Global Analytical Lessons for Evaluating a Myanmar Sovereign Wealth Fund

Oliver T. Gilbert
GLOBAL ANALYTICAL LESSONS FOR EVALUATING A MYANMAR SOVEREIGN WEALTH FUND

Oliver T. Gilbert†

Abstract: After decades of international condemnation, Myanmar, also known as Burma, has initiated rapid political, economic, and legal reforms. In recognition of these reforms, Western governments have broadly curtailed longstanding sanctions against investing in Myanmar. This sudden opportunity for foreign companies to extract Myanmar’s plentiful petroleum resources has increased the need for Myanmar to implement resource revenue management strategies to guard against adverse consequences of the resource curse. Among these strategies is a call by respected global commentators to create a Myanmar sovereign wealth fund (“SWF”).

This article describes each of the main effects generally associated with the resource curse and analyzes how existing global SWFs have been designed to help countries prevent these problems. This article then explores Myanmar’s current political and economic environment to speculate how establishing a SWF would address resource curse concerns and impact Myanmar. In doing so, this article argues that Myanmar currently lacks necessary legal, political, economic, and managerial capacities to support a national sovereign wealth fund at the present time.

I. INTRODUCTION

Once described as an “outpost of tyranny” by former U.S. Secretary of State Condoleezza Rice, Myanmar has recently initiated a series of rapid political and economic reforms that have generated significant global attention. Western governments have recognized the pace of Myanmar’s sweeping reforms and have rewarded Myanmar by curtailting many longstanding economic sanctions on the country. As a result, foreign individuals and corporations are eyeing Myanmar as a “final frontier” for foreign direct investment.

Increased opportunities to invest in Myanmar will be particularly significant to the country’s oil and gas sector, where a high demand already

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3 See id.

exists for the country’s proven petroleum reserves, consisting of approximately 10 trillion cubic feet of natural gas and 50 million barrels of crude oil. In resource revenue information released for the first time in July 2012 state that the country collected USD 16 billion during 2006-2012 from Myanmar’s existing Yadana and Yetagun natural gas pipelines. In addition, the Shwe pipeline to China, which became operational in July 2013, will provide USD 54 billion to Myanmar over the next thirty years. Lastly, Myanmar’s Zawtika offshore natural gas pipeline, expected to produce natural gas for domestic consumption, is planned to open mid-year, 2014. Zawtika project status updates are unavailable at the time of publication.

Furthermore, in 2013, Myanmar invited previously prohibited Western companies to explore additional onshore and offshore blocks. However, anticipated increases in foreign direct investment are not limited to Western countries. China and India both seek Myanmar’s resources to support their own energy needs and geopolitical goals in the region. In addition, with the support of the Asian Development Bank (“ADB”), countries in the Greater Mekong Sub-region have identified Myanmar’s petroleum resources as a key component of Association of Southeast Asian Nations (“ASEAN”) plans to establish and access trans-ASEAN energy sources.

The high demand for Myanmar’s petroleum resources and changes to the country’s regulatory landscape will provide Myanmar much needed revenue. However, the sudden influx of non-renewable, resource-focused investment has led global commentators, including former World Bank

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Chief Economist and Nobel Prize winner in Economics, Joseph Stiglitz, researchers from the Carnegie Endowment for International Peace, and the Bloomberg editorial staff to recommend that Myanmar create a national sovereign wealth fund ("SWF") to better manage anticipated petroleum revenues and enable Myanmar to avoid problems generally associated with the "resource curse."  

The resource curse, also known as the “paradox of plenty,” is a phenomenon in which countries with an abundance of non-renewable resources frequently experience stagnant or negative economic growth. In addition, it is common for these countries to then become overly dependent on commodity revenues, which can lead to a volatile state gross domestic product (“GDP”) and cause related adverse macroeconomic effects. Moreover, political corruption, also a component of resource curse theory, can spread due to the lack of effective legal and regulatory systems to manage revenues, resource rights, income distribution frameworks, and additional government operations.

Multiple countries have established SWFs to guard against adverse effects of the resource curse. Drawing from these examples, global commentators suggest that at-risk countries should deposit resource revenues into a SWF with “watertight governance and clear investment rules.” However, this policy recommendation is unrealistic if overarching state structures have not already created an environment for this type of governance oasis to exist.

This article analyzes global lessons from existing SWFs to evaluate how creating a resource-funded SWF would impact Myanmar and mitigate traditional resource curse concerns. This subject is important and timely given Myanmar’s anticipated influx of extractive project revenue and the lack of clear strategies to avoid suffering from the resource curse. In contrast to some global experts’ recommendations, this article is cautious of the short-term feasibility of a Myanmar SWF.

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14 Id.
15 Id.
17 See Jegarajah, supra note 12; Myanmar’s Mandela Moment, supra note 12.
The structure of this article is as follows. First, this article briefly defines sovereign wealth funds and acknowledges the limitations of generalizing diverse financial instruments under this umbrella. Each following section then addresses key concerns that are generally associated with the resource curse and draws examples from brief case studies of existing global SWFs to describe how SWFs can mitigate these problems. This article then describes Myanmar’s related capacities or vulnerabilities before theorizing how a Myanmar SWF might impact those same problem areas.

Following the analysis, this article identifies multiple important components for establishing a responsibly managed SWF and evaluates Myanmar’s balance of payments surplus, fiscal discipline, and prerequisite domestic legal and financial institutional capacities that are necessary to responsibly finance and administer a SWF. In addition, this article analyzes SWFs’ ability to compensate for macroeconomic effects of the resource curse and discusses economic options for Myanmar. Lastly, this article explores Myanmar’s rampant corruption and poor transparency policies to estimate Myanmar’s current ability to apply international governance best practices to managing a SWF.

This article concludes by summarizing the institutional capacities in need of improvement prior to the creation of any type of Myanmar SWF. Furthermore, through the prism of analyzing SWFs, this article’s conclusion identifies key legal, economic, and political factors that must be reformed to maximize benefits from extractive resource projects without relying on complex financial tools.

This article does not seek to label all SWFs as adverse financial instruments and frequently praises selected SWFs for their effective wealth management and responsible resource stewardship. Instead, this article suggests that a Myanmar SWF may underperform or fail due to Myanmar’s current political and economic realities. Consequently, a Myanmar SWF is not an appropriate resource revenue management strategy to maximize benefits at the current stage of Myanmar’s national development, but may be appropriate once Myanmar improves underlying state capacities outlined in this article.

II. WHAT IS A SOVEREIGN WEALTH FUND?

The Sovereign Wealth Fund Institute, an organization dedicated to the study of these funds and other long-term investments, defines a SWF as, “a state-owned investment fund or entity that is commonly established from
balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, governmental transfer payments, fiscal surpluses, and/or receipts resulting from resource exports." This definition can be further narrowed using a description of SWFs, by Monitor, a global strategic advisory firm, as investment funds owned by governments that are distinct from both official reserves and the capital available to state-owned- enterprises ("SOEs"). This restricted definition allows for a more targeted analysis of fund operations by separating special fund operations from other state-guided financial operations.

This article addresses the major areas of concern associated with the resource curse and includes additional impacts when applicable. It is important to recognize that even under the narrowed definition above, the term “sovereign wealth fund” is a broad classification that includes a variety of different investment vehicles, each tasked with their own unique objectives. For example, commodity-based funds can be used for fiscal stabilization or preventing inflation, while non-commodity-based funds might be used to make investments with surplus amounts of a particular foreign currency.

Accordingly, it is unreasonable to describe one type of SWF as failing in regards to other SWF goals it was not designed to accomplish. For example, a SWF designed to assist commodity price stability cannot be faulted for not providing individual annual dividends if it was not designed to do so. As a result, countries may establish multiple independent SWFs in an effort to concurrently pursue multiple objectives, and this article recognizes that no single SWF can mitigate the simultaneous problems associated with the resource curse. Therefore, analysis of SWFs in each of the following sections is careful to note how specific types of SWFs may address the specific concerns they were designed to influence.

III. PREREQUISITE CAPACITIES

Sovereign wealth funds require a range of capacities to meet financial or strategic objectives. Among the most important are state revenue

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surpluses, government fiscal discipline, and legal and economic experience needed to guide fund operations. Unfortunately, Myanmar currently lacks many of these prerequisite capacities: it does not have a budgetary surplus, financial discipline has been absent, and it lacks financial and legal expertise. These problems would put a burgeoning SWF at a disadvantage. This section describes these problems in detail by exploring funding concerns, fiscal discipline needs, and financial and legal capacity concerns.

A. Funding

SWFs are financed by national revenue in pursuit of a variety of economic goals. Regardless of fund objectives or the sources of funding, contributions to SWFs should be the result of budgetary surpluses that enable states to finance investments with excess capital.\(^\text{22}\) According to Martin Skancke, the Director General of the Norwegian Ministry of Finance, “[i]f a [sovereign wealth] fund is set up with an allocation rule that is not linked to actual surpluses, the accumulations of assets in the fund will not reflect actual savings.”\(^\text{23}\)

Put simply, countries without budget surpluses would likely have to borrow money to invest in a SWF while neglecting other fiscal obligations. For this precise reason, India recently canceled its plans to establish a SWF because the country lacks adequate foreign exchange reserves. Indian officials had originally designated USD 10 billion for a state SWF, but the Indian Department of Economic Affairs advised the government to establish a fund only when the country enjoys a current account surplus.\(^\text{24}\) India is projected to have a balance of payments deficit, estimated at approximately 5% of GDP, and plans to create a SWF have been tabled for the time being.\(^\text{25}\)

Myanmar’s balance of payments deficit amounted to approximately 3.2% of GDP for 2012-2013.\(^\text{26}\) However, Myanmar’s changing fiscal obligations as a partial result of international loan forgiveness by Japan and


\(^{23}\) Id.


Norway should not be considered robust fiscal strength. Ultimately, Myanmar’s deficit is a signal that Myanmar should fulfill financial obligations and reprioritize spending decisions before sterilizing national resource profits in a SWF. Without a budgetary surplus, investments in a SWF are only investments with borrowed money. Therefore, Myanmar should establish a budgetary surplus before investing in a SWF.

B. Fiscal Discipline

SWFs require a high degree of fiscal discipline to balance current government spending needs alongside realistic investment concerns. States without a high degree of fiscal discipline may be prone to treat SWF assets as “rainy day” funds. For example, Ireland took EUR 17.5 billion (USD 23.1 billion) from its National Pensions Reserve Fund as part of the country’s bailout obligations with the International Monetary Fund (“IMF”).

In past decades, Myanmar’s military dictatorship exhibited an extensive history of misappropriation, corruption, and a lack of transparency. Known as the “Burmese way of Socialism”, from 1962 to 1988, Myanmar’s military junta implemented a series of reforms that destroyed Myanmar’s economic productivity through mass nationalization, arbitrary policy driven by military leader, Ne Win’s personal superstitions, and brutal military oppression. Decades of disastrous reform is one of the largest reasons why Myanmar lags far behind its neighbors’ rapid development. These poor governance practices also contributed to false reporting of economic data, leaving the international community without clear information about Myanmar’s true economic landscape.
Recent governance and economic reforms offer potential for rising generations of leaders to guide Myanmar’s financial operations with greater fiscal diligence than their predecessors. Nonetheless, fiscal discipline and fiscal capacity must be developed over time and likely with the guidance of welcomed international advisors. However, SWFs should not be considered hands-on training for establishing fiscal discipline, nor can a SWF’s existence jump-start it. A study conducted by Revenue Watch Institute found no direct and demonstrable correlation between the existence of a SWF and improved fiscal performance.

