Canadian Law on Foreign Corruption &
The Development Turn

by

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Abstract

The significance attributed to corruption, and especially foreign corruption, has been subject to a long series of shifts in political and legal thought. In addition to moralism and self-interest, a third motivation for legal control over foreign corruption has emerged in recent decades: the notion that bribery by businesses from wealthy states plays a material role in perpetuating poverty within developing states. The growth of this idea is the 'Development Turn'. This thesis critically examines, through a broadly interdisciplinary lens, both the Development Turn and associated law in Canada.
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I. Setting the Stage

The significance attributed to corruption, and especially foreign corruption, has been subject to a long series of shifts in political and legal thought. This thesis critically examines, through a broadly interdisciplinary lens, the most recent of these ideologies, which is usefully described in terms of a ‘Development Turn.’ In *The Laws*, Plato sought to distil the practical consequences of his thought to issues of political order,¹ and used the word corruption for both venality and ideological erosion.² Plato’s account, which directs attention to human frailty as well as to social and political repercussions thereof, may stand, at least for current purposes, as an early articulation of what a contemporary scholar has deemed the ‘moralist’ approach to foreign corruption.³ This approach as well as the associated ‘self-interest’ approach is explored in Ramsay MacMullen’s influential *Corruption and the Decline of Rome*,⁴ which argues that insidious corruption rather than any specific event was the primary driver of the Roman empire’s decline. The American historian’s thesis has since permeated received wisdom about political order more broadly. In the following, I acknowledge that it is difficult to understand the motivations for legally regulating foreign corruption without some recourse to both moralism and self-interest as underlying rationales. However, especially in the last two decades, a third, increasingly influential motivation for taking an interest in corruption has emerged: the notion that bribery by businesses from wealthy states plays a material role in perpetuating poverty within developing states. The growth of this idea is the Development Turn.

At the outset, it is useful to briefly review academic criticisms of domestic laws aimed at reducing foreign corruption. A first group of criticisms, which tend to be broadly conservative in orientation, rely on claiming a putatively realistic set of premises. The American intellectual Samuel Huntington for example -- in examining the governance challenges of impoverished, Cold War allies -- wrote that “[c]orruption provides immediate, specific, and concrete benefits to groups which might otherwise be thoroughly alienated from society. Corruption may thus be functional to the maintenance of a political system in the same way that reform is.”

He further noted that “in terms of economic growth, the only thing worse than a society with a rigid, over centralized, dishonest bureaucracy is one with a rigid, over-centralized and honest bureaucracy.” In addition to Huntington’s realpolitik tolerance of corruption in terms of “greasing the wheels of economic life”, at least two other realist criticisms bear acknowledgement. International relations scholars argue from the ‘Neo-Realist’ premise that states should prioritize security and pursue alliances as a means to those ends. These writers criticize foreign anti-corruption laws on the basis that foreign corruption does not materially engage home country interests, and prosecution thereof undermines strategic alliances.

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6 Political Order, 386. Huntington was by no means the only social scientist of the Cold War period to suggest that some amount of corruption might actually facilitate political stability and even economic growth in weak states See Joseph S. Nye, “Corruption and political development: A cost-benefit analysis” (1967) 61.02 American Political Science Review 417-427; and Nathaniel H. Leff "Economic development through bureaucratic corruption" (1964) 8:3 American Behavioral Scientist 8-14. For a critique arguing that this scholarship tended to view corruption, especially in the developing world, in functionalist terms, see Mitchell A. Seligson “The Impact of Corruption on Regime Legitimacy: A Comparative Study of Four Latin American Countries” (2002) 64.2


9 For an example of this formulation, see Philip M. Nichols, "Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal under the Global Conditions of the Late Twentieth Century?- Increasing Global Security by Controlling Transnational Bribery” (1998) 20:3 Michigan. Journal of International Law 451 at 456. Nichols’ larger argument is that even in
The third realist claim is that anti-foreign corruption laws impose costs on domestic firms and by extension on the home state’s economy. On this reading, for instance, laws targeting foreign corruption make Canadian firms less competitive in industries where demands for bribes are commonplace and supply by third-country competitors is not subject to legal restriction. More recently, a second group of criticisms have emerged from progressive discourses on the political left, largely organized around the notion of imperialism. A review of the literature however suggests that the focus is much less on critiquing the idea of foreign corruption as a problem than on taking issue with the mechanisms being adopted to address it. This is also the current project. In turn, the metaphor of left and right serves to indicate that the current inquiry into the Development Turn and its implications for Canadian law, aims to locate itself in the centre.

Despite the above criticisms, Canadian law has in recent years exhibited a marked increase in the quantity and variety of measures against foreign corruption. As part of this trend, recent legal initiatives in Canada related to foreign corruption generally and bribery in particular have included the following:

- Significant amendments to the Corruption of Foreign Public Officials Act (CFPOA);\(^{12}\)
- Enactment of the Extractive Sector Transparency Measures Act (ESTMA);\(^{13}\)
- Issuance of revised guidelines by the Canadian Department of Foreign Affairs, Trade, and Development titled “Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad (CSR Strategy); and

10 See, for instance, Carl D. Hughes and Oliver Pendred, "Let’s be clear: compliance with new transparency requirements is going to be challenging for resource companies" *Journal of World Energy, Law & Business* 7.1 (2014).
12 Corruption of Foreign Public Officials Act (S.C. 1998, c. 34); Fighting Foreign Corruption Act (S.C. 2013, c. 26).
Membership, as one of six founding members, in the International Anti-Corruption Coordination Centre (IACCC).14

As such, Canadian law on bribery of foreign officials has arguably been more dynamic between 2011 and 2017 than at any previous point in time.15 Furthermore, as examined in the second and third parts of this section, the half decade between 2011 and 2017 can usefully be conceptualized as the beginning of a distinct, second era for Canadian law on foreign corruptions.16

If legal developments between 2011 and 2017 do represent a second era of more aggressive Canadian laws on foreign corruption, then what could explain this change? Certainly, the recent, parallel growth in Canadian law on domestic corruption should not be ignored completely. For instance, in November 2016 charges of bribery were laid against a high-ranking official and a local operative, respectively, in the governing Liberal Party of Ontario.17 And, in March 2016, authorities in Quebec arrested a group of five people including two former provincial ministers on charges involving corruption and fraud.18 Both of these developments follow the so-called ‘McGill Super Hospital Scandal’ where it is alleged that more than 22 million dollars in bribes were paid for a 1.3

14 The IACCC – which will “coordinate cross-border investigative communication, increase data sharing between key financial hubs, and assist developing countries with corruption cases” – was the most tangible outcome of the United Kingdom’s inaugural London Anti-Corruption Summit in May 2016. See, for instance, United States of America State Department, Office of the Spokesperson “Fact Sheet: U.S. Commitments at the Global Anti-Corruption Summit”. http://www.state.gov/r/pa/prs/ps/2016/05/257124.htm
15 The only serious alternative would be to argue that 1998 and 1999, when the ‘OECD Convention’ was finalized and the CFPOA was introduced in the House of Commons, was actually the most important / consequential year for Canadian law in this field. For ‘OECD Convention’, see Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997, Doc. No. DAFFE/IME/BR(97)20, 37 I.L.M. 1 (entered into force 15 February 1999).
16 On this schema, the period between 2000 and 2011 could be described either as ‘pre-history’ or as the ‘first wave’.
17 Election Act, R.S.O. 1990, c. E.6 The charges are under Section 96.1(d), which provides that no person shall, directly or indirectly, “apply for, accept or agree to accept any valuable consideration or office or employment in connection with the exercise or non-exercise of an elector’s vote.”
18 The former cabinet ministers are Nathalie Normandeau and Marc-Yvan Cote. The other political figures charged are Bruno Lortie, Normandeau’s former chief of staff, Ernest Murray, a former aide to the former Leader of the Opposition; and Francois Roussy, a former mayor of Gaspe, Quebec. In addition, two former executives with a multinational engineering firm have also been charged.
billion dollar construction contract. Nine people have been charged, in the McGill Super Hospital Scandal including the former Chief Executive Officer of SNC-Lavalin Group Inc.\textsuperscript{19} The recent realization among Canada’s political and legal elites that this country is not immune to corruption, however, does not fully explain the growth of initiatives against foreign corruption.\textsuperscript{20} Indeed, the literature on Canadian foreign bribery law is largely silent on connections between domestic business culture and foreign corruption.\textsuperscript{21}

Another, more promising, line of inquiry is to consider that the expansion and diversification of Canadian law related to foreign bribery is part of a global, but not universal, phenomenon. For instance, following conclusion of the ‘OECD Convention’, which is discussed in detail below, there has been a significant increase in domestic laws aimed at controlling bribery of foreign officials: as of 1 January 2015, for example, 41 states have agreed to criminalize the payment of bribes to foreign officials.\textsuperscript{22} Indeed, Canadian commentary has preferred to view laws on foreign bribery, especially the CFPOA, in terms of whether Canada is complying with the OECD Convention,\textsuperscript{23} and what impact this might have on Canadian business.\textsuperscript{24} Such writing is certainly useful but it is also fundamentally limited. And, in a sign that Canadian scholarship on transnational anti-corruption is maturing, certain critiques of the Canadian law have recently been

\textsuperscript{19} Other corruption scandals have included: the criminal trial of Senator Mike Duffy; the arrest of corporate and government employees for fraud, conspiracy and breach of trust in relation to a $24-million computer equipment and services contract for the Quebec government; and, most recently the announcement that the Ontario Provincial Police are investigating allegations of bid-rigging in City of Toronto procurement.

\textsuperscript{20} Domestic bribery is an offence at Canadian criminal law. Criminal Code, R.S.C. 1985, c. C-46, ss.119 (bribery of judicial officers) and 120 (bribery of officers). Other broadly relevant provisions include s. 121 (frauds on the government) and s. 123 (municipal corruption). Until recently Canadian scholars and practitioners tended to perceive this kind of criminal conduct as extremely rare.

\textsuperscript{21} Consideration of these issues in the American context, in contrast, has led to debates about whether Washington prohibited foreign bribery because of moralism, self-interest, or altruism Kevin E Davis, "Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism." \textit{NYU Ann. Surv. Am. L.} 67 (2011): 497.

\textsuperscript{22} This includes 35 OECD member countries and 6 non-member countries, i.e. Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa, which have adopted this Convention.


published. Milos Barutciski, for instance, has argued that the absence of legal disciplines on the demanders of cross-border bribes is not only asymmetrical but also a weak point in the current legal architecture.\(^{25}\) And, Poonam Puri has argued that existing Canadian laws may be insufficient to stem the supply of bribes and that corporate governance mechanisms should be considered.\(^{26}\) However, there are also important gaps in Barutciski and Puri’s analysis. For instance, although other recent commentaries do acknowledge and seek to offer preliminary analysis of the ESTMA,\(^{27}\) neither Barutciski nor Puri test their analytical framework against this recent development.\(^{28}\) What is more, while both Barutciski and Puri recognize that enforcement under the CFPOA has been limited at best, neither seeks to seriously enquire as to why that should be the case.\(^{29}\) As a result, the Canadian scholarship does not actually offer a thorough discussion of the motivations, and thus objectives, that have driven this growing body of Canadian law. In the absence of serious consideration of this albeit basic question, it appears difficult at best to ascertain the criterion against which Canadian law should be evaluated.

The remainder of this section focuses on documenting the Development Turn as a motivating factor for Canadian law on foreign corruption. It does so in two parts. First, the next sub-section examines the origins of the CFPOA in terms of the moralism, self-interest, altruism schema that has been used by scholarship on the United States legislation and the Organization for Economic Co-operation and Development (OECD) convention. Second, the following sub-section uses the distinction between territorial and national principles of jurisdiction to illustrate how recent amendments signal a shift from


\(^{28}\) This is perhaps explained simply by the inevitable passage of time between writing and publication.

\(^{29}\) For instance, Puri appears to take for granted that the Canadian system of institutions and customs relevant to white collar crime will result in weak enforcement. This is likely a result of her significant experience with corporate securities law. Barutciski takes a somewhat more diplomatic approach and suggests that over time a critical mass of case law might take shape.
passive condemnation to partial deterrence, and thus a fuller embrace of the Development Turn.

### 1.a. Domestic Law on Foreign Bribery: Origins & Shifting Motivations

It is generally recognized that modern law on foreign corruption begins in 1977.\(^{30}\) Scholars have subsequently analyzed both legislative and negotiating histories to ascertain the underlying motivations of lawmakers, and by extension the objectives of such laws.\(^{31}\) In this respect, there is a significant literature on the United States’ *Foreign Corrupt Practices Act* (“FCPA”)\(^{32}\) and the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (“OECD Convention”).\(^{33}\) However, while Canada is by almost any possible count one of the ten most important jurisdictions to have signed and implemented the *OECD Convention*, there does not appear to be substantial analysis of the legislative history pertaining to the *CFPOA*. The following two sections seek to partially address that gap by developing a working hypothesis for how Canada fits in to the leading schema used in the *FCPA* and *OECD Convention scholarship*. The primary finding is that it was only subsequent to not only the *OECD Convention* but also the *CFPOA* – rather than prior thereto as might otherwise have been assumed – that the Development Turn entered in to Canadian discourses on this area of the law.

The United States became the first state to legislate against the payment of bribes to foreign officials through the FCPA in 1977.\(^{34}\) While early observers characterized the

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\(^{31}\) While sources of this type are considered to be secondary for judicial interpretation in the Canadian courts, for current purposes, such documents along with the rigorous analysis thereof by legal scholars are highly useful.


\(^{34}\) Rose-Ackerman, *Corruption and government*, p. 87; Stuart H. Deming "Canada's Corruption of Foreign Public Officials Act and Secret Commissions Offense." *Am. U. Int'l L. Rev.* 29 (2013): 369, p 371 states that “For many years thereafter, the United States remained the only country to have implemented and enforced such a prohibition. A series of significant international
U.S. as a “lonely boy scout”, 35 scholars have sought to understand the actual motivations behind the FCPA and subsequent amendments thereto.36 This scholarship demonstrates that the impetus for the original FCPA was motivated by moralism, justified by self-interest, and blind to altruism. 37 A leading scholar, Kevin Davis, has therefore observed that both the legislative and executive branches of government were animated by “the idea that legislation such as the … FCPA is designed to make a moral statement, to send the message that corrupt practices are morally blameworthy no matter where they take place.”38 This, in turn, was a response to the Watergate Special Prosecutor’s uncovering of illegal contributions to Richard Nixon’s re-election campaign through secret slush funds39 and the subsequent Securities and Exchange Commission (“SEC”) investigation’s revelation that some of these funds were connected to “questionable or illegal foreign developments in the 1990s and the early part of this century have dramatically changed the landscape.”


38 Why Regulate Foreign Bribery, p 497. Davis finds that the legislative history makes these moralistic motivations explicit:

The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. . . . [I] t rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.


Accordingly, scholars have concluded that “The 1977 FCPA resulted from a political bandwagon effect. … statutory action seemed mandatory to Congress in the grip of a post-Watergate morality.”

In addition to the post-Watergate era’s particular brand of moralism, both the U.S. Congress and the SEC addressed the potential of either foreign bribery or the FCPA to harm U.S. self-interest. Congress was primarily concerned about the impact of foreign bribery, and the publication of information about it, on foreign policy. A wide range of ideas about potential economic impacts were also ventilated. For instance, the SEC took the position that information about such payments was generally material to investors because it bore upon both the quality of the company's business and the attendant risks of holding its securities. As such, the most significant debate prior to enactment of the 1977 FCPA was not about the need for a legal response to overseas bribery but rather about the form that it should take. Some law-makers sided with the SEC and argued for imposing new reporting requirements related to foreign bribery. Ultimately, moralist arguments carried the day and foreign bribery was prohibited subject to criminal sanctions. In fact, while criminal prohibition was seen as the most powerful moral gesture, it was also understood to be cheaper in the short-term than the SEC’s proposed disclosure approach. There was no particular expectation that it would be more effective, let alone efficient, in reducing the supply of foreign bribes by U.S. firms.

