other actor in the legislative process. It was their most successful rhetorical strategy; it resonated in the media and found a high level of acceptance among parliamentarians.\(^{167}\))

Some NGOs recognized this rhetorical trap, and sought to escape it by characterizing access to medicines as a human rights issue (rather than an issue of policy or welfare). These NGOs argued that an effective system of compulsory licensing was necessary in order to fulfill the right to health. Some of them suggested that the purpose of CAMR should be to promote health and save lives, and that there should be no question of balancing human life against the profits of

\(\text{\textsuperscript{165} Patent Act, supra note 1, s. 21.03(d)(ii).} \)
\(\text{\textsuperscript{166} Ibid., s. 21.03(1)(b)-(d), schedules 2-4.} \)
\(\text{\textsuperscript{167} Bubela & Morin, supra note 4 at 137-139.} \)
pharmaceutical companies. In making such arguments, NGOs embraced their own version of rights formalism. They sought to turn access to medicines into a “trump” that would necessarily defeat any competing claims.

Implicit in the NGOs’ claims was the sense that, as a human right, the right to health should take precedence over other kinds of rights such as intellectual property rights. However, this idea was never fully articulated or squarely debated. As Bubela and Morin note, the NGOs’ rights discourse failed to resonate with the Canadian media or with parliamentarians. The government simply avoided the topic of human rights when discussing CAMR, and the legislation ultimately contained no references to human rights. The NGOs’ attempt to fight rights formalism with rights formalism was a political failure.

Why was the discourse of intellectual property rights so influential and the right to health ignored? In my view, the debates surrounding CAMR demonstrate the limits of human rights formalism. Those who invoked intellectual property rights were not only able to invoke the power of “rights” discourse; they were also able to situate these rights within an institutional framework—namely the TRIPS Agreement, the WTO, and national patent regimes—giving effect to these rights. No comparable institutional framework existed, or exists, for economic, social, and cultural rights such as the right to health. Any formal legal distinction between human rights and other kinds of rights was less important than this question of how rights are institutionalized.

While access to medicines advocates offered up their own version of rights formalism, they made no sustained attempt, during the legislative debate, to dismantle the formalism of intellectual property rights. Instead, intellectual property rights were largely taken for granted, by proponents as well as opponents of compulsory licensing. This may have been a strategic choice on the part of the NGOs, or it may have been due to inadvertence. In either case, it shows how effective the discourse of intellectual property rights had become. The discourse of intellectual


169 Bubela & Morin, supra note 4 at 137-139.

property rights—one element of the broader project of neoliberalism—had achieved the status of orthodoxy in Ottawa.

5.5.3 Humanitarianism and Jurisdiction

CAMR was intended (by at least some of its proponents) to facilitate access to medicines in the global South. However, it was also intended to showcase Canadian humanitarianism and the ability of Canadians to make a difference. The use of domestic law to address international issues raised questions about Canada’s role in the world. How far should Canadian law reach? As in the case of other internationalist law reforms, the answer to this question was complex. With respect to some issues, Canadian lawmakers avoided this question by invoking a public/private distinction, or by referring to international standards. However, with respect to other issues, they argued in terms of competing principles of non-discrimination and sovereignty (or non-intervention). What is remarkable about CAMR is that the same legislators took different sides in this paired argument set, depending on the provision at issue.

All of the actors in the legislative process not only described CAMR in humanitarian terms, but identified such humanitarianism as a source of national pride. Cabinet ministers who took part in the debates sometimes referred explicitly to Jean Chrétien’s personal sense of commitment to Africa; at other times they noted the fact that Canada could be the first country to implement the General Council Decision. They also emphasized the discretionary nature of Canada’s involvement—the fact that Canada had no formal obligation to implement the General Council Decision. The clearest expression of such sentiments is found in International Cooperation Minister Aileen Carroll’s speech to the House of Commons upon third reading of Bill C-9. Carroll stated:

I should point out that the WTO does not require its members to enact any particular measures. No one has ever said that Canada must get involved. Nevertheless, our collective conscience says we must do so. This is a moral imperative and a pressing need to act, and to act quickly.  

