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## INTERNATIONAL INSTITUTIONS AND THE RESOURCE CURSE

*Patrick J. Keenan\**

### INTRODUCTION

Determining why some countries have prospered and others have failed to grow has puzzled scholars and policymakers for decades and remains an important question to the millions of people in the developing world. A particularly vexing part of the problem has to do with countries that are rich in exploitable natural resources like oil, natural gas, or minerals. These countries have tended to grow more slowly than countries without similar resources. This phenomenon, often called the resource curse, has been the focus of sustained attention by scholars from many disciplines who have attempted to identify whether, how, and why the resource curse exists and how it might be reversed or ameliorated. To a poor country, a source of sustained revenue can look like free money: the country simply needs to extract the resource from the ground and sell it, which should cause the country grow more quickly and fare better than countries without similar resources. In too many places, reality has proven far different.<sup>1</sup> But resource wealth does not inevitably

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<sup>1</sup> For a thorough discussion of the literature on the resource curse, see Michael L. Ross, *The Political Economy of the Resource Curse*, 51 *WORLD POL.* 297 (1999). Ross reviews the literature and concludes that there “is now strong evidence that states with abundant resource wealth perform less well than their resource-poor counterparts, but there is little agreement on why this occurs.” *Id.* at 297. Two relatively early books remain important for their discussion of individual countries and the lessons they draw from these case studies. For discussion of the relative importance of mineral endowments and their often-negative effects on macroeconomic performance, see RICHARD M. AUTY, *SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS* (1993).

cause harm. There are certainly success stories of countries that have turned resource wealth into sustained economic development.<sup>2</sup> What explains the difference in outcomes?

Determining the effect of a country's resource wealth on its economic development is an important strand of development scholarship. As scholars have considered the effect of resource wealth, it has become clear that institutions are a principal factor in determining whether a country develops quickly or slowly (or at all).<sup>3</sup> Some scholars go so far as to argue that "institutions rule" with respect to economic development;<sup>4</sup> that is, that institutions are the most important factor in general and with respect to states rich in natural resources.<sup>5</sup> For my purposes, it is not necessary to argue or to prove that institutions are the principal determinant of economic

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Auty examines in detail six highly resource-dependent countries and finds that resource wealth can have a negative effect on growth under particular policy conditions. Terry Lynn Karl, in the book *THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES* (Stephen D. Krasner et al. eds., 1997), finds similar results in countries dependent on the sale of oil, albeit for somewhat different reasons.

<sup>2</sup> See, e.g., Ragnar Torvik, *Why Do Some Resource-Abundant Countries Succeed While Others Do Not?*, 25 OXFORD REV. ECON. POL'Y 241, 245-46 (2009) (comparing resource-rich countries which have not been affected by the resource curse to those which have).

<sup>3</sup> See, e.g., Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation* (Nat'l Bureau of Econ. Research, Working Paper No. 7771, 2000) (arguing "that differences in institutions account for roughly three-quarters of the differences in income per capita" in former colonies). For an accessible and comprehensive analysis of economic development scholarship and history, see DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (2012). Acemoglu and Robinson consider both individual cases and large-*n* econometric analyses to conclude that countries "differ in their economic success because of their different institutions, the rules influencing how the economy works, and the incentives that motivate people." *Id.* at 73.

<sup>4</sup> Dani Rodrik et al., *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development* (Nat'l Bureau of Econ. Research, Working Paper No. 9305, 2002) (finding that the quality of institutions is the principal determinant of a country's income, more important than geography—which includes resource endowment—and market integration).

<sup>5</sup> A recent study by Jeffrey A. Frankel, *The Natural Resource Curse: A Survey* (Nat'l Bureau of Econ. Research, Working Paper No. 15836, 2010) confirms earlier conclusions and, based on a review of recent literature, identifies institutions as the most important factor.

growth to the exclusion of other factors.<sup>6</sup> Instead, I argue that institutions are important and warrant critical analysis.

In countries with robust and well-functioning institutions, there is ample evidence that it is possible to turn the revenue flowing from the exploitation of natural resources into lasting economic and social development.<sup>7</sup> In countries whose institutions function less well, the presence of resource wealth either does not help as much as would be expected or even harms the country's prospects for development. Although there is still considerable debate about which institutions are most important and why, there is no longer much

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<sup>6</sup> There are, of course, other factors that affect economic development. For example, there are many scholars who argue that geography plays a significant role in determining a country's economic development, perhaps the most important role. For example, Jeffrey D. Sachs, Paul Collier, and their co-authors argue that at "the root of Africa's poverty lies its extraordinarily disadvantageous geography, which has helped to shape its societies and its interactions with the rest of the world." David E. Bloom et al., *Geography, Demography, and Economic Growth in Africa*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 207, 211 (1998). See also John Luke Gallup et al., *Geography and Economic Development*, 22 INT'L REG'L SCI. REV. 179, 194 (1999) (showing empirical linkages between geographic factors, such as transport costs and intrinsic productivity and long-term economic growth). As might be expected, there has long been robust debate between the geography-first camp and the institutions rule camp and which factor is most important. Compare Rodrik et al., *supra* note 4, at 4 (arguing that "the quality of institutions trumps everything else"), with Bloom et al., *supra* note 6 (arguing that geography predominates and about how to determine which factor is most important). See, e.g., Edward L. Glaeser et al., *Do Institutions Cause Growth?*, 9 J. ECON. GROWTH 271, 296-98 (2004) (arguing that "the existing research strategy" has not proven the link "between institutions and economic growth"). See generally Simeon Djankov et al., *The New Comparative Economics*, 31 J. COMP. ECON. 595 (2003) (considering the connections between geography, institutions, and growth in the context of a number of other relevant causal factors). It is not my objective to determine which single factor is the most important in determining economic development. It is enough to show, as the evidence clearly does, that institutions are vitally important and do affect economic development in general and in the context of resource-rich economies.

<sup>7</sup> For a discussion of various policy interventions to address the resource curse, see ESCAPING THE RESOURCE CURSE (Macartan Humphreys et al. eds., 2007). The book's contributing authors consider policies to address the political and economic components of the resource curse and draw on success stories to demonstrate that it is possible to transform resource wealth into sustained economic development.

debate that institutions are central to the problem of development in general and to the effect of resource wealth on development in particular.<sup>8</sup>

To this point, the scholarship on economic development and the exploitation of natural resources has arrived at a rough consensus on two issues. The first is that the resource curse is a demonstrable phenomenon, and the second is that weak institutions are an important causal factor. Having verified that the symptoms are real and identified some of their causes, the next step is to arrive at a viable course of treatment.

The principal contribution of this Article is to show that, in many cases, *international* institutions—as opposed to domestic institutions—are promising mechanisms by which to address the problem. This argument is both an attempt to push the scholarly conversation forward by moving from a cause to treatment and to offer a corrective to a common problem in the policy literature. Most policymakers have focused almost entirely on the reform of domestic institutions as the way to address the problems associated with the resource curse. Given the trajectory of development scholarship, it is unsurprising that scholars and policymakers have focused primarily on domestic institutions. The scholarship on the causes of the resource curse has identified domestic institutional failures as a principal driver of the resource curse. Scholars argue that the failures of domestic institutions cause the resource curse and that fixing domestic institutions is the best way to address the problem. I argue that it is a mistake to assume that because domestic institutional failures are the principal cause of the problem, their reform should be the principal focus of policymakers. In many instances, the weaknesses of domestic institutions are self-perpetuating, and focusing on them can amount to either a missed opportunity or actually contribute to harm. Instead, I argue that international

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<sup>8</sup> See, e.g., Halvor Mehlum et al., *Institutions and the Resource Curse*, 116 *ECON. J.* 1 (2006) (finding that institutions are key to determining the economic success of resource rich countries); Ivar Kolstad, *The Resource Curse: Which Institutions Matter?*, 16 *APPLIED ECON. LETTERS* 439 (2009) (arguing that private sector institutions are more important than public sector institutions with respect to the resource curse).

institutions, even if they are not a principal cause of the problem, can be a viable second-best solution. Indeed, given the state of domestic institutions in many resource-rich developing countries, international institutions may represent the most plausible mechanism by which to address the problem.

The Article proceeds in three parts. In Part I, I review the relevant literature on the resource curse and the role of institutions in economic development. There are two principal schools of thought within the institutions literature. One approach holds that the most important institutions are those that affect the choices faced by people and firms in the private sector. These scholars argue that countries prosper when institutions push entrepreneurs to pursue productive activity instead seeking to garner a greater share of the rents from existing commercial activity. The second approach holds that institutions that affect the behavior of political leaders matter most because they determine how resource revenue is distributed and the extent to which leaders are accountable to citizens. I do not attempt to resolve this debate. Instead, I show that both explanations are plausible, and, more importantly, that my argument works regardless of which approach is the more accurate.

In Part II, I show the various kinds of institutional failures that are associated with poor economic growth; that is, what it is that institutions do or fail to do that contributes to growth or stagnation. These failures come in many forms, of course, but I focus on two clusters of problems. First, in many states, weak domestic institutions permit public officials to play dual roles in resource revenue decisions. In their official roles, they make commercial decisions on behalf of the state, and, in their private capacities, they serve as shareholders or principals in companies that do business with the state on the same projects over which they have official control. Officials are thus policymakers and private actors in the same transaction. This permits officials to personally enrich themselves and their families. Second, the domestic institutions of many resource-rich states are weak enough to permit public officials to distribute resource revenue in ways that benefit themselves or their political allies but do not contribute to the state's long-term growth or improve the lives of citizens. This revenue distribution problem takes many forms, but, at its core, it is about how public officials choose to

use the revenue that comes from the sale of what are, after all, assets owned by the state.

In Part III, I identify the international institutions that either help or could help to ameliorate the resource curse in resource-rich countries under the right conditions. These institutions do the work of constraining the choices or influencing the behavior of the relevant public and private actors involved in the exploitation of natural resources. In this part I have two principal goals, one doctrinal and one theoretical. The doctrinal goal is to demonstrate that my approach is plausible and could succeed by specifying the legal or institutional mechanisms that could serve as substitutes for functioning domestic institutions. These include tools to place limits on the ability of officials to play dual roles, force the disclosure of relevant information to citizens or others, and reduce the incentives that officials have to use resource revenue in self-serving or inefficient ways. The theoretical goal is to anticipate and respond to potential objections to my approach. The strongest of these objections is that it is an affront to the sovereignty of developing states to use international institutions to accomplish what should be core domestic functions. Nonetheless, because international institutions are already involved in resource extraction transactions, their use as substitutes for failing domestic institutions is appropriate.

#### I. THE RESOURCE CURSE AND INSTITUTIONS

In this Part, I address two principal issues: what is the resource curse and how does it affect poor countries, and what role do institutions play in economic development, particularly with respect to resource-rich states. First, scholars have long worked to determine the factors that contribute economic development, including attempting to determine how the presence of exploitable natural resources affects a country's development prospects. Some countries have used the revenues from resources to expand their economies and become solidly developed (or begin on a clear path toward development). Others appear to have foundered despite influxes of wealth from resources.