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42 In this regard they considered the possibility of: undermining allies and friendly parties, lending credence to Soviet propaganda, and generally undermining both the practice and image of U.S. ideals. See, Lindsey Diane Carson, Laws of Unintended Consequences: The Impacts of Anti-Foreign Bribery Laws on Developing Countries. Diss. University of Toronto, 2015. p. 53-55

43 Why Regulate Foreign Bribery, p 501

44 The perception of short-term costs and resulting resistance to disclosure-based laws are prevalent in Canada. One consequence in Canada is that ESTMA is completely outside the securities apparatus. Another consequence, more broadly, is that Canadian authorities tend not to
The initial U.S. debate considered only in passing that U.S.-based transnational firms would be placed at a disadvantage vis a vis their foreign competitors, who were at that time overwhelmingly from Western Europe and Japan. Subsequently, however, the perception of disadvantage became a major driver of domestic lobbying by U.S. firms seeking to have the Act repealed or, in the alternative, to have their foreign competitors subjected to an equivalent prohibition. The first legislative result was a series of amendments to the Act whereby the “1988 Amendments” narrowed the law’s reach in several important respects: criminal liability for accounting violations was made subject to a knowledge requirement; exceptions and affirmative defenses were created for certain types of payments to foreign officials; and a procedure was created for the U.S. Department of Justice to provide guidance on its enforcement policy. The 1988 Amendments also directed the U.S. to negotiate an international agreement on foreign bribery through the OECD. While moralism continued to have currency, the key point for current purposes is that, while the 1988 Amendments were a first step towards a self-interest driven approach to laws on foreign bribery, nowhere in the legislative history of the 1977 FCPA or 1988 Amendments is there any mention of considerations that can be categorized as altruistic.

recognize that foreign bribery has direct costs for Canadian stakeholders, i.e. shareholders and capital markets.

Ultimately, numerous scholars argue that the aforementioned moralist bandwagon was simply too strong for specific policy arguments to gain significant currency. In particular, then President Jimmy Carter voiced strong support for criminalization. The implications of this ‘criminalization model’ are discussed further in terms of the OECD Convention.

Over time, one result of this lobbying has been the increasingly aggressive use of U.S. enforcement agencies to investigate and sanction foreign head-quartered firms through their U.S. subsidiaries or operations.


Prior to the 1988 Amendments, the U.S. State Department had not designated a specific forum and rather advocated for anti-foreign bribery laws on a ad hoc basis. Although not immediately successful, the 1988 amendments therefore marked an early step towards what the scholarship sometimes refers to as “globalization” of anti-foreign bribery law.

Davis, Why Regulate Foreign Bribery 502. The FCPA was subsequently amended again in 1998, following the negotiation of the OECD Convention, and it was only then that the U.S. legislative history mentions for the first time the notion that the FCPA was furthering desirable outcomes in foreign countries such as economic development and respect for human rights, i.e. altruism rather than merely moralism and self-interest. Davis, Why Regulate Foreign Bribery 503=504. Desirable outcomes can, however, be conceptualized and pursued in a range of ways. This is explored in the following sections.
In terms of the OECD Convention in particular, another body of scholarship has developed that seeks to explain why European and Japanese negotiators resisted\(^5\) and how the U.S. was ultimately able to secure\(^5\) the ‘globalization’\(^5\) of criminal prohibitions on bribery of foreign officials.\(^5\) From the fall of 1993 onwards the Clinton State Department prioritized the establishment of a negotiating agenda at the OECD.\(^5\) An immediate result was the creation of the OECD Working Group on Bribery in International Business Transactions (“OECD Working Group”) in 1994.\(^5\) In turn early outputs of the OECD Working Group included: the 1994 Recommendation on Bribery in International Business Transactions (“1994 Recommendation”)\(^5\) and the 1996


\(5^3\) This process of legal norm exportation from the United States to its strategic allies, with Canada as an example, may well merit further study. However, for current purposes, it is sufficient to observe that Canada appears to have participated only passively in the OECD negotiations. This impression is confirmed by the facts that there is again no scholarship on Canada’s role in the OECD negotiations and that the leading scholarship on these negotiations, Abbott and Snidal, for instance, makes no reference to Canada. Likewise, neither Puri nor Barutciski discuss Canada’s negotiating position.

\(5^4\) Daniel K. Tarullo, The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention, 44 VA. J. INT’L L. 665, 675–76 (2004) [Hereinafter “Limits of Institutional Design”]. Tarullo observes that U.S. (self) interest changed in degree rather than kind following Clinton’s electoral defeat of the Republican incumbent. The previous administration had followed the letter of the 1988 FCPA’s law but it was only under the Democrat that the issue was elevated “to a position of daily management by a politically appointed sub-Cabinet official and by regular involvement of Cabinet officials.” See, Tarullo p 677.

\(5^5\) Abbott & Snidal, supra, at 162-64

\(5^6\) The 1994 Recommendation recommended that that OECD member states take “effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.” In this regard it recommended that member states, such as Canada, use at least one of the following five legal domains: criminal law; civil, commercial, administrative law and regulation so that bribery would be illegal; tax legislation and regulation; company and business accounting standards to secure adequate recording of relevant payments; banking, financial and other relevant provisions so that adequate records would be kept and made
Recommendation on Tax Deductibility of Bribes to Foreign Public Officials ("1996 Recommendation"). U.S. firms, however, were not satisfied with these soft law instruments; and, they increasingly demanded that European and Japanese competitors be subject to FCPA-equivalent rules. At the same time, these foreign states – in the absence of post-Watergate morality – did not perceive the prohibition of overseas bribery to be consistent with their own interests. In fact, the senior U.S. negotiator later recognized that it had been necessary to change the rules of the state-to-state negotiating game in order to break the initial impasse. The Clinton administration considered but rejected two such negotiating tactics, before ultimately settling on leveraging the Development Turn. In fact, it only became apparent to U.S. diplomats that the Development Turn might serve their own purposes after the OECD negotiating process formally began.

As described in an influential article by Kenneth W. Abbott and Duncan Snidal titled “Values and Interests”62, the OECD negotiations were shadowed by a loose coalition of non-governmental organizations. For these ‘values activists’ – in the terminology developed by Abbott and Snidal – the prohibition of foreign bribery was championed more because it corresponded with privileged values and less because any particular objective was realistically expected. The U.S. diplomats were savvy enough to

available for inspection or investigation; and laws and regulations relating to public subsidies, licences, government procurement contracts, or other public advantages so that advantages could be denied as a sanction.

57 Recommendation that member states specifically disallow any tax deductibility for bribes to foreign public officials


59 Tarullo, “Limits of Institutional Design”, 675–676. Foreign multinationals had considerable incentives to continue paying bribes and exercised considerable influence over their home state’s negotiating position.

60 Tarullo, “Limits of Institutional Design”, 677–678. These were as follows: first, condoning reciprocal bribery by U.S. multinationals, for instance in the case where the firm could show that it had lost an overseas project for that reason; second, linking the issue of foreign bribery prohibition to another issue in the relevant bilateral relationship

61 Limits of Institutional Design, 677–678. This author was directly involved in formulating and implementing the U.S.’s negotiating tactics.

co-ordinate these NGOs so that pressure was exerted on European negotiators by their own domestic constituencies. In short, the U.S. diplomats thus leveraged the values activism of civil society to deliver for the Fortune 500’s corporate lobbyists. The result was the OECD Convention, which was formally adopted in 1998. The primary operative provision thereof is S. 1, which states that:

> Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

As in the case of the FCPA, the Criminalization Model was thus favored because it sent the strongest possible message of condemnation, which was critical for values activists. It also achieved the primary purpose of the negotiations, which had been to distribute the cost of the FCPA amongst U.S.’s allies.

There is a tension underlying the birth of the Development Turn and persistence of the criminalization model, however: it is far from clear that pro-development, seemingly altruistic discourses deployed by proponents of the OECD Convention were not in fact a tactic for realizing objectives that were actually driven by moralism (this time in the form of values activism rather than post-Watergate morality) as well as self-interest vis-à-vis competitors to U.S. MNCs. However, it is also the case that heightened

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63 The OECD Convention thus became the first agreement between states to take specific domestic legal actions regarding bribery of foreign officials. It was followed by the United Nations Convention on Corruption, which has many more signatory states but much less coercive force.

64 OECD Convention, S. 1.

65 Prior to the OECD Convention, U.S. firms that were unwilling to pay bribes due to the risk of FCPA prosecution incurred an opportunity cost in markets where bribery was expected. Following criminalization of such payments at the domestic law of competitor firms, it was expected that these competitors would also incur the opportunity cost of limited business opportunities in the aforementioned markets. This model, however, contained a number of assumptions: first, with the benefit of hindsight, the possibility of bribes being supplied by foreign investors from outside of the OECD appears to have been given inadequate consideration. Second, and more importantly for this thesis, conclusion of a convention – rather than a treaty – within the OECD gave rise to a club system for monitoring enforcement, which has at times suffered from a lack of coercive force with the result that enforcement outside of the U.S. has been limited.
involvement by NGOs in the OECD process resulted in recognition by capital exporting states that foreign bribery was deleterious to social and economic development in poorer countries.\textsuperscript{66} This is demonstrated by certain changes in the pre-ambulatory language of the OECD Convention in comparison to the 1994 OECD Recommendation and the 1996 OECD Recommendation. The Recommendations had begun by considering “that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions.” The Convention itself, however, notably adds the recognition that “bribery…undermines good governance and economic development.”\textsuperscript{67} Motivations for the criminalization model thus expanded to include not only moralism and self-interest but also a rhetorical appeal to altruism, although it is far from clear that such claims are empirically justified.\textsuperscript{68}

In terms of why Canada accepted the OECD Convention’s criminalization model, a definitive answer would go beyond the scope of this chapter. However, based on reading the parliamentary discussion as well as the representations made to the OECD

\textsuperscript{66} Lindsey Carson therefore writes: “While the conclusion of the OECD Convention cannot be attributed to a single campaign or event, the emphasis of the U.S.-led coalition on the criminalization of foreign bribery as a development imperative certainly contributed to a shift in opinion among the European public, press, and elites, and also helped mobilize leaders of less-developed countries as advocates for their cause.” Lindsey D Carson, “Laws of Unintended Consequences: The Impacts of Anti-Foreign Bribery Laws on Developing Countries” (Toronto: Unpublished SJD Thesis, University of Toronto Faculty of Law, 2015) pp 84-85.

\textsuperscript{67} Prior to the OECD Convention, the FCPA imposed an opportunity cost on U.S. firms that were unable to secure contracts due to a refusal to pay bribes. Viewed from this perspective, the OECD negotiations were originally understood as pertaining to the need for allied states, especially the Europeans, to agree to collaborate and thus both significantly reduce the opportunity cost faced by U.S firms and also share the existing burden, i.e. where firms from outside the OECD continued to pay bribes and thus secure lucrative investment opportunities. Although the strategic interest of the U.S. remained at all times to obviate the opportunity cost brought about by a lack of collaboration, over the course of the OECD negotiations the U.S. and its collaborators in civil society found a second conception of cost that ultimately created a compelling reason for the Europeans to collaborate: the idea that foreign bribery was imposing a cost on global economic efficiency and growth.

\textsuperscript{68} It appears at least arguable that value activism is in fact merely a new permutation of the moralist approach to foreign bribery. Abbott and Snidal describe anti-corruption value activists as aiming “to promote the instantiation and spread of … principled beliefs”. These actors view criminalization as sending the strongest possible message of moral condemnation. They are, therefore, less interested in whether this moral condemnation translates in to general, which is to say pre-emptive, deterrence than whether it adopts the right tone of righteous. Kenneth W. Abbott and Duncan Snidal. "Values and interests: International legalization in the fight against corruption." S147.
Working Group, a working premise takes shape. Canada did not unilaterally adopt the criminalization model or even form a coalition with the United States at the OECD because a review of its interests made these courses of action appear unattractive. And, it was not an active participant in the negotiations but rather passively accepted the result. In turn, Canada did not actively oppose an eventual compromise that would result in some cost sharing because it did not have a significant domestic lobby opposed to plurilateralization, as had been the case in Western Europe and Japan. As such, following agreement at the OECD, Canada’s primary interests were to preserve diplomatic capital by appearing to cooperate with this U.S. driven initiative. These limited motivations are, furthermore, consistent with the legal form that Canada’s implementation of the *OECD Convention* has taken, as illustrated in the following section.

Here I have examined the origin and diffusion of anti-foreign bribery law through the history of the *FCPA* and the OECD Convention. The primary conclusion is that the criminalization model adopted first in Washington, D.C., then in Paris, and finally in Ottawa is ultimately a product of politics rather than institutional design. It does not follow that the Canadian government at any time intended to dramatically impact the supply of foreign bribes by Canadian multinational firms through the *CFPOA*. Most tellingly, for the first decade after enacting the *CFPOA* the Canadian government declined to designate an office responsible for implementing and enforcing the Act. Furthermore, it was only after the legislation of the *CFPOA* – rather than prior to it, as might otherwise have been assumed – that the Development Turn has begun to exercise an influence on Canadian law. This critical history has specific implications: although the

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69 However, numerous data points suggests that while aiming to appease its American partners, the Government of Canada remained oblivious to the Development Turn, for instance: only one member of the Canadian Senate used the word ‘development’ during 1998 hearings prior to enactment of the *CFPOA* and not a single Senator acknowledged that Canadian firms abroad may compromise development outcomes through bribery.

70 It is difficult if not impossible to understand the motivations for Canadian law on foreign bribery without taking account of a phenomenon that global governance scholars label as values activism, which in turn shapes the particular form of legitimacy associated with enforcement of the *CFPOA*.

71 For instance, neither good governance nor economic development is mentioned in the long title of *CFPOA*.

72 The use of value activism to introduce the idea of corruption as a pathway to underdevelopment suggests a focus on condemnation at the expense of deterrence.


*CFPOA* was designed to prioritize condemnation over deterrence, the focus has begun to shift towards albeit partial deterrence. This is examined in the section that follows.

### 1.b. Opening the Extraterritorial Door in Canadian Law

Following the OECD Convention, the criminalization model was legislated into Canadian law through the *CFPOA (CFPOA 1999)*. However, Canada appears to have accepted this U.S.-led initiative in order, primarily, to preserve diplomatic capital. As explored in this section: while the *CFPOA 1999* was consistent with formal but passive condemnation, beginning in or around 2013 there has been a shift towards albeit partial condemnation. Indeed, it appears to have been approximately one decade after the initial legislation of the *CFPOA* that the Development Turn began to exercise material influence over Canadian law. A separate chapter, not included here, would be needed to properly examine the level of deterrence achieved by the CFPOA. Indeed, rational choice models of criminal deterrence typically consider: the level of enforcement, the severity of penalties and, of particular importance for this section, the scope of the legal prohibition. On one hand, enforcement of business crime laws, such as the CFPOA, has proven to be a persistent challenge for the Canadian legal system. On the other hand, legal practitioners and NGOs have highlighted that penalties pursuant to the recently secured convictions under the CFPOA have been quite severe. The current section considers only the third element and, in particular, one specific aspect of the scope of the CFPOA’s prohibition, i.e. the geographic scope. The judicial and legislative developments bearing on a shift from territorial jurisdiction to nationality-based jurisdiction, as examined below, provide a mini case-study of the emergence of deterrence as a motivation or “policy goal” applicable to Canadian law on foreign bribery. This in turn is consistent with the increased influence of the Development Turn.

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73 Indeed, there appear to be systemic issues – including federalism and proximity to the United States – that contribute to limited enforcement of Canadian white-collar criminal laws. And, a separate chapter, not included here, would be necessary to examine the interplay of these general dynamics and concerns specific to the CFPOA.

74 See, for instance, David Debenham “The Karigar Sentence and the future of Anti-Courruption Sentencing under the CFPOA” McMillan LLP Client Alert (May 2014) online: <http://mcmillan.ca>
Prior to the OECD Convention and entry into force of the CFPOA 1999, not only was it not illegal for a Canadian person to bribe a foreign official but Canadian taxpayers were actually entitled to claim said payment as a business expense.\textsuperscript{75} The criminal prohibition of foreign bribery thus represented a significant cost for at least some stakeholders in the Canadian political system. This aspect of cost in addition to the very limited benefits that the Government of Canada associated with the CFPOA is useful for understanding why the scope of the criminal prohibition thereunder was highly circumscribed. Indeed, the Canadian business lawyer James Klotz who currently serves as Secretary-General of the International Bar Association has written that “Canada was the only OECD country to specifically exclude itself from the requirement to include nationality for jurisdiction in the Convention …..”\textsuperscript{76} This in turn is based on Article 4.2 of the OECD Convention, which requires implementing legislation to include nationality-based jurisdiction as follows:

“Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.”