171 House of Commons Debates, 153 (7 November 2003) at 9309 (Hon. Allan Rock).
172 House of Commons Debates, 044 (29 April 2004) at 2567 (Hon. Aileen Carroll).
She went on to declare:

Canada is the first country to adopt this kind of legislation. Other countries are sure to follow our lead.\(^{173}\)

Parliamentarians even made reference to humanitarianism in the legislation itself. Sections 21.01 to 21.19 of the *Patent Act* appear under the heading “Use of Patents for International Humanitarian Purposes to Address Public Health Problems.” The accompanying regulations are entitled the *Use of Patented Products for International Humanitarian Purposes Regulations*. Legislators also gave patentees the right to challenge a compulsory licence, through an application to the Federal Court, on grounds that the licence is “commercial in nature” rather than humanitarian.\(^{174}\)

However, the use of Canadian law for international humanitarian purposes gives rise to a dilemma. To what extent it is appropriate for Canadian law to regulate matters occurring elsewhere? The legislators creating CAMR responded to this dilemma in a number of ways.

First of all, concerns about Canada imposing its laws on others appeared less salient in the case of CAMR, because the activities it deals with cross borders in “private” form. The regulatory regime directly affects the rights of Canadian pharmaceutical companies, but people in other countries only experience CAMR, if at all, in their (presumably consensual) role as purchasers or consumers of medicines. A public/private distinction therefore helps to sidestep issues of jurisdiction.

Second, issues of jurisdiction appeared less problematic in this case because CAMR was built on a multilateral framework. In principle, it had received the blessing of all WTO member states. Moreover, in order to address certain issues that were left vague in the WTO texts, Canadian legislators looked to international norms. For example, the royalties that generic producers must pay to patent holders under CAMR are determined according to the importing country’s rank on

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\(^{174}\) *Patent Act, supra* note 1, s. 21.17. This provision raised alarms for NGOs and generic manufacturers, who cited the litigation practices of the pharmaceutical industry. The enacted legislation frees generic producers from this threat of litigation if the price they are charging is less than 25 percent of the price of the equivalent product in Canada: *Patent Act, s. 21.17(1)*. It also provides them with a defence if the price they are charging is less than 15 percent above their costs: *Patent Act, s. 21.17(5).*
the United Nations Development Programme’s Human Development Index (HDI). The lower the importing country’s rank on this index, the lower the royalty that the generic producer must pay.\footnote{Use of Patented Products for International Humanitarian Purposes Regulations, supra note 1.}

However, with regard to other issues, Canadian legislators sought to use Canadian standards, giving rise to debates about the role of Canadian law. One issue facing legislators was how to ensure the quality and safety of the medicines exported under CAMR. All participants in the debates agreed that recipient countries’ regulatory systems were not up to the task. NGOs suggested that drugs exported under CAMR should be subject by the World Health Organization’s Prequalification Programme. This certification process is meant to ensure the quality of pharmaceuticals purchased by UN agencies, but many Southern countries, lacking domestic capacity for drug safety testing, rely on it as well.\footnote{World Health Organization, “Prequalification Programme,” online: <http://apps.wto.int/prequal>.} NGOs argued that WHO approval should be sufficient, and that this would be the fastest way to ensure the quality and safety of exported drugs. (In July 2006, the WHO agreed to accept the results of Health Canada’s tests for the purposes of its Prequalification Programme, thus avoiding duplication.\footnote{Canada, Statutory Review Report, supra note 139 at 12.})

However, the government added a provision requiring all drugs exported under CAMR to first undergo a Canadian health and safety review.\footnote{Patent Act, supra note 1, s. 21.04(3)(b); Food and Drugs Act, supra note 1, s. 37(2). It is also interesting to note that when Canadian pharmaceutical companies produce medicines for export on a commercial basis—i.e., not under CAMR—they are not subject to a Canadian health and safety review: Food and Drugs Act, supra note 1, s. 37.} (Patent-holding pharmaceutical companies and generic pharmaceutical companies also supported this requirement.) To justify this provision, government actors invoked the idea of non-discrimination. During the second reading of Bill C-9 in the House of Commons, Liberal MP Marlene Jennings stated that “To me, the principle is quite simple: not to authorize the use or the export of drugs in developing countries for treatment that we would not use here.”\footnote{House of Commons Debates, 043 (28 April 2004) at 2530 (Marlene Jennings). In response to NDP MP Brian Masse’s attempt to add to Schedule 1 two drugs that had not been approved for use in Canada, Jennings taunted, “Is the idea that we are going to experiment? Are we going to use people of the developing world and the least developed countries as guinea pigs for treatments that we have not as yet authorized here?” Ibid.} Liberal MP Larry Bagnell framed the issue slightly differently, stating that “We must remember that the drugs being provided under this humanitarian measure...
will carry with them the reputation of Canada for safe, effective, high quality medicines.”  

Whereas Jennings approached the issue in terms of dignity or equality, Bagnell cited an instrumental reason for pursuing the same policy.