The second objective of this Part is to identify what institutions actually do in the context of natural resource development. What do institutions provide to a country, or from what do they protect it? Do they educate people so they can participate in governance or economic activity? Do they protect the country from avaricious bankers or politicians? Do they protect the country from elites attempting to dominate the economy? Because almost anything could be an institution when considered at a sufficiently general level—political parties, social clubs, the criminal law—I first specify that I mean those entities and regulations that shape political and economic behavior with respect to natural resources. I argue that institutions provide successful states with a cluster of essential goods and that when these goods are not provided, states struggle to develop in the first place or to sustain gains made under different conditions.

#### A. The Resource Curse

Countries rich in natural resources grow more slowly than similar countries without the resources.<sup>9</sup> For years, development economists argued that resource endowments were critical to the long-term economic development of countries.<sup>10</sup> Countries that had been blessed with more natural resources were expected to develop more quickly than states not similarly blessed. Then scholars began to note an anomaly: some countries that should have prospered if the conventional wisdom were true were in fact floundering. What was sometimes called “the paradox of plenty” was the finding that more wealth produced less welfare for many people in poor countries.<sup>11</sup> In the policy literature using country studies and analyzing the

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<sup>9</sup> There is a vast literature on the resource curse and its causes and consequences. For a comprehensive survey and analysis of its many strands, see MICHAEL L. ROSS, *THE OIL CURSE: HOW PETROLEUM WEALTH SHAPES THE DEVELOPMENT OF NATIONS* (2012). Ross’s book presents the empirical evidence that resource wealth is associated with slower development and other social ills and analyzes the various hypotheses for why this is true.

<sup>10</sup> See, e.g., AUTY, *supra* note 1, at 1 (noting the conventional view that resource abundance was positively associated with economic development).

<sup>11</sup> See Karl, *supra* note 1 (arguing that the oil and commodity booms of the 1970s and 1980s should have led to development in many poor countries but did not).



connections between resource abundance and wealth over a relatively short time frame, scholars demonstrated that resource wealth did not quickly or inevitably lead to economic development in countries in which it should have had the extant theories been valid.<sup>12</sup> Later, in econometric analyses of many more countries over a longer time period, scholars began to demonstrate the full extent of the problem. Jeffrey D. Sachs and Andrew M. Warner, in a now-famous article, showed that there is a “statistically significant, inverse, and robust association between natural resource intensity and growth.”<sup>13</sup> Sachs and Warner examined the growth rates of 97 resource-dependent countries and found that, even after controlling for other variables, growth was slower, on average, in more heavily resource-dependent states than in states less dependent on resource wealth.<sup>14</sup>

Since the path-breaking work of Sachs and Warner and others, scholars have identified a number of other problems that appear more likely in resource-dependent countries than in countries less dependent on resources: there is a higher likelihood of conflict,<sup>15</sup> there is more official corruption,<sup>16</sup> corrupt rulers stay in power longer,<sup>17</sup> and there is a greater likelihood of a misallocation of

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<sup>12</sup> See, e.g., ALAN GELB, *OIL WINDFALLS: BLESSING OR CURSE?* (1988) (assessing the success or failure of oil exporting countries Algeria, Ecuador, Indonesia, Nigeria, Trinidad and Tobago, and Venezuela during the oil boom of the 1970s).

<sup>13</sup> Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth* 21 (Nat'l Bureau of Econ. Research, Working Paper No. 5398, 1995).

<sup>14</sup> *Id.* at 2 (comparing “each country’s annual growth rate between 1970 and 1989 in relation to the country’s natural resource-based exports in 1970, measured as a percent of GDP.”).

<sup>15</sup> See generally Silje Aslaksen & Ragnar Torvik, *A Theory of Civil Conflict and Democracy in Rentier States*, 108 SCANDINAVIAN J. ECON. 571, 584 (2006) (presenting empirical results showing that greater “resource wealth increases the expected payoff from both elections and conflict”).

<sup>16</sup> Aaron Tornell & Phillip R. Lane, *The Voracity Effect*, 89 AM. ECON. REV. 22, 23 (1999). Tornell and Lane argue that where political and legal institutions are weak, unconditioned wealth can produce “a more-than-proportional increase in redistribution” of wealth from resource rents. *Id.* at 42.

<sup>17</sup> See Benjamin Smith, *Oil Wealth and Regime Survival in the Developing World, 1960-1999*, 48 AM. J. POL. SCI. 232, 238 (2004) (finding that “[o]il dependence is a positive predictor of durability, but at the same time is negatively related to democracy, another positive predictor”).

resources.<sup>18</sup> To be sure, these ills are not unique to resource-dependent countries, and there is no evidence that resource abundance is the sole cause of all of these problems. Regardless, the finding that resource-dependent countries fared worse than similarly constituted countries without the blessing of resource wealth is robust. Once scholars had demonstrated that the problem exists, the next issue was to determine why this was so. In the following parts, I address this question. First I review the literature on institutions and their role in economic development. Then I address the relationship between institutions and the resource curse.

## B. Institutions and Development

Institutions are the controls by which individuals and societies regulate themselves. They shape the incentives faced by a politician who must choose between enriching himself at the public's expense and investing in his nation. They guide a bright young graduate who must choose between developing a productive new business and seeking a way to reap more for herself from an existing enterprise.<sup>19</sup> In recent decades, scholars of various disciplines have studied the role of institutions in economic development,<sup>20</sup> and have tested their theories empirically.<sup>21</sup> In this Part, I lay out what I mean by institutions and discuss what institutions do for societies, particularly those institutions most relevant to economic development.

I use a definition of institutions adopted largely from the work of Douglass North. Institutions are the agreed-upon rules that

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<sup>18</sup> See, e.g., James A. Robinson & Ragnar Torvik, *White Elephants*, 89 J. PUB. ECON. 197, 198 (2005) (describing decisions by the government of Zambia to place manufacturing plants in locations that would ensure support from voters even though the locations were not served by reliable transportation networks and alternative locations were available).

<sup>19</sup> See generally MATTHEW BISHOP, *ESSENTIAL ECONOMICS* (2004); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990); ELINOR OSTROM, *UNDERSTANDING INSTITUTIONAL DIVERSITY* (2005).

<sup>20</sup> See, e.g., Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC'Y REV. 829, 830 (2000).

<sup>21</sup> See, e.g., Rodrik et al., *supra* note 4.

people use to structure their interactions.<sup>22</sup> Included in this are formal rules, such as laws or regulations, explicitly created to facilitate exchange.<sup>23</sup> Also included are non-formal “codes of conduct that underlie and supplement formal rules.”<sup>24</sup> This definition is sufficiently broad as to accommodate constraints, rules, and incentives for all manners of human interaction. Indeed, Nobel-prize winning political scientist Elinor Ostrom, in her work on institutions, argues that institutions organize interactions “within families, neighborhoods, markets, firms, sports leagues, churches, private associations, and governments at all scales.”<sup>25</sup>

In addition to comprising the rules or processes by which interactions are governed, my definition of institution necessarily implicates the structures through which those rules are made and enforced. By this I mean that institutions include both the rules of the game and the mechanisms by which those rules are developed, contested, and enforced. In this way, my conception of institutions is consistent with that of Robert Keohane, for whom institutions include the rules of the game and the “formal organizations” in which these rules find expression.<sup>26</sup> An important implication of my conception of institutions is that it accounts for the way interactions actually occur in international (and domestic) affairs: there is constant negotiation and re-negotiation of the rules of the game, which is affected by and affects the organizations in which the negotiations take place.

A second implication of my conception of institutions is that it accounts for the ways that the rules of the game affect those involved in the game. This problem is necessarily and inevitably contingent on the actors involved, the kinds of rules in place, and the issues at stake. For my purposes, the most convincing account of enforcement comes from Andrew Guzman’s work on international

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<sup>22</sup> NORTH, *supra* note 19, at 4 (“Institutions include any form of constraint that human beings devise to shape human interaction.”).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> OSTROM, *supra* note 19, at 4.

<sup>26</sup> Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT’L STUD. Q. 379, 384 (1988).

law.<sup>27</sup> Guzman argues that what matters is to identify, to the extent possible, how international law—the immediate focus of his attention—“changes the behavior of states.”<sup>28</sup> My focus is therefore not on enforcement, that is, specifying the precise mechanism by which a particular rule is imposed on actors. Instead, my focus is on the ways that institutions might influence the behavior of states and other actors.

At this level of generality, institutions could be almost anything, and it is not my objective to develop a positive theory of institutions. Instead, I focus on a subset of institutions that are most relevant to economic development, particularly in resource-abundant countries. The problem is significantly more complicated in developing countries with exploitable natural resources. But, at its core, the phenomenon is the same: how to mediate among competing desires to achieve the best outcome. Institutions play the role of self-control. They channel the incentives faced by disparate actors, each of whom might have different objectives and desires.

In the view of Douglass North, institutions are *the* principal determinant of economic growth.<sup>29</sup> Dani Rodrik and his co-authors argue that institutional quality does more to explain economic development than the other available hypotheses.<sup>30</sup> One need not go that far, of course, to conclude that institutions are critically important. For my purposes it is enough to conclude, in the words of Daron Acemoglu and James A. Robinson, that dysfunctional institutions “keep poor countries poor and prevent them from embarking on a path to economic growth.”<sup>31</sup>

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<sup>27</sup> See generally ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008).

<sup>28</sup> *Id.* at 22.

<sup>29</sup> NORTH, *supra* note 19, at 107 (arguing that institutions “are the underlying determinant of the long-run performance of economies”).

<sup>30</sup> Rodrik et al., *supra* note 4, at 5 (arguing, based on econometric analysis, that “institutional quality emerges as the clear winner of the ‘horse race’” among geography, integration, and institutions in determining economic development).

<sup>31</sup> ACEMOGLU & ROBINSON, *supra* note 3, at 398. *But cf.* Ha-Joon Chang, *Institutions and Economic Development: Theory, Policy and History*, 7 J. INST’L. ECON. 473, 475-77 (Oct. 2010) (arguing that scholars have paid insufficient attention to

The more difficult task is to identify which institutions are most important and the work those institutions do to help or harm a country. Of greatest interest to scholars concerned with economic development is that subset of institutions that regulate economic and political activity. In states that benefit from the presence of natural resources, there are institutions that mediate citizen and state interactions with respect to commercial activity and the development of state or public resources and that provide points of access for citizens to assert their values and hold their leaders accountable. The failure of such institutions can undermine a state's opportunity for economic development. Even more important, the failure of such institutions can lead to increased human suffering, exploitation, or degradation. When people have few legitimate opportunities to influence their governments, they suffer.

### C. The Work Institutions Do

Not every resource-rich country fails to develop, and scholars have attempted to identify what factors must be present in addition to resource abundance to lead to the problems described above.<sup>32</sup> Increasingly, scholars have identified dysfunctional institutions as a principal cause of the resource curse because of the role institutions play, or fail to play, in society.<sup>33</sup> What is more difficult is to identify

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causality in determining whether institutional quality causes economic or whether economic development causes institutions to improve).