Klotz’s critique needs to be understood in terms of both the CFPOA specifically and Canadian common law generally. In terms of the CFPOA specifically, not only did the CFPOA 1999 not provide for nationality-based jurisdiction, as noted by Klotz, furthermore the operative section S. 3 used the phrase “in the course of business,” rather

\textsuperscript{75} Upon entry into force of the Corruption of Foreign Public Officials Act (“CFPOA”), S. 10 thereof served to amend ITA S. 67. The result is the current approach in ITA Section 67.5 (1), which now prohibits deducting expenses incurred for the purpose of doing anything that would be an offence under section 3 of the CFPOA or the domestic bribery provisions of the Criminal Code:

“In computing income, no deduction shall be made in respect of an outlay made or expense incurred for the purpose of doing anything that is an offence under section 3 of the Corruption of Foreign Public Officials Act or under any of sections 119 to 121, 123 to 125, 393 and 426 of the Criminal Code, or an offence under section 465 of the Criminal Code as it relates to an offence described in any of those sections.” Previously, bribes to foreign officials had been disallowed as deductions only where the payment had been in light of a conspiracy in Canada. This limitation was introduced in 1991, the Income Tax Act, RSC, 1985, c 1 (5th Supp) (“Income Tax Act” or “ITA”)

than specifying “international” business as is the case in the OECD Convention. 77 The Phase 1 Report from the OECD Working Group tasked with reviewing Canada’s legislative implementation of the Convention places in stark relief the “foreignness” of extraterritorial jurisdiction to Canadian law and legal history.

“Canada rarely asserts extraterritorial jurisdiction, and has not established such jurisdiction with respect to the bribery of a foreign public official. Canada explains that it has generally legislated extraterritorial criminal jurisdiction in cases where there is an international consensus that a crime is of such universal concern as to justify extraterritorial jurisdiction, as in offences against internationally protected persons, the protection of nuclear material, torture, war crimes, the citizen accused is employed by the federal government to undertake duties outside of Canada (such as a diplomat), or there exists an established consensus in the international community condemning a particular offence (such as the sexual exploitation of children).”

The implications of this passage are examined immediately below.

While the issue under the OECD Convention was whether Canada had jurisdiction to prosecute its nationals for offences committed abroad, Canada did not take the position that it lacked such jurisdiction. Instead, Canadian officials blithely suggested that the government would only legislate nationality-based criminal jurisdiction where there was an international consensus about the severity of the offence. By extension, it was the position of the Government of Canada shortly after signing the OECD Convention that: that bribery of foreign officials was not of sufficiently “universal concern” despite having been affirmed by every member of the OECD after extensive negotiations. Without passing judgment on the validity of this position, the provisional conclusion is simply that foreign bribery was a bridge too far for Canadian law in the early 2000s.

77 OECD Convention, S 1. Final clause reads “…, in order to obtain or retain business or other improper advantage in the conduct of international business.”

One reason for the above intransigence would appear to be the Canadian common law. Canadian courts by default exercise a territory-based principle, rather than a nationality-based principle, when determining jurisdiction. This was affirmed in the seminal Supreme Court of Canada case of *R. v. Libman* ("Libman"). In *Libman*, the Court held that jurisdiction under Canadian criminal law required a “real and substantial link” between the offence and Canada. The Court then articulated the appropriate test: first, it must take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence; and second, it must then consider whether there is anything in those facts that offends international comity. In practice, this means that Canadian authorities only have jurisdiction where the offence occurred in whole or in part in Canada.

As demonstrated by the first two cases to proceed to trial under the CFPOA, the Department of Justice initially took the position that the real and substantial link test was sufficient to comply with the *OECD Convention*. In *R. v. Karigar* ("Karigar")

79, the defendant was an executive consultant who had offered to act as the agent of a Canadian company seeking to do business with an Indian state-owned enterprise. His argument that the court lacked territorial jurisdiction was, on a consent basis, treated as a substantive defense and held over for the trial court.

81 Mr Justice Hackland made two notable findings. First with regard to the legal threshold under the test set out in *Libman*, he found that: “the substantial connection test is not limited to the essential elements of the offence as submitted by the accused.”

82 As a result, for the Court in *Karigar* a bundle of five factors connected the defendant to Canada and were sufficient to establish the necessary link. The five factors were as follows: 1) the corporate co-conspirator was a Canadian company based in Ottawa; 2) Karigar was a Canadian resident for

79 R. v. Libman, 1985, CanLII 51 SCC. In that case, the defendant used Canadian telemarketing operators to convince U.S. residents to invest in a worthless mining company. He was charged with both fraud and conspiracy to commit fraud.

80 R. v. Karigar 2013 ONSC 5199. Karigar was a Canadian national who had offered himself as a business agent for the purpose of securing government contracts in his native India.

81 R. v. Karigar 2013 ONSC 5199. See in particular para 36. Karigar had argued per *Libman* that there was no real and substantial link between Canada and the activities constituting the offence, and that the case, if allowed to proceed, would contravene the requirements of international comity.


83 R. v. Karigar 2013 ONSC 5199. The five factors were as follows: 1) the corporate co-conspirator was a Canadian company based in Ottawa; 2) Karigar was a Canadian resident for
import the *actus reus* of conspiracy. Furthermore, the Court found that the absence of evidence of a bribe being offered, let alone being paid, was not a bar to guilt under the CFPOA as again per the law of conspiracy it was sufficient that the defendant believed that a bribe was being paid.\(^8^4\) *Karigar* is important at a policy-level as the first conviction obtained under the CFPOA. However, at least some observers have suggested that it is a case of bad facts not necessarily making good law: it was only by importing the notion of conspiracy from the OECD Convention, although again it had been excluded from the CFPOA 1999, that the court was able to find an *actus reus*; and, it was only on the basis of conspiracy that the accused’s conduct had a real and substantial connection to Canada.\(^8^5\)

A second challenge to jurisdiction under CFPOA 1999 is found in R. v. *Chowdhury* ("*Chowdhury*").\(^8^6\) Unlike *Karigar*, *Chowdhury* involved a powerful defendant.\(^8^7\) The Crown alleged that the applicant – who was at the material time the Interior Minister and Minister of State of Bangladesh – offered bribes to foreign public officials of that country on behalf of SNC Lavalin Group Inc., There was no dispute over whether Canada had jurisdiction over the CFPOA offence, but the applicant argued that this did not automatically trigger jurisdiction over parties to that offence. The Ontario Superior Court rejected the Crown’s objection and found that jurisdiction over the person also had to be established. For the Court, this was governed by the legislative

\(^8^4\) Additionally, in Canada the law on conspiracy is interrelated with territorial jurisdiction. This is provided for as follows in section 465 of the Criminal Code: 1. A person who conspires in Canada to commit an act in another country that is an offence under the laws of that country is deemed to have conspired to commit that offence within Canada if that conduct would be an offence if committed in Canada. 2. A person who conspires in another country to commit an offence in Canada is deemed to have conspired within Canada.

\(^8^5\) Critique of the ONSC finding in *Karigar*: David Debenham “The *Karigar* Sentence and the future of Anti-Courrption Sentencing under the CFPOA” McMillan LLP Client Alert (May 2014) online: <http://mcmillan.ca>

\(^8^6\) *Chowdhury* v. H.M.Q. 2014 ONSC 2635

\(^8^7\) *Chowdhury* was alleged to have exerted influence over the selection committee for a bridge project on behalf of SNC Lavalin. The Crown had not yet sought a warrant for the arrest of Mr. *Chowdhury* and Bangladesh and Canada do not have an extradition treaty. Another difference between the facts in *Karigar* and *Chowdhury* is that Chowdhury was able to retain a leading Toronto litigator who specializes in white-collar crime.
language used in the statute creating the offence: although Section 3 of the CFPOA prohibits "every person" from bribery of foreign public officials, in the circumstances of Chowdhury, Mr Justice Nordheimer found that the use of the words "every person" did not capture foreign nationals.\textsuperscript{88}

Both Karigar and Chowdhury illustrate the uneasy co-existence between territorial jurisdiction on the one hand and the prohibition of foreign bribery on the other hand. Over time, the Government of Canada appears to have recognized that territorial jurisdiction is incompatible with the OECD Convention.\textsuperscript{89} As early as 2009, the Minister of Justice introduced amending legislation, which would have amended the operative Section 3 of the CFPOA.\textsuperscript{90} Under the contemplated amendments, in the case of a Canadian citizen, permanent resident, or legal person, activities constituting an offence under CFPOA Section 3 would be deemed to have taken place inside of Canada.\textsuperscript{91} This amendment died on the order paper.\textsuperscript{92} Subsequently, in 2013 the same government introduced a similar provision, as part of a broader suite of amendments, which has entered into law (‘CFPOA 2013’).\textsuperscript{93} The new provision setting out nationality-based jurisdiction, i.e. S. 5 in CFPOA 2013, also responds to the complications that arose in Karigar and Chowdhury.\textsuperscript{94} The result is \textit{prima facie} jurisdiction over foreign bribery based on the nationality of the accused.

As noted above in relation to the OECD Working Group’s Phase 1 Report, nationality-based jurisdiction was previously reserved for “offences against internationally protected persons, the protection of nuclear material, torture, war crimes … the sexual exploitation of children.”\textsuperscript{95} Persistent pressure through the OECD Working

\textsuperscript{88} Chowdhury v. H.M.Q. 2014 ONSC 2635, para 42-54
\textsuperscript{89} The word “appears” here is used to highlight that we do not know what government was thinking.
\textsuperscript{90} Bill C-31: An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a consequential amendment to another Act
\textsuperscript{91} Bill C-31 S. 38.
\textsuperscript{92} This was at least in part due to unforeseen political events, i.e. the prorogation of Parliament in December 2009.
\textsuperscript{93} Fighting Foreign Corruption Act, S.C. 2013, c. 26.
\textsuperscript{94} This is in reference to conspiracy in Karigar and jurisdiction over the accused as well as the offence in Chowdhury.
Group is certainly one reason why the geographic scope of prohibition under the 2013 CFPOA has been expanded. Barutciski therefore writes that: “The 2004 OECD Working Group on Bribery Phase 2 Report on Canada's implementation of its obligations under the Convention identified a number of perceived legislative deficiencies, including the continued exception for facilitation payments, the "for profit" requirement in the definition of "business", and most importantly, the lack of nationality-based jurisdiction.” However, in addition to the Phase 2 and Phase 3 reports’ criticism as an external driver of change, the shift from condemnation in the 1999 CFPOA to partial deterrence in the 2013 CFPOA also needs to be understood in terms of domestic developments. Indeed, Barutciski notes that unlike the failed amendments in 2009, the successful and wider amendments in 2013 were the result of public consultations through the Department of Foreign Affairs.

This sub-section adds to the proceeding sub-section’s examination of Canada’s lack of participation in the OECD negotiations. While providing a complement to the existing commentary on the 2013 amendment of the CFPOA, the notion of iterative judicial and normative feedback loops contributing to the amendment of a global governance-orientated rule, would appear to merit further study. Having documented the relative lateness of Canada’s Development Turn, the following sections turn to questions of whether domestic laws against foreign corruption can meaningfully be expected to contribute to development in foreign states. In this regard, the next section examines the notion of ‘Law & Development’ to identify a framework for analyzing

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97 Barutciski "Corruption at the Intersection of Business and Government" p 249
98 Barutciski "Corruption at the Intersection of Business and Government" p 249. Through this process, Canadian value activists supportive of the Development Turn provided significant input.
99 For example, the imposition of nationality-based jurisdiction under the CFPOA 2013, suggests to-date unexplored linkages between Canadian law on foreign corruption and the “globalization” of Canadian courts. One specific instance of this globalization appears in a series of tort cases brought against Canadian mining companies in relation to conduct abroad. See, Choc v. Hudbay Minerals Inc., 2013 ONSC 1414; Araya v. Nevsun Resources Ltd., 2016 BCSC 1856
ESTMA as the domain of Canadian law on foreign bribery that is empirically most likely to fulfill the promise of the Development Turn’s rhetoric.
II. Law, Development, and Institutions

The proceeding section on the origin and diffusion of the criminalization model arrived at a working premise: the CFPOA should not be expected to have a material impact on macro-level outcomes in foreign countries. However, that discussion also reviewed the role of values activism in diffusing the idea that laws bribery of foreign officials contributed to undesirable economic and social outcomes outside of the OECD. In short, there was a gap between institutional design and the growing perception of using home-state laws – i.e. of ‘developed’ jurisdictions – to combat corruption in ‘developing’, host-state jurisdictions. Concurrently, scholars of development and the role of law therein have devoted an increasing amount of attention to corruption. Wherein, transparency has been identified as a promising mechanism for combating corruption in developing states and this has led to a second generation of anti-foreign bribery initiatives including both the Extractive Industry Transparency Initiative (EITI) and Canada’s Extractive Sector Transparency Measures Act. Unlike the CFPOA, Canada’s implementation of ESTMA (together with its to-date limited participation in the EITI) thus appears to demand a ‘Law & Development’ analysis. (Section 3 of this thesis presents a case study.)

Katharina Pistor, a Columbia Law School professor, has written that: “Law & Development is a difficult field. It is at once multi-disciplinary and comparative; historical and policy driven; theoretical and empirical; positive and normative.”¹⁰⁰ A comprehensive history of “Law & Development” scholarship is beyond the current scope. But, this section is organized chronologically to make the argument that over the course of what insiders refer to as Second Generation Law & Development, New Institutional Economics has come to occupy an increasingly central position. In turn, this both partly explains the emergence of corruption as a major issue for the initiatives studied by Law & Development scholars and provides one relevant lens of analysis.

¹⁰⁰ Katharina Pistor, back cover material in Michael Trebilcock and Mariana Mota Prado, What Makes Poor Countries Poor: Institutional Determinants of Development (Edward Elgar: Cheltenham, UK & Northampton, MA, 2012). I use this quote to suggest that the term ‘Law & Development’ is ambiguous, meaning different things to different people. While I ultimately focus on the project of analytically assessing best practices given the fixed objective of economic growth, the broader debate about the legitimacy of development interventions cannot be completely ignored.
This paragraph identifies leading intellectual and institutional pre-curors to today’s Law & Development field. 19th Century European scholars of capitalism as a social system, such as Weber and Durkheim, had already begun to investigate the relationship between law and development.\(^{101}\) Although not consistently recognized by the Law & Development literature, another antecedent is found in Western scholarship on the role of law during colonization.\(^{102}\) A third pre-cursor, is the writing of non-Western elites on the role of law in nation building.\(^{103}\) In parallel, scholars have analyzed the post-World War II shift amongst both indigenous and cosmopolitan elites of viewing economic growth as a national imperative that could be equated with ‘development’.\(^{104}\) Indeed, economists originally dominated the major Bretton Woods development institutions, i.e. the World Bank and International Monetary Fund.\(^{105}\) The “optimistic perspective on law and development”\(^{106}\) of the 1960s is thus a widely acknowledged starting point that did not take place in a vacuum.\(^{107}\) It is also worth acknowledging the on-going debate over whether Law & Development can properly be considered as a “field” of scholarship at all.\(^{108}\) Specifically, Brian Tamanaha has argued that conceiving of law and development as a field is a conceptual mistake and that “there is no uniquely unifying basis upon which to construct a “field” and no way to draw conceptual

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\(^{106}\) Optimists versus Skeptics. at p 8

\(^{107}\) A broader discussion is found in Duncan Kennedy, “Three Globalizations of Legal Thought: 1850-2000” in Critical Appraisal. See also, David Trubek, “Max Weber on Law and the Rise of Capitalism” 1972 Wis L Rev 720-753

\(^{108}\) The challenging nature of defining what it means for something to be a scholarly field and resolving the status of Law & Development is routinely recognized by leading scholars. See, for instance, David M Trubek in “Law and development: Forty years after ‘Scholars in Self-Estrangement’, “ University of Toronto Law Journal 66(3), p. 302.
boundaries to delimit it.” Tamanaha’s emphasis on distinguishing among “the multitude of countries around the world targeted for law and development projects” is certainly welcome. However, as examined later in this section, the focus on donor-funded projects as the central site of the Law & Development field is limiting. Instead, as a working premise sufficient for current purposes, one might accept a compromise whereby Law & Development although inchoate remains a “ripe field for academic research”.

The First Wave of Law & Development scholarship was a relatively modest endeavor, which a leading scholar describes as “a small band of liberal lawyers …. [who] sought to interest development agencies in the importance of legal reform.” According to that same scholar, the research agenda was instrumental and heavily influenced by the need to justify legal development activities already occurring in practice. A more recent critique portrays the “liberal lawyers” of the first wave as ultimately motivated by social ambitions. Certainly, most participants in the first wave self-identified as part of the larger Law and Society movement within the American legal academy. Ultimately, the first wave of Law & Development was discredited by practical experience and policy shifts as donors turned their attention elsewhere.