Canada’s international role was also debated in relation to another set of provisions. Bills C-56 and C-9 initially specified that only governments or “agent[s] of government” could act as importers of medicines under CAMR. Access to medicines campaigners, however, insisted that NGOs such as MSF should be able to import medicines into Southern countries and distribute them locally. The government eventually conceded, but nevertheless stipulated that private importers would have to obtain permission from the importing country’s government. Access to medicines advocates remained critical, calling this requirement an unnecessary obstacle to NGO work.

In response to ongoing NGO criticism, Liberal MP Marlene Jennings argued that to remove the requirement of governmental permission would be “Eurocentric.” She elaborated:

> We must work with the NGO community, governmental agencies of other countries, and multilateral agencies that we have put in place. When I say we, I mean the world. However, to remove that link, in my view, is to say that the governments of the importing countries do not have a role to play in elaborating and implementing their own public health policies and their own public health infrastructure, and that we in the developed world and industrialized world know what is best for them. We would therefore not need to treat directly with them; we could simply bypass them. I cannot agree with that…

Half an hour later, Jennings declared:

> We are not living in a colonialist world. We are no longer living in a Eurocentric world. We are living in a world where we recognize sovereign state to sovereign state, government to government. That is what WTO is all about.

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180 *House of Commons Debates*, 043 (28 April 2004) at 2531 (Hon. Larry Bagnell).


182 *House of Commons Debates*, 043 (28 April 2004) at 2526 (Marlene Jennings).

The government of Canada thus championed the universal application of Canadian standards in one context, but argued for deference to host state governments in another. In both cases, the government’s position contributed to the complexity of the Canadian compulsory licensing process and the moderation of the General Council Decision. However, the government’s use of both sets of arguments helps demonstrate the emptiness of these arguments.

5.5.4 Proceduralism

The government of Canada moderated the General Council Decision largely by adding to its procedures. The conditions and requirements imposed in CAMR created additional hurdles for any manufacturer hoping to export generic drugs. As I have described in the previous sections, arguments about Canada’s role in the world and its moral obligations towards people in the global South were channelled into debates over procedural design.

In the case of CAMR, these procedures had a clear substantive valence. They worked to protect the interests of patent holders. Proceduralism thus enabled the government of Canada to effectively protect the interests of patent holders, while claiming that it had contributed to access to medicines.

CAMR’s application process provides roles for many different actors. At a minimum, an application under CAMR requires the active participation of a generic manufacturer, an importing country government, a patentee, the Commissioner of Intellectual Property, and the Minister of Health. Depending on the circumstances, the application may also involve the WTO; the ministers of Foreign Affairs, International Trade, and International Cooperation; the federal cabinet; a third-party purchaser who intends to supply the drug in the developing country; and the Federal Court. The involvement of each of these actors creates uncertainty and potential delays, acting as a disincentive to generic manufacturers who might try to use the system.

The story of the one set of licenses issued under CAMR illustrates the complexity of the regulatory process. As soon as CAMR received royal assent in May 2004, MSF announced its intention to try to use the regime. It informed Health Canada that it would like to export a generic version of the HIV/AIDS medicine Triavir. This product, known as a “fixed-dose-combination” antiretroviral, combines three different HIV/AIDS drugs in a single pill, making it easier to prescribe and administer. At the time, no generic version of Triavir was available. In
August 2004, Canada’s largest generic drug company, Apotex, agreed to produce a generic version of Triavir. By February 2005, it had developed a prototype.

However, significant regulatory obstacles remained for MSF and Apotex after CAMR came into force in May 2005. First, Triavir’s component drugs were not included in Schedule 1. Amending the schedule required a cabinet decision, which took place in September 2005. Second, Apotex’s drug, Apo-Triavir, required regulatory approval from Health Canada, which took several more months; Apotex obtained approval in July 2006. Third, it was difficult to find a country willing to publicly declare its intention to import medicines under the WTO framework. Eventually, the Clinton Foundation put MSF and Apotex in touch with the government of Rwanda.\(^{184}\) Rwanda agreed to provide a notification under the WTO system in July 2007. Apotex then had to request voluntary licences from the patentees, all of whom refused. Once 30 days had passed, in September 2007, Apotex could finally apply for a compulsory licence. The Commissioner of Intellectual Property granted this within two weeks, on September 19, 2007.

Apotex could then participate in Rwanda’s tendering process. Apotex received tender approval from Rwanda in May 2008.\(^{185}\) Apotex sent two shipments of Apo-Triavir to Rwanda: the first in September 2008, and the second in September 2009, just before the licence was to expire. Apotex ultimately lost money on this deal, and was left with a pessimistic view of CAMR. The president of Apotex declared in May 2009 that CAMR is “not workable for us.”\(^{186}\) No one has applied for a compulsory licence under CAMR since then.