Literature regarding Mongolia’s planned SWF has also argued that effective and sustainable fiscal discipline must be established well in advance of the creation of SWFs for funds to be successful. Similarly, according to Eric Parrado, a former manager of Chile’s SWFs, without fiscal discipline “a fund is not a SWF in anything but name.”

C. Financial & Legal Capacity

Sovereign wealth funds are managed separately from other central bank activities because SWFs are complex financial vehicles that require innovative and flexible methods that are best managed outside the scope of typical budgetary operations. Financial expertise is important to ensure SWF funds are invested appropriately. One possibility for countries, like Myanmar, that lack financial expertise is to seek assistance from foreign financial experts. However, foreign experts may be disconnected from domestic interests, as highlighted in examples with Nigeria’s proposed SWF, described below. Moreover, Myanmar also lacks legislative capacity, which is necessary to outline the SWF’s rules and objectives.

Sovereign wealth fund experts Adam D. Dixon and Ashby Monk have argued that SWFs must be staffed with financial and legal technocrats to

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34 Schuman, supra note 32.
37 Id.
39 Id.
effectively design and manage a fund.\textsuperscript{40} However, many resource-dependent and developing states seeking to establish a SWF lack domestic financial or legal experts.\textsuperscript{41} Without domestic fiscal discipline, financial expertise, and legislative clarity, public officials may poorly allocate funds to a state SWF to the detriment of the state.\textsuperscript{42} As a result, states sometimes seek foreign experts to manage funds.\textsuperscript{43} However, externally managed SWFs may be disconnected from domestic interests and can raise public concerns for increased domestic control over their national resources.\textsuperscript{44} In addition, generally speaking, relying on foreign experts to solve domestic problems may not provide a sustainable solution to ongoing state planning needs.

Nigeria’s planned oil-funded SWFs exemplify this dilemma. Article 6(1) of the legislation establishing the Nigeria Sovereign Investment Authority provides that, “The Authority may at any time appoint asset managers outside the Authority to manage its assets as may be specified by the board.”\textsuperscript{45} However, Ayo Salami, a London-based asset manager at Duet Management, forecasted an anticipated domestic pressure for Nigeria’s SWF to invest with Nigerian managers even though the country lacks enough Nigerian financial experts to reasonably accommodate this need.\textsuperscript{46} Accordingly, in 2013, Nigeria announced that JP Morgan will manage the country’s SWF.\textsuperscript{47} Uche Orji, a former UBS analyst and Nigerian fund manager who has lived outside of Nigeria for the past seventeen years, will manage the Nigerian SWF.\textsuperscript{48} Time will tell if JP Morgan’s mixed foreign management team can reconcile maximizing returns with accommodating domestic investment priorities.

Myanmar currently lacks the financial or legislative expertise necessary to avoid the problems demonstrated in the examples above.

\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Agande, supra note 43.
Myanmar’s banking system is broken.\textsuperscript{49} According to a report by the Myanmar Union Auditor General’s Office, the Myanmar Economic Bank, a large state-owned bank, has not generated a profit in twenty-two years and has been operating at a loss since 1990.\textsuperscript{50}

Decades of isolation have also drastically reduced technocratic management experience that could be applied to managing a SWF. According to Mr. Turnell, Myanmar’s economic governance is limited “to a handful of individuals skilled in policy formulation, and fewer still schooled in the attributes necessary for institution building.”\textsuperscript{51} More recently, in 2013, Myanmar’s parliament passed legislation to clear the way for Myanmar to establish an independent central bank.\textsuperscript{52} Myanmar should first demonstrate an ability to responsibly administer routine functions of this basic independent body before it creates an independent SWF. Likewise, Myanmar should encourage domestic financial expertise before outsourcing complex financial operations to foreign experts to prioritize national interests, even if national interests do not maximize financial best interests.

Legislation outlining a SWF’s rules and investment objectives prior to the fund’s creation is essential for preventing systemic failures. One historic example of this type of failure is Papua New Guinea’s former SWF, the Mineral Resources Stabilization Fund (‘‘MRSF’’).\textsuperscript{53} The MRSF was established in 1974 to manage revenue from the country’s Panguana copper mine and reduce commodity price volatility.\textsuperscript{54} Original legislation planned for the fund to collect all revenues from extractive resource projects and then fund Papua New Guinea’s state budget using a complex formula for maximum annual withdrawals.\textsuperscript{55} However, amendments to the MRSF Act allowed unlimited government withdrawals from the account, and the fund


\textsuperscript{51} See Turnell, \textit{supra} note 49.

\textsuperscript{52} Natasha Brereton-Fukui, \textit{Myanmar Is Closer to Autonomous Central Bank}, \textit{THE WALL STREET JOURNAL} (June 9, 2013). http://online.wsj.com/article/SB10001424127887323949904578535141675555294.html. Note that as of publication of this article, the president has yet to sign the legislation.


\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.}
was forced to close in 1999 once government borrowing under original legal guidelines became unsustainable.\textsuperscript{56}

Myanmar’s legal expertise is similarly limited. According to a report by the global law firm DLA Piper, Myanmar graduates approximately 200 to 300 lawyers each year.\textsuperscript{57} However, qualifications to gain admittance to law school in Myanmar are the lowest among all professions in the country, and students generally memorize information without learning a practical application of law.\textsuperscript{58} In fact, the Myanmar Union Attorney General assumes that “newly-hired lawyers in his office have no sufficient legal education prior to entering their six-month training program.”\textsuperscript{59} However, even though Myanmar graduates and trains a marginal number of lawyers each year, over 1,000 attorneys have been reprimanded, suspended, and disbarred over the past twenty years.\textsuperscript{60} Lastly, Mr. Turnell reports that “the IMF and [World Bank] have found few, if any, legally qualified (or skilled) counterparties in the Burmese government” to assist in drafting laws.\textsuperscript{61}

As a result, drafting legislation has historically been a challenge for Myanmar. In his report, Mr. Turnell describes a common practice in both the previous and current governments to sub-contract the legislative writing process to outside parties.\textsuperscript{62} Alarmingly, Mr. Turnell’s report anecdotally cites that a South Korean sub-contractor’s flawed translations into domestic corporate taxation law ultimately made the law unenforceable and meaningless.\textsuperscript{63} Steps toward reform will hopefully include an openness to accept international assistance to guide legal drafting in the future.

Ultimately, Myanmar’s lack of domestic financial or legal capacity means that a Myanmar SWF likely lacks the technocratic oversight necessary to establish SWF rules and objectives, manage the operations of a SWF, and accommodate domestic pressures. While foreign financial experts could be used to manage fund operations, promoting domestic financial expertise would offer more sustainable fund guidance and help ensure that fund operations are being directed in accordance to national best interests even if actions do not maximize fund profits. Myanmar must take steps to strengthen these weaknesses prior to the creation of a SWF.

\textsuperscript{56} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 35.
\textsuperscript{61} See Turnell, supra note 49.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
IV. ADDRESSING THE RESOURCE CURSE

Analyzing individual components of the resource curse can help determine how effectively sovereign wealth funds can mitigate similar resource curse concerns. Gauging a SWF’s utility toward this task alongside Myanmar’s current economic, social, and political realities provides greater insight into how a SWF would likely impact Myanmar. As a result, this section first discusses economic factors of the resource curse, such as economic diversification, inflation, exchange rate stability, and commodity price stability. Thereafter, this section evaluates the need for intergenerational justice and savings, as well as the opportunity cost of investing in a SWF. Lastly, this section examines points of conflict and political division, including varying levels of domestic political consensus, public consent, and the equitable division of wealth.

A. Economic Diversity

The resource curse theory hypothesizes that dependence on commodity revenue can direct already limited investments further towards that same industry to increase efficiency and profitability for extracting proven resources.\(^\text{64}\) However, without reinvesting profits into other sectors, countries will subsequently fail to diversify their economies.\(^\text{65}\) In fact, the ADB found in its 2012-2014 Interim Country Partnership Strategy that roughly one-third of Myanmar’s USD 13.6 billion of foreign direct investment has been directed to the country’s petroleum sector and that these investments are unlikely to increase local employment.\(^\text{66}\) Oil and gas extraction projects, like those planned in Myanmar, typically do not create many jobs for local populations.\(^\text{67}\) This is particularly troublesome because Myanmar’s unemployment rate hovered around 40% of the population in 2013 and is desperately in need of increased opportunities for job creation and economic diversification.\(^\text{68}\) However, as the following section shows, international investment options may not be preferable for building

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\(^{65}\) Id.


\(^{67}\) See Movahed, supra note 64.

\(^{68}\) Nearly 40% Unemployment in Myanmar, BANGKOK POST (Jan 25, 2013) http://www.bangkokpost.com/most-recent/332618/.
economic diversity. In addition, as described in this section, Myanmar already maintains a capacity to increase economic diversification without using SWFs and recently passed legislation that will assist foreign direct investment opportunities in the country.\footnote{The Foreign Investment Law, 2012, No.21, art. 9 (Myan.).}

States have sought to use SWFs to make international investments in a variety of industries in a top-down approach to diversify domestic economies.\footnote{David McKenzie & Victoria Eastwood, \textit{Oil-rich Angola Bids to Secure Future with $5bn Wealth Fund}, CNN (Oct. 25, 2012), http://edition.cnn.com/2012/10/25/world/africa/angola-oil-sovereign-wealth-fund/index.html.} Some countries with unique economic and geographic conditions have used international investment strategies like SWFs in lieu of domestic economic diversity with some degree of success, but building a self-sustaining and diverse, domestic economic base is virtually always preferable to building a diversified international financial support system.\footnote{Bryan Balin, \textit{Sovereign Wealth Funds: A Critical Analysis} 10 (Sept. 23, 2009) (unpublished dissertation, Johns Hopkins University) (on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1477725.} This is because building a diverse domestic economy to prevent against commodity or global shocks is more sustainable than creating an investment fund to guard against the effects of similar shocks.\footnote{Id.}

Myanmar has alternative opportunities for economic diversification beyond petroleum. Myanmar is the world’s second largest exporter of beans and pulses after Canada.\footnote{See Turnell, supra note 49.} In addition, Myanmar can increase production of its significant garment, hardwood, and gemstone industries.\footnote{Id.} Moreover, tourism rose sharply from 2011 to 2012, and Myanmar is currently working on a master tourism plan with the German-based Hans Seidel Foundation and the ADB to further expand tourism infrastructure and services for the increasing numbers of tourists expected in the near future.\footnote{Burma Developing Master Tourism Plan, \textit{MIZZIMA NEWS} (Oct. 6, 2012), http://archive-2.mizzima.com/business/8166-burma-developing-master-tourism-plan.html?tmpl=component&print=1&layout=default&page.}

Myanmar was also formerly known as the “rice bowl of the world” for its world-leading rice exports before agricultural productivity was reduced by the failed “Burmese Way of Socialism” policy.\footnote{See Turnell, supra note 49.} According to the International Rice Research Institute, Myanmar could improve or regain its agricultural sector’s former status by expanding farmers’ access to credit, increasing storage and production facilities, and improving transportation...
Improving outputs in most of the above sectors will likely increase transportation and logistics business opportunities to export products to market. Resultantly, Myanmar already has a variety of existing options to expand domestic economic diversity without needing to depend on a SWF to create an internationally focused financial base.

Recently introduced legislation may offer future opportunities to expand authentic economic diversity. Myanmar’s 2012 Foreign Direct Investment Law (“FDI Law”) was signed in 2012 and allows foreign corporations to retain up to 100% of its investment in Myanmar.

