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Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

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Aleydis Nissen*

Abstract

The United States Securities and Exchange Commission (SEC) issued the rules for Disclosure of Payments by Resource Extraction Issuers for the third time in March 2021. This was prescribed by Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010). These anti-corruption rules require resource extraction issuers listed on the U.S. stock exchanges to publicly report the type and total amounts of payments made for the "commercial development of oil, natural gas or minerals" to governments all over the world. This Article argues that the long process of the creation of these rules, while frustrating for SEC officials and staff, can be conceptualized as a "stag hunt" involving other countries that host extraction companies on their stock exchanges.

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I. INTRODUCTION

The misuse of public office for private gain is perceived as a serious problem all over the world.[1] A 2020 index published by Transparency International indicates that two-thirds of 180 countries studied scored below 50 on a 100-point scale of perceived corruption.[2] Businesses often pay bribes to government officials because they want access to profitable concessions. Legal measures to curtail public office misuse are often reactive to scandals. Examples include the United States Foreign Corrupt Practices Act,[3] which was adopted after the Lockheed scandal in 1977,[4] and Section 1504 of the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act,[5] which was adopted to curb corporate corruption in 2010. This Section inserts an obligation in the Securities Exchange Act to hold foreign governments, as well as all departments, agencies, instrumentalities, and state-owned companies, accountable when they exploit natural resources.[6]

Although the Dodd-Frank Act was adopted in 2010, the Securities and Exchange Commission (SEC) failed to successfully implement Section 1504's disclosure provisions for over a decade due to pressure from U.S.-based extraction issuers, which are legal entities that engage in the commercial development of oil, natural gas or minerals and that develop, register and sell securities to finance their operations.[7] This Article argues that the extensive delays and relaxations in SEC rulemaking—which may not have ended yet—can be conceptualized as a "stag hunt."

A stag hunt is a concept in game theory stating that "participants do much better by cooperating to take a very valuable stag," but that they can choose to act alone to "capture a less valuable hare."[8] The term "stag hunt" was lifted from Jean-Jacques Rousseau's *Discourse on Inequality*.[9] Two or more hunters need to work together to take a stag of high value, but there is always the risk that a hunter will

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1 *See* Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320, 1321 (1997).

2 *Corruption Perceptions Index*, TRANSPARENCY INT'L, https://perma.cc/728D-W8T7.

3 15 U.S.C. § 78dd-1.

4 The Foreign Corrupt Practices Act was adopted after it was revealed that the U.S. aerospace manufacturer Lockheed paid bribes to foreign government officials and other figures with influence in the process of negotiating the sale of aircraft. *See generally* Philip Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257 (1999).

5 15 U.S.C. § 78m.

6 *See* 15 U.S.C. § 78d.

7 *See SEC Adopts Final Rules for the Disclosure of Payments by Resource Extraction Issuers*, SEC (Dec. 16, 2020), https://perma.cc/EF8W-EQX9.

8 Carol Rose, *Game Stories*, 22 YALE J. L. & HUMAN. 369, 375 (2010).

9 *See id.* at 375 (citing JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN AND BASIS OF INEQUALITY AMONG MEN (1755)).

go rogue to capture a less valuable hare. If one hunter takes this "defect" strategy, the others can no longer capture the stag, and they would benefit more by also shifting to "hunting hares." However, all the hares that could be captured would never be as valuable as the capture of the high-value stag. Therefore, each hunter needs the assurance that other hunters will stay with the game plan to gain the maximum value. This is why the stag hunt game is sometimes called the "assurance game."[10]

In international relations, countries are the participants in the stag hunt. Every country operates selfishly in the international order.[11] This Article conceptualizes a stag hunt in which the participants are countries that host extractive companies on their stock exchanges, including the U.S., Canada, the United Kingdom, the Member States of the European Economic Area (EEA), and Switzerland. It is unclear whether these countries "lost control" over companies in the contemporary era of neoliberalism or whether they were complicit in making neoliberalism appear "inevitable and self-regulating."[12] However, it is clear that companies hold economic bargaining power over countries.[13]