From 2006 to 2007, Industry Canada carried out a review of CAMR, as required under the \textit{Patent Act}.\(^{187}\) During the accompanying consultation process, NGOs and generic pharmaceutical companies argued that CAMR’s administrative process was overly complex and difficult to use. However, citing the experience of Apotex’s Triavir licences, the Industry Canada concluded that

\(^{184}\) Weber & Mills, \textit{supra} note 5 at 118.  
\(^{186}\) Apotex, News Release, “CAMR Federal Law Needs to be Fixed if Life-Saving Drugs for Children are to be Developed” (14 May 2009).  
CAMR “works reasonably well and quickly.” The Conservative government declined to pursue any changes to the legislation. Since that time, opposition senators and members of Parliament have introduced a number of private members’ bills seeking to amend CAMR. However, none of these bills has garnered majority Parliamentary support.

In the case of CAMR, procedural complexity became an important way of mediating between different views about Canada’s role in the world and its obligations toward people beyond its borders. As I have described in the previous sections, various procedural mechanisms became the focus of debates between intellectual property advocates and access to medicines campaigners. Nevertheless, CAMR also vividly demonstrates how procedure is never truly free of substance. CAMR provides a set of procedural details that enhance the complexity of the compulsory licensing process and make it less attractive to potential users. CAMR therefore works to the benefit of patent holders—who have an interest in ensuring that the system is not used.

It is important to place CAMR’s procedural complexity in global context. While the government of Canada enhanced the complexity of the WTO texts, the process dictated by these texts is already rather complex. Indeed, a number of other countries have also implemented the General Council Decision into their domestic laws, and have done so without adding to its complexity as Canada has done. Most of these countries do not restrict which medicines are eligible, and most do not require a quality and safety review. None of them limits the duration of the licence. However, not one of these legislative regimes has ever been used. On the WTO’s web

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188 Canada, Statutory Review Report, supra note 139 at 36.
190 These countries include Norway, Switzerland, India, China, and South Korea. The European Union has also issued legislation implementing the General Council Decision: World Trade Organization, “Members’ Laws Implementing the ‘Paragraph 6’ System,” online: <http://www.wto.org/english/tratop_e/trips_e/par6laws_e.htm>.
page listing uses of the process established by the General Council Decision, at the time of writing (December 2012), Canada’s licence for exports to Rwanda remains the only entry.\textsuperscript{192}

In practice, compulsory licensing for export is but a minor detail in a broader global complex of laws that serve to hinder or facilitate access to medicines. These laws include not only the TRIPS Agreement and national patent laws, but also laws governing the organization of health care systems, laws governing the purchase and sale of pharmaceuticals, insurance schemes, health and safety regulations, education systems, subsidies for research, and so on. They also include international economic laws that help to characterize these different laws and activities as public or private matters.

CAMR’s procedural complexity therefore probably made little difference in practice. It seems likely that, even if NGOs had been successful in shaping CAMR to more closely reflect the permissions of the General Council Decision, the regime would not have received wider use. Nevertheless, CAMR’s procedural complexity stands as testimony to the government’s moderation of the General Council Decision and its determination to protect an intellectual property regime that was largely favourable to the interests of patent holders.

5.6 Conclusion

CAMR was a made-in-Canada response to the global access to medicines debate. In designing CAMR, Canadian government officials and parliamentarians appear to have been genuinely inspired by humanitarian compassion for sick people in the global South. However, in expressing this compassion, they were unwilling to compromise pharmaceutical companies’ entitlements under Canadian patent law. They adopted an interpretation of the General Council Decision that skewed it toward heightened monopoly protection for producers of recently-invented pharmaceuticals. This moderation of the General Council Decision shows the extent to which actors in Canada’s government and Parliament had internalized the ideas associated with the discourse of intellectual property.

The experience of CAMR demonstrates the influence of neoliberalism on Canadian approaches to the international. It also shows the persistence of additional themes that are familiar from the other case studies in this dissertation: a structure of paired arguments about the role of Canadian law vis-à-vis people in other countries; the use of procedures to mediate various claims about Canada’s moral obligations.

In the case of CAMR, all of these themes point to the limits of “humanitarianism” as an attribute of legislation. There is no doubt that many of the actors involved in the creation of CAMR had good intentions, and genuinely wanted to do something for people in need. But they nevertheless crafted a legislative regime that was, for the most part, too difficult to use. Humanitarianism must be placed in context. In the case of CAMR, humanitarianism had to coexist with other ideas that circumscribed the possibilities Canadian legislators were willing to imagine.
Chapter 6: Conclusion

The findings of my research contain general lessons about law and globalization as well as particular lessons about internationalism in Canadian law. First, as I argue in part 6.1, my research shows that ostensibly “Canadian” law reform projects may be part of larger patterns of global governance. This has implications for the way we think about, and for the way we evaluate, such projects. Second, as I argue in part 6.2, Canadian internationalist law reforms show certain common tendencies as well as a general historical trajectory. These features make it possible to venture a tentative assessment of these reforms.