David Trubek and Tom Ginsburg both locate the origin of a Law & Development Second Wave in the winding down of the Cold War in the late 1980s and early 1990s. For Trubek what is significant is the resilience of “the project of democracy”

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111 both of these conclusions are developed below
115 Bryant G. Garth and Yves Dezalay The Internationalization of Palace Wars: Lawyers, Economists, and the ... (Chicago University Press: Chicago, 2002).
117 Trubek, "The 'Rule of Law' in Development Assistance: Past, Present, and Future"
and “the project of markets” which characterized that particular moment. Ginsburg describes “the lingering importance of the underlying questions” as providing “momentum to a new wave of law and development activities on a far larger scale than ever before.” Another explanation for Law & Development’s re-birth is Kerry Rittich’s observation that increased interest in social dimensions of development, including governance and by extension law, was in part a product of the World Bank’s strategic shift from project-based to policy-based lending. Indeed, rule of law programs championed by technocrats and launched from within the Bretton Woods institutions have been an important part of Law & Development’s second wave. At the same time, the Second Wave has not been without critics who argue that it has been unable to avoid many of the intellectual cul-de-sacs that marked the end of the First Wave. Trubek for example observes a persistent focus on the administration of justice; undue emphasis on contract and property laws; obstinate attempts at legal transplantation; and, the naïve belief in a single “rule of law.” Clearly, rule of law is hardly a “development panacea” – as noted rhetorically by Duncan Kennedy -- and attempts to reduce it to an easily transferable technology are bound to fail. While the relationship between law and development are complex – and it would appear not fully accounted for by any one approach – the following introduces the ‘institutional turn’ as a promising direction in the scholarship.

Two aspects of the debate about Second Wave Law and Development are particularly important for current purposes. First, Trubek identifies three broad factors

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122 Trubek, "The 'Rule of Law' in Development Assistance: Past, Present, and Future"; Ginsburg
123 David M. Trubek and Alvaro Santos eds., The New Law and Economic Development: A Critical Appraisal (Cambridge, U.K.: Cambridge University Press, 2006). In particular, both Trubek and Rittich appear to take the position that the World Bank’s governance turn …
124 See Trubek, "Rule of Law".
126 The premise is that the critiques need not invalidate Law & Development’s underlying reform project of improved policy and thus, in due course, improved development outcomes
that have been critical to the movement’s relative staying power: the relative sophistication of legal academia generally and the trend towards interdisciplinary studies in particular; the recognition of a need to distinguish and even to choose between scholarly and policy audiences; and the rise in interest amongst students, which led to increased space for teaching and writing.\textsuperscript{127} Second, Michael Trebilcock has argued persuasively that increasing optimism about institutional theories of development opens up new spaces for Law & Development interventions.\textsuperscript{128} Rather than assuming sufficient institutional capacity, the resulting “Institutional Law & Development” should use insights from the New Institutional Economics (NIE) literature to integrate consideration of institutional constraints in developing countries into analysis of legal reforms.\textsuperscript{129}

Although some scholars have suggested that Institutional Law & Development marks a ‘Third Wave’,\textsuperscript{130} the current chapter uses this term merely to highlight a break with Trubek’s criticisms noted in the previous paragraph.

Dani Rodrik’s writing about the relative lack of results from the so-called Washington Consensus provides a specific example of the turn towards institutions by development economists.\textsuperscript{131} Rodrik argued, for instance, that “[w]hat has become clearer to practitioners of the Washington Consensus over time is that the standard policy reforms did not produce lasting effects if the background institutional conditions were

\textsuperscript{127} Trubek, "The ‘Rule of Law’ in Development Assistance: Past, Present, and Future" 313-316
\textsuperscript{128} Trebilcock and Prado, \textit{What Makes Poor Countries Poor}. Trebilcock and Prado use the concept of “institutional design”. This chapter aspires to borrow from their work, I remain unsure about the suggestion that institutions can be designed. I suggest instead a call for “programming design” whereby reform interventions are to the greatest extent possible sympathetic to historical legacies, plugged-in to local knowledge, and sufficiently flexible to the exigencies of local institutions.
\textsuperscript{130} At least one scholar has recently argued that this focus on institutions appears is a new, third wave and is increasingly recognized as such by other scholars in the field. Yong-Shik Lee “Call for a New Analytical Model for Law and Development” \textit{Law and Development Review}. Volume 8, Issue 1, Pages 1–67, p 22. See also, Owen Fiss “Trebilcock's Heresy” in \textit{University of Toronto Law Journal} Volume 60, Issue 2, spring 2010
poor.”

Concurrently, there is a line of scholarship beginning in the mid to late 1990s questioning the relationship between corruption and slow economic growth. For instance, World Bank economist Paulo Mauro empirically demonstrated that high rates of bribery have a negative impact on economic growth. Subsequently, university-based political scientists began re-framing the debate around questions such as why corruption should be more widespread in some countries than others. One Law & Development scholar describes this non-legal scholarship as leading to an increased appreciation of the “complex and causally bi-directional relationship between corruption and development.”

Despite increased recognition of corruption, especially in developing countries, as a problem to be addressed by transnational initiatives, finding a legal solution has been difficult. Although not identical, this maps with the insight from new institutional economics that while per the seminal work of North, cited above, “institutions matter” -- developing countries suffer from dysfunctional institutions -- but policy makers and academics have failed to crack the code of generating functional institutions.

One important attempt to generate functional institutions has been a proliferation of transparency initiatives, especially in the extractive industries. This has included supply-chain certification schemes, such as the Kimberley Process, and the funding of inter-governmental organizations for the exchange of best practices like the International Council on Mining and Metals. PWYP Rules, such as Canada’s ESTMA as well as the EITI provide another example. In fact, PWYP Rules are both relevant to the intellectual

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chestnut of generating functional institutions in developing countries and they involve a significant legal dimension, which brings us back to the relationship between law and development. Yet, until recently Law & Development scholarship has had relatively little to say about PWYP Rules. For instance, reviewing the field of Institutional Law & Development in 2011, Trebilcock addresses the EITI only briefly and concludes that “how effective such a voluntary initiative is likely to prove remains to be tested by experience.” In the last two years, however, a number of studies have been published that attempt to ascertain the relationship between participation in the EITI and development outcomes. This work and its implications for Canadian PWYP is considered in Chapter 3, which aims to identify the strengths and weaknesses of both this new legal strategy and the specific law in Canada. I will examine how a particular form of disclosure obligations related to industries with a heightened bribery risk might impact not only firms, i.e. the supply side of bribery, but also, foreign officials and the broader demand side of bribery. This section thus establishes a framework for realist questions about whether there is a strong, unified explanation for expending (by definition, finite) additional resources on bribery of foreign officials? The answer, as explored in the following section’s case study, is that this development in Canadian law instead appears to be a product of multiple and sometimes under-theorized motivations wherein development plays an increasingly important role.

III: Payment Transparency & Resource Institutions

137 Trebilcock and Prado, What Makes Poor Countries Poor, p 191. The more recent Advanced Introduction to Law & Development identifies but does not seek to explicitly evaluate the EITI. See, Trebilcock and Prado, Law & Development, p 161. The issue of whether the EITI is voluntary is considered elsewhere in thesis. The notion that Law & Development scholarship has not considered PWYP is echoed by a recent UofT Law thesis. Patrícia Galvão Ferreira “Breaking the Weak Governance Curse: Global Regulation and Governance Reform in Resource-Rich Developing Countries” at p 125.


139 As noted in the introduction, commentators on Canadian law have to date not considered ESTMA and thus concluded that the law is purely focused on the supply of bribes.
Although there is a general consensus that natural resources have been a “blessing” along Canada’s development pathway, many developing states have actually experienced an inverse relationship. This phenomenon where abundant natural resources often correspond with weakened economic growth is frequently referred to as a “resource curse”. It is the subject of a voluminous scholarly literature and in the last decade has become a significant concern amongst international development stakeholders. Concurrently, starting with the 2008 United Nations Guiding Principles on Business and Human Rights (Ruggie Principles) and the 2010 United Nations Global Compact (UNGC) certain aspects of development are increasingly understood as a responsibility of the transnational firms that invest in developing states. And, this pattern is especially visible in the case of transnational firms dealing in natural resources. Despite these emerging discourses oriented towards binding forms of corporate responsibility, the role of home-country domestic law in addressing issues of international development has

140 The seminal study is Harold Innis The Fur Trade in Canada: An Introduction to Canadian Economic History (Toronto: University of Toronto Press, 1999). See also, Melville Watkins “A Staple Theory of Economic Growth” (1963) 29:2 CJEPS 141. This intellectual tradition is discussed briefly in the conclusion. For a current application of the resource curse literature to Canada’s recent experience, see Alan H. Gelb “Should Canada Worry About a Resource Curse?” (2014) 7:2 SSP Research Papers, University of Calgary.

141 Gelb argues that “Canada’s plentiful resources are an indisputable blessing”. See Alan H. Gelb “Should Canada Worry About a Resource Curse?” (2014) 7:2 SSP Research Papers, University of Calgary.

142 In terms of what qualifies as a ‘developing state’, I propose to use this term as a catch-all for countries that have not joined the OECD. Although the use of OECD membership as a dividing line is not perfect, it distinguishes between ‘developed states’, i.e. OECD members, involved in reciprocal exchanges regarding institutional best practices, and developing states which merely receive related advice from organizations such as the World Bank. The distinction is relevant because payment transparency initiatives have taken two forms depending on whether the country in question is ‘developing’ or ‘developed’.

143 For an authoritative perspective on concern about the resource curse amongst international development stakeholders, e.g. states, granting agencies, and policy originators, see Paul Collier “Laws and Codes for the Resource Curse” (2008) 11:1 YRDLJ 9.

144 The Ruggie Principles contemplate as the second of three pillars a corporate responsibility to respect the rights and interests of local communities in host states.

145 Barrick Gold Corporation for instance, which is headquartered in Toronto and listed on the Toronto Stock Exchange (TSX) Main Board, issues an annual Responsibility Report pursuant to standards devised by the UNGC Global Reporting Initiative (GRI) G4 Standards and principles articulated through the International Council on Mining and Metals (ICMM).
historically been minimal. The payment transparency initiatives – often referred to as “Publish What You Pay” (PWYP) – examined in detail in this chapter are both an example of the focus on extractive industries and a notable exception to the abiding absence of home-country regulation of transnational firms. And, the recently legislated Extractive Sector Transparency Measures Act (ESTMA) would therefore appear to raise questions about whether and in what circumstances Canadian domestic law is compatible with international development objectives. However, that conversation remains at a preliminary stage.

In light of the intersecting research and norms hinted at above, the current chapter develops preliminary hypotheses about how ESTMA may impact the development pathways of a specific foreign state while also identifying questions for future research. The method may be viewed as two-fold. I draw on and critically analyze scholarship on the resource curse and earlier forms of PWYP, i.e. the Extractive Industries Transparency Initiative, in the context of key insights from the Institutional Law & Development framework introduced in the previous chapter. This is complemented by developing a case-study of the Republic of the Union of Myanmar (Myanmar).

146 While liberal post-World War II development initiatives have prioritized economic mechanisms, as surveyed in the preceding chapter the influence of New Institutional Economics (NIE) opened a door to examining legal mechanisms in terms of economic growth. This shift in thinking overlaps with a post-Cold War focus amongst policy elites on domestic governance in developing states; however, the ‘turn’ towards using the domestic law of capital exporting states to pursue development abroad is still more recent. Some scholars argue that international human rights law imposes development-related duties on the home states of transnational firms in the extractive industries. See, Penelope Simons and Audrey Macklin, _The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage_ (London: Routledge, 2014).

147 This is perhaps in part because the law itself is still novel and there is thus limited data. The considerable global governance scholarship on payment transparency tends to focus on the emergence of international standards, such as through the EITI. As noted previously, much less has been written on the EITI from the perspective of law and development. This gap in the literature is even more acute when considering home-state payment transparency laws: no such publications exist on the Canadian law.

148 The first disclosures under ESTMA were made in May 2017, but the relevant deadline has yet to be triggered for the large majority of covered firms. As such, the existing data is incomplete for the purposes of an empirical analysis. This chapter focuses on conceptualizing potential approaches to conducting such research while at the same time seeking to draw on the research that has been done regarding other PWYP initiatives.

149 On terminology, although the intervening circumstances of electoral suppression are highly regrettable, the country’s name was officially changed from ‘Burma’ to ‘Myanmar’ in 1989 as recognized by the United Nations and the Association of Southeast Asia Nations as well as other
Myanmar provides a pertinent point of reference as it is both rich in minerals – as well as many other natural resources – and a priority recipient of Canadian development assistance. Indeed, as reform-era leaders in Myanmar persistently articulate the goal of becoming a “Middle Income Country” by 2030, a Myanmar-based political scientist has recently written that:

“[t]he country is rich in natural resources which, until now, have been exploited for the personal gain of the military elite and their business allies and, in regions where resources were controlled by non-state armed groups, to bankroll conflict. More open and equitable governance of those resources could provide a sound basis for the development of both Myanmar’s economy and its new democratic institutions …”

Put slightly differently, as almost all sanctions have been lifted and Western political leaders appear content to feign ignorance in the face of increasing sectarian violence, significant investment in Myanmar, especially in the mining sector, is highly likely. But, as suggested in the preceding chapter, the turn towards Institutional Law & Development has raised questions about how a developing state, such as Myanmar, which has limited capacity, can hope to generate functional institutions so that said institutions can effectively mediate the investment-growth relationship. In short: the academic research does not offer simple solutions for a poor country, such as Myanmar, seeking economic growth.

My analysis of Myanmar’s case will propose the following argument: payment transparency is hardly a magic bullet but it is one potentially meaningful tool for addressing dysfunctional ‘Resource Institutions’, which are highlighted by recent international organizations. Myanmar is used throughout except when ‘Burma’ or ‘Burmese’ is associated with a specific organization or ideology.

150 See generally, Katherine J. LaJeunesse Connette et al, (2016) 8:11 "Assessment of Mining Extent and Expansion in Myanmar Based on Freely-Available Satellite Imagery" Remote Sensing 912. (Canadian FDI in Myanmar-based mining is currently limited but – for a variety of reasons that are addressed below – this appears likely to change in the short to medium-term.)


152 In the case of Canada, sanctions were implemented through the Special Economic Measures Act and regulations thereunder.

153 This first step – i.e. the creation of functional institutions – is neither fully understood nor easily achieved. See, Mariana Prado and Michael Trebilcock (2009) 59.3 “Path Dependence, Development, and the Dynamics of Institutional Reform” University of Toronto Law Journal 341 at 351.
empirical scholarship on the resource cure; and, to the extent that a capacity-constrained developing state such as Myanmar struggles to implement payment transparency through the EITI, the ESTMA offers a safe-guard. It is in this context – which is to say that it is less bad than the other available strategies – that payment transparency continues to be a moderately promising strategy for reforming specific Resource Institutions.

The chapter proceeds as follows: First, it critically examines the key instruments and provisions of the ‘ESTMA Scheme’, which creates a legally binding obligation that can be usefully characterized as a ‘PWYP Rule’. Second, it analyzes the resource curse scholarship and the implications that resource-rich developing countries must focus on improving ‘Resource Institutions’. Third, it applies the Institutional Law & Development concepts of path dependency, rent-seeking, and sequencing to focus on revenue collection in Myanmar – as a specific Resource Institution – that urgently requires reform. Fourth, it examines Myanmar’s experience with the Extractive Industry EITI and the limited quantitative research on the EITI’s impact in other developing states. Finally, the chapter identifies two specific questions for future research. First, in what ways is the ESTMA Scheme complementary to efforts taken by developing states to generate a domestic PWYP Rule?154 Second, in the specific case of Myanmar: after an appropriate period of time, will future empirical research strengthen the proposition that payment transparency boosts revenue collection efficiency, and what kind of research methodology would be most valuable in this regard?

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A proviso is warranted at the outset. As a central component of payment transparency the notion of disclosure invokes a literature on specifically financial disclosure.155 This scholarship tells us that while increased disclosure is likely to be

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154 [Note to draft: because the first disclosure will be made under ESTMA in the coming months, there is currently no empirical data to draw on. As such, this chapter’s analysis is largely focused on potential approaches to conducting such research while at the same time seeking to draw on the research that has been done regarding other PWYP initiatives.