The structure of this Article is as follows. Section II of this Article describes Section 1504 of the Dodd-Frank Act. Section III argues that there is a "very valuable stag" to be captured for the U.S. (and other countries that host extraction issuers on their stock exchanges). This stag consists of good corporate governance for issuers that must comply with Section 1504 (or equivalent measures in other countries). There are multiple long-term benefits for these issuers as well as for aliens that are victims of corrupt governments. Section IV.A explains that there has, however, been significant resistance from issuers and their representatives against Section 1504 over the last decade. I interpret the significant delays and relaxations in SEC rulemaking as indications that the U.S. threatened to go after "a less valuable hare": the protection of short-term economic interests of resource extraction issuers listed on the U.S. stock exchange. Section IV.B discusses the interaction between the U.S. and other countries that host extraction issuers on their stock exchanges. I explain that the other participants—in particular, the EEA—have given signals that they are prepared to go after "a less valuable hare"

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10 Rose, *supra* note 8, at 375.

11 *See generally* DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016).

12 Horatia Muir Watt, *Private International Law beyond the Schism*, 2 TRANSNAT'L LEGAL THEORY 347, 422 n.360 (2011).

13 *Cf.* Benedict Wray & Rosa Raffaelli, *False Extraterritoriality? Municipal and Multinational Jurisdiction over Transnational Corporations*, 6 HUM. RTS. & INT'L LEGAL DISCOURSE 108, 124 (2012) (explaining that corporations' bargaining power over states may lead to the creation of laws that protect the interests of corporations).

if the U.S. defects. Lastly, in Section IV, I synthesize this Article's core arguments and identify an opportunity to take the stag hunt to the next level.

II. SECTION 1504 BEGINS THE STAG HUNT

Section 1504 of the Dodd-Frank Act builds upon the Extractive Industries Transparency Initiative (EITI), a global soft law standard that has tried to mitigate corruption since 2003.[14] Although the U.S. is not an EITI member, since 2006 it has supported the EITI International Secretariat through the U.S. Agency for International Development.[15] Guided by the belief that a country's natural resources can provide opportunities to its citizens, the EITI has sought to promote the open and accountable management of resources. This initiative encourages governments to publish revenue stream data—including profits taxes, royalties, dividends, bonuses, license fees, rental fees, entry fees and all other material benefits—for the extraction of oil, gas, and mineral resources. While information alone is never sufficient to ascertain corporate accountability, it is a critical resource for individuals and civil society to assess business impact.[16] The intended effect is indirect. Citizens and civil society in resource-rich countries can evaluate whether revenue streams deliver sufficient value to them or disappear into the pockets of government officials and their allies. They can then, provided they have the freedom to do so, develop strategies to oppose or support the risks and benefits that companies create.

The EITI and Section 1504 of the Dodd-Frank Act put different levels of trust in foreign governments. The EITI can be stripped of its impact because the ultimate obligation to publish information lies with foreign governments. In addition, governments can autonomously decide on the size of payment or the threshold size of company operations, below which they are excluded from the process. In contrast, Section 1504 effectively sidelines foreign governments that solicit or receive bribes. Resource extraction issuers are the duty bearers. This provision requires them to publicly report the type and total amounts of payments made for the "commercial development of oil, natural gas or minerals" per project and per government. [17]

Section 1504 is only applicable to issuers that have a strong connection with the U.S. Commonly, issuers need to have securities listed on U.S. stock exchanges, but it is not required for them to be incorporated in the U.S. Such so-called

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14 *See The EITI Standard*, EITI, https://perma.cc/WQP4-L2CC.

15 *See The United States*, EITI, https://perma.cc/9CD5-4P8M.

16 *See* Archon Fung, *Infotopia: Unleashing the Democratic Power of Transparency*, 41 POL. & SOC'Y 183, 184 (2013).

17 EITI, *supra* note 14, 4.1; 15 U.S.C. § 78m(q)(2)(A).

"extraterritorial" legislation is analogous to requiring foreign nationals to respect the laws of the regulating country when visiting that country.[18]