6.1 Law and Globalization

In each of the case studies in this dissertation, law reformers sought to use Canadian law to give effect to internationalist values. However, as I have shown, the law reforms they enacted were ultimately structured around discourses, policy models, and norms borrowed from outside sources. This suggests that these law reforms should not be understood simply as expressions of internationalism, but as part of larger, more complex arrangements for global governance.

In each of the cases I have described in this dissertation, law reformers announced their intention to use Canadian law to give effect to internationalist values. And in each case, Canadian domestic law appears to have been modified to take into account the rights or interests of people in other countries. On the surface, it appears that Canadians, through their legal system, are making a direct contribution to the pursuit of global justice.

However, in each case, major elements of the form, structure, or principles of the legislation were not native to Canada. In the case of the ODA Accountability Act, the Canadian legislation was based on British legislation as well as discourses and norms that had achieved currency within the global field of development assistance. In the case of the environmental assessment laws I describe, Canada instituted a policy model that had been invented in the United States and globalized through the work of a number of international organizations. Canada’s Access to Medicines Regime represented a Canadian instantiation of the WTO’s General Council Decision
on access to medicines; it also showed the extent to which Canadian parliamentarians and government officials had internalized the discourse of intellectual property rights.

In effect, this dissertation shows that Canadians’ attempts to use their legal system to champion the rights or interests of persons outside Canada are often shaped by discourses, policy models, and norms developed elsewhere. Discourses often circulate through international organizations and expert networks. Policy models may be globalized through conscious emulation, sometimes under economic pressure. Finally, whether through formal or informal processes, certain ideas may take on the force of norms—understood as binding by actors participating in a certain area of global governance. The extent of these influences shows that these law reforms may have turned into something other than what their proponents imagined. Rather than reflections of Canadians’ moral and political choices, these legislative regimes appear as nodes in larger configurations of global governance, involving states, international organizations, NGOs, and networks of experts.

This disjuncture suggests that some of the proponents of these projects may have failed to grapple with globalization and its implications for law. As I described in part 2.4, globalized pressures have in some ways constrained state authority; however, state institutions have also been complicit in these processes and have sometimes understood globalization to require them to compete with one another. Globalization has also meant that a broader range of subjects now fall under the purview of public international law, but that public international law has also become deormalized and juxtaposed with various hybrid public/private forms of governance.

However, the law reform projects I have described in this dissertation appear to be premised, at some level, on an older conception of lawmaking, similar to the one I described in part 2.3. Although they are informed by internationalist values, they hew closely to a state-centred conception of law: one that combines liberal-democratic positivism at the national scale with liberal positivism at the global scale. Law reformers behind these projects ostensibly attempted to instrumentalize state law to bring about certain outcomes consistent with their internationalist values. In doing so, they acknowledged the economic, social, and cultural changes associated with globalization: increased trade and migration, for example, and increased potential for an imagined global community. But they appear to have disregarded, for the most part, the institutional changes associated with globalization: the shifting of power and legitimacy toward
some state institutions and away from others; the dispersal of authority among diffuse “governance” arrangements operating globally and locally.

In the previous paragraph, I used qualifiers such as “at some level” and “for the most part.” This is because the criticisms in that paragraph cannot be equally directed at all actors in the legislative processes. Some of them were quite conscious of the limits of state lawmaking and the global context within which Canadian law would operate. Rather than trying to instrumentalize Canadian law, they tried to mobilize Canadian law as part of a transnational political process. For example, when the proponents of the *ODA Accountability Act* stipulated a modification of the DAC definition of aid, they were not simply trying to impose limits on Canada’s uses of its aid. They were also trying to challenge a transnational standard (and standard-setting process) that they disagreed with.

In fact, many of the actors in the legislative processes I have described fell into both categories from time to time. The very same actors believed at times in instrumentalizing Canadian law for internationalist purposes, but at other times accepted a much more modest and realistic perspective on the potential relevance of Canadian law in global context. This appears to have been true of the NGO representatives who led the campaign for the *ODA Accountability Act*, as well as those who tried to achieve a more liberal compulsory licensing regime in order to promote access to medicines.

This dissertation basically argues for the more modest perspective. It suggests that the laws it examines must be situated within a broader set of global governance processes.