<sup>32</sup> See, e.g., Torvik, *supra* note 2 (reviewing empirical literature on the existence of the resource curse and theoretical literature on explanations for its presence or absence).

<sup>33</sup> There is a robust literature on the causes of the resource curse. The first set of scholarly explanations addresses the effects of resource booms on exchange rates and non-resource sectors of the economy. See, e.g., PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 39-40 (2007) (reviewing the macroeconomic arguments for the resource curse); Michael Bruno & Jeffrey Sachs, *Energy and Resource Allocation: A Dynamic Model of the "Dutch Disease,"* 49 *REV. ECON. STUD.* 845, 846 (1982) (describing the effects of resource booms on various sectors of the economy). Later studies concluded that, in most cases, there was scant empirical support for these explanations. See Erwin H. Bulte et al., *Resource Intensity, Institutions, and Development*, 33 *WORLD DEVELOPMENT* 1029, 1030 (2005) (reviewing the literature and concluding that there "is little empirical support for the Dutch disease as an explanation for the resource curse"). More recently, scholarly

those features of institutions that do the important work. Scholars of the roles of institutions argue that at their most basic, institutions operate as ways to allocate power, whether political, social, or economic.<sup>34</sup> That is, institutions provide the rules and the forum by which actors seek, keep, and contest power. For my purposes, what matters is not to develop a full, positive theory of all that institutions do. Instead, my goal is to show the ways that institutions affect economic outcomes in the presence of resource wealth.

What are the institutional failures that most contribute to the negative effect of resource wealth? Institutions come in all types, but two main types of institutions are relevant to the use or misuse of resource wealth.<sup>35</sup> One set of institutions includes those that principally affect the private sector. Put simply, private-sector institutions are those that would affect the decisions an entrepreneur might make when deciding where to apply her talents and energy: the protection of property rights, the fair resolution of disputes, and the like. The second are those that principally affect the public sector. Public-sector institutions are those that ensure the accountability and responsiveness of political leaders, including the role of these leaders in the distribution of resource revenue.

Scholars who attribute more explanatory power to the role of private institutions posit two states of affairs. In each there is the presence of valuable and exploitable natural resources. Entrepreneurs are faced with a choice between productive activities, those that will grow the pie, and rent-seeking activities, those that allocate to the entrepreneur a bigger share of the pie without increasing its size. One leading study terms these institutions “grabber-friendly” and “producer-friendly” institutions<sup>36</sup> and argues that the “combination

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explanations of the resource curse have begun to converge around institutions as the most important variable. *See, e.g.*, Mehlum et al., *supra* note 8, at 1 (reviewing the literature and previous studies and concluding that “the dangerous mix of weak institutions and resource abundance causes the resource curse”).

<sup>34</sup> *See* DARON ACEMOGLU & JAMES A. ROBINSON, *ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY* 218 (2006) (arguing that “institutions influence the allocation of future political power” and provide mechanisms by which to “lock in” or context political power).

<sup>35</sup> Kolstad, *supra* note 8, at 439-40.

<sup>36</sup> Mehlum et al., *supra* note 8, at 2-3.

of grabber friendly institutions and resource abundance leads to low growth,” whereas “[p]roducer friendly institutions” can “help countries take full advantage of their natural resources.”<sup>37</sup> On this account, the quality of institutions determines the relative appeal of productive or rent-seeking activities, and entrepreneurs faced with a choice between the two typically behave rationally and choose the more profitable route.<sup>38</sup> Better institutions lead to more production and better economic growth because entrepreneurs choose that route; worse institutions cause entrepreneurs to choose a less productive path.

Scholars who give more weight to the role of public sector institutions instead focus on the choices faced by politicians.<sup>39</sup> These scholars argue that “bad economic policies” lead to low growth,<sup>40</sup> and that the bad policies stem from the decisions made by politicians in resource-rich countries.<sup>41</sup> To explain this outcome, these scholars focus on the role that political institutions play in shaping or constraining the behavior of politicians. In this model, politicians face a choice: distribute resource revenue in a way that promotes fair and long-term development, or distribute revenue in a way that increases the politician’s chances of staying in power.<sup>42</sup> States with institutions that make it difficult or impossible for the politician to choose the self-serving distribution of revenue fare better than states whose institutions permit such distribution.

There is no consensus yet as to which of these two approaches is the more viable, but there is empirical support favoring the private sector explanation.<sup>43</sup> For my purposes, what matters most is not to declare a winner but to recognize the vital role institutions play and to identify those essential functions that might be approximated by outside institutions. Political institutions constrain

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<sup>37</sup> *Id.* at 16.

<sup>38</sup> Kolstad, *supra* note 8, at 439.

<sup>39</sup> James A. Robinson et al., *Political Foundations of the Resource Curse*, 79 J. DEV. ECON. 447, 449 (2006).

<sup>40</sup> *Id.* at 448.

<sup>41</sup> *Id.* at 466.

<sup>42</sup> *Id.*

<sup>43</sup> Kolstad, *supra* note 8, at 441 (arguing that “only private sector institutions matter empirically”).

or embolden politicians, who set policies that can push entrepreneurs in a productive, pro-growth direction or in an unproductive, growth-inhibiting direction. The decisions made by individual entrepreneurs can either exacerbate existing problems, leading to worse policies and less accountability, or they can lead to more growth and more accountability. In the end, once revenue started flowing in many resource rich countries, the result was a gross mis-deployment of human capital and public resources because the incentives facing individuals and leaders were insufficient to push them into productive work or use of public resources.

## II. THE EFFECTS OF WEAK OR DYSFUNCTIONAL INSTITUTIONS

After years of prospecting, oil companies confirmed in 2006 that there were billions of barrels of oil reserves in the ground under Uganda.<sup>44</sup> This prompted the mix of hope and fear that is not uncommon when oil or other valuable natural resources are discovered in developing countries. What should be a windfall is now widely seen as a mixed blessing at best and a curse at worst. When oil production began in Ghana in 2010, the president felt compelled to reassure the nation and the international community that he would “ensure that it becomes a blessing not a curse.”<sup>45</sup> Indeed, one leading pastor in Ghana told the Financial Times that he had prayed that Ghana would never discover oil because of his fears that oil would harm the country.<sup>46</sup> Citizens and leaders in the Democratic Republic of Congo, Equatorial Guinea, and Sao Tome and Principe expressed similar concerns when oil was discovered in their countries. It is no longer surprising when resource wealth makes a country worse off. In

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<sup>44</sup> Josh Kron, *Uganda's Oil Could be Gift that Becomes a Curse*, N.Y. TIMES, Nov. 25, 2011, [http://www.nytimes.com/2011/11/26/world/africa/uganda-welcomes-oil-but-fears-graft-it-attracts.html?\\_r=0](http://www.nytimes.com/2011/11/26/world/africa/uganda-welcomes-oil-but-fears-graft-it-attracts.html?_r=0).

<sup>45</sup> *Ghana Enters New Era With Oil Field Launch*, FIN. TIMES, Dec. 16, 2010, <http://www.ft.com/intl/cms/s/0/2a785790-0877-11e0-80d9-00144feabdc0.html#axzz2mQWSxpZw>.

<sup>46</sup> William Wallis, *Let the Good Times Roll*, FIN. TIMES, Feb. 18, 2011, <http://www.ft.com/intl/cms/s/2/235d95a2-3972-11e0-97ca-00144feabdc0.html#axzz2mQWSxpZw> (quoting Pastor Mensa Otabil as stating, “For years I prayed we would never find oil. I don’t think it will help us to develop the work ethic we need to structure a viable, productive society. I think people would most likely become very corrupt because there are no barriers.”).



this Part, I analyze the types of harms done by resource wealth in countries with weak institutions. It is important to specify the harms because only by identifying the particular harms is it possible to target solutions to these harms. Think of these harms as types of cancer: without knowing the particular type of cancer, it would be difficult for doctors to select the appropriate medicine to treat the illness most effectively.

Weak or dysfunctional institutions permit leaders to engage in all manner of mischief with the wealth they receive from the sale of natural resources. I argue that this mischief can usefully be divided into two rough categories: personal enrichment at public expense and distributing legitimately obtained revenue in ways that are damaging to the political or economic life of the country. There is, of course, substantial overlap between the categories, and it is certainly true that these categories do not represent the sum total of the activity that contributes to the resource curse. Nonetheless, the categories are useful for two purposes. First, they help disaggregate types of behavior to locate more precisely how that behavior is harmful. For example, the harms that come from investing in wasteful but politically popular infrastructure projects, like building a grand new stadium in an impoverished country, are different from the harms caused when a leader steals revenue that should accrue to the state.

These categories, imperfect as they may be, are helpful for an additional reason as well. The objective of this Article is to identify international substitutes that might do some of the work that is usually performed by domestic institutions. The international mechanisms available to combat outright theft are different than the mechanisms available to influence domestic decisions about the distribution of legitimately-obtained state wealth. Relatedly, the categories help to anticipate the normative justifications for and objections to the idea of using international institutions to affect core domestic functions, such as restricting a country's ability to determine how to spend its own money on its own people, and to the particular mechanisms that I propose.

#### A. Personal Enrichment at Public Expense

It is, of course, no longer surprising to learn that leaders of resource rich countries enrich themselves at the expense of their citizens.<sup>47</sup> The more challenging questions center around how leaders enrich themselves, how it affects citizens, and what can be done about it. In many countries the best way to become wealthy is to either hold political power or be related to someone who does. This is not, of course, limited to developing countries or to countries of any particular region of the world. But in places where political power, or proximity to it, is the exclusive path to wealth, the problem takes on added importance. How do political leaders enrich themselves, and why does it matter? There are perhaps as many ways for autocrats to enrich themselves as there are autocrats, but several general patterns stand out. What unites these various mechanisms is that they persist in large measure because of weakened domestic institutions. In this Part, I outline the ways that autocrats are able to enrich themselves and the effects of this behavior. The goal of this Part is not to provide a comprehensive account of corruption or quasi-corruption. Instead, my goal is to provide the backdrop against which to argue that weak domestic institutions are subject to gross exploitation that affects citizens, and that international institutions might provide a mechanism by which to mitigate these harms.