Consistent with the EITI, under Section 1504, all payments for each project relating to the commercial development of oil, natural gas, or minerals made by the extraction issuers, as well as their subsidiaries and other businesses that they control, need to be reported.[19] Section 1504 contains three requirements regarding the disclosure of information. First, the following information needs to be reported: (i) the total amounts of the payments by category; (ii) the currency used to make the payments; (iii) the financial period in which the payments were made; (iv) the business segment of the resource extraction issuer that made the payments; (v) the government that received the payments and the country in which the government is located; (vi) the project of the resource extraction issuer to which the payments relate; and (vii) such other information as the SEC may determine is necessary or appropriate in the public interest or for the protection of investors.[20] Second, SEC staff must compile statements publicly available online.[21] It is not clear the extent to which this compilation should be informative or allow stakeholders to compare data, as the text of this Section only indicates that this should happen "to the extent practicable."[22] The SEC staff may determine the form, manner, and timing of the compilation. Finally, Section 1504 mandates that the SEC issues final rules that require each resource extraction issuer to produce an annual report containing information relating to any payment made to a foreign government or the federal government for the purpose of the commercial development of oil, natural gas, or minerals within 270 days after the enactment of the Dodd-Frank Act.[23] The decade-long creation process of the SEC rules will be discussed in Section IV.A below.

III. THE VERY VALUABLE STAG

In this Section, I argue that there is a "very valuable" stag to be captured. This stag consists of good corporate governance for issuers that must comply with Section 1504 of the Dodd-Frank Act (or equivalent legal provisions in other countries). Section III of this Article thus challenges the discussion in Section IV.A below, which argues that the perceived value seems to be non-existent for

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18 Jennifer Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* 64 (Harv. Corp. Soc. Resp. Initiative, Working Paper No. 59, 2010), https://perma.cc/S6SG-9C9T.

19 *See* 15 U.S.C. § 78m(q)(1)(C), (2)(A).

20 15 U.S.C. § 78m(q)(2)(D)(ii).

21 *See* 15 U.S.C. § 78m(q)(3)(A).

22 *Id.*

23 *See* 15 U.S.C. § 78m (q)(2)(A).

some industry bodies. Corporate representatives often keep unfavorable information silent because they might lose business opportunities if they invite public scrutiny.[24] While there is a risk that U.S. businesses would be placed at a competitive disadvantage because some of their competitors are beyond the reach of the law, I will argue that general "anti-regulation" arguments are fragmentary, or even wrong.

Corporate Social Responsibility (CSR) provides a noteworthy framework for thinking about how issuers' compliance with Section 1504 may be beneficial. To understand the business case for CSR, Archie Carroll's conceptual model of corporate performance—originally proposed in 1979—is helpful.[25] He proposed that CSR "encompasses the economic, legal, ethical, and discretionary (philanthropic) expectations that society has of organizations at a given point in time."[26] Businesses strive for societal approval, but these four societal expectations do not have equal importance. Their impact on society changes over time as social standards evolve and science progresses.[27]

In 1991, Carroll depicted the four societal expectations as a pyramid with four layers.[28] Accordingly, the base layer is labelled "economic," the second layer is labelled "legal," the third layer is labelled "ethical," and the top layer is labelled "philanthropic."[29] In Western societies, the two base layers are strongly required. Economic responsibility is the base of the pyramid because it is "a foundational requirement in business."[30] A sustainable competitive advantage is required to make businesses survive and thrive. Second, legal responsibility requires business to play by certain rules, laid down in laws and regulations.[31] Businesses at least need to passively comply. While laws and regulations are often expressions of power,[32] Carroll argued that they also "codify ethics" in the sense that they

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24 *See generally* David F. Larcker & Brian Tayan, *Blindsided by Social Risk: How Do Companies Survive a Storm of Their Own Making?*, STAN. CLOSER LOOK SER. (July 21, 2020), https://perma.cc/A8QY-QE6Q.

25 *See generally* Archie Carroll, *A Three-Dimensional Conceptual Model of Corporate Performance*, 4 ACAD. MGMT REV. 479 (1979).

26 Archie Carroll, *Carroll's Pyramid of CSR: Taking Another Look*, 1 INT'L J. CORP. SOC. RESP. 1, 2 (2016).

27 *Cf.* Patrima Bansal & Kendall Roth, *Why Companies Go Green: A Model of Ecological Responsiveness*, 43 ACAD. MGMT J. 717 (2000) (explaining that British and Japanese corporations' ecological CSR is influenced by three motivations: competitiveness, legitimation, and ecological responsibility).

28 *See generally* Archie Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, 34 BUS. HORIZONS 39 (1991).