Such a description also has implications for any normative appraisal of these laws. Their links to broader global governance processes means that they can’t be assessed in isolation. A proper evaluation of these laws will partly depend on an evaluation of the larger global governance processes of which they are a part.

These larger global governance processes may be responsible for injustices. For example, they may contribute to maldistributions: concentrating wealth or income in the hands of the few at the expense of the many. Or they may involve democratic deficits, enabling unrepresentative institutions to make rules and decisions that have a widespread impact.
To the extent that Canadian laws and institutions contribute to such global governance processes, they will be vulnerable to the same criticisms. I have tried to identify such links and to offer such criticisms where possible. For example, in my discussion of development assistance, I have argued that the field of development assistance involves an unrepresentative form of “expert rule” that potentially serves to limit possibilities for social change. I therefore raise similar concerns in relation to the *ODA Accountability Act*. Likewise, in my discussion of patent law and access to medicines, I have noted that the globalized protection of intellectual property rights generally benefits wealthier countries at the expense of poorer ones. I argue that Canada’s *Access to Medicines Regime* is complicit in this overall pattern.

Situating Canadian internationalist law reforms within a more realistic account of globalization thus makes possible a more sophisticated critical assessment of these laws. It calls into question the use of such law reforms as means to a progressive internationalist agenda—whether this is framed in terms of equality, democracy, or human rights.

The argument I have just finished making must be qualified in some respects. Although I have spent the bulk of this dissertation demonstrating that ostensibly “made in Canada” law reforms were in fact imported from elsewhere, I also acknowledge the influence of Canadian law, society, and politics. And this domestic context sometimes gave these law reforms a particular character.

These law reforms came about through the efforts of certain Canadian actors. Politicians were always key players in the legislative process. In the case of CAMR, Jean Chrétien’s personal expression of humanitarianism took centre stage. NGOs also set the agenda for Canadian law reforms at various points. In the case of the *ODA Accountability Act*, the legislative process was initiated by NGOs. Moreover, in all three case studies, federal government departments and their officials played a decisive role. The law reforms described in this study were also shaped by domestic institutions. For example, Canadian environmental assessment laws have taken their particular form because of Canada’s federal system. The *ODA Accountability Act* emerged from the political compromises necessary to pass legislation in Canada’s fragmented Parliament.

The domestic actors and institutions that controlled the Canadian legislative process thus left their mark on the law reforms enacted. Although these law reforms represent instantiations of globalized discourses, policy models, and norms, none of them simply reproduces a normative
arrangement developed elsewhere. Instead, each introduces its own particularities. There is nothing essentially Canadian about these particularities. But these particularities are an important part of the story of how globalized laws and legal ideas are experienced. Studies of globalization that emphasize the universality and homogeneity of policy models risk missing this important element.

Such particularities may be valuable. Ideally, they reflect a national community’s deliberation about its relationship with the world beyond its borders. The domestic adaptation of globalized models and norms represents a countercurrent in the generally unidirectional flow of such ideas outward from centres of power. Given these unequal flows, it is important for national communities to be able to reflect on these outside influences, and hopefully, to change them.

6.2 Canadian Internationalism in the Post-Cold War Era

As I have noted, law reforms such as those I have described gave rise to considerable debate about how Canada—or its legal system—should treat people beyond its borders. In order to resolve these debates, Canadians relied on certain standard mechanisms, including proceduralism and expert decision-making. In addition, the succession of law reforms I have described makes it possible to examine certain historical trends, most notably the triumph of neoliberal ideas about the state, markets, and the role of public and private.

In my account of the law reforms in this dissertation, I have described how legislative debates revealed different moral and political positions with regard to Canada’s international obligations. I have also described how these substantive moral positions intersected with the issue of the legitimacy of Canadian lawmaking vis-à-vis people in other countries. On one hand, some actors argued for the universal application of Canadian standards and policy models. On the other hand, some actors argued for deference to other countries’ autonomy.

Canadian lawmakers sometimes managed to avoid such debates by invoking international norms and standards. As I noted in part 6.1, the Canadian law reforms in question relied heavily on international sources. For example, the general outlines of CAMR were derived from the TRIPS Agreement and the General Council Decision. Likewise, the ODA Accountability Act refers to the Paris Declaration on Aid Effectiveness and to ideas such as “poverty reduction” that are the
subject of an ostensible consensus within the development assistance field. Such references enabled Canadian legislators to avoid an appearance of conflict between Canadian policy making and other countries’ autonomy.