When the president of a country in which the citizens have little power to hold their leaders accountable wants to enrich himself, he has plenty of options. Some autocrats put themselves or their family members in a position to profit personally from state endeavors, by, for example, putting their children on the boards of corporations that profit from business with the state. Others take handsome signature bonuses, ostensibly legal side payments to state officials for their signatures on public-private contracts. Others place family members or close associates in controlling positions in key industries. This might happen by, for example, requiring that foreign corporations wishing to extract oil or natural gas enter into joint ventures with local companies, and then awarding the joint venture

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<sup>47</sup> See, e.g., *Show Us the Money: Africa, oil and the West*, THE ECONOMIST, Sept. 1, 2012, <http://www.economist.com/node/21561886> (describing widespread corruption in the oil and gas industries in Africa).

contract to a company owned by their children or close allies. This is the path of the family of Teodoro Nguema Obiang, the president of Equatorial Guinea.<sup>48</sup> President Obiang's relatives held official positions which allowed them impose taxes to benefit themselves and exploit their connections to the president for their personal benefit.<sup>49</sup> Others manipulate domestic regulation to make it difficult to determine how much revenue is coming in to the state's treasury. This is path of the leaders of Angola, who created a financial structure for the nation's oil wealth so opaque and convoluted that it is virtually impossible for outsiders to determine how much has been stolen from the national treasury.<sup>50</sup>

None of these paths to enrichment would be as possible without weakened or dysfunctional domestic institutions. If there were a rigorous and independent domestic securities regulatory system, then autocrats would find it much more difficult to engage in securities manipulation or fraud. A stringent corporate governance regime would make it more difficult for autocrats to place their children or cronies in vital positions in joint ventures or other firms that stand to profit from doing business with the government. An

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<sup>48</sup> See, e.g., Xan Rice, *Mansions, Memorabilia and Personal Log Tax*, FIN. TIMES, June 19, 2012, <http://www.ft.com/intl/cms/s/0/ca5d3de0-b93b-11e1-b4d6-00144feabdc0.html#axzz2mQWSxpZw> (reporting that Equatorial Guinea's president's son spent approximately \$315 million on houses, cars, and memorabilia, such as Michael Jackson's white glove, using funds amassed when he served as Minister of Forests at an official salary of \$82,000 per year; he reportedly assessed a personal tax on every log exported). See also *United States v. One White Crystal Covered Bad Tour Glove & Other Michael Jackson Memorabilia*, No. CV 11-3582-GW(SSx), 2012 WL 8467453 (C.D. Cal. Sept. 6, 2012).

<sup>49</sup> See, e.g., Ian Urbina, *Taint of Corruption is No Barrier to U.S. Visa*, N.Y. TIMES, Nov. 16, 2009, <http://www.nytimes.com/2009/11/17/us/17visa.html?pagewanted=all> (reporting connections between President Obiang's family and the state oil and forestry industries).

<sup>50</sup> See, e.g., *Extracting Oil, Burying Data: Energy Companies are Fighting Efforts to Reveal Payments to Governments*, THE ECONOMIST, Feb 23, 2012, <http://www.economist.com/node/21548214> (describing difficulty in determining how much revenue the government receives from the sale of state oil reserves); John Reed, *Angola Oil Loan Likely to Raise Transparency Issues*, FIN. TIMES, Oct. 10, 2005, <http://www.ft.com/intl/cms/s/0/a70afe4e-39b4-11da-806e-00000e2511c8.html#axzz2mQWSxpZw> (reporting on corruption in the financing of oil production in Angola).

informed and engaged electorate might operate as a check on autocrats who wished to sell off vital state assets at below-market rates under terms that enrich themselves personally.

1. *Public officials and private companies*

In most developing countries, oil and other natural resources are treated as state assets. That is, they belong to the state and can be sold only by the government.<sup>51</sup> Because states are not in the business of developing oil wells or titanium mines, they typically sell the rights to exploit natural resources to private companies. The actual exploitation of the resource is conducted by a complex web of companies, usually involving one or more private companies, a state-owned company, and multiple subcontractors. This complex structure results in opportunities for state officials to insert themselves or their families into the private ownership structure so as to enrich themselves from the sale of state assets. Public officials have two principal ways to help themselves. First, they help themselves politically by doing business with companies headed by potential political supporters. Second, they can directly benefit themselves or their families by ensuring that some or much of the revenue flows to them.

A recent investigation into the labyrinthine structure of the oil industry in Equatorial Guinea illustrates the political dimensions of the phenomenon. Equatorial Guinea is a small country in West Africa sitting on substantial oil reserves and a well-deserved reputation for corruption.<sup>52</sup> People seeking to work in the oil industry in that country actually work for sub-contractors, not the oil

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<sup>51</sup> See generally Pauline Jones Luong & Erika Weinthal, *Rethinking the Resource Curse: Ownership Structure, Institutional Capacity, and Domestic Constraints*, 9 ANN. REV. POL. SCI. 241 (2006) (discussing the state ownership of resources and its effect on the resource curse). See *id.* at 259 (arguing that state ownership and state control over natural resources significantly contributes to the resource curse).

<sup>52</sup> See *Equatorial Guinea: Country Outlook*, ECONOMIST INTELLIGENCE UNIT: COUNTRY VIEWSWIRE (Oct. 10, 2012), available at Gale Global Issues in Context A305990653 (predicting a “difficult business environment” caused largely because “corruption among public officials will remain rampant”).

companies themselves.<sup>53</sup> Because these subcontractors determine who receives the most lucrative jobs in a desperately poor country, they play a role with substantial economic and social importance. The investigation of the industry found that some of the most powerful employment agencies were owned by, among others, the president's brother (who was also a general in the Army), the president's son (who was also the Secretary of Mining and Energy), the president's uncle (who was also a general and Minister of Security), and the president's father-in-law (the former Minister of Mining).<sup>54</sup> These officials, operating through private companies doing business with the state they represent, are the gateway through which anyone seeking employment in the oil sector must pass. Decisions regarding the sale of the country's assets are made to ensure that those in power remain in power. They are not made to facilitate broad-based economic development.

The case of Angola illustrates the problem of direct personal enrichment from the sale of state assets. Sonangol is the company responsible for the exploitation of all of Angola's substantial oil and gas reserves.<sup>55</sup> In this capacity, it manages all 40 of the onshore and offshore concession blocks—the geographically defined areas in which companies with a license are permitted to extract and sell oil. Sonangol, acting on behalf of the state, sells the rights to exploit oil and gas for each block to one or more companies in a kind of auction. The result is that each of the 40 blocks has a different set of owners, and all of the blocks are owned by multiple companies. For example, block two is owned in shares by Petrobras, Chevron, Somoil, Poliedro Oil Company, Kotoil, and a subsidiary of Sonangol

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<sup>53</sup> HUMAN RIGHTS WATCH, WELL OILED: OIL AND HUMAN RIGHTS IN EQUATORIAL GUINEA 20 (2009), [http://www.hrw.org/sites/default/files/reports/bhr0709web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/bhr0709web_0.pdf).

<sup>54</sup> *Id.*

<sup>55</sup> *See* Petroleum Activities Law, No. 10/04 (2004) (Rep. of Angola), <http://www.eisourcebook.org/cms/files/attachments/other/Angola%20Petroleum%20Activities%20Law,%202004.pdf>. Under Angolan law, Sonangol is the sole concessionaire for oil and gas exploration and exploitation rights, which means that the company is the only entity with author to sell the state's petroleum assets.

itself.<sup>56</sup> To be sure, the fact that blocks are owned in shares by multiple owners is not itself indicative of wrongdoing. However, the complex nature of the system leaves it vulnerable to abuse by officials wishing to obscure their role in the transaction. In early 2012, the former head of Sonangol, which is solely responsible for the awarding of concession rights, disclosed that he had for years held an ownership interest in a private company which had been involved in a lucrative oil exploitation contract with the state.<sup>57</sup> Manuel Vincente, the former head of Sonangol, disclosed that the head of the president's military police agency and the minister for state economic cooperation also held stakes in the same company.

## 2. *Opacity in national accounting*

States with abundant natural resources and weak institutions often provide little information about how much of the resource they possess or how much they receive in payments for the resources they sell. This problem takes multiple forms. First, some countries restrict information and decision making authority to a small coterie of individuals, often including relatives or close allies of government officials who are charged with overseeing the industry. This means that very few people, and no one outside the influence of top officials, has information about the value of the resource being sold or the revenue that has come into the country's treasury. In Angola, for example, auditors appointed by the International Monetary Fund estimated that approximately 50% of the revenue that should have been received under existing contracts had disappeared from the national treasury.<sup>58</sup> Even assuming the original contracts represented fair value for the oil, the state could account for only half of the revenue it was supposed to have received.

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<sup>56</sup> See *Sonangol Oil Concessions Map*, SONANGOL EP, <http://www.sonangol.co.ao/wps/portal/epNew/atividades/concessions/mapaconcessoes> (last visited Jan. 28, 2014).

<sup>57</sup> Tom Burgis & Cynthia O'Murchu, *Angola Officials Held Hidden Oil Stakes*, FIN. TIMES, April 15, 2012, <http://www.ft.com/intl/cms/s/0/effd6a98-854c-11e1-a394-00144feab49a.html#axzz2mQWSxpZw>.

<sup>58</sup> See Justin Pearce, *IMF: Angola's 'Missing Millions'*, BBC, Oct. 18, 2002, <http://news.bbc.co.uk/2/hi/africa/2338669.stm> (reporting that the IMF found nearly \$1 billion had "disappeared" from the Angolan treasury in the previous year).

The problem of opacity manifests itself in other ways as well. In Nigeria, government officials charged with negotiating oil and gas exploitation leases regularly agreed to terms that were well below market rates.<sup>59</sup> In effect, officials sold Nigeria's natural resources at rates far below the amount those resources would have fetched if sold in a transparent auction. This is a distinct harm from that discussed above. In the previous example, the problem was that revenue to which the state was contractually entitled did not actually flow to the state; it was either stolen by corrupt officials, returned to the oil companies, or not accounted properly accounted for. In this instance, the problem is that the theft was built into the contract. Perhaps unsurprisingly, the report that identified the below-market contracts also identified a number of instances in which the officials who executed these contracts received large signature bonuses, which were not disclosed or properly accounted for.<sup>60</sup>

When ExxonMobil was awarded a lease to extract oil from three blocks off the coast of Nigeria, the company was required to pay a "signature bonus" of approximately \$600 million.<sup>61</sup> In Angola, when Sonangol negotiated the sale of lucrative oil blocks off the coast of the country, it obtained a signature bonus of \$10 million from the companies awarded the contract.<sup>62</sup> Signature bonuses are payments made after an agreement is concluded but before any of the natural resource is extracted. The size of the payment is determined by the presumed value of the resource to be exploited, but the

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<sup>59</sup> Joe Brock, *Exclusive: Nigeria Loses Billions in Cut Price Oil Deals*, REUTERS, Oct. 24, 2012, <http://www.reuters.com/article/2012/10/24/us-nigeria-oil-idUSBRE89N0VV20121024>.

<sup>60</sup> *Id.*

<sup>61</sup> Tom Burgis, *Groups to Dig Deep for Nigerian Leases*, FIN. TIMES, Dec. 13, 2009, <http://www.ft.com/intl/cms/s/0/355075c0-e80d-11de-8a02-00144feab49a.html#axzz2mQWSxpZw> (reporting that ExxonMobil was required to pay a signature bonus "of as much as \$600m after securing a new 20-year lease to three blocks").