29 *See id.*

30 Carroll, *supra* note 26, at 4.

31 *See id.*

32 Aleydis Nissen, THE EUROPEAN UNION, EMERGING GLOBAL BUSINESS & HUMAN RIGHTS (forthcoming).

"embody basic notions of fair operations" at a certain point in time.[33] The ethical responsibility, by contrast, suggests a level of business conduct that goes above and beyond current laws, and anticipates *future* laws.[34] Changing ethics or values precede and drive "the very creation of laws [and] regulations."[35] Finally, businesses take up philanthropic responsibilities to be good corporate citizens, but charity is not expected by society in an ethical sense. In other words, businesses are not regarded as unethical by society if they do not engage in philanthropic responsibilities.

Wayne Visser adapted Carroll's pyramid to the African context, where much but not all of the world's resources are concentrated.[36] Visser argued that the order of the CSR layers differs from the classic pyramid in various African countries to fill a governance gap left by under-resourced government structures "that fail to adequately provide various social services."[37] Economic responsibility is placed at the base of the pyramid, with philanthropic responsibilities considered to be more important than legal and ethical ones.[38] Complying with laws and regulations that are created by government officials is thus considered to be less important than funding community projects.[39] Apart from poor governance, other factors such as the pursuit of capital by global business, indigenous traditions, and a history of reliance on aid and donor assistance contribute to the importance of philanthropy in various African societies.[40] Visser assesses that the EITI can strengthen the importance of legal expectations but worries that this initiative can be stripped of its impact relatively easily by foreign governments.[41] On the other hand, as discussed in Section II of this Article, Section 1504 can inject more transparency in payments than the EITI because the onus lies not on foreign governments, but on extraction issuers.

Carroll's pyramid and Visser's pyramid are helpful for understanding the business case for CSR. Tensions inevitably arise when companies seek to adequately meet each of the four categories of societal expectations.[42] Such tensions are important decision points, but "they are not in complete opposition

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33 Carroll, *supra* note 25, at 41.

34 *See* Carroll, *supra* note 26, at 5.

35 Carroll, *supra* note 25, at 41.

36 *See* Carroll, *supra* note 26, at 7 (citing WAYNE VISSER, THE AGE OF RESPONSIBILITY: CSR 2.0 AND THE NEW DNA OF BUSINESS (2011)).

37 Wayne Visser, *Corporate Social Responsibility in Developing Countries*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 473, 483 (Andrew Crane et al. eds., 2008).

38 *See id.* at 489.

39 *See id.*

40 *See id.* at 490.

41 *See id.* at 492.

42 *See* Carroll, *supra* note 26, at 6.

to one another as is often perceived."[43] These tensions are important considerations in decision-making, but they can run parallel, conflict with each other, or converge. Sustainability-driven efforts can create results that deliver value to customers and positively affect the business's standing in the marketplace.[44] For most businesses, such efforts only pay off in the long run. This is the main reason why corporate responses to sustainability are often neither strategic nor operational, but mainly cosmetic.[45] Nevertheless, the recognition of sustainability as a strategic resource has led to considerable insights. For example, the literature has discussed how companies "can do well by doing good" by examining the integration of sustainability issues in the value chain and in product and service development.[46] In addition, acting "ethically" by anticipating future national laws has been recognized as a business strategy to achieve a sustainable competitive advantage.[47]

Increasingly, countries also anticipate transnational legal developments by being first movers.[48] This can give all the businesses in the country's jurisdiction a first-mover advantage, as they get the time and opportunity to experiment with sustainable practices and gradually implement due diligence practices already required by "soft norms." An additional advantage of this strategy is that it allows countries to define benchmarks and shape the global regime. Thus, once the first companies have taken their positions, the issues at hand can change from a matter of differentiation into a matter of legitimacy. As laggard firms emulate industry leaders, their best practice is competitive parity—based on mimetic isomorphism—and not competitive advantage in first-moving countries.[49] For example, such ambitions were made explicit by French lawmakers when they

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43 *Id.*

44 *See generally* George Day, *Marketing's Contribution to Strategy: the View from a Different Looking Glass*, 20 J. ACAD. MKTG. 323 (1992); Philip Kotler, *Reinventing Marketing to Manage the Environmental Imperative*, 75 J. MKTG. 132 (2011).

45 *See generally* Michael Porter & Mark Kramer, *Strategy and Society: the Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 62 (2006).