However, to the extent that legislators applied Canadian standards to international issues, they were required to debate the legitimacy of such a practice. Participants in these debates sometimes framed these arguments in terms of legal principles. Arguments for universality were often framed in terms of non-discrimination. For example, the extraterritorial application of the Canadian Environmental Assessment Act was founded on the principle of nondiscrimination, which meant treating environmental issues outside Canada the way they would have been treated in Canada. Nondiscrimination may be linked to cosmopolitan fairness: providing justice to the stranger as one would to one’s neighbour. However, there is also an argument to be made for treating foreign environmental issues differently. Environmental issues are complex, context-specific, and socially constructed. Other states (or local communities) may seek to decide environmental issues according to their own standards. This argument may be encapsulated in the concept of sovereignty, or non-intervention.

Nevertheless, the issue of Canada’s international moral obligations could not have been resolved through arguments about non-discrimination and sovereignty. As the case study of Canada’s Access to Medicines Regime demonstrates, these arguments were substantively empty. The legislators who created CAMR argued for non-discrimination when insisting that drugs produced for export undergo a Canadian regulatory review. But they invoked the idea of sovereignty when insisting that parties wishing to import drugs under CAMR obtain permission from the host country government. Both of arguments were used to justify legislative provisions meant to limit the use of compulsory licensing. This example shows how arguments about non-discrimination or sovereignty can be filled with just any content depending on the circumstances.

Instead, a much more substantively significant way in which the content of Canadian internationalism was determined was through the use of procedures. This theme appears most strongly in the case of environmental legislation. EA is itself a form of procedure; its instantiation in Canadian law includes mechanisms for consultation with affected communities and official cooperation between governments. Canada’s Access to Medicines Regime also exhibits a high degree of procedural complexity. Anyone wishing to use the regime must
complete a sequence of approvals from a number of different authorities. Through such mechanisms, Canadian lawmakers effectively deferred debates about Canada’s role in the world and its obligations toward other countries, channelling them into specialized fora where they can be dealt with on a case-by-case basis.

However, as I have tried to show, proceduralism does not really insulate Canadian lawmakers from the need to make political choices. Procedures confer advantages and disadvantages on certain actors. They make some substantive outcomes more likely than others. The example of Canada’s Access Medicines Regime shows how procedures can be designed to effectively dictate certain outcomes.

Another way in which Canadian lawmakers determined the content of Canadian internationalism was through reliance on expert knowledge. The *ODA Accountability Act* is centred on a broad grant of ministerial discretion, which in the case of CIDA normally implies deference to expertise. Likewise, environmental assessment under the *Canadian Environmental Assessment Act* (1992) emphasized the technical, expert-driven nature of the EA process. It confined extraterritorial EAs to a “screening” process in which public participation was optional. CEAA 1992 was also based on the principle of self-assessment, which meant that Canadian governmental authorities were free to conceptualize environmental issues in ways that suited their purposes.

However, expert governance, like proceduralism, can also be highly political. Expert-led governance takes its colour from the disciplinary background and the knowledge practices of the experts in question. In the case of development assistance, for example, the applicable forms of expert knowledge tend to treat poverty as a local or national issue and to eliminate consideration of global political economy.

Such analyses makes it possible to provisionally characterize the politics of Canadian internationalism. In my view, the dominant theme that emerges from the case studies was the consolidation of neoliberalism. During the post-Cold War era, neoliberalism gradually assumed a position of dominance among the ideas shaping Canadian internationalism.

As I explained in chapter 2, neoliberalism was a political project launched during the economic crises of the 1970s to challenge the then-dominant ideas of embedded liberalism and the
Keynesian welfare state. Its intellectual foundations included libertarianism as well as public choice theory. Neoliberals promoted privatization, the reduction of social welfare measures, and a reorientation of law toward the establishment and maintenance of markets. Throughout the 1980s and 1990s, the U.S. government and international organizations such as the World Bank and the IMF helped to globalize this project.

During the 1990s, a neoliberal preoccupation with market-led economic growth likewise became the dominant ideological position in Canadian politics—including the Canadian politics of internationalism. Neoliberalism pushed aside, but did not entirely eliminate, the social-democratic tradition of internationalism that had influenced Canadian foreign policy since the 1950s. This social-democratic tradition remained on the scene. However, the “social” concerns that had been central to social-democratic internationalism were increasingly reframed in terms of human rights. And this reframing made it easier to collapse social concerns into economic ones.