In contrast to Myanmar’s 1988 Foreign Investment Law, the 2012 FDI Law also allows foreign investors to enter into unrestricted joint ventures. Article 6(a)(2) of the 1988 Foreign Investment Law states, “if a joint venture is formed the foreign capital shall be at least 35 percent of the total capital.” In addition, the 2012 FDI Law provides land rights previously absent in the 1988 Foreign Investment Law. Under this revision, “[Section 31]: The Commission may allow the investor the actually required period of the right to lease or use land up to initial 50 years depending upon the category of business, industry and the volume of investment.” Furthermore, Section 32 states that foreign investors “may extend the period [a] consecutive 10 years and for further 10 years after the expiry of such period . . . after the expiry of the term permitted under section 31 . . . .” This seventy year time-frame is particularly attractive for capital intensive, long-term building projects, like hotels or factories.

The 2012 FDI Law also supports job creation by requiring investors to hire an increasing number of Myanmar nationals over the first six years of corporate operations. According to Chapter XI, Section 24(a), “citizens shall have been appointed at least 25 percent within the first two-year[s], at least 50 percent within the second two-year[s] and at least 75 percent within the third two-year[s] from the year of commencement of the business.” Importantly, the 2012 FDI Law’s Section 28 also “guarantees that a business formed under the permit shall not be nationalized within the term of contract

78 The Foreign Investment Law, 2012, No.21, art. 9 (Myan.).
79 The Union of Myanmar Foreign Investment Law, 1988, No.10, art. 6(a)(2) (Myan.); The Foreign Investment Law, 2012, No.21, art. 9 (Myan.).
80 The Union of Myanmar Foreign Investment Law, 1988, No.10, art. 6(a)(2) (Myan.).
81 The Foreign Investment Law, 2012, No.21, art. 31 (Myan.).
82 Id.
83 Id. at art. 32.
84 Id. at art. 24(a).
or the extended term if such term is extended.”\textsuperscript{85} Although the 1988 Foreign Investment Law also included this provision, it is wise for the government to guarantee that nationalization practices once prevalent during the Burmese way of Socialism era will not once again be employed during the country’s rapid increase in foreign investment.\textsuperscript{86}

Lastly, in July 2013, Myanmar’s parliament, the Pyihtaungsu Hluttaw, signaled that it would accept President Thein Sein’s push to join the World Bank’s Multilateral Investment Guarantee Agency (“MIGA”) to extend greater guarantees and assistance to foreign investors.\textsuperscript{87} The combination of the above-mentioned legal reforms in the 2012 FDI Law and the steps to increase foreign investment guarantees will increase domestic investment opportunities and economic diversification.

Myanmar policymakers should also recognize that SWFs do not consistently achieve economic diversification goals. A 2007 IMF report found that “the more reliant a country is on one commodity, the less effective its SWF is in achieving its goals.”\textsuperscript{88} Venezuela’s SWF, the National Development Fund, is a shining example of this dependency. The Fund, more commonly known as the Fonden Fund, was created to allocate oil revenues separate from the national budget and help diversify Venezuela’s economy.\textsuperscript{89} Aside from being a glaring instance of corruption, discussed in a subsequent section of this article,\textsuperscript{90} Fonden has actually contributed to Venezuela’s increased dependence on oil exports, from 80% ten years ago to 96% of exports in 2012.\textsuperscript{91}

Some states have also made internal investments with SWFs to improve domestic diversification. One example of internal investment with SWFs is Angola’s petroleum-funded Fundo Soberano de Angola, designed to make targeted domestic investments in infrastructure projects and the hospitality industry.\textsuperscript{92}

However, Myanmar should note that internal investment strategies with SWFs are so risky that some states have prohibited their SWFs from

\textsuperscript{85} Id. at art. 28(a).
\textsuperscript{86} The Union of Myanmar Foreign Investment Law, 1988, No.10, art. 22 (Myan.)
\textsuperscript{88} Balin, supra note 71.
\textsuperscript{90} See infra Part V.
\textsuperscript{91} See infra Part V.
\textsuperscript{92} McKenzie & Eastwood, supra note 70.
making similar domestic investments. Norway’s SWF, the Norwegian Government Pension Fund Global ("NGPG"), is a leading example of SWF good governance and expressly prohibits investment in “infrastructure such as roads, railways, harbours, airports, and other basic infrastructure” in Chapter 3, Section 3-1(3) of its incorporating Investment Mandate because “domestic recycling of surplus risks fanning inflation and discouraging competitiveness.”

Additionally, the ability for SWFs to increase and advance research and development through foreign investments is limited. Deloitte, a global consulting firm, found that SWFs can, “move up the value curve quickly as they acquire legal rights to intellectual property and access to research, design, and development that may take years to develop at home.” However, acquisition of intellectual property does not simultaneously train personnel to apply intellectual property, and funds “do not offer an alternative to developing a capable and active workforce” Therefore, investing in foreign companies using SWFs to obtain legal intellectual property rights would be of little consequence for Myanmar’s vastly undertrained workforce unless local workers receive the extensive training needed to utilize that technology towards domestic commercial operations.

Ultimately, Myanmar has existing and forecasted opportunities to develop economic diversification without a SWF.

B. Macroeconomic Stabilization

Sovereign wealth funds are often tasked with offsetting negative macroeconomic effects associated with the resource curse, including the need to manage inflation risk stemming from foreign currency exchange rates and stabilize commodity price volatility. However, using SWFs to
mitigate macroeconomic problems depends on preexisting institutional financial and fiscal capacities, described in Section I, that Myanmar currently lacks. Furthermore, devoting resources to SWF stabilization efforts can detract funds from building a genuine diversified domestic base that can serve as a natural guard against future macroeconomic challenges.  

1. **Inflation and Exchange Rate Stability**

Large and sudden profits collected from the sale of resources can trigger a phenomenon known as “Dutch Disease.” Named after the 1960s Dutch economic crisis, which was caused by the discovery of natural gas in the North Sea, Dutch Disease occurs when countries experience sharp increases in foreign currency, often as a result of extractive resource projects. The influx of foreign capital causes the real exchange rate to rapidly appreciate followed by wage inflation. Increased domestic costs then make manufactured products more expensive and less competitive in the global marketplace because trading partners are forced to pay higher costs for the same products as a result of purchasing goods with a more expensive currency.

Sovereign wealth funds focused on currency stabilization can help manage currency exchange rate stability to prevent inflation by investing foreign exchange reserves in short-term, liquid assets that grant states the flexibility to buy or sell their own currency on international markets and maintain a preferable exchange rate relative to a global base currency. However, a study regarding SWF Dutch Disease conducted by the Australian Industry Group, an industry group representing over 60,000 Australian businesses, found that SWFs can assist stabilization, but cannot insulate economies from currency appreciation alone and should be

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101 *Id.*
102 *Id.*
complemented by structural legal reforms to tax systems, labor practices, and competition policies.\textsuperscript{105}

As argued in this paper, Myanmar presently lacks the legal and structural abilities to complement potential SWF’s activities similar to the recommendations by the Australian Industry Group. In November 2013, the World Bank estimated that Myanmar’s economy would grow by 6.8\% in 2014 due to energy extraction, foreign direct investment, and construction projects.\textsuperscript{106} Should inflation rise to critical levels as a result of increased petroleum and non-petroleum related foreign direct investment, Myanmar’s government should explore traditional monetary policies and build a domestic base for sustainable and diversified economic growth before creating a SWF as a safety net to protect against stability fluctuations.\textsuperscript{107}

2. Commodity Price Volatility

Commodity price volatility is a large component of the resource curse. States that are dependent on commodity revenue, like petroleum resources, are vulnerable to sharp market shifts because such a large percentage of their state income relies on strong global prices for these resources. As a result, when global prices shift, commodity dependent states may realize annual windfall profits or suffer massive budgetary crises.\textsuperscript{108} Similar to lessons from the Papua New Guinea MRSF’s failures, exampled above, establishing clear legal frameworks for SWF management can provide more dependable estimates of how much resource revenue is available to fund annual government spending.

Trinidad and Tobago’s Heritage Stabilization Fund (“HSF”), established in 2000 and financed with petroleum revenues, is an example of how guiding legislation can be implemented to mitigate commodity price volatility.\textsuperscript{109} The HSF’s founding legislation, cited below, clearly outlines the SWF’s purpose and goals:


\textsuperscript{107} See \textsl{Heuty & Aristi}, supra note 35.

\textsuperscript{108} \textit{Id.}

[Section 3] (2) The purpose of the Fund is to save and invest surplus petroleum revenues derived from production business to:

(a) cushion the impact on or sustain public expenditure capacity during periods of revenue downturn whether caused by a fall in prices of crude oil or natural gas; (b) generate an alternate stream of income so as to support public expenditure capacity as a result of revenue downturn caused by the depletion of non-renewable petroleum resources; and (c) provide a heritage for future generations, of citizens of Trinidad and Tobago from savings and investment income derived from the excess petroleum revenues.\(^\text{110}\)

In meeting goals to protect against commodity price shocks, the Fund established an eleven-year average consisting of the past five years, a forecast of the current year, and incorporates expectations of the next five years in Section 13(3).\(^\text{111}\) Doing so legislates a general price level for the government to use when calculating spending forecasts and limits inherent risks by smoothing prices needed for annual speculation of a volatile commodity.\(^\text{112}\) Importantly, the HSF’s guiding legislation also includes an expressed guard against unsustainable withdrawals.\(^\text{113}\) According to Section 15(3), “no withdrawal may be made from the Fund in any financial year, where the balance standing to the credit of the Fund would fall below one billion dollars in the currency of the United States of America, if such withdrawal were to be made.”\(^\text{114}\)

All together, the HSF’s strategy paid off handsomely in 2008. The Fund previously set its estimates of oil prices at USD 45 per barrel in 2007.\(^\text{115}\) In 2008, oil’s global price sharply rose and Trinidad and Tobago gained an additional USD 3 billion, or eleven percent of the country’s GDP, compared to previous estimates.\(^\text{116}\)

Petroleum commodities are highly volatile,\(^\text{117}\) and a realistic barrel price drop in 2008 could have sharply reduced the profits available to


\(^{111}\) See id.; see also HEUTY & ARISTI, supra note 35.

\(^{112}\) See HEUTY & ARISTI, supra note 35.


\(^{114}\) Id. at §15(3).

\(^{115}\) See HEUTY & ARISTI, supra note 35.

\(^{116}\) Id.

\(^{117}\) See Cait Murphy, Why Oil Prices Are So Volatile, CBSNEWS (Sep. 10, 2009), http://www.cbsnews.com/8301-505123_162-51337483/why-oil-prices-are-so-volatile/.
Trinidad and Tobago. Trinidad and Tobago was able to avoid this risk by prudently establishing legal frameworks to govern the fund and by applying financial management practices to its operations.\(^{118}\) However, as previously discussed,\(^{119}\) Myanmar has yet to demonstrate its ability to apply similar responsible legal or financial practices. As a result, the HSF can provide valuable lessons for fund management, but Myanmar must build the legal and financial oversight practices that contributed to the HSF’s success to enable itself to share the same rewards.

Lastly, while states like Trinidad and Tobago have found some success with SWF stability operations,\(^{120}\) a 2007 report commissioned by the IMF found little evidence that SWFs in natural resource exporting states were able to “smooth out” commodity volatility between times of strong and weak commodity prices.\(^{121}\) This was partially attributable to independent SWFs acting disconnected from state financial decision-makers.\(^{122}\)

Economic diversification should be the primary recipient of finite revenue rather than creating a financial buffer against volatility caused by not diversifying domestic economies. Therefore, policymakers should not view the creation of a Myanmar SWF as a panacea for the deeper problems of commodity price volatility.