46 *See* Devashish Pujari, Gillian Wright & Ken Peattie, *Green and Competitive: Influences on Environmental New Product Development Performance*, 56 J. BUS. RES. 657, 658 (2003); Sanjay Sharma, *Managerial Interpretations and Organiational Context as Predictors of Corporate Choice of Environmental Strategy*, 43 ACAD. MGMT J. 681, 691 (2000).

47 *See generally* GEORGE SIEDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE (2000); Christine Parker & John Braithwaite, *Regulation*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 119 (P. Cane & M. Tushnet eds., 2003); Robert Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT Sloan MGMT. REV. 81 (2014).

48 *See* Nissen, *supra* note 32.

49 *See* Paul DiMaggio & Walter Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 151 (1983).

adopted a due diligence law in 2017.[50] The law requires businesses to design a plan for their own and their suppliers' activities addressing human rights and fundamental freedoms, health and safety of persons, and the environment.

At the very least, there is a need to acknowledge that the perceived compliance costs of Section 1504 of the Dodd-Frank Act for extraction issuers can be offset by long-term gains.[51] What is "good" for issuers today may not be good for them tomorrow. At least four advantages might exist for extraction issuers who do not enjoy the maximum degree of freedom. First, extraction issuers listed on the U.S. stock exchanges can experiment with disclosure of payment requirements and thus influence how benchmarks develop globally. Second, they can earn a "reputational premium" that might be appreciated by stakeholders, including shareholders and customers.[52] Third, in an industry that is characterized by long project cycles, transparency rules can create some certainty regarding resource prices, investments, and project outputs.[53] Issuers listed in the U.S. do not benefit from an unstable environment in which governance is low. Section 1504 makes it more difficult for foreign government officials to solicit a bribe twice for the same concession (to the same or other extraction issuers). Light is the best disinfectant. Finally, injecting transparency into supply chains will allow U.S.-listed business to secure the sustainable supply of rare minerals in the decades to come.[54] It preserves the common pool of resources that all issuers need.[55] This issue is now taken more seriously in the U.S. due to the severe resource shortages that the COVID-19 pandemic has created. In his first days in office, President Joe Biden requested a task force to review key U.S. supply chains, including rare earth materials.[56]

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50 *See* Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. HUM. RTS. J. 317, 317 (2017).

51 *Cf.* HA-JOON CHANG, 23 THINGS THEY DON'T TELL YOU ABOUT CAPITALISM (2010) (Chang explains there is a myth that government needs to give the maximum degree of freedom to the corporate sector in the US. He argues that it is in the long-term interest of the business sector to restrict the freedom of individual firms so that they do not destroy the common pool of resources that all of them need. Regulation can also help businesses by making them do things that may be costly to them individually in the short term but raise their collective productivity in the long-term.).

52 *Cf.* Brief for Oxfam America, Joseph Stiglitz, and Geoffrey Heal as Amicus Curiae Supporting Respondents, Nestlé USA, Inc. v. Doe I et al. and Cargill, Inc. v. Doe I et al. at 25, 34-36 (2020) (Nos. 19-416 and 19-453). The amici curiae write that the Foreign Corrupt Practices Act led to an environment in which U.S. businesses benefit from both a reputational premium and a more conductive business environment abroad, despite initial complaints of U.S. business.

53 *See* Aleydis Nissen, *The European Union as a Manager of Global 'Business and Human Rights' Regulation: Country-by-Country Reporting Rules*, 8 UNIV. C. LONDON J. L. & JURIS. 141, 154 (2019).

54 *See id.* at 150.

55 *Cf.* Chang, *supra* note 51.

56 *Fact Sheet: Securing America's Critical Supply Chains*, THE WHITE HOUSE (Feb. 24, 2021), https://perma.cc/CDF8-FB97.

IV. PLAYING THE INTERNATIONAL STAG HUNT GAME

In the stag hunt, what is rational for one player to choose depends on their beliefs about what the other players will choose. Both "stag hunting" and "hare hunting" are equilibria. A participant "who chooses to hunt stag takes a risk that the other will choose not to cooperate."[57] As explained below, there were specific fears that U.S. businesses would be placed at a competitive disadvantage because many of their competitors were beyond the reach of Section 1504 (or similar regulation). Without the assurance of a level playing field, some actors in the U.S. have tried to ensure that the U.S. goes after "a less valuable hare." They challenged the previous rules that the SEC created to implement Section 1504 in court and in Congress. In the "hare hunting" equilibrium, the payoff is smaller, but it does not depend on the choice of action of other participants.[58] In Section IV.A, the delays and relaxations in SEC rulemaking are described in detail in order to convey to the reader the importance that was attached to "not running any risk" by issuers and their allies in the U.S. In Section IV.B, I explain that other countries that host extraction issuers on their stock exchanges—most notably the Member States of the EEA, the U.K., Switzerland, and Canada—participate in the stag hunt with the U.S. I provide evidence that the existing regimes have copied each other to minimize the perceived competitive disadvantages. I then argue that the other participants—in particular, the EEA—have given signals that they are also prepared to go after "a less valuable hare."