155 Christian Leuz and Robert E. Verrecchia “The Economic Consequences of Increased Disclosure” (2000) 38 Journal of Accounting Research 91. While the corporate literature on disclosure has proposed formal models for how increased information symmetry between those inside the firm and those outside the firm facilitates the firm’s ability to issue securities and consequently lowers the cost of capital, Leuz and Verrecchia note that “while the theory is
popular amongst activists, expected benefits should be balanced against costs.\textsuperscript{156} The costs of PWYP for Canadian firms will not be cheap: almost all firms will have to engage professional advisors, and many firms will feel themselves, in terms of sharing strategically sensitive information, to be disadvantaged vis a vis competitors from non-PWYP jurisdictions.\textsuperscript{157} There are also costs for the Canadian government. This chapter, however, is limited to the first part of the analysis, which is to say identifying whether and in what ways benefits can be expected, especially in the context of international development.\textsuperscript{158} Or, to use the terminology of New Institutional Economics, in what ways might Canadian PWYP provoke “positive feedback effects”\textsuperscript{159} in developing states?

### III.A. Canadian Payment Transparency Law: The ESTMA Scheme

This section critically examines the key instruments and provisions of ESTMA as creating a legally binding obligation that can be usefully characterized as a PWYP Rule. In addition to the 2015 \textit{Extractive Sector Transparency Measures Act}, the ESTMA compelling, so far empirical results relating increased levels of disclosure to measurable economic benefits have been mixed.\textsuperscript{91} \textit{Discussed throughout}. Their research supports the proposition that the mixed empirical results are a product of data sets from jurisdictions, such as the United States, with \textit{status quo ante} high levels of financial disclosure. In contrast, they find that increased disclosure at German firms, with lower starting levels of disclosure, result in increased ability to issue securities and consequently in lowered costs of capital.\textsuperscript{156} Benjamin E. Hermalin and Michael S. Weisbach, "Information disclosure and corporate governance" 2012 67.1 \textit{The Journal of Finance}. Hermalin and Weisbach identify increased costs a) stemming from direct compliance, b) sharing proprietary information with competitors, and c) “through the governance channel”.

\textsuperscript{157}Carl D. Hughes and Oliver Pendred, "Let’s be Clear: Compliance with New Transparency Requirements is Going to be Challenging for Resource Companies" (2014) 7.1 \textit{Journal of World Energy, Law & Business}. In terms of costs, it bears noting that the designated regulator in the United Kingdom – i.e. Company House – has undertaken to ascertain the costs associated with home state PWYP rules. In Canada, the federal government, through the Ministry of Natural Resources, has not made anything public in this regard.

\textsuperscript{158} One other context in which benefits may be appreciable is in terms of reputational protection for “best in class” extractives firms. See, Alexandra Gillies, "Reputational concerns and the emergence of oil sector transparency as an international norm" (2010) 54.1 \textit{International Studies Quarterly} 103.

\textsuperscript{159} Paul A. David, "Why are institutions the ‘carriers of history’?: Path dependence and the evolution of conventions, organizations and institutions" 1994 5.2 \textit{Structural change and economic dynamics} 205-220, 213.
Scheme examined in this section includes administrative guidance issued from time to time by the Canadian Ministry of Natural Resources.\textsuperscript{160} It provides answers to basic questions about the content of the law, such as what types of firms should expect to be covered and what obligations are created, that serve as a foundation for analysis in subsequent sections.

Pursuant to ESTMA S. 2, S. 8, and S. 10 only certain types of firms, which are usefully described as ESTMA Reporting Entities, have obligations under the Act. In order to ascertain whether a firm is an ESTMA Reporting Entity, the Act mandates a two-stage analysis as explained by NR-Can in subsequent administrative guidance:

Only a business that is an Entity for purposes of the Act can be required to report payments under the Act. However, merely being an Entity under the Act does not automatically mean that a business will have to report payments. Your business must also be a Reporting Entity to be required to report payments under the Act.\textsuperscript{161}

Thus, the first stage is to ascertain whether the relevant firm is an “ESTMA Entity”, which is a defined term in S. 2 of ESTMA, as below:

\textit{“entity” means a corporation or a trust, partnership or other unincorporated organization}

\begin{itemize}
  \item \textbf{(a)} that is engaged in the commercial development of oil, gas or minerals in Canada or elsewhere; or
  \item \textbf{(b)} that controls a corporation or a trust, partnership or other unincorporated organization that is engaged in the commercial development of oil, gas or minerals in Canada or elsewhere. (entité)”
\end{itemize}

This definition has, however, left room for not insignificant uncertainty. For instance, questions have been raised about the meaning of the term “other unincorporated organization”.\textsuperscript{162} NR-Can has responded to this concern by stating that:

\textsuperscript{160} The documents are: first, guidance with general information on who is subject to \textit{ESTMA}, which entities must report payments under the Act, and what payments should be reported under \textit{ESTMA} (ESTMA Guidance); second, technical reporting specifications providing information on the mechanics of reporting under \textit{ESTMA} (ESTMA Technical Specifications); and third, a template for reports under \textit{ESTMA} (ESTMA Reporting Template). There are to-date no regulations under \textit{ESTMA}.
\textsuperscript{161} ESTMA Guidance; p 7
\textsuperscript{162} ESTMA Guidance
These four categories of enterprises are intended to be broadly interpreted and extend to similar forms of business organizations, both within and outside Canada. For example, these categories include unlimited liability corporations, limited partnerships and royalty trusts. Further, foreign corporations, trusts, partnerships or unincorporated entities, in whatever form, may be Ententities subject to the Act. The Act may also apply to business organizations that are owned or controlled by domestic or foreign governments (e.g. crown corporations or state-owned enterprises).

Therefore, the use of the term “other unincorporated organization” appears to stem from a desire to cast a wide-net aimed at catching forms of business organization that are used in foreign jurisdictions but are unusual under Canadian law. The NRCAN Guidance further states that for the purpose of ESTMA individuals and sole-proprietorships are not captured by either this term or the over-arching concept of an ESTMA Entity. The term ESTMA Entity is thus expected to be applied broadly, in the first instance, to include almost all forms of business organizations, provided that the criteria in (a) or (b) are satisfied.

Turning to the criteria under (a), three further tests for ascertaining whether a firm is an ESTMA Entity are introduced: the ESTMA Entity Commercial Development Test; the ESTMA Entity Extractive Industry Test; and the ESTMA Entity Geography Test. They are considered in course.

The term “commercial development” is defined through S. 2 of ESTMA, which states that

“commercial development of oil, gas or minerals mean
(a) the exploration or extraction of oil, gas or minerals;
(b) the acquisition or holding of a permit, licence, lease or any other authorization to carry out any of the activities referred to in paragraph (a); or
(c) any other prescribed activities in relation to oil, gas or minerals.”

Based on this definition, “commercial development” encompasses not only exploration but also, in certain circumstances, acquiring or holding a permit, licence, lease, or any other authorization to conduct said exploration. However, overall, the ESTMA Entity

163 However, according to the NR-Can Guidance, whether a particular firm is engaged in said commercial development depends on the specific facts, and firms themselves are expected to be in the best position to make that determination. In general, firms that provide goods or services
Commercial Development Test is highly inclusive. Subject to the limitations imposed through the second-stage of the Reporting Entity analysis, a Canadian company listed on the Toronto Stock Exchange–Venture Board and prospecting for minerals in Myanmar would \textit{prima facie} qualify as engaged in commercial development.

The ESTMA Entity Extractive Industry Test is perhaps the most important limitation on the scope of the term Entity. According to the plain text, the firm’s business activities must pertain to “oil, gas or minerals”. This excludes at least two additional types of business activity that are often associated with natural resource extraction. The first is forestry, which continues to be an important part of the Canadian economy and has attracted considerable attention in Myanmar. The second is agriculture generally including the fishing industry. This distinction between extractive industries, i.e. the commercial development of oil, gas, and minerals, and the colloquial usage of natural resources as including lumber and fisheries is considered in the later section on the resource curse literature.

Third, the ESTMA Entity Geography Test is \textit{prima facie} completely open-ended as it captures activities in either “Canada or elsewhere”. The apparent implication is highlighted by considering the application of this test under (b), which purports to capture an “other unincorporated organization” that “controls” a firm that satisfies these three tests. The result, as noted by business law practitioners, is a circle whereby any firm anywhere in the world qualifies as an entity so long as it controls a firm engaged in commercial development in the extractives industry.\footnote{Eden Oliver, Richard Stone, “ESTMA Compliance – Will you be ready when the time comes?” (13 April 2016) online: Bennett Jones LLP \url{https://www.bennettjones.com}} NR-Can has responded by inserting a declaration into the Guidance stating that:

\begin{quote}
The Act does not have extra-territorial application to businesses that are not subject to Canadian law. Businesses that are not subject to Canadian law, but may have subsidiaries operating in Canada, are not subject to the Act by virtue of their ownership of or interests in any Canadian subsidiary businesses, even if the subsidiary itself is a Reporting Entity.
\end{quote}

associated with or related to commercial development are unlikely to be Entities. And, contractors providing goods or services associated with or in relation to commercial development by another firm that holds the principal permit, licence, lease or other authorization to carry out such activities would not be considered to be Entities by virtue of contractual arrangements therewith.
The NR-Can Guidance is not a source of law; however, it is worth noting that this issue is also disposed of through the criteria for qualifying as a Reporting Entity. The broader implication is that the scope of the term Entity is very wide and it is therefore appropriate to look at the second stage of the Reporting Entity analysis to fully ascertain who has obligations under the Act.

Only some Entities qualify as Reporting Entities thus becoming subject to legal obligations under ESTMA. In order to ascertain whether an Entity qualifies as a Reporting Entity, S. 8 is of critical importance. Unlike the securities regulation approach under consideration in the United States, ESTMA is not limited to reporting issuers. Instead being a reporting issuer in Canada is only the first of three avenues through which an Entity becomes a Reporting Entity. The second avenue is that of administrative jurisdiction pursuant to S. 8(3). Finally, the third and most complicated road to becoming a Reporting Entity is established in S. 8(2).

S. 8(2) establishes that an Entity will be a Reporting Entity if, based on its consolidated financial statements, it meets two or more of the following conditions for at least one of its two most recent financial years: (i) it has at least $20 million in assets; (ii) it has generated at least $40 million in revenue; and, (iii) it employs an average of at least 250 employees. A general consequence is that at least some Canadian firms will experience on-going, annual uncertainty as to whether they qualify as Reporting Entities based on factors such as fixed asset valuation and exchange rates. In terms of Canadian firms operating in Myanmar, or in almost any other developing jurisdiction, for that matter, the typical pattern in the mining industry would be for the firm to have gone public prior to establishing significant local operations and thus to have become a reporting issuer. However, where that is not the case, the above de minimis requirements would have to be achieved before the Entity would become a Reporting Entity. In the case of a mining business at the exploration stage, it would be unusual for any one of the above tests to be triggered let alone two of the three. S. 8(2) further sets out that the

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Entity must either have a place of business in Canada, do business in Canada, or have assets in Canada.

As a general rule, it is therefore possible to conclude that the following three types of firms operating in the extractive industries will qualify as Reporting Entities: Canadian reporting issuers; medium and large firms engaged in the commercial development of oil, gas or minerals in Canada; and medium and large firms that have a place of business in Canada, do business in Canada or have assets in Canada and engage in the commercial development of oil, gas or minerals anywhere or control an entity that is engaged in the commercial development of oil, gas or minerals anywhere.

A further noteworthy characteristic of ESTMA is the substitution provision in S. 10. In parallel to legislation in the United Kingdom, the United States, and elsewhere, this provision grants NR-Can discretion to waive the ESTMA Report obligation where a Reporting Entity has fulfilled the reporting requirements of another, equivalent jurisdiction. Considering that a significant number of medium and large-sized Canadian firms are cross-listed in the United Kingdom and even more so in the United States, an empirical issue will emerge as to which jurisdiction becomes the primary regulator. This is beyond the scope of the current paper.

What Obligations? ESTMA Reports

As the operative provision of the Act, S. 9 establishes the transparency obligations of Reporting Entities. S. 9.1 establishes the obligation to issue an ESTMA Report not later than 150 days after the end of the relevant financial year. S. 9.2 sets out the type of “Payment” that is to be included in the ESTMA Report, i.e. those above CDN 100,000 on a project basis.\(^{166}\) By definition, a Payment is made to a “Payee”, which is to say a public body in Canada or abroad. Furthermore, S. 2.1\(^{167}\) establishes a closed-list of only two formats to be used in the preparation of ESTMA Reports, either XLS format or PDF format. Both XLS, which was used by Microsoft Excel between 2002 and 2007, and PDF are proprietary and by definition not meant to facilitate the movement of data. Rather the

\(^{166}\) The term “Payment” is defined in significant detail in the Act: it includes monetary or in kind transactions, to an employee or public office holder of a payee is deemed to have been made to the payee; valuation to entity or fair market value.

\(^{167}\) Extractive Sector Transparency Measures Act Technical Reporting Specifications
Selling point is data security. S. 2.4 establishes certain parameters regarding the publication of ESTMA Reports. Reporting Entities must publish “on the Internet so they [ESTMA Reports] are available to the public.” The expectation appears to be that each Reporting Entity will create a webpage on its public-facing website for the publication of ESTMA Reports.

By way of conclusion, certain particularities of the ESTMA Reporting Obligation are most apparent through comparison with other home country PWYP legislative schemes. First, unlike the US and UK legislation, which require disclosure of payments to foreign governments only, the term Payee in ESTMA is defined through an open-list that includes: first, a government whether in Canada or in a foreign state; second, “a body that is established by two or more governments”, which would appear to be a reference to international organizations; and third, a wide range of public bodies and bodies carrying out public functions, which results in payments to aboriginal bands being covered but also presumably to state-owned enterprises. This is an issue of significant importance in the context of Myanmar.

A second particularity is that, unlike the securities regulation approach taken in the United States, ESTMA is not limited to reporting issuers. ESTMA thus captures a broad range of beneficiaries and entities in comparison to other host-country PWYP legislative schemes. However, the absence of an experienced regulator and uncertainty about how data will be accessed, let alone distributed, suggests that the Canadian scheme is far from perfect. All three of these legislative schemes (Canadian, British, and American), once entered into force, do however succeed in establishing a “PWYP Rule”:

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168 This admittedly dry subject actually amounts to the distinction between digital and paper data. Considering the significant expenditures and professional advice that will be necessary to comply with ESTMA, it is not clear why NRCan did not go the extra step to require all Reporting Entities to use industry best practices.

169 This will be suitable for those interested in the disclosure of a particular, pre-identified firm. However, the implication is that ESTMA Reports will not be grouped together in a single location. There is also no expectation that NR-Can will create a database or other mechanism for searching the contents of ESTMA Reports. Questions therefore remain about how accessible the data will truly be.

170 The inclusion of international organizations merely mirrors the approach taken in the CFPOA.

171 Section … of … specifies “ any trust, board, commission, corporation or body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government referred to in paragraph (a) or a body referred to in paragraph (b).
i.e. covered firms have a positive legal obligation to make disclosure of certain information through an established mechanism.

III.B. Extractive Industry Investment: From Curse To Risk

This section examines scholarship on the so-called resource curse and its implications for revenue collection and by extension payment transparency. Paul Collier, a leading development economist, has described the resource curse as “the tendency for many low-income commodity exporters to experience slower economic growth than countries that are less well-endowed with resources [emphasis added].”\(^{172}\) On Collier’s definition, the focus is on measuring the relationship between rents from natural resources and economic growth.\(^{173}\) For current purposes, two particularly pertinent points emerge from the literature. First, development organizations and some scholars are susceptible to the inaccurate simplification, often based on out-dated research, of a “Resource Curse Paradigm” whereby excessive rents from natural resources automatically trigger a ‘curse’. Second, empirical critiques in the last decade have shed light on the importance of “Resource Institutions” and the possibility that the right combination thereof may lead to mitigation and even reversal of the problems putatively associated with extractive industry investment. There is still significant work to be done in identifying the exact identity and combination of these Resource Institutions. Early findings, however, suggest that revenue collection is a necessary, though not necessarily sufficient part, of this


\(^{173}\) However, there are at least two other streams of scholarship under the resource curse banner. In addition to reduced economic growth, heightened civil conflict and less-desirable forms of governance have also been observed to correspond with natural resource windfalls. Andrew Rosser, “The Political Economy of the Resource Curse: A Literature Survey” (2006) Working Paper No. 268, Brighton: Institute of Development Studies. On civil war, the leading scholarship is from Collier who finds that resource abundance is associated with the onset of civil war, and influences the duration and intensity of such conflicts. See Paul Collier and Anne Hoeffler, “The Political Economy of Secession” (2002) 23 December (Washington, DC: Development Research Group, World Bank). In terms of regime type, this would appear to have a rather direct inter-connection with the broad notion of weak governance and the more specific matrix of bribery. The focus here, however, is not on whether extractive industries aggravate bribery risks.
mix. There is thus measured optimism that the generation of functional resource collection institutions in a developing state, such as Myanmar, can contribute to facilitating the transformation of mineral and hydrocarbon FDI into sustained economic growth.