C. Intergenerational Justice & Savings

Intergenerational justice, also known as intergenerational equity, refers to efforts to ensure future generations can share benefits from the country’s limited non-renewable resources.\(^{123}\) These benefits can be preserved physical deposits, funds set aside for future expenses, or public institutions financed with resource wealth.\(^{124}\) As a result, a SWF may ensure intergenerational justice concerns are met prior to approving additional extractive projects.\(^{125}\)

Revenue collected from extracting non-renewable resources is only a change in the physical nature of a state’s existing assets and does not

\(^{118}\) See Heuty & Aristi, supra note 35.
\(^{119}\) See infra Part X.
\(^{120}\) See Heuty & Aristi, supra note 35.
\(^{121}\) Balin, supra note 71.
\(^{122}\) Id.
\(^{124}\) See Heuty & Aristi, supra note 35.
represent new income for countries. As a result, the monetization of non-renewable resources underlines the need to ensure intergenerational justice prior to approving extractive projects. The goal of intergenerational justice is to ensure that future generations are able to share the benefits of a country’s non-renewable resources. One way to pursue this goal is to save a portion of the resource revenue until more developed governance practices can guide spending priorities. However, there are problems with this strategy.

In countries with poor governance histories, like Myanmar, there is no guarantee that future spending decisions will be guided by wiser decision makers. In addition, SWFs are not guaranteed to yield future profits. Lastly, since SWFs can be raided as “rainy day” funds, described in detail below, one must question whether state revenue invested in a SWF better contributes to national building than investments in state and social services. In light of these realities, some commentators have proposed ring fencing a portion of state revenues from extractive projects in SWFs for future generations. In this scheme, extractive projects could commence and provide limited funding for present-day government spending while also saving a portion of non-renewable resource revenue until future generations and leaders can responsibly guide government spending priorities.

International civil society organizations have advocated for Myanmar to refrain from approving additional natural resource extraction projects until good governance, human rights, and environmental best practices emerge to more responsibly manage extractive revenues from these projects. This is a sensible course of action to preserve resources and revenue for future generations, but it is understandable why cash-starved states like Myanmar would be reluctant to pause or cancel multi-billion dollar international agreements needed to fund government operations.

Ultimately, while people may hope that governance only improves over time, there is no guarantee that tomorrow’s leaders will be better

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126 See Heuty & Aristi, supra note 35.
128 Id.
129 Carling & Kircher, supra note 125, at 5.
130 Asfaha, supra note 127.
equipped to manage state resources for national benefit. Authors Robert Carling and Stephen Kircher argue that government savings are deferred future government spending and found no basis to assume that investment decisions will be more “correct” in the future regardless of the virtuousness of new ruling parties.\textsuperscript{132} Myanmar’s current political leadership is limited in its technical, legal, and financial expertise.\textsuperscript{133} Additionally, Myanmar’s rising opposition party, the National League for Democracy (\textquotedblright NLD\textquotedblright), is composed of the same individuals mentioned in Section I, who are not yet any more legally or financially qualified to responsibly allocate funds in the future should the party continue its ascension into leadership roles.\textsuperscript{134}

Even SWFs with expert guidance are not guaranteed to fulfill intergenerational justice obligations or serve as a final benchmark necessary to allow additional extractive activities.\textsuperscript{135} As a result, Myanmar must weigh its commitment to preserving resources and revenues for future generations prior to establishing a SWF.

Moreover, despite previously discussed pressures for domestic management, onlookers may instead suggest that SWFs be managed by foreign experts who can be trusted to make responsible decisions with SWFs. This logic also depends on substantial assumptions. Even when managed by external legal and financial expertise, SWFs are not fundamentally guaranteed to yield profits due to economic downturns or poor management decisions.\textsuperscript{136}

Norway’s SWF, the NGPG, is considered a world-class example of good governance, transparency, and fund management.\textsuperscript{137} However, in 2008, the fund was not immune from the global financial crisis and lost 23\% of its value, or approximately USD 100 billion.\textsuperscript{138} Moreover, funds can suffer even under the expert management of world leading financial services providers. In 2007, Goldman Sachs lost 98\% of Libya’s USD 1.3 billion

\begin{itemize}
\item[\textsuperscript{132}] Carling & Kircher, supra note 125.
\item[\textsuperscript{133}] Turnell, supra note 49.
\item[\textsuperscript{134}] Id.
\item[\textsuperscript{135}] Carling & Kircher, supra note 125.
\item[\textsuperscript{136}] Fontevecchia, supra note 43.
\end{itemize}
Furthermore, in 2011, even after the worst of the financial crisis, Bahrain’s USD 9 billion fund lost USD 717 million.\footnote{Fontevecchia, supra note 43.} Lastly, SWFs meant to be saved for future generations have occasionally been used as “rainy day” funds during state emergencies.\footnote{Reuters, Bahrain’s Sovereign Wealth Fund Sees Losses Widen, ARABIAN BUSINESS.COM (July 9, 2012, 9:58 AM), available at http://www.arabianbusiness.com/bahrain-s-sovereign-wealth-fund-sees-losses-widen-465194.html.} As mentioned above, following the global financial crisis, Ireland was forced to take EUR 17.5 billion (USD 23.1 billion) from its SWF, the National Reserve Pensions Fund, and its additional cash reserves as part of its broader European Union (“EU”) bailout package.\footnote{Ian Traynor, et al., Ireland Must Find €17.5bn from Its Pension Fund and Reserves for Bailout, THE GUARDIAN (Nov. 28, 2010 3:24 PM), available at http://www.theguardian.com/business/2010/nov/28/ireland-bailout-contribution-pensions.} Similarly, in 2011, Portugal raided EUR 5.6 billion (USD 7.4 billion) from its pension fund to meet EU and IMF fiscal targets.\footnote{Id.}

Given Myanmar’s previously described lack of fiscal discipline, onlookers should be skeptical that Myanmar would be able to resist similar fund usage in situations where well-governed Organization for Economic Co-Operation and Development (“OECD”) countries have not, given governmental realities described throughout this paper. Countries like Myanmar should establish a safety net against unexpected crises and emergencies, but countries should also be mindful that funds in a SWF will likely be the first target in future fiscal emergencies.

Investment is based on a tolerance for risk, and these critiques do not advocate against investing resource wealth solely because of inherent downside risks. Instead, these examples merely emphasize that SWFs, even under expert guidance, are not guaranteed to yield profits. Accordingly, countries like Myanmar must decide whether investments with a SWF are better uses of state revenue than investments in state and social services that can otherwise contribute to nation building.

\section*{D. Opportunity Cost}

Opportunity cost is an economic term that describes the cost of pursuing one decision and forgoing another.\footnote{Portugal Seizes Pension Funds, Is US the Next?, COMMODITY ONLINE (Dec. 5, 2011), http://www.commodityonline.com/news/portugal-seizes-pension-funds-is-us-the-next-44199-3-44200.html.} Policymakers must consider

the opportunity cost of investing revenue abroad in a SWF over the benefits of making investments in the local economy to expand domestic growth and provide social services.

Similar to the aforementioned concerns about capital loss or destruction, SWFs can also underperform compared against other options available to governments. A team of researchers evaluating Australia’s Future Fund found that the Fund had a negative 0.3% return compared to investing in standard government ninety day bank bills, essentially questioning Australia’s decision to invest in a SWF at all.

Alaska’s SWF has recognized the need to assess opportunity costs in its founding legislation. In recognition of the need for diversification, Section 37.13.120 of Alaska’s Permanent Fund (“APF”) founding law states:

(c) The board shall maintain a reasonable diversification among investments unless, under the circumstances, it is clearly prudent not to do so. The board shall invest the assets of the fund in in-state investments to the extent that in-state investments are available and if the in-state investments (1) have a risk level and expected return comparable to alternate investment opportunities . . . .

This distinction is not prevalent in all SWF founding legislation and Alaska’s SWF defines its opportunity cost assessment slightly differently than some other SWFs’ specifications for maximizing investments. For example, the NGPG specifies in the opening section of its Investment Mandate that “[section 1-2(3)] the bank shall seek to achieve the highest possible return after costs . . .”; and that “[section 3-5(9)] [the] real estate portfolio shall be well diversified in geography, and over sectors, properties, and instruments.” The APF and the NGPG are leading global examples of good governance, so while this particular divergence in language is modest, both examples emphasize the need to include provisions for opportunity cost assessments in fund legislation.

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146 Id.

147 ALASKA STAT. § 37.13.120(c) (2007).

148 NORGES BANK INVESTMENT MANAGEMENT, supra note 93, at § 1-2(3).

149 Id. at § 3-5(9).
A variety of literature has also explored the benefits of funding domestic projects with extractive revenue in the present. A report by the Revenue Watch Institute found that domestic investments funded by extractive revenue, such as increasing domestic skills, health, or security, may have higher social rates of return compared to SWF assets that are “sterilized abroad and therefore [make domestic investments] a better way to transfer wealth across generations.” The same report also cites two other reports of particular relevance to Myanmar. First, one report found in 2004 that countries with low capital stock earn greater benefits from spending oil wealth on present-day public spending needs rather than saving for the future. Second, the report cites a study by Frederick Van der Ploeg and Anthony J. Venables that indicates that countries should only establish a SWF after accelerating state development with accumulations of public and private capital or risk stunting growth. These examples demonstrate the negative opportunity cost of a country like Myanmar investing extractive revenue in a SWF at the present time.

Furthermore, a World Bank report on the use of domestic investments with SWFs argues general public investment can be categorized as either investments that seek financial returns, or investments in “broader economic or social terms.” In clarifying these social terms, the article acknowledges that “[s]ome worthy investments might have no direct financial returns at all, and may instead require years of recurrent spending to realize a value for the country.” Early childhood education is one example of this type of long-term recurrent cost. As a result, the same report argues that SWFs are meant to serve the primary function of generating profit, and therefore, “should not invest in projects that are justified primarily by their economic or social externalities.” Such investments should be funded through the normal budget process, which should also make provision for the future recurrent costs necessary for operations and maintenance.

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150 HEUTY & ARISTI, supra note 35, at 7.
151 Id.
152 Id.
154 Id.
155 Id.
156 Id.
157 Id.
Myanmar is a country already in crisis after decades of poor economic management and, “the opportunity cost of saving for future challenges when Myanmar already exhibits extensive symptoms of state failure . . . is not in Myanmar’s social or economic best interests.”158 As a result, per the urging of the World Bank report above, Myanmar should fund all social spending through standard budgetary processes rather than by creating a SWF to do the same.

E. Social Contract

Falling victim to the resource curse can erode the “social contract” between governments and citizens. The term social contract refers to the public’s consent to be governed and pay taxes in return for their government’s provision of various social and security services.159 In theory, government leaders are then held accountable to citizens for the proper allocation of taxes and the provision of services.160 However, dependence on resource revenues can reduce or eliminate the need for public tax collection and therefore can undermine the accountability of public officials.161 Sovereign wealth funds have been proposed to assist efforts to repair broken social contracts using dividend payments to populations.162 The APF is one example of a SWF dividend payment system.163 However, a similar SWF dividend system may not be the optimal use of all SWFs, and Myanmar presently lacks the preexisting legal and managerial capacities that account for the APF’s success with dividend payments.