The earliest laws examined in this dissertation consist of the extraterritorial aspects of the Canadian Environmental Assessment Act, with accompanying regulations. This legislation was drafted in the early 1990s and came into force in 1995 and 1996. While neoliberalism was already a dominant political ideology by this time, this legislation is essentially pre-neoliberal in its design. Environmental assessment, as a policy model, dates from the early 1970s. It is best identified with the retreat from centralized planning and the administrative state, and with the turn to more flexible and responsive policy models. One aspect of this turn was a shift away from substantive standards and toward proceduralism; EA is characteristic of this shift. Social concerns are dealt with indirectly through the self-assessment principle. This means that departments and agencies may approach environmental issues in social terms—or not, depending on their priorities. Human rights are nowhere mentioned.

The case study of Canada’s Access to Medicines Regime, drafted and enacted between 2003 and 2005, shows neoliberalism at its zenith. Despite the legislation’s ostensibly social purpose, the government’s overriding concern when drafting the regime was to avoid derogating from the patent monopolies enjoyed by pharmaceutical companies. Government spokespeople described these monopolies in quasi-natural terms, as “intellectual property rights,” and justified them as necessary for the proper functioning of a market for pharmaceuticals (which was to have public
benefits in the form of investment and innovation). Although an NGO-led campaign sought to frame the “access to medicines” issue in terms of human rights, the government was able to ignore this rights discourse, instead treating access to medicines as an issue of discretionary humanitarian concern.

The *Official Development Assistance Accountability Act*, drafted and enacted between 2005 and 2008, originated as a rearguard action by social-democratic internationalists trying to promote social priorities in the field of development assistance. Although its proponents succeeded in getting their legislation enacted, they relied on indeterminate discourses (such as poverty reduction) which the government was able to interpret in a manner consistent with neoliberalism. The proponents of the *ODA Accountability Act* also invoked the idea of human rights in order to express their social concerns. However, this concept proved to be highly malleable, and fully compatible with an aid policy prioritizing Canadian commercial and security interests.

All of the law reforms I examined occurred within the two decades that followed the end of the Cold War. These laws are not exhaustive—and perhaps not entirely representative—of Canadian legal internationalism during this period. Nevertheless, the trajectory is clear. Neoliberal ideas about the state, markets, and rights, which were still contested at the beginning of this period, gradually came to provide the default set of ideas informing Canadian internationalist lawmaking. The two later law reforms I have described—CAMR and the *ODA Accountability Act*—were understood by at least some of their participants as challenges to this neoliberal orthodoxy. But in practical terms, at least, the challenge failed. CAMR was designed to prioritize the protection of intellectual property rights over access to medicines. And the government has interpreted the *ODA Accountability Act* so as to be consistent with its own policy goals.

The Conservative government of Prime Minister Stephen Harper, in majority control of Parliament since 2011, has taken Canadian internationalism in a new direction. In some respects, Harper’s foreign policy is continuous with the neoliberal project of privatization, markets, and the retreat of the state from explicit social and economic regulation. However, the Harper government has also explicitly repudiated the liberal internationalist tradition that had been dominant within Canadian foreign policy since the end of the Second World War. Its foreign policy has instead emphasized militarism, bilateral alliances, and the promotion of resource extraction at home and abroad.
Indeed, the recent enactment of the *Canadian Environmental Assessment Act 2012* suggests that the federal government’s primary economic vision is no longer the facilitation of markets but rather the extraction of rents. As I have explained, CEAA 2012 reduces the role of the federal government in environmental assessment, while concentrating what remains of that role in the hands of the federal cabinet. In doing so, it makes a clear statement about the centrality of resource extraction to the Canadian economy.

During Harper’s rise to power, Canadians continued to try to use domestic law as a vehicle for the pursuit of internationalist purposes. The *ODA Accountability Act* is one example. Another example is a bill dealing with the activities of Canadian mining, oil, and gas companies in Southern countries. Since the late 1990s, controversy has swirled around the activities of Canadian companies abroad and their alleged involvement in social and environmental abuses. In 2010, a bill designed to address these issues by withdrawing public financial support from impugned companies was narrowly defeated in Parliament. ¹

It is impossible to know whether the Harper government’s reorientation of Canadian foreign policy represents a temporary aberration or a permanent shift. In either case, however, this is an opportune time to reflect on the record of Canadian internationalism in the post-Cold-War era. On the whole, this reflection suggests that internationalist law reforms were limited not only by insufficient political will or by incomplete implementation, but that such legislation also incorporated elements and assumptions that privileged certain ways of thinking about global justice. Acknowledging this record is an important step toward imagining what might come next.

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¹ Canada, Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, 3rd Sess., 40th Parl. (reinstated from previous session, 3 March 2010). This bill was sponsored by John McKay, the same Liberal member of Parliament who sponsored the bill that became the *ODA Accountability Act*. Bill C-300 was defeated by a vote of 140 to 134.
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