<sup>62</sup> Tom Burgis & Cynthia O'Murchu, *Spotlight Falls on Cobalt's Angola Partner*, FIN. TIMES, Apr. 15, 2012, <http://www.ft.com/intl/cms/s/0/1225e3de-854d-11e1-a394-00144feab49a.html#axzz2rF7FuPQ7> (reporting that the companies Nazaki Oil & Gaz and Cobalt International Energy had paid a signature bonus to Sonangol as part of a deal to secure rights to exploit oil in offshore fields).

payment must be made regardless of whether the project succeeds or fails.<sup>63</sup>

As the law is currently interpreted, signature bonuses do not violate the Foreign Corrupt Practices Act, the United Kingdom's new anti-bribery statute, or the OECD's anti-corruption provisions. Moreover, under the appropriate conditions, signature bonuses can help to balance one of the challenges inherent in the sale of the right to exploit natural resources. The state selling the resource wants as much money as possible up front. The company buying the right to exploit the resource wants to pay as little as possible until it is certain of the quantity, quality, and marketability of the resource.<sup>64</sup> Because it is an upfront payment, the signature bonus is a potentially useful way to account for the risks faced by each party.

The principal problem with signature bonuses is that, because they are difficult to trace and account for, they can be used for expenses that would be difficult to justify if subjected to public scrutiny or robust political checks.<sup>65</sup> For example, after officials in Angola received a \$900 million signature bonus from the sale of several oil exploration licenses in 1999, officials apparently spent much of the money on weaponry for use in the country's civil war.<sup>66</sup> Again, it is not the fact of the bonuses that causes the problem.

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<sup>63</sup> See Peter Cramton, *How Best to Auction Oil Rights*, in ESCAPING THE RESOURCE CURSE 114, 126 (Macartan Humphreys et al. eds., 2007), <http://works.bepress.com/cgi/viewcontent.cgi?article=1039&context=cramton> (defining a signature bonus as an "upfront payment determined in auction for the right to explore and develop the block during the license period").

<sup>64</sup> See, e.g., John McMillan, *Promoting Transparency in Angola*, 16 J. DEMOCRACY 155, 159 ("[U]se of signature bonuses is not a sign of corruption; it is sound auction design.").

<sup>65</sup> See Henri E. Cauvin, *IMF. Skewers Corruption in Angola*, N.Y. TIMES, Nov. 30, 2002, <http://www.nytimes.com/2002/11/30/world/imf-skewers-corruption-in-angola.html> (reporting on leaked IMF report stating that at least \$100 million in bonus payments were not entered in the country's accounts). See also *Angola 2002 Article IV Consultation: Preliminary Conclusions of the IMF Mission*, INT'L MONETARY FUND (Feb. 19, 2002), <http://www.imf.org/external/np/ms/2002/021902.htm> (urging Angola to include in the national treasury account "the total amount of signature oil bonuses").

<sup>66</sup> Jędrzej George Frynas & Geoffrey Wood, *Oil & War in Angola*, 90 REV. OF AFR. POL. ECON. 587, 595 (2001).



Instead the problem is the institutional failures that allow officials to use the bonuses without meaningful scrutiny or accountability.

## B. Internal Revenue Distribution

States rich in resource revenue must determine how to distribute the revenue from the sale of resources. The most basic goal is to turn a non-renewable resource into permanent improvement—transforming today’s dollars into future development. But resource wealth also raises many other distributional questions. How much should be spent on people living near the extraction site and how much on people living far from it? How much should be devoted to the current generation and how much to future generations? How much should be reinvested in the enterprise and how much extracted to diversify the state’s financial portfolio? Weak institutions permit officials to use resources inefficiently.

### 1. *Investment in unnecessary or inefficient projects*

Many resource-dependent economies make substantial investments in infrastructure and the domestic economy, even in the presence of corruption and mismanagement. In one survey of resource dependent economies, the author found that investment projects, along with the state payroll, represented one of the two largest expenditures for the state.<sup>67</sup> Thus, the problem is typically not that the state is underinvesting in the domestic economy or in infrastructure. The problem is that the state is making the wrong kinds of investment decisions. Too often, politicians invest in inefficient projects that on their face seem more designed to fail than to succeed. In the field of development economics there is a small but interesting literature on what are often called white elephants; that is, expensive but unnecessary projects whose completion is unlikely or would actually be socially harmful.<sup>68</sup> Put somewhat more

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<sup>67</sup> Frankel, *supra* note 5, at 23.

<sup>68</sup> The term “white elephant” apparently comes from a story told about the kings of Siam. As the story goes, “the kings of Siam were accustomed to make a present of one of the animals to courtiers who had rendered themselves obnoxious in order to ruin the recipient by the cost of its maintenance.” OXFORD ENGLISH DICTIONARY 134 (2d ed., vol. V, 1989).

formally, these are projects “with a negative social surplus.”<sup>69</sup> An example from Nigeria illustrates the point. In the 1970s, the government of Nigeria set out to build Africa’s largest steel plant,<sup>70</sup> but it was not fully operational as late as 2010.<sup>71</sup> The problem continues today. Consider a recent example from Ghana. In the lead-up to the presidential elections in late 2012, the government used the revenue from Chinese investment in the resource sector to finance a number of major infrastructure projects that had little to commend them other than their potential political payoff.<sup>72</sup>

White elephant projects are undertaken not because there is convincing evidence that they will be socially useful or economically efficient, but because they provide a payoff to the politicians who champion them.<sup>73</sup> For example, in Zambia, the government ordered the construction of brick factories far from the places where construction would take place, causing the cost of bricks to skyrocket because of transportation costs. Contractors quickly stopped using bricks and began to use concrete blocks. The brick factory was eventually shuttered.<sup>74</sup> Thus, the problem was not that the government failed to invest in development projects—it had actually invested heavily in the brick factory—or that the project itself was without any value. Instead, the problem was that the institutions that

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<sup>69</sup> Robinson & Torvik, *supra* note 18 (developing a typology of white elephant projects).

<sup>70</sup> See NICHOLAS SHAXSON, POISONED WELLS: THE DIRTY POLITICS OF AFRICAN OIL 22 (2007) (“[Nigeria’s leaders] spent recklessly: building a new national capital in Abuja and pushing ahead with the giant Ajoakuta steel project, a class of white elephant that was supposed to be Africa’s biggest steel plant yet ended up consuming billions of dollars without producing any steel”).

<sup>71</sup> Teresa Daban & Jean-Luc Helis, *A Public Financial Management Framework for Resource-Producing Countries* 11 (IMF, Working Paper No. WP/10/72, 2010) (“Ajoakuta steel mill built in the 1970s absorbed over US \$3 billion yet is not fully operational on a commercial basis”).

<sup>72</sup> *Political Storm Over Chinese Gas Contracts*, 6 AFRICA-ASIA CONFIDENTIAL, Nov. 2012, [http://www.africa-asia-confidential.com/article-preview/id/823/Political\\_storm\\_over\\_Chinese\\_gas\\_contracts](http://www.africa-asia-confidential.com/article-preview/id/823/Political_storm_over_Chinese_gas_contracts).

<sup>73</sup> Robinson & Torvik, *supra* note 18, at 201 (arguing that white elephant projects are undertaken because their “inefficiency” is particularly politically beneficial to those who promote them).

<sup>74</sup> *Id.*

should have pushed the government to favor social welfare or long-term development over their own political gain failed to work.

## 2. *Politically-motivated revenue distribution*

In many developing countries, particularly those with substantial natural resources, the number of public employees is far greater than would otherwise be warranted. Many political leaders have the power to increase or decrease public employment numbers as they see fit. One extreme example is Kuwait. One recent study found that 91 percent of the Kuwaiti labor force (that is, Kuwaiti citizens) worked in the public sector.<sup>75</sup> The problem of political patronage is by no means limited to developing countries or those rich with natural resources. Indeed, one study argued that many cities in the United States use public employment as a way to distribute wealth to politically favored groups.<sup>76</sup> But the problem is pronounced in developing countries,<sup>77</sup> and it can have particularly bad consequences in resource-rich countries.<sup>78</sup> One reason politicians hand out public sector jobs is that the practice can operate as a kind of political insurance. That is to say, politicians can stay in office longer if they distribute at least some of the revenue from resources through public employment. For this to happen, two conditions must be true. First, incumbent politicians must desire to remain in office.<sup>79</sup> Second, citizens must have relatively few opportunities for

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<sup>75</sup> Laura El-Katiri, Bassam Fattouh & Paul Segal, *Anatomy of an Oil-Based Welfare State: Rent Distribution in Kuwait* 19 (Kuwait Program on Dev., Governance, and Globalization in the Gulf States, Research Paper No. 13, 2011) (noting that 91% of Kuwaiti nationals work in the public sector and that 98% of private sector jobs are held by non-Kuwaitis).

<sup>76</sup> See Alberto Alesina, Reza Baqir & William Easterly, *Redistributive Public Employment* (Nat'l Bureau Econ. Research, Working Paper No. 6746, 1998).

<sup>77</sup> See Alan Gelb et al., *Public Sector Employment, Rent Seeking and Economic Growth*, 101 *ECON. J.* 1186 (1991) (showing that the size of public sector employment relative to total non-agricultural employment was far higher in developing countries than in industrialized countries).

<sup>78</sup> See Karl, *supra* note 1, at 27 (describing the political benefits of expanding the public payroll).

<sup>79</sup> James A. Robinson et al., *Political Foundations of the Resource Curse*, 79 *J. DEV. ECON.* 447, 449 (2005), [http://www.feem-web.it/ess/ess07/files/bulte6\\_in.pdf](http://www.feem-web.it/ess/ess07/files/bulte6_in.pdf) (modeling the behavior of politicians who wish to be reelected or remain in power through other means).

employment, a reality in developing countries by definition. Under these conditions, politicians can distribute public sector jobs to favored groups as a strategy to ensure that they remain in power.<sup>80</sup>

The harms from this activity can take a number of forms. One harm is that it leads to a misallocation of human capital. A rational worker is forced to choose between receiving his or her full share of resource rents in the public sector and foregoing that share in the private sector.<sup>81</sup> A second harm is that the economy as a whole may become inefficient because there are more workers than are necessary and those workers face little incentive to work hard because their jobs are virtually certain.<sup>82</sup> As with the other problems described above, it is institutional weakness that permits political leaders to make self-serving decisions with little regard for social welfare or long-term economic development.

### III. INTERNATIONAL INSTITUTIONS AS SUBSTITUTES FOR DOMESTIC INSTITUTIONS

To this point I have argued that resource wealth can help or hurt a country depending largely on the quality of its institutions. I have also shown the kinds of institutional failures that lead to harmful outcomes. These include permitting officials to monopolize information about national assets and revenue, arrogate to themselves dual business and public roles in resource transactions, and distribute resource wealth capriciously. In this Part, I argue that these domestic institutional failures can and should be addressed by

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<sup>80</sup> See RICHARD M. AUTY, RESOURCE ABUNDANCE AND ECONOMIC DEVELOPMENT 134 (2001) (arguing that patronage jobs are an efficient way to distribute rents from resource revenue).

<sup>81</sup> See Paul Segal, *How to spend it: Resource wealth and the distribution of resource rents*, 51 ENERGY POL'Y 340, 345 (2012), <http://www.lse.ac.uk/IDEAS/programmes/middleEastProgramme/kuwait/documents/Segal.pdf> (arguing that workers “face the following choice: be unproductive in the public sector and be rewarded with oil rents, or be productive in the private sector and not be rewarded with oil rents.”).