A. Significant Delays in the U.S.

Section 1504 of the Dodd-Frank Act determines that the SEC regulates the type and total amount of payments made for each project *as well as* the type and total amount of such payments made to each government.[59] The Act became law in 2010, but the SEC was unable to successfully implement Section 1504's disclosure provisions for a decade.[60] The SEC has adopted Rule 240.13q-1 three times.[61]

The first iteration of Rule 240.13q-1 (promulgated in 2012) can be summarized as follows.[62] Resource extraction issuers must disclose the type and total amount of payments made for each project, the government to which each payment was made, the currency of the payments, the total amounts of the

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57 Brian Skyrms, *The Stag Hunt*, 75 PROC. & ADDRESSES AM. PHIL. ASS'N 31, 32 (2001).

58 *See id.*

59 *See* 15 U.S.C. § 78m(q)(1)(C), (2)(A).

60 *See* SEC, *supra* note 7.

61 *See* 17 C.F.R.§ 240.13p–1 (Sep. 12, 2012); 17 C.F.R.§ 240.13p–1 (July 27, 2016); 17 C.F.R. § 240.13p–1 (Mar. 16, 2021).

62 17 C.F.R.§ 240.13p–1 (Sep. 12, 2012).

payments by category, the business segment that made the payments, and the financial period in which the payments were made.[63] The SEC adopted a threshold of $100,000 (for all payments together), below which companies were not required to disclose their payments.[64] In 2013, the American Petroleum Institute filed a suit against the SEC in the District Court for the District of Columbia.[65] The Institute argued that Rule 240.13q-1 endangered issuers' First Amendment rights. It also argued that the SEC created unnecessary burdens on competition and that lower-cost alternatives were available. The Circuit Court declined jurisdiction, but the District Court had ears for the two arguments in a later case.[66] In *National Association of Manufacturers v. SEC*, Judge John Bates issued an opinion vacating Rule 240.13q-1, holding that the SEC needed to reconsider (i) whether all company payment reports need to be made public and (ii) whether there might be exemptions if foreign laws or regulations forbid disclosure.[67] For example, issuers active in the Angolan petroleum industry are prohibited from divulging any information without the formal authorization of the Ministry of Petroleum.[68]

After Oxfam America sued the SEC for delaying the creation of new rules, the SEC took action.[69] The second Rule 240.13q-1 (2016) allowed U.S.-listed issuers to apply for "exemptive relief" on a case-by-case basis when foreign governments prohibit the publication of payments.[70] This iteration of Rule 240.13q-1 further allowed exceptions for delayed reporting when issuers engage in exploratory activities or acquire new entities. One year later, this Rule was removed by the Republican-controlled U.S. Congress in a joint resolution signed by then-President Donald Trump under the Congressional Review Act.[71] Removing the reporting obligation was part of the Trump Administration's efforts to reduce the regulatory burden facing issuers and their subsidiaries. The administration explained that Rule 240.13q-1 would impose compliance costs on American energy companies, and that these costs were "not justified by quantifiable benefits."[72] Companies could "face a competitive disadvantage in cases where their foreign competitors are not subject to similar rules."[73]

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63 *See id.*

64 *See id.*

65 Am. Petroleum Inst. v. S.E.C., 953 F. Supp. 2d 5 (D.D.C. 2013).

66 *See generally* Nat'l Ass'n of Mfrs. et al. v. S.E.C., 800 F.3d 518, 530, ¶ 23 (D.C. Cir. 2015).

67 *See id.*

68 Despacho 385/06, Angola Ministry of Petroleum (2006).

69 *See* Oxfam Am., Inc. v. S.E.C., 126 F. Supp. 3d 168 (D. Mass. 2015).