The notion of an economic resource curse can be traced back to post-World War II development economists Hans Singer and Raul Prebisch. Singer and Prebisch argued that long-term price trends would disadvantage countries that exported primary commodities and imported manufactured goods. The resulting “Prebisch-Singer hypothesis” has been used by proponents of dependency theory and import substitution industrialization. However, it has been argued that Singer and Prebisch were “radical” and that theirs was a minority view that ultimately had a minimal impact on the mainstream of development economics. As such, prior to the 1990s scholars generally accepted that natural resource abundance was advantageous for development. “A country's endowment of natural resources”, it was claimed, “will benefit its industrial development by providing domestic markets and investible funds for manufacturing industries, as well as materials for further transformation.”

The resource curse hypothesis entered mainstream development economics in the early 1990s. Later in that decade, Jeffrey Sachs and Andrew Warner published an empirical study which has become the seminal article in this field. Based on almost two decades of data from a wide cross-section of developing countries, Sachs and Warner

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174 [As well, although the project of reforming dysfunctional institutions into functional institutions is notoriously difficult, payment transparency is seen as amongst the most promising approaches. A condition needs to be added here: provided that the transparency satisfies a de minimis test for ‘effective transparency.’


176 See, Rábal Arezki, Thorvaldur Gylfason, and Amadou Sy, eds, Beyond the Curse: Policies to Harness the Power of Natural Resources (Washington, DC: International Monetary Fund, 2011). Harold Innis’ staples thesis, which is addressed briefly in the conclusion of this chapter, is often associated with dependency theory.


178 Bela Balassa The Process of Industrial Development and Alternative Development Strategies (Princeton: Princeton University Press, 1980), at 2. Balassa, however, notes that this endowment is a “mixed blessing” and references the cases of Venezuela and Mexico.

established an inverse relationship between natural resource exports and economic growth.\textsuperscript{180} Furthermore, the finding was robust as the inverse relationship remained statistically significantly even after controlling for additional variables, such as initial per capita income, foreign investment rates, and trade policy. According to another leading scholar in this field, Paul Collier, that inverse relationship has been confirmed by subsequent studies using a variety of research methodologies, i.e., case studies, cross-country regressions and panel data studies.\textsuperscript{181} Subsequently, a strong consensus emerged that developing countries with bountiful natural resources, measured in terms of export ratios, were likely to experience reduced economic growth.\textsuperscript{182}

The first major caveat to be attached to the empirical findings on the resource curse is the need to distinguish between “point source resources”, which typically include minerals, oil, and gas, and “non-point source resources” such as forestry and agriculture.\textsuperscript{183} This has also been discussed in terms of diffuse natural resources and non-diffuse natural resources. Regardless of the terminology, numerous studies have found that the risks associated with natural resource abundance are particularly acute in the case of oil, gas, and minerals.\textsuperscript{184} This maps with the scope of ESTMA.

As a result of the above scholarship, subsequent research has frequently posited weakened growth as a premise in order to focus on identifying reasons. By the mid-2000s, this ‘Resource Curse Paradigm’ had been neatly swallowed, digested and re-


\textsuperscript{182} At least one researcher has found that when export intensity is replaced by resource abundance, the negative effect on economic growth dissipates. See, J.-Ph.C. Stijns “Natural resource Abundance and Economic Growth Revisited” (2005) 30 Resources Policy 107. It bears noting that the scholarship focuses on export dependence rather than investment intensity.


\textsuperscript{184} Some of this scholarship uses the abundance and civil war frame. The borderline cases are agricultural commodities, such as cocoa and coffee, that are conducive to plantations. Xavier Sala-I-Martin et al., “Addressing the Natural Resource Curse: An Illustration from Nigeria.” 2003 IMF Working Paper WP/03/139; Erwin Bulte, et.al., “Resource Intensity, Institutions and Development,” 2005 World Development 33, no. 7, 1029-1044.
packaged by international development organizations. For instance, the United Kingdom’s Overseas Development Agency (‘ODA’) stated in 2006 that “[t]he ‘resource curse’ is the phenomena [sic] whereby a country with an export-driven, natural resources sector, generating large revenues for government, leads paradoxically to economic stagnation and political instability.” ODA’s experts thereby erased the distinction between a tendency or risk of unsatisfactory development outcomes, which is what the scholarship shows, and a cause-effect relationship as suggested by their own pithy formulation. This Resource Curse Paradigm, however, has had implications for scholarly inquiry as well as policy discourses. The following reviews pertinent economic and political theories as to why natural resource abundance has been observed to correspond so frequently with under-development.

A particularly prominent line of reasoning that seeks to explain cases of inverse correlation between natural resource rents and economic development is formulated as the ‘Dutch disease’. Early references to ‘Dutch disease’ go back to at least a 1982 article on the relationship between exploitation of natural gas deposits and decline of manufacturing in the Netherlands. On this economic theory, a surge in resource exports led to rising real exchange rates, which in turn made it more difficult for tradable sectors to compete. The Dutch disease therefor stands for the economic phenomenon whereby excessively high resource export to GDP ratios crowd out other sectors such as export-orientated manufacturing. In recent decades however, a discernable trend within the resource curse scholarship suggests a move away from purely economic explanations.

188 The recommendation of an investment moratorium cited above also appears to have internalized this basic mistake.
189 This theory of Dutch disease appears to underlie, for instance, calls for halting western-based investment in Myanmar’s mining, oil, and gas sectors.
This was well articulated by an early critique, which found that “most recent work on the relationship between natural resource abundance and economic performance has given much greater attention to the role of political variables in mediating this relationship.”\textsuperscript{190} Andrew Rosser goes on to argue that both economists and political scientists have thus tended, most recently, to focus on poor economic management as the immediate cause of under-development in resource-rich countries while continuing to disagree about the underlying causes thereof. In terms of economic mismanagement, issues of fiscal profligacy, overvalued exchange rates, excessive protection, and inefficient spending, have all been identified in the literature. This is the context for Collier’s 2008 policy intervention, which played a key role in driving the PWYP agenda, as examined in the following discussion.

In “Laws and Codes for the Resource Curse”, Collier reviews and synthesizes three particularly important criteria for understanding when a given developing country will suffer from an economic resource curse. First, there has to be a price boom, as was the case in most commodities during the first decade of the 21st century. Although the overall economy benefits in the years immediately following the boom, after about twenty years the effects are often highly adverse. Second, adverse effects do not follow booms in agricultural commodities, which qualify as non-point source resources” and distinguished from “point source resources” such as oil, gas, and minerals. The third qualification Collier observes in the data is that even in the case of poor countries, when they function above a threshold level of “governance” there are no adverse effects associated with exporting commodities during a price boom. When he turns to developing states that have been hit by the resource curse, Collier finds that they invariably failed to effectively collect revenues during commodity booms, and that this was caused by errors of human judgment, lack of training, and institutional weakness.\textsuperscript{191} This is the immediate context for expecting that more effective revenue collection, facilitated by participation in the EITI, might mitigate the tendency to squander windfall rents during commodity booms. Collier’s work has been influential and is associated with

\textsuperscript{190} Rosser (2006).
\textsuperscript{191} Collier, "Laws and Codes” See also, Paul Collier \textit{Plundered Planet} (Oxford: Oxford University Press: 2011).
the institutionalization of PWYP through the creation of the Extractive Industries Transparency Initiative (EITI).

While “Laws and Codes” is an example of sophisticated analysis within the Resource Curse Paradigm, other scholars have used new institutionalism or NIE to offer more fundamental critiques. Over the last decade, empirical results questioning the paradigm have grown in prominence. In 2006, quantitative analysis found that resource curse-afflicted countries actually suffer from grabber-friendly institutions while the existence of producer-friendly institutions facilitates resource-led growth.\textsuperscript{192} The following year, Anne Boschini and colleagues furnished further empirical support for a critique of the Resource Curse Paradigm. They found that: “the extent to which natural resources are good or bad for growth depends on their ‘appropriability’ in two dimensions.”\textsuperscript{193} Rather, their “results indicate that a sufficient improvement in institutional quality turns resource abundance into an asset rather than a curse.”\textsuperscript{194} In short, there is now empirical support for the view that provided sufficiently good institutions the resource curse is a risk to be mitigated rather than a paradox to be explained. As a result, the group’s later work notes, citing a colleague, that the Resource Curse Paradigm has become “widely accepted as one of the stylized facts of our times”\textsuperscript{195} but is in fact “far from inevitable”.\textsuperscript{196} Instead, scholars influenced by NIE have concluded that: “The key question is why resource rich economies, such as Botswana or Norway, are more successful while others perform badly despite their immense natural wealth.”\textsuperscript{197} But, to date, answers have proven elusive, and Boschini eventually acknowledges: “we

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\textsuperscript{193} Anne Boschini, Jan Pettersson, and Jesper Roine, “Resource Curse or Not: A Question of Appropriability” (2007) 109:3 Scandinavian Journal of Economics 593, 593. According to this research, the two factors are resource type but even more importantly quality of institutions.
\textsuperscript{194} Boschini, (2007), 614.
\textsuperscript{196} Boschini et al (2013) at 34.
\textsuperscript{197} Frederic van der Ploeg, “Natural Resources: Curse or Blessing?” (2011) 49:2 Journal of Economic Literature 366.
\end{flushleft}
do not answer it”. The following thus turns to introducing a potential avenue for future research towards more robust indications of the type of institutions needed to mitigate the resource curse risk.

Boscini, Pettersson, and Roine conduct empirical analyses on the “interaction effect” among three factors: primary exports, institutional quality, and time period. They do not, however, consider the discrete issue of revenue collection, although it appears quite relevant to their research. Until recently, NIE research on extractive industry revenue collection would have encountered methodological hurdles. Whereas Boscini et al use large data-sets such as ‘Polity’, which contain indexes of non-resource specific institutions such as property rights and expropriation risks, there has not necessarily been a data-set that was directly relevant to, for instance, revenue collection. This has recently changed, however, with the launch of the Resource Governance Index (RGI) by the EITI together with a sympathetic think-tank in 2013. In particular, the RGI addresses the collection, allocation, transfer and reporting of resource revenues. Whatsmore, Collier’s expectation that revenue collection might prove to be a Resource Institution capable of, or at least contributing to, mitigating the extractives risk is also expressed in contemporaneous policy reports by the World Bank. For instance, the 2009 Extractive Industries Value Chain describes a state’s ability to collect revenue as among the first forms of institutional capacity that must be developed for resources to lead to growth.

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198 Boschini et al (2013) at 34. The most significant finding is that stronger “property-rights institutions” correlate with improved growth especially in the case of bountiful minerals. Boschini et al (2013) at 31. Viewed from an alternative angle, this points to limits on expropriation as one criterion for institutions that can mitigate the resource curse risk. Although certainly noteworthy, the finding is tentative and incomplete.

199 Although not discussed further in this paper, the most significant finding in Boschini et al (2013) at 31 is that stronger “property-rights institutions” correlate with improved growth especially in the case of bountiful minerals. According to the authors, this points to limits on expropriation as one criterion for institutions that can mitigate the resource curse risk. While the authors’ finding about property-rights institutions as limits on expropriation raises the problem of rent-seeking, the notion of commodity booms points to the need for institutions that protect against rent-seeking in the collection of windfall revenues.

200 The think tank is the Revenue Watch Institute. See, Revenue Watch Institute, Resource Governance Index: A Measure of Transparency and Accountability in the Oil, Gas and Mining Sector (Revenue Watch Institute: London, 2013)

201 The ‘Institutional and Legal Setting’ component of the RGI appears particularly relevant. The RGI also distinguishes between mineral and hydrocarbon revenues, which connects with the tentative findings in “Potential Reversal” regarding expropriation and minerals.

202 Eleodoro Mayorga Alba, Extractive Industries Value Chain. (Washington: The World Bank,
As explored in the following section, this is highly relevant in Myanmar’s case where there is a tradition of parallel revenue collection by powerful individuals and ministries on behalf of the weak central state.

A basic premise of this chapter is that prospective Canadian mining FDI in Myanmar offers an opportunity for that country to strengthen its Resource Institutions, such as revenue collection, but that this is not without risks. Others have argued in more absolute terms that mining FDI in Myanmar should be suspended because it offers only a down-side. The locally-based development economist Stuart Paul Larkin, for instance, has written that “foreign investments into resource enclaves and the recycling of ‘resource rents’ earned by government elites into the country’s real estate and consumer imports boom may undermine its economic potential and perpetuate a ‘resource curse‘.” This prescription unfortunately reflects an unsupported simplification of the resource curse research, as reviewed above. Instead, there is an increasingly strong consensus around the idea that extractive industry investment poses a risk that must be mitigated through functional institutions. While there is still no strong data on exactly what combination of institutions will prove to be key in this regard, there is enthusiasm about focusing on revenue collection. And, the development policy community currently believes that payment transparency is the most promising approach to improved revenue collection institutions. There is however one caveat that is increasingly attached to this expectation: transparency must be “effective transparency.” The implications of this ambiguous diagnosis for mitigating the ‘resource curse’ are explored in the final subsection, in terms of Myanmar’s attempts to reform domestic institutions through the EITI.

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2009).

III.C. Path Dependency & Rent-Seeking in Myanmar

Following World War II and especially after the Vietnam War, certain countries in Southeast Asia have achieved significant economic growth on a per capita basis. Success stories include Singapore, Malaysia, and Thailand as well as Indonesia and Vietnam. However, Myanmar, has not been able to sustain development: isolated periods of economic growth have been largely erased by ensuing periods of political crisis and economic contraction. The resource curse literature examined in the preceding section – in particular, the links between excessive reliance on resource rents and dysfunctional Resource Institutions – provides one relatively strong departure point for understanding ‘why’ Myanmar has remained poor. This section begins to build on that knowledge as well as the insights from the field of Institutional Law & Development to address the more intellectually vexing question of ‘how’ the sustained economic growth envisioned by both domestic elites and foreign scholars might best be pursued. In this regard, the current section applies a political economy lens to review potential reforms to Resource Institutions in post-independence Myanmar. It thus connects the concepts of path dependency and rent-seeking as well as recent developments in the resource curse literature to Myanmar’s current challenges.

Myanmar’s modern history is categorized by the leading authorities as starting with the Kingdom of Burma’s annexation as a province of British India in 1886. Subsequently, the Burma delta became known as the breadbasket of the British Raj due to expansive, fertile plains in the Irrawady River delta, which were used to cultivate rice.

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204 Malaysia and Indonesia are perhaps most relevant to Myanmar in that they both have significant extractive industries. Although beyond the current scope, it has been useful to review the following literature on comparative, regional experiences. Benjamin K. Sovacool "The Political Economy of Oil and Gas in Southeast Asia: Heading Towards the Natural Resource Curse?" (2010) 23:2 The Pacific Review 225; Michael L. Ross, Timber Booms and Institutional Breakdown in Southeast Asia (Cambridge: Cambridge University Press, 2001); Andrew Rosser, "Escaping the Resource Curse: The Case of Indonesia" (2007) 37:1 Journal of Contemporary Asia 38.


206 In addition, it situates the recent embrace of growth orientated reforms as part of a broader political transition that remains tenuous.

for export throughout British India. And, “[a]s the cultivation of paddy land increased, Burma became the largest rice exporter in the world.” In contrast to standard accounts, the current chapter treats Myanmar’s modern history as starting at independence in 1947, which leads to a schema of four stages, i.e. independence, autarky, coup d’état, and the current era of tentative reforms.