<sup>82</sup> See *id.* (reporting on a study showing that Mexico’s state-owned oil refineries “are among the least efficient in the world, partly because they employ six times the number of people as US refineries of comparable size and complexity, without higher levels of production.”).

*international* institutions. Whether by design or happenstance, international institutions already have a profound effect on the domestic institutions of every state. There is an extensive literature on this issue, with which I do not engage here except to note that there is nothing particularly unusual about recognizing the domestic effects of international law and institutions.<sup>83</sup> What is new is the attempt to develop more fully a theory of how and why international institutions can and should serve some of the functions of domestic institutions. To suggest that international law should operate as a substitute for robust and effective domestic institutions is to acknowledge at the outset the deep flaws present in the domestic institutions of the states at issue. It is also to accept that international institutions are inevitably imperfect and incomplete. Nonetheless, concluding that international institutions are imperfect does not undermine my argument that they can be a substitute for domestic institutions under the right conditions.

The objective of this Part is two-fold: to demonstrate that my approach is possible at a doctrinal level and to make the normative case for the use of international institutions when domestic institutions are inadequate. At the doctrinal level, I argue that the use of international institutions is an appropriate and potentially useful tool to address the resource curse in developing countries. I have already discussed what I mean by institutions as a general matter, but it bears explaining what I mean by “international institutions.” For my purposes, the term “international institutions” is a broad placeholder that means almost anything that is not a purely domestic institution of the target country. The term “international institutions” should be understood broadly to include both independent bodies such as the United Nations, disaggregated groups, substantive rules, and the like. Included in this would be measures that are created by

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<sup>83</sup> See generally BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009) (showing that, through the lens of human rights, international norms and obligations—what I have labeled *international institutions*—have had a profound effect on the human rights practices of many countries). Simmons’s work is a kind of corrective to the arguments made by some scholars and others that international norms have not had a profound effect on the actions of states. See also Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002) (purporting to show that treaties do not affect human rights practices of states).

super-national bodies (or groups of states) such as the International Criminal Court—an entity that exists apart from any particular state with its own juridical personality and rules. My definition also includes the substantive law the ICC applies. I also include national statutes or regulations that are applied across borders. For example, this can include the U.S. Foreign Corrupt Practices Act, which regulates the conduct of U.S. corporations and those international corporations trading on U.S. stock exchanges who do business outside the U.S. The substantive rules and enforcement institutions are not themselves international, but they reach across borders and affect the substantive behavior of persons and entities outside the U.S.<sup>84</sup>

Adopting such a broad definition means, of course, that there are myriad entities, laws, and regulations that could fit my argument. In this Part, my goal is to identify institutions that are plausible. That is to say that the institutions I analyze can be used without radical overhaul and are meant to show the mechanics of my proposal. I do not argue that the set of institutions I have identified is the only, or even the optimal, set of institutions for this purpose. Indeed, one of the goals of this Article is to open a scholarly conversation on the use of international institutions when domestic institutions fail to fulfill their purpose. Thus my doctrinal objectives are largely illustrative.

I build the normative case on two blocks. I argue that states owe positive obligations to their citizens, particularly with regard to the use of non-renewable state-owned resources. When states or their leaders use these resources for anything other than the benefit of citizens, states have failed to fulfill important duties. Thus the first normative building block is the notion of state obligation and stewardship. Next I argue that, because international institutions are already involved in the mechanics of the resource curse, the use of international institutions to address the resource curse is entirely appropriate. For example, state officials who pocket signature bonuses move the money through the international banking system. They rely on international corporations as joint venture partners to

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<sup>84</sup> For a full discussion of transnational law, including its international and domestic dimensions and origins, see Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745, 745-47 (2006).

exploit the resources that make them rich and on international lenders to finance their vanity projects.

Before moving on, one caveat is in order. I have argued that the reform of international institutions is a plausible second-best approach to preventing or mitigating the effects of the resource curse, but there is some evidence that international measures may be a first-best approach, at least for some of the countries affected by the resource curse. In some resource-rich countries, politicians can reshape institutions to make it easier for them to capture as much of the resource wealth as possible.<sup>85</sup> There is significant debate about how this might occur,<sup>86</sup> but three possible explanations stand out. First, governments with enough wealth can use the wealth to mollify potential opponents or otherwise reduce domestic opposition.<sup>87</sup> Second, governments with sufficient wealth might deliberately interfere with the formation of opposition groups to ensure their own survival.<sup>88</sup> Finally, because political leaders enforce as well as make the law, they can manipulate the enforcement of the law to avoid the consequences of their own misdeeds.<sup>89</sup> I do not attempt to resolve this issue here, but it is nonetheless instructive to note that

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<sup>85</sup> See Michael L. Ross, *Does Oil Hinder Democracy?*, 53 *WORLD POL.* 325, 333-36 (2001) (arguing that state-controlled concentrated wealth can permit elites and political leaders to modify existing institutions to insulate themselves from accountability).

<sup>86</sup> Indeed, there is debate about whether it occurs at all. See, e.g., Stephen Haber & Victor Menaldo, *Do Natural Resources Fuel Authoritarianism? A Reappraisal of the Resource Curse*, 105 *AM. POL. SCI. REV.* 1, 3 (2011) (arguing that “increases in natural resource income are associated with increases in democracy”).

<sup>87</sup> See, e.g., Ricky Lam & Leonard Wantchekon, *Dictatorships as Political Dutch Disease* (Econ. Growth Ctr., Yale Univ., Working Paper No. 795, 1999), cited in Ross, *supra* note 85, at 333.

<sup>88</sup> See, e.g., NICHOLAS VAN DE WALLE, *AFRICAN ECONOMIES AND THE POLITICS OF PERMANENT CRISIS 1979-1999* (2001).

<sup>89</sup> See, e.g., E. Woodrow Eckard, *Are Autocratic Rules Also Inside Traders? Cross-Country Evidence*, 43 *ECON. INQUIRY* 13, 20 (2005) (arguing, based on econometric analysis of 101 countries, that autocratic governments manipulate the regulatory regime to create opportunities for political leaders to enrich themselves). See also GREENPEACE, *CONNING THE CONGO: LOGGING SECTOR REV.* (2008), <http://www.greenpeace.org/international/Global/international/planet-2/report/2008/7/conning-the-congo.pdf> (documenting manipulation of accounting and tax regulations to hide official profiteering).

what I have labeled a second-best may well be first-best in some circumstances.

The approaches outlined below fit into two broad categories that are ordered roughly by the degree to which they would infringe on the sovereignty of the target country. First, I argue that international institutions can function as collectors and disseminators of information that could be used by an informed and empowered population to hold their leaders accountable. Information is a necessary but certainly not sufficient ingredient in addressing the resource curse. Citizens often simply do not know how much money an oil company is paying for the oil it takes, who receives the money, or how much the resource is truly worth. International institutions often possess or could easily require or facilitate the disclosure of this information.

Second, I argue that there are international institutions that could be used to make access to markets and finance conditional on a state's compliance with certain norms or regulations. Put slightly differently, states that refuse to disclose how much they receive from oil companies should not be permitted to sell their products using international markets or should be ineligible for participation in international lending or insurance regimes. This approach represents a greater intrusion on the target state's sovereignty because the state would be required to change its behavior or face exclusion from external sources of finance or markets. Nonetheless, the behavioral change is minimal because it merely requires compliance with existing norms or regulations. It is already a violation of international norms for government officials to personally benefit from the sale of state assets or for a state treasury to fail to record payments for the sale of state assets.

#### A. The Uses of Information

Perhaps the least intrusive international response would be to require entities involved in transactions to gather and disseminate information about their activities. Scholars and policymakers have long argued that transparency can be a useful tool in the fight against official corruption, regardless of whether the country is affected by



the resource curse.<sup>90</sup> Entities from the International Monetary Fund to the World Bank to Transparency International have long called for more transparency as a way to fight corruption.<sup>91</sup> My general approach is therefore not unique. What is different is my argument that international institutions can play an important role in the process.

Most theories about the utility of transparency focus on the causal pathways by which transparency might reduce corruption. One prominent argument is that officials are less likely to engage in corrupt behavior when there is a greater likelihood that they will be found out.<sup>92</sup> One strand of this argument is that officials will be deterred if they fear their reputations will suffer if they are exposed as corrupt.<sup>93</sup> Another strand holds that transparency works because officials are more likely to be caught by law enforcement, and if caught, proof of their crimes will be more readily available.<sup>94</sup> Regardless of which of these approaches is correct, transparency is likely to work only when the information ends up in the hands of an entity (or population) with the power to hold corrupt leaders accountable.<sup>95</sup> For this to happen, those who receive the information

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<sup>90</sup> For a thorough discussion of the causes and consequences of corruption, including analysis of the uses of transparency, see SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM* (1999) and SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* (1978).

<sup>91</sup> See, e.g., Susan Rose-Ackerman, *Redesigning the State to Fight Corruption: Transparency, Competition, and Privatization*, Note No. 75, PUB. POL'Y PRIVATE SECTOR (April 1996), <https://openknowledge.worldbank.org/bitstream/handle/10986/11627/multi0page.pdf?sequence=1> (summarizing best practices with respect to reducing corruption).

<sup>92</sup> See Rose-Ackerman, *supra* note 91.

<sup>93</sup> See, e.g., Gerald Anselm Acquah-Gaisie, *Curbing Financial Crime Among Third World Elites*, 8 J. MONEY LAUNDERING CONTROL 371, 377 (2005) (arguing that the “fear of exposure can act as a deterrent” to official misconduct).

<sup>94</sup> See Ivar Kolstad & Arne Wiig, *Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?*, 37 WORLD DEV. 521, 523 (2009) (arguing that under “non-transparent circumstances proof is more difficult to generate and corrupt officials are able to buy their way out of punishment”).

<sup>95</sup> See, e.g., McMillan, *supra* note 64, at 161-66 (describing the ways policymakers and citizens used information about official corruption and oil revenue in Angola to push for reforms).

must have the capacity to process it and have the means to affect the behavior of those engaging in corrupt behavior.<sup>96</sup>

At the doctrinal level, what matters is to identify how and where information can be obtained and disclosed.<sup>97</sup> I highlight two approaches: disclosure of information about financial movement and transactions, and disclosure of substantive information about a company's supply chain or other business practices.

It is almost impossible to move money around the world without leaving at least some trace.<sup>98</sup> That commercial and financial transactions leave a trail is neither new nor particularly noteworthy in the context of law enforcement or those seeking civil redress or the enforcement of contracts. In most instances, this trail consists of the information gathered by entities that facilitate or regulate such transactions, including banks, regulatory agencies, securities

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<sup>96</sup> See Kolstad & Wiig, *supra* note 96, at 529 (arguing that the “impact of transparency therefore depends on the level of education of an electorate, the extent to which key stakeholders have the power to hold a government to account, and the private or collective nature of the goods about which information is provided”).

<sup>97</sup> There have been attempts to harness information in similar ways. For example, the conflict minerals provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act are an attempt to do this. For a full treatment of this issue, see generally Christiana Ochoa & Patrick J. Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 GOETTINGEN J. INT'L L. 129 (2011). Similarly, the Extractive Industries Transparency Initiative attempts to harness the power of information to modify the conduct of corporations and governments. See generally Clare Short, *The Development of the Extractive Industries Transparency Initiative*, 7 J. WORLD ENERGY L. & BUS. 8 (2013).