A recent publication by the Center for Global Development recognized this problem and suggested that SWFs could be established to repair social contracts in states suffering from the resource curse.164 The article argues that SWFs can collect resource profits then make cash transfers directly to citizens as a way to build social contracts.165 Transfers, also known as dividends, could provide citizens a share of resource profits

160 Id.
162 Dixon & Monk, supra note 38, at 3.
163 ALASKA STAT. § 37.13.120(c) (2007).
164 Dixon & Monk, supra note 38.
165 Id. at 3.
while creating taxable income. Taxed income could then function as the basis for the public to hold officials accountable for providing services.\footnote{\textit{Id.}}

The use of SWFs to provide individual dividends, rather than funding a pension system to individuals, is currently in practice in Alaska.\footnote{Cummine, supra note 22, at 1.} The APF receives 25\% of revenues from the state’s oil resources and has grown in value from its initial deposit of USD 734,000 in 1977 to over USD 40 billion in 2012.\footnote{Cummine, supra note 22, at 8.} The APF provides annual payments to all Alaskan residents and in 2012 the Fund paid an annual dividend of USD 878.\footnote{See infra.}

Alaska’s dividend arrangement is designed to fit the state’s specific needs, and multiple legislative components enshrined in Alaska’s constitution are directly responsible for the APF’s success while also providing SWF good governance standards, as outlined below.\footnote{ALASKA STAT. §§ 37.13.020 to .040 (2007). Section 37.13.020, titled “Findings,” states:}

\begin{quote}
  The people of the state, by constitutional amendment, have required the placement of at least 25 percent of all mineral lease rentals, royalties, royalty sale proceeds, and federal mineral revenue sharing payments and bonuses received by the state into a permanent fund. The legislature finds with respect to the fund that 
  
  (1) the fund should provide a means of conserving a portion of the state's revenue from mineral resources to benefit all generations of Alaskans; 
  
  (2) the fund's goal should be to maintain safety of principal while maximizing total return; 
  
  (3) the fund should be used as a savings device managed to allow the maximum use of disposable income from the fund for purposes designated by law. 
  
  Sec. 37.13.030. Purpose.
  
  It is the purpose of AS 37.13.010 - 37.13.190 to provide a mechanism for the management and investment of those fund assets by the Alaska Permanent Fund Corporation in a manner consistent with the findings in AS 37.13.020. 
  
Sec. 37.13.040. Alaska Permanent Fund Corporation. The Alaska Permanent Fund Corporation is a public corporation and government instrumentality in the Department of Revenue, managed by the board of trustees. \textit{Id.} at § 37.13.010–.190. The purpose of the corporation is to manage and invest the assets of the permanent fund and other funds designated by law. \textit{Id.}
\end{quote}

\footnote{\textit{Id.} § 37.13.120.}
Heritage Stabilization Fund, the APF ensures fund sustainability by legislating that “[i]income available for distribution equals 21 percent of the net income of the fund for the last five fiscal years, including the fiscal year just ended, but may not exceed net income of the fund for the fiscal year just ended plus the balance in the earnings reserve account . . . ,”\textsuperscript{173} Lastly, the law’s Reports and Publications section sets out transparency guidelines in explicit detail, not present in many other SWF laws. One such transparency example is the following requirement:

By September 30 of each year, the board shall publish a report of the fund for distribution to the governor and the public. The board shall notify the legislature that the report is available. The report shall be written in easily understandable language. The report must include financial statements audited by independent outside auditors, a statement of the amount of money received by the fund from each investment during the period covered, a statement of investments of the fund including an appraisal at market value, a description of fund investment activity during the period covered by the report, a comparison of the fund performance with the intended goals contained in AS 37.13.020, . . . recommendations of any needed changes, and any other information the board believes would be of interest to the governor, the legislature, and the public. The annual income statement and balance sheet of the fund shall be published in at least one newspaper in each judicial district.\textsuperscript{174}

The APF attributes its own success to its creation through a state constitutional amendment, strong legislative oversight, public transparency, sound management practices (including managerial performance evaluations), internal consensus, public consent, and the prohibition against using the Fund as a development fund.\textsuperscript{175} However, establishing a social contract is notably not one of the APF’s goals.

The concept of SWF dividend payments has also received sharp criticism in academia, thereby raising questions of whether Myanmar should use a SWF to implement a dividend-based method for developing a social

\textsuperscript{173} Id. § 37.13.140.
\textsuperscript{174} Id. § 37.13.170.
Distributing dividend payments instead of reinvesting wealth reduces the amount of money that could be invested with a SWF. Moreover, dividend payments disregard intergenerational justice concerns because profits shared individually in the present deplete resources and neglect to provide benefits to future citizens. Lastly, providing dividend payments and spreading wealth within the country essentially negate anti-Dutch Disease effects that SWFs in resource-dependent states are often established to originally mitigate.

Logistically, it is also unclear how dividend payments in Myanmar could be expanded to cover additional taxable income and create a sustainable taxation system. According to Sean Turnell, Myanmar’s tax system is “disorganized, arbitrary, and extraordinarily inefficient at raising revenues,” and taxes are often collected in an unofficial manner from local authorities. Given Myanmar’s inability to efficiently collect money from its citizens, one must be skeptical of the government’s ability to do the reverse and effectively provide money to its citizens. Without expanding legitimate taxable income beyond dividend payments, taxes collected on these transfers would simply be overstated prior to tax collection.

Citizens would not likely object to receiving a share of resource profits, but this process could create a dependence on the government’s provision of revenue that might fluctuate over time given petroleum commodities’ high price volatility. Alarmingly, this dependence could then duplicate price volatility problems on a household level if individuals build personal budgets based on government dividend payments that fluctuate without warning.

Myanmar presently lacks the preexisting legal and managerial capacities that account for the APF’s success with dividend payments. Establishing a similar dividend-paying fund to rebuild a broken social contract would not create accountable governance institutions in Myanmar. Ultimately, Myanmar must demonstrate its commitment to governance and transparency best practices while legitimizing its existing tax collection system to strengthen its social contract with its citizens. This process cannot be shortcut with a SWF.

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176 Cummine, supra note 22.
177 Id. at 2
178 Id. at 13.
179 See Turnell, supra note 49.
180 See supra Part IV.B.2
F. Conflict

Decisions to establish a SWF require a degree of political consensus to agree on fund objectives, determine allocation levels, and mandate how investment funds can be withdrawn. Achieving political consensus depends on agreement between domestic political factions, public discourse permitting the use of state resources, and an equitable system for distributing wealth. Unfortunately, Myanmar’s domestic political divisions between the military and the NLD, its inability to freely gauge public opinion regarding resources in which all citizens share a stake, and inequitable distribution of wealth, create sources of conflict that raise the question of whether Myanmar is presently prepared to forge the consensus needed to establish a SWF.181

1. Domestic Political Divisions

Existing domestic political support for creating a SWF is essential for establishing SWF objectives, allocating funding levels, and outlining withdrawal policies. As a result, political divisions must be recognized prior to establishing a fund.182 The situations in Chad, Nigeria, and Zimbabwe, described below, demonstrate that a lack of political consensus can endanger a SWF. Similarly, Myanmar has unsettled political divisions, notably a military that is unwilling to relinquish control and a critical election in 2015 that may re-orient the country’s political landscape.183

The Republic of Chad is a leading example of what can happen when SWFs fail to recognize changing political interests prior to their creation. In 1999, the World Bank mandated that Chad legislate clear governance standards for the country’s oil revenues prior to receiving World Bank financing and guarantees towards a 650-mile, USD 4.1 billion pipeline to Cameroon.184 In meeting these obligations, Article 1 of the Revenue Management Plan defined the specific petroleum projects that would provide revenue to special investment funds, and Article 3 ensured a layer of international oversight by specifying that, “[resources] shall be deposited

181 Id.
182 Dixon & Monk, supra note 38, at 11.
183 See Turnell, supra note 49.
into special accounts of an international financing institution opened in the name of the Republic of Chad and referred to as the offshore escrow accounts.”

Following their creation, the escrow accounts were held in a Citibank account in London under the guidance of the World Bank and an independent body of experts. Furthermore, Article 9 stipulated that, “[t]he 10% remainder of the direct resources, royalties and dividends mentioned in Article 3 of this Law shall be deposited in a Savings Account opened in an international financing institution on behalf of future generations, in accordance with the rules of the Bank of the Central African States (BEAC).” This law was then passed by Chad’s National Assembly and signed by President Deby.

Five years later, Chad’s President Deby leveraged his own political connections and existing political divisions in the country to successfully circumvent layers of built-in fund protection by championing subsequent amendments to overhaul the fund’s predetermined annual payout structures. In opposition to the World Bank, President Deby scrapped Article 9’s provision of funds set aside for intergenerational equity concerns and proposed legislation that doubled the percentage of petroleum revenue that could be spent without oversight. In addition, the President designated the military and judiciary as priority sectors in need of the Fund’s reserves, thereby reducing shared funding to poverty reduction initiatives. Thereafter, President Deby branded the World Bank’s opposition to these changes as foreign efforts to attack Chad’s national sovereignty and succeeded in getting his revisions passed by the National Assembly with 119 votes in favor to 13 votes opposed.

Nigeria has also encountered related difficulties reaching political consensus over the management of their proposed SWFs. Nigeria recently allocated an initial contribution of USD 1 billion to launch an oil-funded SWF. Immediately thereafter, thirty-six state governors filed court

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186 Id. at 70.
187 Id. at 69.
189 See Alusala, supra note 188.
190 Id.
191 World Bank Chief Condemns Changes to Chad Oil Law, supra note 184.
submissions to block the SWF’s creation because annual payouts would decrease the pool of oil profits distributed to individual states and because the governors did not trust the leaders in control of the fund.  

In addition, political divisions may complicate planning for which government branch should oversee a SWF. For example, Zimbabwe’s main political parties, Zimbabwe African National Union – Patriotic Front (“ZANU-PF”) and Movement for Democratic Change (MDC) were formerly deadlocked about which state ministry should house its proposed SWF. Zimbabwe has been governed by an acrimonious power-sharing agreement between ZANU-PF and MDC that was brokered by international parties following a streak of election violence in 2008. Since that time, these political parties have divided control over different branches of government until President Mugabe and the ZANU-PF party claimed victory in a 2013 election condemned as illegitimate by Western governments. At the time of publication, it is unclear whether a compromise similar to the 2008 agreement will arise to divide government powers. As a result, the ministry that houses a potential SWF would determine which political party can set spending priorities with that amount of the country’s resource wealth.

Myanmar has similar political divisions that must be resolved prior to establishing a SWF. First, Myanmar’s most recent 2008 constitution establishes a set number of military seats in Myanmar’s parliament, the Pyidaungsu Hluttaw. According to Chapter 109, “The Pyithu Hluttaw shall be formed with a maximum of 440 Hluttaw representatives...(b) not more than 110 Pyithu Hluttaw representatives who are the Defence Services personnel nominated by the Commander-in-Chief of the Defence Services in accord with the law.” Similarly, Chapter 141 states, “The Amyotha Hluttaw shall be formed with a maximum of 224 Hluttaw representatives.”

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195 Id.
196 Constitution of the Republic of the Union of Myanmar, May 29, 2008 (Myan.).
199 See Myanmar Country Profile, supra note 197. The Amyotha Hluttaw is the Upper House of Parliament and is also known as the House of Nationalities.
representatives . . . [and] (b) 56 Amyotha Hluttaw representatives who are the Defence Services personnel nominated by the Commander-in-Chief of the Defence Services in accord with the law." Together, these articles guarantee the military 25% of elected seats in parliament. Despite the NLD’s previous success winning parliament seats in the 2012 election, the military has expressed its unwillingness to relinquish control and believes it must “safeguard” ongoing reforms.

In addition, Myanmar is approaching a critical election in 2015 that has the potential to reorient the country’s political landscape. Even after her release from house arrest and her election to parliament, Nobel-laureate, Daw Aung San Suu Kyi, is currently barred from running for president under Chapter 59(f) of the 2008 Myanmar constitution on the basis that “one of their legitimate children or their spouses not owe allegiance to a foreign power, not be subject of a foreign power or citizen of a foreign country.” Suu Kyi’s two adult-aged children are British citizens and were raised in the United Kingdom by Suu Kyi’s deceased husband, Michael Ayers. This provision is highly criticized by pro-democracy forces in Myanmar because it unjustly targets Suu Kyi to prevent her and the NLD from leading additional progressive reforms. However, in March 2013, The Irrawaddy, an online news publication focused on Myanmar, reported that two former military generals who are current members of parliament proposed amending Myanmar’s constitution to remove restrictions on Suu Kyi from serving as president. These revisions are still pending at the time of this article’s publication.