At independence in 1947, the Union of Burma was the wealthiest country in Southeast Asia. It had prospered as an exporter of non-point source natural resources, especially rice, from the Irrawady delta. This had allowed for the emergence of a Burmar political class that looked to the future with optimism. But, the following 14 years witnessed intense social and political instability fuelled by both internal conflict – between the government and revolutionary movements linked with colonial-era immigrants – and the great power rivalry that was descending on Cold War Southeast Asia. In 1962, a military coup, led by General Ne Win, overthrew the civilian government and proclaimed a socialist regime thus launching the second period. The subsequent policy of autarky ushered in the intensification of a trend that persists to the current day: the army was used to assert the hegemony of Burmar elites over not just the fertile plains at the country’s geographic centre but also at the border regions inhabited predominantly by minorities. It was also at this time that indigenous groups living in the hilly north began to organize themselves into militias. For current purposes,

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212 Tarling Britain, Southeast Asia and the Onset of the Cold War p 194 – 209.
213 The Socialist Republic of the Union of Burma was only created in 1974.
214 One particularly notorious and tragic example of this pattern is the expulsion of Rohingya people. In 1978 a military operation was conducted against the Rohingya Muslims in Arakan, called the King Dragon operation, causing 250,000 Rohingya to flee to neighbouring Bangladesh.
215 The Kachin insurgency by the Kachin Independence Organisation (KIO) had begun earlier in 1961 triggered by a declaration of Buddhism as the state religion. The Shan State Army (SSA), however, launched its rebellion in 1964 as a direct consequence of the 1962 military coup.
communities such as Kachin and the Shan as well as the Wa are particularly important because they inhabit mineral rich territories.

In 1988 the death of Ne Win and incompetence of his successor led to protests by urban residents. And, the country was listed as a Least Developed Country (LDC) by the United Nation’s list of Least Developed Countries. This in turn provided an opportunity for a group within the military, i.e. the State Law and Order Restoration Council (SLORC), to stage a coup. Shortly thereafter, the SLORC announced that the country’s English name would be changed from Burma to Myanmar. Ostensibly, the primary motivation for this name change was to claim that the – Burmar dominated – military was acting on behalf of all citizens regardless of ethnic origin. This third period witnessed two further developments that are critical to understanding path-dependency and rent-seeking in Myanmar’s extractive industries: first, the military was encouraged to become financially self-sufficient; and second, foreign investment was actively solicited.

Under the SLORC, Myanmar was subject to increasingly comprehensive sanctions by first the U.S. and then allies such as Canada. In that vacuum, Thailand and China emerged as especially influential sources of financing to the army and its cronies. This resulted in cooperation between foreign and domestic rent-seekers who

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217 Nicholas J. Gardiner, et al "Tin Mining in Myanmar: Production and Potential" (2015) 46 Resources Policy 219. The Wa in particular occupy an area that is rich in tin; and, they have been used as a proxy by China for several decades.


219 In September 1987, Ne Win had abruptly cancelled certain currency notes, apparently due to simple superstition relating to lucky and unlucky numbers, which sent shock waves through Yangon and other urban centres. See, Joshua Kurlantzick, "Can Burma Reform?" (2002) Nov/Dec Foreign Affairs 133.


seized control of world-class deposits of gemstones, such as jade and rubies, as well as tropical hardwoods such as teak. Control over these particular resources commands such extravagantly high rents that extraction remained competitive despite a relative lack of capital, technology, and export markets. In fact, neither gemstones nor hard wood lumber are included in the main work program of the EITI in Myanmar. The Myanmar EITI does, however seek to promote transparency related to government revenue from hydrocarbons such as petroleum and gas as well as industrial use minerals such as coal, copper, lead, tin, & zinc in which Myanmar is wealthy. China began to sponsor certain related-projects at the end of the SLORC period, but over all extraction of these industrial metals was highly compromised by lack of capital and technology. Although certainly not the only reason for the SLORC regime to withdraw from public life and inaugurate the current period of reforms, anticipated investment in the extraction of these resources should not be underestimated as a motivating factor.

222 Notoriously, to the present day, Myanmar’s precious stones continue to be mined by small-scale, low technology operations that allegedly involve conditions tantamount to modern slavery. On jade in particular, see: Andrew C Marshall and Min Zayar Oo, “Myanmar’s old guard clings to $8 billion jade empire” (29 September 2013) Reuters Special Report, http://in.reuters.com/article/2013/10/01/myanmar-jade-idINDEE98S04J20131001; and Global Witness "Jade: Myanmar’s ‘Big State Secret’" (London: Global Witness, Oct 2015). Advocacy groups consistently argue that development funding and domestic reforms must tackle this bastion of impunity. The current government and the Myanmar state more generally are, on the other hand, fragile and it appears unrealistic to expect broad-based reforms to established operations. Certain caveats are noted below but in general this chapter leaves for another day the challenge of proposing a strategy for reforming mines that are controlled by war-lords, drug syndicates, and ethnic militia since they are also controlled by politically powerful networks.

223 In terms of teak, there has been a lot of action in this area recently with import sanctions being imposed by both Denmark and Sweden and it would appear that moving towards more sustainable forestry practices is highly desirable. But, lumber is generally excluded from the EITI framework and has not to-date been included in Myanmar’s efforts. Notably, an argument can be made that although forestry in general is not subject to the resource curse, as most types of lumber constitute a non-point source resource, in the case of precious hardwoods such as teak there is an increased bias towards point source terms of trade. In any case, the issue of lumber is left for a future intervention.


225 Amongst the complicated reasons for and expectations of these reforms, economic growth occupies a leading position. See for instance the following press report regarding policy coordination with the Asian Development Bank: http://www.mmmtimes.com/index.php/business/10123-adb-president-meets-with-u-thein-sein-pledges-support.html
The SLORC regime was successful in funneling rents to its core constituency, but inability to provide broader economic benefits and fear about the prospect of being dominated by China resulted in an inherently unstable grasp on power. This was exasperated by natural catastrophes such as hurricane Nargis, which marked a nadir for the regime’s relationship to civil society. In that context, a reform-orientated faction emerged within the junta led by General Thein Sein who subsequently, in early 2011, stood for and won election as Myanmar’s president in a civilian capacity. This initiated a political transition towards civilian rule, which would ultimately see long-time opposition leader Aung San Suu Kyi winning election.\footnote{In 2015, Aung San Suu Kyi lead the National League for Democracy (‘NLD’) to a landslide electoral victory and in 2016 the NLD formed a national government. For reasons beyond the scope of this essay, but which underline the tenuous nature of today’s reforms, Aung San Suu Kyi is constitutionally barred from serving as head of state.} It also began a diplomatic transition towards an attempt to use the United States as a counter-weight to China’s ascendant supremacy in the region.\footnote{A much discussed example of the move away from Chinese influence, and investment, has been the decision by first Thein Sein and later Aung San Suu Kyi to suspended construction of a Chinese-funded mega dam, i.e. the Myitsone Dam.} There have thus been attempts during this reform period to leverage Aung San Suu Kyi’s status as a ‘charismatic leader’ to interrupt the path dependency of collusion between domestic elites and foreign patrons in Myanmar’s extractive industries. But, the lack of domestic institutional capacity, which characterizes LDCs, makes the notion of sequencing particularly relevant.\footnote{Mariana Mota Prado and Michael Trebilcock. "Path Dependence, Development, and the Dynamics of Institutional Reform" (2009) 59:3 UTLJ 341.} Although the resource curse scholarship surveyed above has not been able to precisely identify a necessary basket of Resource Institutions, there is a strong expectation that revenue collection is something that must be addressed. Furthermore, as opposed to gemstones where there are entrenched incumbents, reforms pertaining to new projects, i.e. industrial minerals, will encounter less difficulty in aligning public and private incentives amongst Myanmar’s elites.\footnote{This strategy has been described as an institutional bypass. See, Mariana Mota Prado, , and Ana Carolina da Matta Chasin. "How Innovative was the Poupatempo Experience in Brazil? Institutional Bypass as a New Form of Institutional Change" (2012) 5:1 Brazilian Political Science Review 11.} In that context, the following section examines Myanmar’s experience with the Extractive Industry Transparency Initiative (EITI) as well as certain empirical work on the impact of the EITI in other developing states.
III.D. Limitations of Domestic Reform

Having identified potential benefits of improved Resource Institutions in reform-era Myanmar through the preceding two sections, this section turns to the more challenging issue of how to achieve institutional reform. In particular, it examines Myanmar’s efforts to reform its revenue collection institutions by increasing transparency. As noted by Brown, “[i]n late 2012, Myanmar’s government agreed to sign up to the EITI and work towards compliance with this global standard as a flagship reform.”230 Supporters of the EITI make wide-ranging claims about the benefits of transparency, and despite its origins in “Publish What You Pay” campaigns, the EITI’s mandate continues to expand beyond revenue collection.231 But, what can participation realistically offer Myanmar? To address that question, the following analyzes Myanmar’s first report and the agenda for its second report, which will likely be produced over the coming year. To provide a broader context, it also surveys the quantitative research on payment transparency for developing states more generally.

Clare Short, the current Chair of the EITI’s Board of Directors, has described the EITI’s *raison d’etre* as follows:

In the late 1990s and early 2000s, there was an expanding library of academic literature around the resource curse by such acolytes as Jeffrey Sachs, Joseph Stiglitz, Terry Lynn Karl and Paul Collier detailing how the huge potential benefits of oil, gas and mining were not being realized and …. each outlined remedies for addressing the curse, often noting that no single action would be capable of tackling all of these challenges.

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231 PWYP, Payment transparency, and the EITI all need to be located in a series of political deals triggered by Global Witness’ report titled “A Crude Awakening”, which sought to shame international oil companies active in Angola during that country’s decades-long civil war. An immediate consequence of the report was intense pressure on BP PLC whereby it ultimately offered to publish information about its payments to the Angolan government as a way of disavowing knowledge of corruption. Subsequently, in 2002 Global Witness joined a coalition of more than 30 non-governmental organizations, including Transparency International, in calling on governments to enact Publish What You Pay or ‘PWYP’ rules. An important outcome of this coalition was the launch of a distinct NGO – Publish What You Pay – devoted to advocating for published “what you pay” measures. Subsequently, Tony Blair was recruited as an ally of PWYP in the immediate aftermath of 9/11 – and used UK foreign policy to put in motion the events leading to the EITI’s creation.
However, the literature was clear – transparency and dialogue had to be part of the starting point.\(^2\)

This account of the EITI makes three noteworthy claims. First, it explicitly links the origin of the EITI to resource curse scholarship without acknowledging the limitations examined in the preceding section.\(^3\) Second, there is a welcome, recognition that no single intervention will be sufficient for a resource-rich LDC such as Myanmar to achieve sustained growth. Third, the notion of transparency occupies a privileged position when at the end Short appears to claim that it may be a necessary condition for sustained growth.\(^4\) However, the scholarly literature demonstrates a variety of understandings about the ultimate significance of the EITI’s promotion of transparency.\(^5\) These include: transparency as a means to achieve increased accountability and reduced corruption;\(^6\) transparency as a means to increased growth;\(^7\)

\(^2\) Clare Short, "The development of the extractive industries transparency initiative" Journal of World Energy Law and Business 7.1 (2014): 8-15. Short’s article should be read along with that of Peter Eigen who was the founding Chair of the EITI Board. Peter Eigen, "Fighting corruption in a global economy: Transparency initiatives in the oil and gas industry." Houston Journal International Law 29 (2006): 327. As insider accounts, both articles require critical reading.

\(^3\) In fact, it would be major a mistake to accept that the EITI is a product of disinterested academic research. Instead, in addition to the Blair government’s search for legitimacy in oil rich states, the EITI also needs to be understood in terms of values advocacy, as associated with Abbott and Snidal’s analysis of the OECD Convention. See, Kenneth W. Abbott & Duncan Snidal, “Values and Interests: International Legalization in the Fight Against Corruption” (2002) 31 Journal of Legal Studies S141-S177.

\(^4\) Along with the Kimberley Process Certification Scheme and the International Council on Mining and Metals, the EITI is one of several trans-national “multi-stakeholder dialogues” in the extractive industries. In comparison however, it places a particular emphasis on transparency. See, Cynthia A Williams, “Civil Society Initiatives and Soft Law in the Oil and Gas Industry” (2003) 36 NYUJ Int’l L & Pol 457.

\(^5\) According to a recent interdisciplinary survey, “[i]n recent years, the term 'transparency' has emerged as one of the most popular and keenly-touted concepts around. In the economic-political debate, the principle of transparency is often advocated as a prerequisite for accountability, legitimacy, policy efficiency, and good governance, as well as a universal remedy against corruption, corporate and political scandals, financial crises, and a host of other problems.” Jens Forssbaeck and Lars Oxelheim, The Oxford Handbook of Economic and Institutional Transparency (Oxford University Press, 2014). Back cover material.

\(^6\) Ivar Kolstad and Arne Wiig, "Is Transparency the Key to Reducing Corruption in Resource-rich Countries?" (2009) 37:3 World Development 521.

transparency as a means to increased legitimacy within global governance;\textsuperscript{238} and, transparency as an end in itself. This paper, however, approaches the EITI from the perspective that transparency may lead to improved institutional quality, which should lead to superior economic growth.

III.D.1 Quantitative Research on EITI

As of January 2017, the literature contains only two studies attempting to empirically ascertain whether payment transparency has in fact provoked "positive feedback effects"\textsuperscript{239} in developing states. Both focus on implementation of the EITI. The first was conducted by an American international affairs scholar.\textsuperscript{240} The second was conducted by a group of European researchers working on energy governance.\textsuperscript{241}

As part of an article critically examining the impact of the EITI, Clare Corrigan analyzed data from 200 countries between 1995 and 2009 ("Corrigan Study). Corrigan’s study aimed to test two hypotheses. The first was that, depending on the size of the resource sector within a country, EITI membership improves economic development (measured in GDP per capita). The second hypothesis was that, depending on the size of the resource sector within a country, EITI membership improves governance. (For economic growth, seven control variables were included in the regression model.\textsuperscript{242} For governance, six indicators chosen from the World Bank’s Worldwide Governance Indicators were measured.\textsuperscript{243} In order to test the hypotheses, Corrigan employed a pooled cross-sectional panel methodology. Each country was classified as an EITI Member at

\textsuperscript{242} These were: inflation, investment, government consumption, democracy levels, population, and trade openness.
\textsuperscript{243} These were: voice and accountability, political stability, government effectiveness, regulation quality, rule of law, and control of corruption.
the point in time when it expressed intention to become a candidate; or, in the absence of such an announcement, at the date when candidacy was approved. The study therefore aimed to compare 1) the economic wealth of EITI Member and EITI Non-Member countries; 2) the governance quality of EITI Member and EITI Non-Member countries; and 3) within EITI Member countries, both wealth and governance prior to and following membership. Below I examine the results of Corrigan’s calculation and analyze the significance of these findings.

According to the study, EITI Membership had a significant, positive effect on GDP per capita and on three of the six governance indicators: government effectiveness, regulation quality, and rule of law. Corrigan observes that, “[t]he effect of resource abundance on economic development is the main focus of research on the resource curse and therefore a noteworthy finding in terms of the success of the EITI’s goals.”

Certainly this and other findings would appear to merit considerable optimism. However, it should be noted that EITI Membership did not have a significant effect on accountability, stability, or corruption. The absence of any observable impact on either accountability or corruption provides reason to pause before relying on Corrigan’s study to reach broader conclusions.

In the following I examine a series of potential concerns about the design and analysis of “Breaking the Resource Curse”. As a preliminary observation, it bears noting that although Corrigan certainly shows dexterity in reviewing the resource curse literature, she appears to accept certain simplifications and short cuts in applying the theory to her empirical study. For instance, she settles on the notion that natural resource abundance triggers diminished economic growth, i.e. the Resource Curse Paradigm discussed in section 3. Another concern is Corrigan’s approach to the role of institutions. Corrigan’s own analysis, which is to say the thinking that she has done to frame her findings, appears to consist of two steps. First, she notes that, “countries with weak institutions” experience weak economic growth and poor governance despite natural resource abundance. But, second, she acknowledges that “countries with strong

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244 Corrigan, at 28.
245 Corrigan at 22.
institutions” benefit from natural resource abundance. Since this seems to be an idea with significant currency in the academic debate, it would be interesting to know the results of the Corrigan study for countries with weak institutions in particular. These however are not provided.

Finally, the most serious issue with the study’s design is that it uses intention to become an EITI candidate as a proxy for membership. As a result, it appears to be measuring not so much the effect of EITI compliance generally and PWYP disclosure specifically, but rather the willingness to acknowledge that reform might be desirable. But, if EITI membership is a proxy for openness to institutional reform, and the result is improved growth and governance, i.e. two outcomes of better institutions, then the Corrigan Study appears to have gone in a circle. The key correction here appears to be Collier’s insight that it is only one to two decades after a commodity price boom that negative effects from the resource curse can be expected. Therefore, Corrigan’s data from the 1990s and 2000s more than likely reflects, at least in part, policy dynamics realized well before the conceptualization of the EITI.