<sup>98</sup> See, e.g., Caterina Giannetti & Nicola Jentzsch, *Credit Reporting, Financial Intermediation and Identification Systems: International Evidence*, 33 J. INT'L MONEY & FIN. 60, 64 (2013) (describing various international regulations regarding the obligations of financial institutions to verify the identity of those using the financial system). But see NICHOLAS SHAXSON, *TREASURE ISLANDS: UNCOVERING THE DAMAGE OF OFFSHORE BANKING AND TAX HAVENS* (2011) (describing the many ways that participants in the financial system can obscure or hide their transactions). Nonetheless, my point is not that the system is perfect. Instead, I argue that there is information available that could be used for the purposes I describe.

exchanges, and the like.<sup>99</sup> This financial trail is perhaps best thought of not as a uniform, unbroken line but as a pointillist representation of a line: a series of discrete points, which take on the shape of a line only when viewed together. Each point might represent the arrival of money in a bank or the registration of a securities transaction with a regulatory or trading house. Regardless of what they are, most of the points exist through the compulsion, either direct or indirect, of the law. Regulatory bodies gather information using legal tools. Trading houses do the same. Institutions that ostensibly operate privately—such as banks—are nonetheless subject to investor protection regulations and other laws that compel them to gather information. Each point in the series is both an example of the law of that jurisdiction regulating the conduct of a non-citizen and an opportunity to gather or obscure information. Both of these issues are relevant to my argument. Recent efforts to recover the proceeds of corruption illustrate the potential of using bits of information gathered from seemingly disparate sources. Using information gathered from financial regulators, customs houses, corporations, and international institutions, litigants have been able to recover some of the money stolen by Frederick Chiluba, the former president of Zambia, and his associates.<sup>100</sup>

Recent legislation in the United States illustrates the second model: requiring entities to assemble and disclose information about their own operations.<sup>101</sup> As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),<sup>102</sup> the U.S.

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<sup>99</sup> See generally Jackie Johnson, *Is the Global Financial System AML/CFT Prepared?*, 15 J. FIN. CRIME 7 (2008) (describing information gathering requirements imposed by financial regulators after Sept. 11, 2001 to promote anti-money laundering and countering the financing of terrorism and finding that significant work remains to be done despite the improvements in tracing funds).

<sup>100</sup> See Jeffrey Simser, *Asset Recovery and Kleptocracy*, 17 J. FIN. CRIME 321, 322-23 (2011) (describing the history of efforts to recover funds stolen by Chiluba between 1991 and 2001).

<sup>101</sup> For a more extensive treatment of this issue, see Christiana Ochoa & Patrick J. Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 GOETTINGEN J. INT'L L. 129, 137-41 (2011) (arguing that requiring companies to assemble and disclose information was a means to promote transparency and reduce corruption).

<sup>102</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173.ENR, § 1502, Conflict Minerals.

Congress included provisions designed to address the ongoing conflict in the Democratic Republic of Congo. The conflict minerals provisions, and the regulations that implement them, require manufacturers to determine whether there are any materials “necessary to the functionality or production of a product”<sup>103</sup> which they manufacture that originate in the DRC or any country with which it “shares an internationally recognized border.”<sup>104</sup> Importantly, these provisions do not prohibit the use or sale of conflict minerals. Instead they require companies to gather information about their practices and disclose this information to regulators and the public. Thus the use of U.S. markets is conditioned on the disclosure of information about the participant’s financial practices.

I argue that international institutions are a plausible second-best approach, but there is some evidence that, with respect to transparency, they may be more effective than domestic institutions. Broadly speaking, transparency can occur in two ways: through mechanisms controlled by the targeted actor or through mechanisms outside of that actor’s control. For example, freedom-of-information laws are controlled by the source of the information. A free press is outside the control of the source of the information.<sup>105</sup> In an empirical analysis of transparency reforms, scholars found that the transparency measures under the control of the source of information are less effective at reducing corruption than similar measures that are outside the control of the source.<sup>106</sup> This suggests that transparency measures under the control of international institutions (and independent from domestic actors) may be more effective than purely domestic measures.

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<sup>103</sup> *Id.* at § 1502(2)(B).

<sup>104</sup> *Id.* at § 1502(e)(1).

<sup>105</sup> See Catharina Lindstedt & Daniel Naurin, *Transparency Is Not Enough: Making Transparency Effective in Reducing Corruption*, 31 INT’L POL. SCI. REV. 301, 305 (2010) (arguing that “who controls the release of information” is an important variable in determining the efficacy of transparency as an anti-corruption tool).

<sup>106</sup> *Id.* at 316.

## B. Conditional Access to Markets

One way to address the problem would be to recognize and capitalize on the conditional nature of access to markets and financial systems. The international financial system is not an entity unto itself; it is made up of many connected networks, each of which is governed by the national law of one or more states. Access to the financial system is conditional in every case. Firms that wish to raise capital on U.S. exchanges are permitted to do so only if they comply with certain regulations. Firms that wish to raise capital in the City of London must comply with U.K. regulations.<sup>107</sup> For example, in the United States the Office of Foreign Asset Control (“OFAC”) plays this role. OFAC is a part of the U.S. Department of the Treasury that enforces trade and economic sanctions involving foreign individuals and groups believed to be involved in various kinds of illegal activities.<sup>108</sup> Because OFAC is an enforcement mechanism—it executes presidential directives or statutory requirements—the analogy is not perfect, but it is instructive nonetheless. OFAC identifies individuals who, by their actions or position, are considered to be ineligible to do business in the United States or use the U.S. financial system in their dealings. Similarly, access to U.S. consumer markets is conditional. Companies whose products are made with forced labor, for example, are prohibited from selling their products in the U.S. What I propose is to expand the categories of persons who would be subject to heightened scrutiny or outright prohibitions on access to markets. What follows are examples of and justifications for the kinds of categories I propose.

### 1. *Prohibit dual roles in transactions*

Politicians often enrich themselves by participating in the same project as both private citizens looking to make money and

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<sup>107</sup> See, e.g., Peter Johnstone & George Brown, *International Controls of Corruption: Recent Responses from the USA and the UK*, 11 J. FIN. CRIME 217, 219-25 (2004) (describing various regulatory and statutory obligations of those using the U.S. and U.K. capital markets).

<sup>108</sup> See *Mission of the Office of Foreign Assets Control*, U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx> (last visited Dec. 3, 2013).

public officials charged with pursuing the public good. Consider again the example from Angola. In his official role, Manuel Vicente was head of Sonangol, the Angolan national oil company. In this capacity he was charged with constructing the best possible arrangement for Angola to exploit its vast oil reserves. In this role he was selling an asset owned by the country with the goal of transforming oil into long-term development. In his private capacity, he had a stake in one of the companies purchasing the very same state-owned asset he was selling in his official capacity.<sup>109</sup> In Equatorial Guinea, public officials, who were close relatives of the president, were, in their private capacities, owners of companies that contracted with the state oil company.<sup>110</sup>

The phenomenon of public officials using official positions for personal gain is not unheard of in wealthy Western countries.<sup>111</sup> But the problem is particularly troublesome in resource-rich developing countries.<sup>112</sup> The principal check on this kind of official behavior is political. Politicians who abuse their public positions can simply be voted out or otherwise removed from office. This check works only with an informed, empowered electorate, which is absent in most developing countries suffering from the resource curse. In Angola, most citizens do not have the information to hold official accountable, and even if they did there are few opportunities for them to do so.

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<sup>109</sup> See Tom Burgis et al., *Interactive: Angolan Oil Connections*, FIN. TIMES, Apr. 15, 2012, <http://www.ft.com/intl/cms/s/0/03293b62-84c4-11e1-a3c5-00144feab49a.html#axzz2rjxc08vT>. Vicente had a private stake in a company named Aquattro, which was a shareholder in Nazaki, which was one of four companies that purchased the right to exploit the oil in blocks 9 and 21.

<sup>110</sup> HUMAN RIGHTS WATCH, *supra* note 53, at 20.

<sup>111</sup> See generally Susan Rose-Ackerman, *Political Corruption and Democratic Structures*, in THE POLITICAL ECONOMY OF CORRUPTION 25, 35-40 (Arvind K. Jain ed., 2001) (describing and measuring corruption in advanced democracies).

<sup>112</sup> See, e.g., Hazel M. McFerson, *Extractive Industries and African Democracy: Can the "Resource Curse" be Exorcised?*, 11 INT'L STUD. PERSP. 335, 340-41 (2010) (using various quantitative indicators to demonstrate high levels of corruption in resource-rich developing countries).

## 2. *Reduce patronage opportunities*

One of the causal pathways by which the resource curse affects poor countries is that politicians engage in patronage. That is, they use their official positions to reward supporters by providing civil service jobs or investing in politically useful but socially inefficient projects. To mitigate this effect, it would be useful to reduce opportunities for politicians to directly distribute public benefits in a way that accrues to their benefit. This could be accomplished by reducing the decisional authority of individuals and restricting spending choices.

Perversely, international institutions seem to encourage, or at least facilitate, this behavior. Consider the ways that international institutions encourage or require corporations and countries to interact. It is considered an international best practice for companies and countries to engage in what are often called multi-stakeholder dialogues. These are opportunities for identified stakeholders—those affected by a resource extraction project, for example—to negotiate the contours of the project. There is something intuitively appealing about requiring a large corporation to sit down with community leaders before beginning a project that will affect the community. And there is some evidence that these dialogues can make projects more efficient and reduce their social costs. The problem comes when the government names the stakeholders and designates the local businesses or leaders who will participate in the process.<sup>113</sup> This is a perfect patronage opportunity: in exchange for a seat at the bargaining table or a share of the proceeds, local leaders might reward the politicians who nominate them with political loyalty or with acquiescence in an inefficient or even harmful project.

Domestic institutional failures make this possible. Patronage and other types of abuse are more likely to occur when the control of a complex transaction is vested in a very small handful of officials who play multiple roles in the transaction. This is a distinct problem

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<sup>113</sup> See, e.g., Ivar Kolstad & Tina Soreide, *Corruption in Natural Resource Management: Implications for Policymakers*, 34 RES. POL'Y 214, 218 (2009) (describing the ways that politicians can manipulate multi-stakeholder dialogue process for political advantage).

from the dual public/private issue discussed separately. One way this issue comes about is that officials who are charged with determining the optimal process by which to exploit resources are the same officials who are charged with assessing the success or failure of the project. Put slightly differently, those charged with maximizing returns are also given the authority to monitor how well they are doing their job. A second way the issue comes about is that officials who are charged with selling state assets also run the auctions at which those assets are sold.