Lastly, in April 2012, Suu Kyi’s political party, the NLD, won forty-three out of forty-four parliament seats in national by-elections. If the NLD continues its parliamentary success as expected, the country could potentially be governed by a broad number of new representatives each with their own interests for how to manage resource profits. As a result,

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201 Id.
203 Constitution of the Republic of the Union of Myanmar, May 29, 2008, ch. 59(f) (Myan.).
205 Id.
208 Gilbert, supra note 145.
establishing long-term financial planning tools, such as a SWF, should at least wait until after the next election in order to reasonably gauge prevailing political opinions about the necessity of creating a fund and defining its investment objectives.²⁰⁹

2. Public Consent

Public opinion and consent should be incorporated into state decisions for approving extractive projects and setting spending priorities with project profits. Resource revenue is a country’s birthright and citizens should have an unencumbered ability to express their opinions on how national public property is allocated.²¹⁰ While communication systems have become more accessible in 2013, only 1% of the country has reliable Internet access and approximately only 5% of the population uses mobile phones.²¹¹ Resultantly, without alternative technology, public assembly remains a primary, basic form of public discourse in Myanmar. Therefore, Myanmar’s new era of legislative reforms should ensure support for freedoms to assemble, express public opinions, and consent to extractive projects before extractive projects are approved.²¹² However, two overarching problems, described in detail below, stand in the way of unhindered public consent: Myanmar’s existing legislation does not protect these internationally recognized freedoms, and Myanmar lacks or inconsistently meets its obligations to implement international treaties.

In July 2012, the government of Myanmar passed the Decree on the Right to Peaceful Assembly and Peaceful Procession (“the Decree”).²¹³ This law is one of Myanmar’s first examples of civil rights legislation following the country’s recent political reforms.²¹⁴ However, civil society groups have criticized the Decree because it lacks sufficient protections for basic

²⁰⁹ Id.
²¹³ Id.
freedoms of expression or assembly and creates burdensome requirements for organizing demonstrations. In addition, the Decree also breaks from international best practice by allowing the state to prohibit public gatherings, vaguely defined as situations “if the security of the State, rule of law, public tranquility and the existing laws protecting the public are to be breached.”

Lengthy application requirements set in Chapter 2(1) also state that a person who wants to exercise either the right to peaceful assembly or peaceful procession must apply for the permission at least five days in advance. Moreover, Chapter 3 sets out thirteen lengthy administrative processes necessary to obtain a permit and navigate appeals. Lastly, the Decree places unrealistic levels of personal liability on event organizers by requiring, “the main applicant or organization must take the responsibilities of all attendees during, either, the peaceful assembly or peaceful procession or the peaceful assembly and peaceful procession is carrying out in accordance with the permission granted.”

Myanmar has also used Penal Code 505(b) to prohibit peaceful public demonstrations even as recently as June 2013. Outlining the harsh penalties from violating what is otherwise an accepted human right, Penal Code 505(b)’s harsh punish states,

Whoever makes, publishes or circulates any statement, rumour or report . . . (b) with intent to cause, or which is likely to cause fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offense against the State or against the public tranquility . . . shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Myanmar is similarly failing to meet its obligations to implement international human rights treaties that would enhance good governance.
practices and protect freedoms of assembly and expression.\textsuperscript{222} In a 2013 assessment of rule of law in Myanmar, a group of international pro-bono legal advisors found that Myanmar’s government has, “performed no assessment regarding the compatibility of existing Myanmar law with its obligations under international law,” and that “there remains a substantial gap between the treaties signed by the Myanmar government and the implementation of rights protected by the treaties in practice.”\textsuperscript{223} Among the laws listed as incompatible with international obligations and of relevance to public consent are Myanmar’s Penal Code 505(b), State Protection Act, and Myanmar’s Code of Criminal Procedure.\textsuperscript{224}

The Universal Declaration on Human Rights (“UDHR”), passed in 1948 by the United Nations General Assembly (“UNGA”), provides protections for freedom of expression and assembly and is generally considered a non-binding principle of customary international law for U.N. member states.\textsuperscript{225} The International Covenant on Civil and Political Rights (“ICCPR”) also protects these rights.\textsuperscript{226} However, Myanmar is not a signatory to the ICCPR or similar treaties protecting human rights.\textsuperscript{227}

Nonetheless, Myanmar has taken some steps to alleviate these concerns. In September 2011, President Thein Sein issued Notification No. 34, creating a Myanmar National Human Rights Commission (hereinafter “the Commission”) tasked with, “promoting and safeguarding fundamental rights of citizens described in the constitution of the Republic of the Union of Myanmar.”\textsuperscript{228} The Commission has taken commendable steps such as calling for the release of political prisoners and recommending Myanmar join the ICCPR.\textsuperscript{229} However, civil society organizations have faulted the Commission’s noncompliance with the United Nation’s Principles Relating to the Status of National Human Rights Institutions, otherwise known as the

\textsuperscript{222} DLA PIPER ET AL., \textit{supra} note 57.
\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.} at 36.
\textsuperscript{225} \textit{See} Article 19, \textit{supra} note 214.
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{Id.}
“Paris Principles.” The Paris Principles were adopted in 1993 and establish a set of recommendations for national human rights institutions (“NHRIIs”), among which are recommendations that emphasize the need for NHRIIs to function independently from central government operations in order to produce untainted assessments of problem areas.

At the core of the issue, the Commission was established by a presidential notification, rather than abiding by the Paris Principles’ requirement that “[a] national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence [Competencies and Responsibilities (2)].” Therefore, the creation of the Commission is commendable, but legislating its existence would allay concerns that the commission can be altered or subject to financial pressure based on future political desires.

Inadequate access to alternative information, legislation that blocks freedom of expression and assembly, and noncompliance with international best practices and treaties effectively limit citizens from publically debating critical information. Myanmar and international parties must not establish a SWF before free public discourse can at least have an unrestricted opportunity to weigh the benefits of creating a fund and define investment objectives with extractive resource profits.

3. Equitable Wealth Distribution

States or divisions within a country that depend on their areas’ resource wealth are often cautious about funneling extractive profits into a national fund because projects may reap local resources without providing local benefits. As a result, countries should clearly articulate the land and property rights that govern the use of local, state, and federal resources.

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The aforementioned example of Nigeria’s state governors petitioning against creating a SWF due to a decline in regional profit sharing is a prime example of equitable wealth sharing concerns. The Nigeria Sovereign Investment Authority ("NSIA") was established in 2011 to manage three separate SWFs using Nigeria’s oil wealth. Pursuant to the NSIA's founding legislation, the initial funds would be “provided by the Federal, State, Federal Capital Territory, Local Government and Area Council of the Federation . . . [and] shall be the Naira equivalent of the sum of USD 1 billion. [Part 3, Section 29(1)].” In addition, the law stipulates that each of the government authorities listed above, “shall contribute a percentage of such initial funding equal to each such Government’s share of Federation revenue in accordance with the formula stated in the Allocation of Revenue (Federation Account, etc.) Act [Part 3, Section 29(2)].”

Each of Nigeria’s thirty-six state governors, collectively known as the Nigeria Governors Forum, subsequently went to court to block the SWFs’ creation because these requirements to fund national funds would reduce revenues to individual states. Criticism by the governors is generally based on two articles in Nigeria’s 1999 constitution. First, Section 80 (1) states that,

All revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National Assembly into any other public fund of the Federation established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the Federation.

In addition, under Section 162:

(1) The Federation shall maintain a special account to be called “the Federation Account” into which shall be paid all revenues collected by the Government of the Federation . . . [and] (3)

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235 Id.
237 Id.
238 Id.
239 Adigun, supra note 192.
Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the Local Government Councils in each State . . . .

Taken together, the Nigeria Governors Forum argued that funds may not be legally deposited into SWFs under the NSIA and that depositing these funds violated Section 162’s provision of state-level revenue sharing. According to former Lagos State Governor, Asiwaju Bola Ahmed Tinubu, Nigeria’s states are desperately in need of money, and Tinubu has drawn the analogy that allowing the federal government to save for long term needs at a time of crisis is similar to not paying for life saving medical treatment for a sick child because you are saving for their future.

In May 2013, Nigeria’s Supreme Court heard arguments from the Federal Government and the Nigeria Governors Forum, and presiding Judge Walter Onnoghen commented that, on the issue of revenue sharing, “there is nothing constitutional about money sharing but negotiation,” thus recommending that any state revenue sharing must be determined through state and federal negotiation. Judge Onnoghen urged both sides to negotiate this point out of court before their next scheduled court appearance on December 2, 2013.

The Nigeria case study highlights constitutional revenue sharing issues in developing petroleum states; however, even well diversified Western economies may share these same concerns. Madelaine Drohan, a Canadian correspondent for The Economist, recently recommended in a report on SWFs that the Canadian International Council should not establish a national Canadian SWF because doing so would deny or reduce revenue to Canada’s individual provinces that are dependent on extractive projects in those areas.

Myanmar’s ongoing regional divisions only underline the need to ensure that extractive projects transfer benefits to local communities else provide additional reasons for conflict. Kachin State, one of Myanmar’s

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241 Id.
242 Idigun, supra note 192.
243 Id.
245 Id.
ethnic states with plentiful jade resources, is a notable example. In June 2011, a seventeen-year ceasefire broke down between the Kachin Independence Army and Myanmar’s military and displaced approximately 100,000 people. According to Richard Horsey, a former U.N. senior official in Myanmar, “such vast revenues – in the hands of both sides – have certainly fed into conflict, helped fund insurgency, and will be a hugely complicating factor in building a sustainable peace economy.”

In order to prevent further conflict, basic land rights that intersect with extractive resource reserves and revenue distribution must be enshrined in law prior to creating SWFs that may detract critical funds from certain regions. Of particular note, Myanmar’s constitution and two of Myanmar’s highly criticized existing land laws, the Farmland Act and the Vacant, Fallow, and Virgin Lands Management Law (“VFV Law”), both detailed below, underscore the need to revise the governance of natural resources before establishing a fund to reap the benefits of local lands.

Myanmar’s constitution clearly restricts ownership of extractive resources and states,

The [Myanmar] Union: (a) is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union; [and] (b) shall enact necessary law to supervise extraction and utilization of State-owned natural resources by economic forces [Article 37].

Therefore, on a basic level, regional or state-level profit sharing will remain limited as long as this provision is intact.