The second quantitative study (Sovacool) was prepared by researchers with backgrounds in business studies, energy studies, and political studies. However it is not clear that any of these disciplines, relatively interdisciplinary in their own right, played a determinative role in framing the research agenda. As they themselves acknowledge, the authors focused on statistically exploring the efficacy of the Extractive Industries Transparency Initiative. Sovacool used nonparametric tests and regression analysis on data from the World Bank in order to test three groups of hypotheses – of which the first set appear particularly pertinent to the current chapter -- that were putatively justified by the literature. Sovacool used data from a slightly later period in time than the Corrigan study, i.e. 2002 to 2012. Also in contrast to it, Sovacool examined only countries that had participated in the EITI. Furthermore, it distinguished three stages: the period immediately prior to EITI candidacy, the candidacy period, and the period after EITI-compliant status was achieved. As such, the research aimed to “measure whether

246 Corrigan at 22.
247 Corrigan explicitly states this at 17: “EITI membership can be used as a proxy of willingness to reform institutions.”
248 Sovacool, at 181.
249 Sovacool, at 181.
governance and development outcomes improve over time as a country moves from non-membership to candidacy and then EITI compliance.”

For the first set of hypotheses the independent variable consisted of the 16 countries that had, as of 2012, achieved EITI-complaint status. The dependent variable included both governance and development outcomes. For governance, the same six World Bank Worldwide Governance Indicators used by Corrigan were adopted; for development, the Sovacool study used two distinct matrixes, i.e. FDI inflows and GDP per capita. The analysis then examined whether governance and development outcomes improved over specific time periods. As such, this was a within-country analysis. The results indicated: during EITI candidacy, each individual country experienced a positive trend for regulatory quality and increased FDI inflows. The results also indicated, during both EITI candidacy and EITI compliance, a positive trend for GDP per capita. More specifically, in terms of the medium and long-term effects.

The Sovacool authors concluded that the above results are indicative of the EITI having minimal effect. That may well be true, but certainly it also needs to be asked why the researchers imagined that a mere two years of EITI-compliance, i.e. between 2012 and 2014, could possibly have a transformative effect. The authors appear to have approached their own data on the presumption that others “think of the EITI as a panacea for good resource governance”. Although there may be some commentators who take this doctrinaire position, they would be in the extreme minority and in any case do not reflect the modest expectations put forward in this paper.

For current purposes, I suggest that the Sovacool Study appears to allow for modest optimism. It does not, after all, document any correlation between EITI participation and negative performance. This is noteworthy given that within the very

250 Sovacool, at 181
251 The hypothesis being tested were thus: 1) governance and economic development metrics in EITI countries is positive and significantly different from zero during candidacy; 2) governance and economic development metrics in EITI countries is positive and significantly different from zero during compliance; 3) governance and economic development metrics in EITI countries develop better during candidacy than Pre-EITI; 4) governance and economic development metrics in EITI countries develop better during compliance than Pre-EITI; 5) governance and economic development metrics in EITI countries develop better during compliance than during candidacy. Sovacool, “Energy governance, transnational rules, and the resource curse” at 181.
252 Sovacool at 184.
253 Sovacool at 189.
small sample of 14 EITI-compliant states as of 2012, a significant number could be
described as either least developed countries or even failed states. Early participants
included Azerbaijan, Ghana, Iraq, Kyrgyz Republic, Liberia, Mali, Mauritania, Mongolia,
Mozambique, Niger, Nigeria, Tanzania, Timor Leste, and Zambia as well as Peru and
Norway. At least eight of these countries – Liberia, Mali, Mauritania, Mozambique,
Niger, Tanzania, Timor Leste, and Zambia – are recognized by the United Nations as
LDCs. Others such as Nigeria and Mongolia are considered as text book cases of the
‘resource curse’ wherein, as discussed above, negative patterns tend to get worse as time
passes. Furthermore, Iraq has been in the midst of civil war since the early 2000s. Given
these circumstances, some positive change and no documented negative change actually
appears to be a rather encouraging “early harvest”.

The Sovacool Study and the Corrigan Study used different methodologies to
attempt to answer a common question: does participation in the EITI whether as a
candidate country or a member country, or as both, induce positive effects in commonly
utilized governance and development indicators? Neither study used the Resource
Institution-specific indicators highlighted earlier in this chapter. While Corrigan
compared EITI-participating countries to all other countries, Sovacool compared EITI-
participating countries internally at different periods in time. One of the key challenges
that Sovacool faced, however, was the small number of EITI-participating countries as of
2012 and the very limited period of time between, for instance, compliance and the end
of the study period. The number of EITI-participating countries has grown rapidly in
recent years as has the length of time since early adopters first joined. As such, we can
expect more and perhaps better studies to become available over the coming years.

### III.D.2 EITI in Myanmar

Although not without challenges, Myanmar’s first cycle of participation in the EITI
between 2012 and 2015 produced both procedural and substantive benefits. In terms of

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254 The process has been fraught with conflicting priorities. For instance, the EITI was embraced at the beginning of the current reform era in an effort to generate legitimacy for the government. Business leaders, however, are naturally concerned with safe-guarding their economic interests, which may be harmed by excessive scrutiny. Brown, Testing Transparency.
the former, the EITI’s process for admitting member states sets out the following steps: first, a public declaration of intent by the government and the designation of a senior person to lead implementation;\textsuperscript{255} second, commitment to work with and composition of a multi-stakeholder group (‘MSG’), which must include civil society and the private sector, that is in turn delegated the substantive task of reporting;\textsuperscript{256} and third, the MSG must maintain a current work plan in line with reporting and validation deadlines as ratified by the EITI Board.\textsuperscript{257} The creation of a national MSG in particular has provided a forum for cooperation among state, business and civil society, which has built a basic level of trust among these actors.\textsuperscript{258} Brown thus writes that “shared decision-making platforms for state, private sector and civil society actors can play an important role in building trust and delivering reforms in low trust settings.”\textsuperscript{259} Myanmar’s EITI process has also resulted in the creation of an umbrella organization that facilitates civil society’s participation in both the MSG specifically and resource governance more broadly.\textsuperscript{260} This identifies concrete pathways through which participation in the EITI has helped Myanmar to build what Collier might describe as supervision mechanisms for transparency related to resource revenues.\textsuperscript{261}

The first cycle has also resulted in substantive benefits in the form of newly available information about money flows and revenue collection. For instance, Myanmar’s first report in 2013-14 covers USD 3.14 billion in oil, gas and mining revenues accounting for at least 23.6\% of total government revenues and around 6 percent of GDP.\textsuperscript{262} It also documents that 85\% of USD 3.14 billion takes the form of non-tax revenues such as the state’s share of production and royalties. As Brown writes:

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\textsuperscript{255} The EITI Standard is the primary set of rules governing membership for states. These requirements are set out in items 1.1.a and 1.1.b thereunder. In Myanmar’s case this was accomplished in December 2012 through Presidential Decree No. 99

\textsuperscript{256} According to requirement 1.4.a

\textsuperscript{257} Requirement 1.5

\textsuperscript{258} Brown, Testing Transparency, at ‘executive summary’

\textsuperscript{259} Brown, Testing Transparency, at ‘executive summary’

\textsuperscript{260} This is the Myanmar Alliance for Transparency and Accountability (MATA), which is a nationwide umbrella organisation for civil society actors engaged in MEITI and other resource governance processes.

\textsuperscript{261} It also points to increased oversight as a deterrent to back-tracking. Critics, however, may argue that these developments can be characterized as low hanging fruit that will only be available once and that were in any case the result of the EITI being heavily subsidized.

\textsuperscript{262} Brown, Testing Transparency
“[the result is] a level of disclosure about companies and government that would have been unthinkable a few years ago.”263 In line with the World Bank’s description of best practices and Collier’s concerns about diversion, it has been adduced by the Natural Resource Governance Institute – a leading civil society think tank in this area -- that “only about half of revenues make it into the central state’s budget. Approximately 50 percent of public money from oil, gas and mining end up in off-budget ‘other accounts’.”264 There may be a number of potential reasons for this aberration: according to one news report, the Internal Revenue Department (‘IRD’) apparently is still keeping records on paper; and, non-tax revenues, which account for 85% of the total, are collected by state-owned companies rather than the IRD.265 This confirms that Myanmar’s revenue collection is an economic institution that must be improved. While it does not follow automatically that transparency will lead immediately to institutional transformation, as a provisional conclusion it can be argued that participation in the EITI offers improved information and appears on balance to be a positive step toward such change.

However, it bears noting one specific reason for trepidation about Myanmar’s relationship with the EITI going forward. Especially after reforms internal to the EITI in 2015, the organization’s mandate has dramatically expanded beyond revenue transparency.266 Although the work program for the country’s second report is still being negotiated between Myanmar-EITI and the EITI Secretariat in Oslo, it appears that the foreign aid community is intent on calling for an ever greater variety of information to be disclosed, i.e. licensing procedures and criteria, identification of beneficial owners, and even the terms of specific contracts. And, there appears to be concern in Myanmar, as a result, that the country is being pressured to publish information that it does not

263 Brown, Testing Transparency
266 Extractive Industries Transparency Initiative. 2015. The EITI Standard. (The EITI International Secretariat, Oslo) [‘The EITI Standard’]
necessarily have the resources to collect and, in any case, did not agree to disclose as a condition of membership. In fact, although this appears to be a result of lack of government capacity rather than local push-back against foreign intervention, Myanmar’s MSG stopped working after the 2015 election and had to file a last minute extension request.\textsuperscript{267} The extension was recently granted,\textsuperscript{268} but it is noteworthy that some locals perceived the potential for censure by the EITI as ‘shameful’. This pursuit of transparency for its own sake rather than – more productively – as a means to a specific end, such as increased institutional capacity for revenue collection is problematic.\textsuperscript{269}

**IV: Conclusion**

The opening section of this thesis inquired into whether there is a strong, unified explanation for expending – by definition, finite – additional resources on laws to combat foreign corruption. It found that the answer appears instead to be multiple and sometimes under-theorized motivations for such laws wherein development plays an increasingly important role. Canadian law has been influenced not only by notions of moralism and self-interest but also certain conceptions of altruism. However, unlike the more widely studied experiences of law on foreign corruption in the United States and Western Europe, the Development Turn in Canadian law has taken place at a relatively late stage. In turn, Canada’s Development Turn runs parallel to the emergence of a Second Generation of legal initiatives.

During the Second Generation, the CFPOA has evolved from an instrument of formal condemnation to one of limited deterrence. As noted in sub-section 3 of the first section, this has taken the form of increased enforcement and relatively severe penalties. In addition, the scope of prohibition has also been significantly expanded.


\textsuperscript{268} https://eiti.org/BD/2017-18.

\textsuperscript{269} After all, if it is shameful to miss a deadline because the government was dealing with more pressing matters, which by the way include on-going civil war, then it would seem to follow that a never-ending list of sins for confession – i.e. poorly negotiated contracts, ill-advised decisions to award licenses, and etcetera – will eventually lead to ‘over-dosing’ on the medicine of transparency.
Despite being a relatively recalcitrant participant in the criminalization model, Canada has become a relatively early-adopter of disclosure-based laws against foreign corruption. PWYP differs from the criminalization model in that: it was explicitly designed in order to meet the expectations of pro-development campaigners; it is being promoted in both developing and developed jurisdictions. In this regard, Canada’s PWYP legislation – the Extractive Sector Transparency Measures Act (ESTMA) – is thus highly relevant to both Canada’s Second Generation and the Development Turn. And, the sector-specific approach of ESTMA is notable.

The extraction and exportation of natural resources has – since at least the seminal work of Harold Innis – been central to intellectual inquiry into Canada’s economic development.270 And, Innis’s staples thesis has been described as “Canada's most distinctive contribution to political economy.”271 According to the staples thesis, Canadian settlers had exported increasingly valuable commodities – such as cod, furs, and lumber – in exchange for increasingly sophisticated processed goods, thus spurring a virtuous cycle of investment and production. In contrast to the staples thesis and other economics-centric theories of development, as noted in the concluding section of Chapter 1, the nascent field of law & development aspires to understand the relevance of law and legal reform to development. Concurrently, the contemporary Canadian economy, although no longer dominated by resource extraction, continues to export highly valued commodities such as heavy oil, potash and, potentially, liquid natural gas. However, critically for this chapter, Canada also exports the technology, management, and capital required by modern extractive industries. These relatively new forms of exchange typically take place through firms that are organized and listed in Canada while operating globally: there are more than 1,700 mining firms listed on Canadian stock exchanges and many of these are either prospecting or developing mineral deposits.

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270 Innis’ The Fur Trade in Canada: An Introduction to Canadian Economic History was originally published in 1930 and continues to be re-published. See, Harold Innis The Fur Trade in Canada: An Introduction to Canadian Economic History (Toronto: University of Toronto Press, 1999).

Indeed, more than 70% of equity capital for global mineral projects is raised overseas.\textsuperscript{272} Canadian extractive industry firms – in mining as well as oil and gas – therefore, may play an important albeit potentially complex role in the development pathways of foreign states.\textsuperscript{274}

In light of the research program of Institutional Law & Development and the legislation of PWYP into Canadian law, fundamental questions arise about whether ESTMA is likely to fulfill the Development Turn’s rhetoric. The broader scholarship on PWYP has yet to demonstrate that payment transparency has a determinative impact on economic growth. However, through research conducted during this LL.M., certain intermediary insights have come in to focus.

First, development organizations and some scholars have been susceptible to the inaccurate simplification a Resource Curse Paradigm. But, the literature increasingly finds that it is the combination of dysfunctional institutions combined with windfall rents that cause the weaker than expected growth rates, which were first observed by Sachs two decades ago. New Institutional Economics-influenced scholars, in particular, have found that sufficiently functional institutions made resource-led growth tenable, but these same studies were unable to identify the specific Resource Institutions that needed to be improved. As revenue collection sits at the interface of institutional quality and windfall rents, policy makers believe that revenue collection is a necessary, though not necessarily sufficient part, of the functional Resource Institutions basket. And, most recently, the Natural Resources Governance Institute has created data-based research tools that allow for specific measurement of, for instance, revenue collection. This could contribute to the design of future empirical research.

\textsuperscript{272} See, Eden Oliver and Sander Grieve “Canada's TSX: A Global Mineral Plays Supermarket“ in \textit{India Business Law Journal} 2013. Firms and projects financed through the TSX operate assets from Latin America to Sub-Saharan Africa and East Asia.

\textsuperscript{273} See, Bonita I. Russell, Daniel Shapiro, & Aidan R. Vining “The evolution of the Canadian mining industry: The role of regulatory punctuation“ \textit{Resources Policy} Volume 35, Issue 2, June 2010, pp 90–97. The number of public mining companies in Canada is greater than the aggregate number listed in Australia, South Africa, the United Kingdom, and the United States of America.

\textsuperscript{274} Although Canada increasingly exports services and knowledge, there is little evidence that it aspires to materially shape related transnational norms and rules. Instead, as illustrated by the history of Canada’s participation in the G8 on PWYP, the Government of Canada and Canadian industry appear largely content to free-ride in this regard on initiatives advanced either by leading states, such as the United States and the United Kingdom, or by civil society values activists.
Second, Myanmar provides a case-study of a developing state struggling with rent seeking and path-dependency as conceptualized by Institutional Law & Development. This in turn leads to issues about the type of intervention that might be expected to positively impact highly dysfunctional revenue collection institutions. There are no quick answers. I would argue that rather than looking for macro-transformation, as suggested by the Corrigan article on EITI examined above, a better approach is to demand incremental but consistent changes in the right direction. In this respect, Myanmar’s experience with the EITI has to-date generated changes that are modest as well as fragile. Indeed, While Myanmar struggles to consistently implement PWYP, the Canadian legal system has created a PWYP Rule – as set out in the first sub-section of section three – that acts as a safeguard at least with respect to investors in Myanmar that are organized in Canada. For the time being, this is the main impact that Canada’s ESTMA Scheme appears to have within the framework of Institutional Law & Development applied herein. As a question for future analytical research, it may thus be appropriate to review in greater detail the scholarship on institutional complementarity and apply a related framework to analysis of an over-arching question, i.e. would complementarity be increased if Canada either adopted a securities regulation-based approach to PWYP, as has been the intention in the U.S., or participated in EITI as a member in parallel to recent commitments by the U.K.