The harms are similar in both instances. The problem of dual roles—even when both are ostensibly for the benefit of the public—makes self-serving behavior possible and therefore more likely. Consider an example. Chad and Cameroon signed an agreement to extract oil in Chad and transport it through a pipeline in Cameroon for sale on the international markets.<sup>114</sup> Officials in Cameroon had to determine how to compensate the communities affected by the pipeline and attendant activity. Those same officials were charged with determining how well the original plan worked, including seeking information from those affected, hearing complaints from citizens, and assessing the environmental impacts of the project. These officials were, in effect, grading themselves. There was little incentive for critical assessment of the initial plan or for identification of corrective measures for problems that arose.

The second, and perhaps more significant problem, has to do with information. As discussed separately, mechanisms that require the production of information that can be used by citizens or other interested parties to hold the government accountable are an important tool. When officials are charged with monitoring themselves, they have no incentive to produce or disseminate information, particularly information critical of their own conduct. One way to address these concerns is to provide a place at the table in any investment dispute for people who are not directly involved in

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<sup>114</sup> See generally Scott Pegg, *Can a Policy Intervention Beat the Resource Curse? Evidence from the Chad-Cameroon Pipeline Project*, 105 AFR. AFF. 1 (2005) (describing the legal and policy apparatus created to address potential revenue distribution problems in the Chad-Cameroon pipeline project).



the transaction but who represent the true owners of the asset for sale.

### C. Complications and Objections

The claim that international institutions can operate as substitutes for domestic institutions is open to a number of objections, two of which I address here. The first is that taking my approach seriously would undermine the sovereignty of resource-rich states. The second objection is that, because institutional failures occur everywhere, not simply in resource-rich countries, and international institutions are far from perfect themselves, there is not sufficient justification to substitute international institutions for domestic institutions.

#### 1. *Sovereignty*

The first and most important objection is that my argument is nothing more than neo-colonialism under a different name because it advocates foreign intrusion into what should be purely domestic concerns. The concept of sovereignty is both a foundational concept of international law and affairs and an idea subject to varied and changing definition. For my purposes, sovereignty is the principle that there is a sphere of domestic authority into which external forces may not interfere without permission.<sup>115</sup> The protected domain was never absolute,<sup>116</sup> and it is even more difficult to define in light of the development of human rights law.<sup>117</sup> But even if contours of sovereignty are not susceptible to precise definition, the core concept remains important: countries expect to have unchallenged authority

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<sup>115</sup> See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 20 (1999) (defining various strands of sovereignty, including Westphalian sovereignty: “the exclusion of external actors from domestic authority structures”).

<sup>116</sup> See Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 962 (2000) (reviewing STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999)) (describing the history of variations in state control and claims of authority over territory).

<sup>117</sup> See generally W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866 (1990) (arguing that the advent of universal human rights norms has modified traditional conceptions of sovereignty).

over their domestic affairs, including the use of natural resources found in their territory. My argument does intrude on this domain. I argue that international institutions should be used, for example, to require states to make substantively different decisions with regard to how they distribute the revenue from the sale of state assets. Instead of spending state revenue on building a new soccer stadium, the state would be required to invest in ways with a greater likelihood to improve the welfare of citizens. In this way, my argument, and the objections to it, bears some resemblance to the arguments over the attachment of conditions to development assistance. In the 1980s and 1990s, the International Monetary Fund and the World Bank, among other international financial institutions, sought to promote economic policy reform based on what was called the “Washington Consensus.”<sup>118</sup> To accomplish these policy objectives, the International Monetary Fund required countries wishing to avail themselves of the IMF’s resources to adopt reforms in line with the Washington Consensus.<sup>119</sup> One objection to the practice of conditionality was that it intruded on the sovereignty of the recipient states.<sup>120</sup> Put another way, the problem was that the policies required by international financial institutions were those which should have been the prerogative of the recipient country, not an international institution.

The sovereignty issue is important but it does not defeat my argument. I do not attempt to arrive at a theory of optimal social

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<sup>118</sup> The set of policy prescriptions comprising the Washington Consensus was first assembled in an article by John Williamson in *What Washington Means by Policy Reforms*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED* (John Williamson ed., 1990).

<sup>119</sup> See, e.g., Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 49, 50 (arguing that “the IMF is able to exert greater influence over those Member States who need or expect to need its financial assistance” by converting “advice” into “conditionalities attached to IMF financing”); Moises Naim, *Washington Consensus or Washington Confusion?*, 118 *FOREIGN POL'Y* 86, 90 (2000) (describing the ways the IMF and the World Bank required countries to adopt the Washington Consensus reforms as a condition of receiving development or financial assistance).

<sup>120</sup> See, e.g., Douglas Zormelo, *Is Aid Conditionality Consistent with National Sovereignty?* (Overseas Dev. Inst., Working Paper 95, 1997) (surveying the sovereignty-based arguments regarding aid conditionality).

investment.<sup>121</sup> Instead my goal is to identify ways to set broad boundaries outside of which countries should not go with respect to how they spend state assets. Conditions on wealth transfers, including resource extraction contracts, are ubiquitous.<sup>122</sup> It is instructive to note that, in the end, the Washington Consensus collapsed not because of the sovereignty objection, but because it failed to achieve its stated objectives.<sup>123</sup> Conditions are a mechanism by which owners of a resource—in this case, the citizens who ultimately own oil or minerals or the like—can affect the behavior of those who wish to use those resources. Lenders do not just give away money for any purpose; instead they inquire about the purpose and incorporate ways to discipline recipients if they use the money for improper purposes. Similarly, I argue that when international institutions are involved in any way in a resource extraction transaction, they are providing a benefit for which they can appropriately request something in return.

Related to this is a second response. International institutions are already associated with every resource extraction transaction. I argue that these institutions amount to tools necessary for the execution of resource extraction transactions. Participants include corporations registered and regulated in the U.S. and around the world, financial institutions whose accounts are used to transfer funds, and courts and other dispute resolution institutions used to enforce contracts in the event of a dispute.<sup>124</sup> My argument is that

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<sup>121</sup> There is no shortage of attempts to develop such a program using revenue generated from resources. See generally MINERAL RENTS AND THE FINANCING OF SOCIAL POLICY: OPPORTUNITIES AND CHALLENGES (Katja Hujó ed., 2012). In her concluding article, Katja Hujó summarizes the various ways that development schemes financed by resource wealth can negatively affect a country and the policy interventions best capable of preventing these harms. *Id.* at 318-31.

<sup>122</sup> In previous work I showed the prevalence of conditions on wealth transfers, including development assistance, foreign direct investment, and resource extraction contracts. See Patrick J. Keenan, *Curse or Cure? China, Africa, and the Effects of Unconditioned Wealth*, 27 BERKELEY J. INTL. L. 84, 110-17 (2009).

<sup>123</sup> See generally Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform*, 44 J. ECON. LITERATURE 973 (2006) (surveying the evidence of reform failures and analyzing possible reforms).

<sup>124</sup> See, e.g., Timothy L. O'Brien, *At Riggs Bank, a Tangled Path Led to Scandal*, N.Y. TIMES, July 19, 2004, <http://www.nytimes.com/2004/07/19/us/at->

these institutions should use their involvement to benefit local people and avoid permitting others to use them to do harm.

## 2. *The Fallibility of International Institutions*

The next objection is actually a cluster of related points. Some argue that there is nothing magical about what I have called international institutions. Recall that my definition includes institutions in one country that regulate or otherwise affect the behavior of actors in other countries. The objection would be that institutions do not function perfectly in any country, and even robust institutions are subject to capture by interest groups, incompetence, and weakness in the face of political pressure or particularly sophisticated schemes to avoid regulation or to defraud. I do not argue is not that international institutions are a panacea for every ill. Instead, I contend that weak domestic institutions provide opportunities for unaccountable political leaders to enrich themselves, and that this enrichment harms the citizens of the country. International institutions are not a panacea, but do have a role to play in mitigating these harms.

A second strand of this objection would be that international institutions have a poor track record with respect to developing countries.<sup>125</sup> There is undoubtedly evidence to support this objection, but the fact that past efforts have not worked is not, standing alone, sufficient reason to abandon any attempt at reform. I do not argue that international institutions are, in a first-best world, preferable to robust domestic institutions. Instead, I argue that international institutions, particularly legal institutions, are a workable second-best option that might mitigate the harms caused by domestic institutions. Citizens in poor countries plagued by corrupt leadership are unlikely

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[riggs-bank-a-tangled-path-led-to-scandal.html?pagewanted=all&src=pm](#) (describing the involvement of Riggs Bank in laundering money for corrupt foreign dictators including Augusto Pinochet and Teodoro Obiang).

<sup>125</sup> For a thorough treatment of the history of foreign assistance failures, see WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2006). Easterly argues that attempts by international institutions such as the IMF and the World Bank to aid poor countries and encourage them to adopt pro-growth policies have done much more harm than good.

to object to international regulations that make their leaders more accountable and less likely to enrich themselves by impoverishing the country. Over the long run the locus of institutional control matters: external regulation might undermine internal efforts to develop strong regulatory institutions. But in the short to medium term, citizens, particularly the poorest citizens, surely are less concerned about the locus of institutional control than they are about having opportunities to better themselves.<sup>126</sup>

The final strand is that the kinds of institutional failure I have described occur in every country to at least some extent. These phenomena are not unique to developing countries, resource-dependent economies, or any other narrow group of countries.<sup>127</sup> It is important to recognize that even if there is not a difference in kind among countries with respect to the types of institutional weaknesses that I describe, there is a difference in degree. There is ample evidence that many developing countries, particularly those rich in natural resources, have a higher incidence of corruption, less transparent and less effective corporate governance, and a greater centralization of control over the business and technical aspects of resource exploitation. My focus is on those states in which the available evidence suggests that weak domestic institutions are subject to exploitation that significantly affects citizens who are already struggling.

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<sup>126</sup> This is a version of an argument I made in an earlier article. See Patrick J. Keenan, *Sovereign Wealth Funds and Social Arrears: Should Debts to Citizens be Treated Differently than Debts to Other Creditors?*, 49 VA. J. INTL. L. 431, 453-64 (2009). There I developed a theory of what states owe their citizens and specified the sources and contours of these obligations.

<sup>127</sup> See generally Susan Rose-Ackerman, *The Political Economy of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 31 (Kimberly Ann Elliot ed., 1996) (surveying the causes and consequences of corruption in countries around the world); Kenneth J. Meier & Thomas M. Holbrook, "I Seen My Opportunities and I Took 'Em:" *Political Corruption in the American States*, 54 J. POL. 135 (1992) (analyzing the scope of and explanations for corruption in the United States); James C. Scott, *Corruption, Machine Politics, and Political Change*, 63 AM. POL. SCI. REV. 1142 (1969) (showing the effects of systems of political patronage on governance in the United States).

## CONCLUSION

The conclusion that the resource curse is caused in large part by weak domestic institutions represents a significant advance in the literature on economic development. At first glance the solution seems to follow from the problem: address the resource curse by fixing domestic institutions. But when that is not possible or is likely to be a slow process, there are good reasons to use international institutions to do some of the work of domestic institutions, at least in the short and medium terms. Particularly with respect to legal institutions, there are a number of ways to apply insights from the development economics literature to mitigate the effects of the resource curse and allow citizens of poor countries to reap more of the benefits of the countries' wealth.