The Farmland Act, enacted in March 2012, affirms the State’s ownership of all farmland in Myanmar. Under the Farmland Act, farmers must receive permission from the government before they harvest crops, even on generations-old family land. In addition, the law claims all above

249 Id.
252 Id.
and belowground extractive resources as property of the state without any profit-sharing provisions for local communities.\textsuperscript{255} Lastly, the Farmland Act also curtails existing legislation that previously allowed partial collective unionization rights.\textsuperscript{254}

The VFV Law, also passed in March 2012, grants the government control over state or regional resources.\textsuperscript{255} Conditions governing the use of land include that, “If natural resources are found in the authorized land and the Government being desirous of extracting the same on a commercial basis resumes the area required therefrom, it shall be surrendered as directed by the Union government.”\textsuperscript{256} In addition, the law also enables the country’s Central Body of Vacant, Fallow, and Wilderness Land Management to re-designate vacant, fallow, and virgin land as “farmland.”\textsuperscript{257} Reclassified farmland can then be granted to “farmers.”\textsuperscript{258}

Two critical issues arise from this process. First, a Reuters Special Report found in 2012 that occupied farmland deliberately left vacant as part of annual crop cycles, or generational family land without official land titles, was labeled “vacant” and confiscated by the Myanmar government.\textsuperscript{259} Second, the government’s definition of “farmer” is irresponsibly defined to include state officials, politically connected crony tycoons, and foreign investors.\textsuperscript{260} The government can therefore grant these “farmers” the ability to develop up to 50,000 acres of “vacant” farmland to develop industrial raw materials.\textsuperscript{261} Alarmingly, if this legal manipulation was not blatant enough, the government can expropriate land from inhabitants when vaguely defined “national interests” are at stake, and any traditional farmers who refuse to leave confiscated land will face prison sentences, fines, or both.\textsuperscript{262}

Policymakers and citizens should not allow a SWF to make investments with funds that are inequitably obtained from project areas. As a result, Myanmar must resolve its land ownership and resource profit-sharing disputes before establishing a SWF. Failure to do so can further

\begin{flushleft}
\textsuperscript{253} Id.
\textsuperscript{254} Id.
\textsuperscript{255} The Vacant, Fallow, and Virgin Lands Management Law, 2012, No. 1 (Myan.).
\textsuperscript{256} The Vacant, Fallow, and Virgin Lands Management Law, 2012, No. 1, ch. 6(16)(g) (Myan.).
\textsuperscript{257} Examination and Critique of the 2012 Farmland Bill, supra note 251.
\textsuperscript{258} Id.
\textsuperscript{260} Examination and Critique of the 2012 Farmland Bill, supra note 251.
\textsuperscript{261} Id.
\textsuperscript{262} Szep, supra note 259; Examination and Critique of the 2012 Farmland Bill, supra note 251.
\end{flushleft}
detract critical funds from specific regions without providing local benefits to at-risk populations.

V. C U T T I N G T H R O U G H M Y A N M A R ’ S J U N G L E : T R A N S P A R E N C Y A N D C O R R U P T I O N

Myanmar is one of the most corrupt and non-transparent countries in the world.\textsuperscript{263} In addition, global SWFs have a poor track record at serving as transparent features of good governance.\textsuperscript{264} It follows that mixing Myanmar’s poor governance record and a SWF in Myanmar raises considerable governance and transparency concerns. The following section illustrates the extent of global SWF transparency, and initiatives that may assist transparency in Myanmar. The section then describes how corruption in Myanmar’s untransparent environment can impact SWF operations and overall state governance.

A. T r a n s p a r e n c y

Sovereign wealth fund transparency is an important component of holding governments accountable for national resource revenue.\textsuperscript{265} However, even though SWFs control over USD 5.5 trillion of global wealth, the general lack of transparency regarding SWF size, investment activity, leadership, and motivations is staggering.\textsuperscript{266} Lack of SWF transparency damages state finances and puts government bonds at risk of being downgraded.\textsuperscript{267} Myanmar’s historic corruption and poor transparency are reasons for concern that a Myanmar SWF would fall prey to the institutional governance and transparency deficiencies that have plagued the Myanmar ministries. The United States government has recently imposed transparency requirements for those investing in Myanmar, which may establish a degree of transparency best practices, but Myanmar should also reform its domestic legislation to do the same.

\textsuperscript{266} Sovereign Wealth Fund Rankings, supra note 264.
\textsuperscript{267} Ellsworth & Chinea, supra note 89.
In a recent survey of SWFs, researchers found that seven of the least transparent global SWFs control approximately half of all SWF holdings, amounting to several trillion US dollars. Multivariate tests have demonstrated a “strong and positive correlation between a country’s political and civil liberties and the quality and transparency of its sovereign wealth funds.” As a result, SWFs in OECD economies typically are considerably more transparent regarding their operations than SWFs based in non-OECD or developing countries. This is evident in states like Norway that maintain strict annual transparency procedures. In comparison, however, the United Arab Emirates’ Abu Dhabi Investment Authority, established in 1976, controls over USD 627 billion of assets and only released limited information about its financial transactions for the first time in 2010.

The lack of SWF transparency can also damage the legitimacy of state finances. Venezuela’s Fonden Fund, previously controlled personally by the late President Hugo Chavez, lacks congressional oversight and does not regularly disclose its investments. Due to the opaque nature of such a large percentage of state revenue, Erich Arispe, the director of Fitch Ratings Sovereign Group, previously commented that, “I can’t rate what I can’t see,” and signaled that Venezuela’s debt runs the risk of being downgraded because of fund transparency concerns. Downgraded credit raises the cost of borrowed capital, and downgrades such as these can be avoided by committing to more transparent legal and managerial best practices.

In addition, Revenue Watch Institute has identified very few cases when SWFs have increased state transparency, with exceptions in Azerbaijan and Kazakhstan. However, these states and their SWFs are governed by authoritative presidential decrees, so increased transparency has not

269 Drezner, supra note 20.
270 Id.
273 See Ellsworth & Chinea, supra note 89.
274 Id.
276 See Ellsworth & Chinea, supra note 89.
277 See Heuty & Aristi, supra note 35.
necessarily led to increased political openness or public participation in investment decisions.  

In an effort to increase transparency and establish general best practices, in 2008, the International Working Group on Sovereign Wealth Funds (“IWG-SWF”) and the IMF put forward a set of twenty-four principles for SWF governance. To date, twenty-six nations have committed to the IWG-SWF principles, known as the Santiago Principles. Among these principles are the requirements that, “the legal framework for the SWF . . . be sound and support its effective operation” and that funds be, “clear and publicly disclos[e] policies, rules, procedures, or arrangements in relation to the SWF’s general approach to funding, withdrawal, and spending operations.” Lastly, the Santiago Principles emphasize the need for SWF operations to be, “clearly defined in the relevant legislation, charter, other constitutive documents, or management agreement.”

However, the voluntary nature of this transparency regime raises questions about countries’ real commitment to the Santiago Principles. For example, Nigeria’s NSIA specifically mentions the Santiago Principles in Part 1, Article 4 (2)(d) of its founding legislation. The article stipulates that “[t]he [NSIA] . . . implement[s] best practices . . . respect[s] independence and accountability, corporate governance, transparency and reporting on performance as provided in this Act, including with due regard as appropriate for the Santiago Principles.” The NSIA Act does not define “due regard as appropriate” and resultantly the parameters of this language are far too broad to be truly considered in adherence to the Santiago Principles. This instance demonstrates that the Santiago Principles may serve as an effective guideline for fund creation, but do not inherently provide solutions to transparency concerns.

278 See id.
281 Id. at 1.
282 Id. at 4.
283 Id. at 10.
285 Id.
286 See id.
Myanmar’s historic corruption and poor transparency practices cast doubt on the proposition that a Myanmar SWF would escape the institutional governance and transparency deficiencies that have plagued the Myanmar ministries that would likely be tasked with overseeing a national SWF. In fact, EarthRights International, a non-profit organization with an extensive focus on Myanmar’s extractive industry, found that Myanmar had unaccounted foreign exchange reserves in excess of hundreds of millions of US dollars held in two foreign Asian banks in 2009. Similar to a potential SWF, these funds are not included in annual budgets or subject to civil society oversight.

More recently, Myanmar has signaled its intention to join international transparency initiatives to address some of these concerns, and Western governments have set strict transparency guidelines for national companies investing in Myanmar. Implementation of these transparency best practices parallel the current challenges faced in implementing transparency standards Myanmar would need to overcome before establishing a transparent national SWF.

In 2012, Myanmar announced that it would become a signatory to the Extractive Industries Transparency Initiative (“EITI”). The EITI is a voluntary international initiative that requires extractive companies to self-report payments to foreign governments. Governments then report payments received from companies to a third party to verify that neither side has corruptly siphoned revenue. The EITI has been applied in thirty-six other countries, but experts and civil society groups have expressed concern that Myanmar may fail to adequately meet multiple core objectives of the EITI. In particular, concerns that Myanmar may fail to meet these objectives partially stems from EITI Requirement 4, which requires that:

288 Id.
290 Kelly, supra note 289.
291 Id.
292 Id.
293 Id.
(a)...implementation of the EITI is overseen by a multi-stakeholder group comprising appropriate stakeholders, including—but not limited to—the private sector, civil society (including independent civil society groups and other civil society, such as the media and parliamentarians) and relevant government ministries... (d) Civil society groups involved in the EITI as members of the multi-stakeholder group must be operational, and, in policy terms, independent of government and/or companies...[and] (e) Members of the multi-stakeholder group should be able to operate freely without restraint or coercion, including be liaising with their constituency groups.294

Myanmar’s poor track record of encouraging civil liberties or enabling civil society activities may result in an inability to meet authentic multi-stakeholder requirements as set forth in the EITI.295 This is particularly problematic because EITI Requirement 4.1(a) tasks those multi-stakeholder groups to, “define, by agreement of the multi-stakeholder group, what these material payments and revenues comprise and what constitutes a pre-defined, reasonable materiality threshold.”296 Therefore, the inability to forge authentic multi-stakeholder groups will prevent an authentic definition of what activities are considered material payments to governments, thereby potentially allowing an unobservable amount of corrupt revenue to continue flowing from extractive projects.

In addition to the EITI’s international focus on extractive transparency, U.S. President Barack Obama recently praised Myanmar for the country’s commitment to join the Open Government Partnership Initiative (“OGP”), a separate international transparency body, by 2016 in his speech at the University of Yangon.297 The OGP is a global organization that aims to make governments more accountable, transparent, and effective to each country’s citizens through regularly released data and continuous

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295 See id.; Failed States Index, supra note 158.
297 See Obama, supra note 289; Zaw W. Than, supra note 289.
engagements with international parties and civil society groups.\textsuperscript{298} Similar to the EITI, global commentators remain cautiously optimistic that Myanmar can fulfill transparency obligations under the OGP.\textsuperscript{299}

Furthermore, American transparency requirements for investing in Myanmar may establish a degree of transparency best practices,\textsuperscript{300} but Myanmar must consider the merits of enacting similar domestic legislation prior to creating a responsibly managed SWF. Over the objections of Aung San Suu Kyi, in July 2012, President Obama announced that American companies would be allowed to invest in Myanmar and the country’s extractive sector.\textsuperscript{301} Following this decision, the U.S. Treasury Department issued General License 17, which allows investment in Myanmar contingent on satisfying conditions released under the “Responsible Investment Reporting Requirements (OMB No. 1405-0209).”\textsuperscript{302} This license requires U.S. individuals to report any investment with the Myanmar Oil and Gas Enterprise (“MOGE”), a military controlled agency focused on petroleum reserves.\textsuperscript{303} In addition, Requirement 8 further forces a degree of transparency by setting a low basic payment materiality threshold when requiring that investors must:

report total payments made by submitter or on its behalf valued over $10,000 during the reporting year to each Government of Burma entity and/or any sub-national or administrative governmental entity or non-state group that possesses or claims to possess governmental authority over the submitter’s new investment activities in Burma.\textsuperscript{304}

Furthermore, the license requires releasing two annual reports regarding investment: one eight-point report for public consumption and a

\begin{footnotesize}
\textsuperscript{302} Responsible Investment Reporting Requirements, supra note 300.
\textsuperscript{303} Id.
\textsuperscript{304} Id.
\end{footnotesize}
second report for confidential government use. The more comprehensive, confidential second report includes the eight points required by the publically disclosed report and also requires disclosing:

9. **Point of Contact**: Name and contact information of individuals(s) responsible for preparing this report. The U.S. Government may request additional or clarifying information.

10. **Military Communications**: Has the submitter, or any individual from or representing the submitter, had meetings or other communications, including written and telephone communication, with the armed forces of Burma and/or other armed groups related to the submitter’s investments in Burma?

11. **Risk Prevention and Mitigation**: With regard to human rights, worker rights, anti-corruption, and/or environmental issues, summarize any risks and/or impacts identified, any steps taken to minimize risk and to prevent and mitigate such impacts, and policies and practices on risk prevention and mitigation.

International civil society organizations have called for these last three points to be made public because they often carry particularly critical consequences on state governance practices surrounding extractive sector operations. These points remain unchanged at the time of publication.

Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act Rules, released by the U.S. Securities and Exchange Commission (“SEC”), are additionally relevant for tracking extractive profits and payments. Extractive companies that trade on American public exchanges must disclose their payments for each project abroad in order for investors to be able to hold governments accountable for those

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305 *Id.*

306 *Id.*

307 *Id.*

308 *Id.*


profits. These rules define payments to mean “a payment that is made to further the commercial development of oil, natural gas, or minerals, is ‘not de minimis,’ and includes taxes, royalties, fees (including license fees), production entitlements, and bonuses.”

The EITI included several of these types of payments as suggested payments for multi-stakeholder groups to incorporate into materiality threshold determinations, but defining payments in these terms to be more comprehensive than the EITI was no mistake given the SEC’s explicit mention of the EITI. According to the SEC’s rules, the final rules are consistent with the EITI. In instances where the language or approach of Section 13(q) clearly deviates from the EITI, the final rules track the statute rather than the EITI because in those instances we believe [U.S.] Congress intended the final rules to go beyond what is required by the EITI. We believe this approach is consistent with Section 13(q) and furthers the statutory goal to support international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals because the EITI is referenced in Section 13(q) and is well-recognized for promoting such transparency.

The United States’ standards that extend beyond EITI are positive for shaping transparency. However, China, South Korea, India, and Thailand have historically served as Myanmar’s largest trading partners and would only be bound by these reporting requirements if their national companies trade on American exchanges or if Americans run their companies. Therefore, an important component of evaluating Myanmar’s transparency practices lies in the country’s domestic legislation.

One specific domestic law would have especially critical impacts on Myanmar’s transparency and would likely lead a national SWF to fail. Myanmar’s Special Funds Law for Perpetuating National Sovereignty (hereinafter “the Special Fund Law”) allows the commander-in-chief of the military to request and receive discretionary special funds for “defending the
constitution and the State from external and internal threats.”\textsuperscript{315} The Special Fund lacks parliamentary oversight and Chapter 3, Article 5 even audaciously states that, “no individual person or organization is allowed to scrutinize or audit the usage of the Special Fund.”\textsuperscript{316}

The Special Funds Law has clear implications for a potential national SWF. Even if Myanmar establishes a fully transparent SWF that is funded with transparent revenue in compliance with the aforementioned international commitments, the Special Funds Law could provide a domestic legal basis for Myanmar’s leaders to redirect transparent funds from the SWF to fund opaque operations from the Special Fund Account. As a result, Myanmar must demonstrate its commitment to align domestic transparency best practices with international standards and initiatives before officials can be provided with an avenue to further siphon funds from the state.

\textbf{B. Corrupti\textit{on}}

Domestic pressures and political corruption, broadly defined as the misuse of political authority, can negatively impact SWF performance. This section discusses the extent of this pressure to examine Myanmar’s existing levels of corruption. In doing so, the combination of Myanmar’s existing level of corruption and SWF’s general lack of transparency would put a Myanmar SWF at risk of succumbing to pressures for domestic involvement. This could include investing profits in domestic sectors, which could result in a fund that underperforms compared to investment options otherwise unhampered by domestic involvement.

In a survey of 2,662 investments by twenty-nine SWFs made between 1984 and 2007, a team of Harvard Business School (“HBS”) researchers found that the political process can introduce short-run pressures on SWFs to accommodate public demands for job creation and economic stabilization within the country and can lead to political intervention that sharply deviates from originally stated plans for long-term maximization.\textsuperscript{317} In addition, countries may acquiesce to pressures to grant politicians increased managerial input over SWF investments to achieve non-monetary domestic

\begin{itemize}
\item \textsuperscript{316} \textit{Id}.
\end{itemize}
objectives rather than ensuring financial experts and technocrats maximize investment returns.\textsuperscript{318} The HBS researchers also compared SWF management to the International Country Risk Guide, a widely accepted indicator score for evaluating country corruption that ranks countries from zero (most corrupt) to ten (least corrupt), and discovered that each additional point of corruption yields a 10.8% greater likelihood that countries will focus funds to domestic investments.\textsuperscript{319} Disturbingly, the researchers then found that politically influenced funds that made direct domestic investments significantly underperformed by 16\% in six months following investment compared to SWFs managed by foreign experts who would otherwise seek to make global investments for higher returns.\textsuperscript{320}

Myanmar is plagued by corruption. The 2011 Corruption Perception Index (“CPI”), an annual index released by Transparency International that rates perceptions of domestic corruption, found that Myanmar ranked 180\textsuperscript{th} out of 183 countries as one of the most corrupt states in the world.\textsuperscript{321} Even during recent reforms, the 2012 CPI, the most recent version publically released, scored Myanmar at 172 out of 176 countries surveyed, ranking above only Sudan, Afghanistan, North Korea, and Somalia.\textsuperscript{322} According to a report by Quartz, Atlantic Media’s business-focused online news magazine, SWFs do not consistently lead to reductions of corruption in petroleum states,\textsuperscript{323} and as a partial result, SWFs can serve as slush funds for additional corruption. One example of the corrupt use of SWFs is the Iranian Stabilization Fund (“ISF”).\textsuperscript{324} The ISF was initially designed to compensate for commodity price volatility and support entrepreneurial enterprises in expanding industries,\textsuperscript{325} but instead the ISF has financed “bonuses to government retirees, payments for gasoline imports, the expansion of the Basij (the volunteer militia) and the purchase of new police equipment.”\textsuperscript{326}

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\textsuperscript{318} Bernstein, Lerner, & Schoar, supra note 317.
\textsuperscript{319} Id. at 19.
\textsuperscript{320} Id.
\textsuperscript{321} Corruption Perceptions Index 2011, supra note 263.
\textsuperscript{322} Id.
\textsuperscript{324} See HEUTY & ARISTI, supra note 35.
\textsuperscript{325} See id.
\textsuperscript{326} See id.
The corrupt use of a SWF would have especially detrimental impacts for Myanmar amidst the country’s privatization reforms. Myanmar has initiated a series of privatization reforms, known locally as “pocketization” because state owned businesses are sold off to well-connected individuals with deep crony ties to government leaders.\footnote{See Turnell, supra note 49.} If government leaders are successful in biasing fund objectives to direct SWF resources domestically, as predicted by the HBS team, a Myanmar SWF has an increased chance of being used as a seemingly legitimate way to further fund illegitimate crony interests under the guise of SWFs leading domestically-focused privatization reforms and economic development initiatives.

Even worse, state officials potentially cannot be held accountable for these pocketization practices. Chapter 445 of Myanmar’s constitution states, “No proceedings shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.”\footnote{Constitution of the Republic of the Union of Myanmar, May 29, 2008 (Myan.).} Therefore, not only could corrupt government officials redirect funds from a SWF to support crony interests, but these individuals would actually be protected by law in the course of illicitly privatizing state resources.

Detailed analysis of SWF performance conducted by the HBS team raises concern that Myanmar’s own corrupt practices would negatively impact a potential SWF performance. The ability to bias fund activities, combined with explicit indemnity offered to government officials in Chapter 445 of Myanmar’s constitution, creates conditions that are inhospitable for proper fund management. Resultantly, Myanmar should not establish a SWF until corrupt practices can be stymied and effective legal regulations hold government accountable for state resource revenue.

VI. CONCLUSION

This article draws global lessons from existing SWFs to speculate how creating a SWF with Myanmar’s resource profits would impact Myanmar and mitigate concerns associated with the resource curse. Following a thorough analysis, this article demonstrates that Myanmar currently lacks important components needed to establish and responsibly manage an effective SWF.

Highlighting the reasons why Myanmar is not prepared to establish a SWF at the present time provides a snapshot of specific steps Myanmar can
implement to strengthen its governance and economic practices. These steps are key components for Myanmar’s development, but would undoubtedly require deliberate and sustained effort. However, in the course of pursuing these steps, Myanmar could simultaneously create conditions to establish a well-managed SWF in the future.

Myanmar must continue to engage the international community to build the domestic legislative and financial skill sets needed to manage future legal, regulatory, and economic reforms. The resulting framework will then ideally offer Myanmar’s rising experts an opportunity to build the fiscal discipline necessary to reconcile state spending priorities with the needs of the people and build an authentic balance of payments surpluses. During this time, Myanmar’s Ministry of Finance and the Central Bank must demonstrate their ability to manage resource revenue and macroeconomic concerns prior to outsourcing this responsibility to foreign advisors.

Myanmar’s leaders should also recognize the importance of building a diversified economy with profits from non-renewable resources. Building a self-sustaining domestic economy will be a monumental feat, but can be assisted by reforming agricultural practices with an aim at regaining world-leading crop exports, providing credit to farmers to support upward growth, and improving product transportation networks. Stabilization problems will always exist in varying degrees as Myanmar modernizes, but experts agree that building a diversified economic base is preferable to developing complex financial tools to mitigate problems caused by not supporting economic diversity.329

Leaders who achieve this goal will be recognized by the population, thus rebuilding a social compact in a country long divided by military rule. In addition, governments and foreign investors focused on Myanmar’s resources should support civil society calls to formulate intergenerational justice strategies. Successful efforts to build profit-sharing systems, even if they are not similar to the APF’s dividends, will equitably spread benefits of extractive projects to local citizens. With a system to spread benefits, extractive companies and communities can share the desire to further develop natural resources while generating profits used to improve society.

Bridging inherent political divides in Myanmar to achieve these goals will surely take time. However, Myanmar has experienced monumental change in the past two years and it is impossible to speculate exactly what further reforms will occur after the country’s upcoming election in 2015. As

329 Balin, supra note 71.
a result, international onlookers should cautiously await the next election to
gauge prevailing political opinions prior to establishing any kind of long-
term financial plans.

Myanmar also has the ability to reform multiple controversial laws
specified throughout this article. The country can start by repealing Penal
Code 505(b) and the Decree to allow citizens to freely voice opinions about
the direction of their country and the use of the country’s non-renewable
profits without fearing arrest. Furthermore, the Farmland Law and the VFV
Law should be amended to provide greater individual and local benefits,
while also introducing legislation to define how regions most affected by
extractive projects will benefit from continued project expansions.

Lastly, there is no silver bullet to reverse the endemic corruption that
has strangled Myanmar for decades. However, to paraphrase United States
Supreme Court Justice Louis Brandeis, “sunlight is the best disinfectant” and
Myanmar can take strides towards reducing corruption by increasing
transparency. 330 Ensuring Myanmar meets its expressed obligations to the
EITI and OGP are great starting points, and designing domestic parallel
structures to Western investment guidelines can help ensure that non-
Western based foreign investments do not take advantage of Myanmar or
threaten governance building measures. Similarly, in committing to these
practices, Myanmar should define uses and oversight for the State Fund
Account to complement ongoing transparency initiatives as well as add a
layer of accountability to government officials by revising or repealing
Chapter 445 of the constitution.

These steps are admittedly ambitious and may take generations to
ultimately accomplish. However, the pace of the most recent reforms gives
hope that these additional steps may be achievable in this lifetime and
completed without dependence on complex financial instruments.