70 *See* 17 C.F.R.§ 240.13p–1 (July 27, 2016).

71 *See* Pub. L. No. 115-4, 131 Stat. 9 (2017).

72 Donald Trump, Statement of Administration Policy: HJ Res 38, HJ Res 36, HJ Res 41, HJ Res 40, and HJ Res 37 (Feb. 1, 2017), https://perma.cc/298V-57Z9.

73 *Id.*

In December 2020, the SEC proposed a third iteration of Rule 240.13q-1.[74] The process had been long, expensive, and seemingly required a large deal of fruitless labor. The SEC Commissioner compared the rewriting of the rules with taking part in the movie *The Nightmare Before Christmas*.[75] It was likely no coincidence that the rules were issued after President Joe Biden was elected, but before he took office, as this timing provided more leeway to minimize the perceived competitive disadvantages that the Rule creates.

Among other things, the third iteration of Rule 240.13q-1 exempts certain smaller companies and delays the deadline for reporting for some companies. This Rule also allows for companies to aggregate the payments made to governments instead of specifying individual payments for each project. Arguably, this goes against the letter of Section 1504.[76] The rule became effective in March 2021 but provides for a two-year transition period. Industry associations might challenge this rule again in the future. For example, the American Petroleum Institute and other industry players would prefer information to be collected confidentially and published in an aggregated, anonymized form.[77] It is apt to question here whether future reduction approaches will still have any meaningful long-term positive impact for issuers, as well as aliens, who are victims of corrupt governments. David Weil wrote in this regard that transparency initiatives "do not work sometimes because they are political compromises that were never intended to work."[78]

B. Developments by the Other Stag Hunt Players

In the context of anti-corruption disclosures concerning natural resources, countries that host extraction issuers on their stock exchanges are participants in the stag hunt. While stock exchanges in emerging markets are catching up, economically developed countries still attract the bulk of extraction resource issuers to their stock exchanges in the hope of attracting investors from these

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74 17 C.F.R. § 240.13p–1 (Mar. 16, 2021).

75 *See* Hester Pierce, *Statement at Open Meeting on Disclosure of Payments by Resource Extraction Issuers*, MONDOVISIONE (Dec. 16, 2020), https://perma.cc/VK8D-XFQG.

76 *Cf.* Connor Bildfell, *The Extractive Industries Transparency Measures Act: Critical Perspectives*, 12 MCGILL INT'L J. SUSTAIN. DEV. L., 233, 252 (2016). The 'letter of the law' was explained in Section II. It is first required to report the following information: "(i) the total amounts of the payments by category; (ii) the currency used to make the payments . . . . Connor Bildfell has also said that aggregated statements are not allowed. He writes: "Both the US and EU transparency legislation contain explicit requirements of project-by-project reporting." *Id.* at 252.

77 *See* Dylan Tokar, *SEC Schedules Vote on Controversial Extractive Industry Rule*, WALL ST. J. (Dec. 14, 2020, 5:30 AM), https://perma.cc/2WSX-6FQD.

78 David Weil, *Targeted Transparency*, *in* ADVANCING EXCELLENCE AND PUBLIC TRUST IN GOVERNMENT 77, 78 (Cal Clark & Don-Terry Veal eds., 2011). *See* ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 141–42 (2013).

countries.[79] The London Stock Exchange only allows large mining enterprises with relatively low risk to list, but the London-based Alternative Investment Market lists more junior exploration and development companies.[80] The Toronto Stock Exchange and the Toronto Venture Exchange attract the bulk of extraction issuers nowadays.[81] They list 47%of the public mining companies.[82] This concentration of issuers creates scale advantages, attracting interest from global investors.

From the beginning, it was the goal of the U.S. to work together with other countries to capture the "very valuable" stag through a global compatible transparency regime that would minimize perceived negative impacts on U.S.-based business. Evidence for this is in Section 1504, which states that the SEC rules shall support the commitment of the federal government to international transparency promotion efforts relating to the commercial development of oil, natural gas, and minerals.[83] The U.K. has been an important ally from the start. The U.K. hosted the EITI informally between 2003 and 2006 and put anti-corruption disclosure in natural resources on the agenda of the 2013 G8 Leaders' Summit.[84] At this summit, the G8 leaders agreed to improve standards for extractive transparency and make progress towards improving global reporting standards.[85] When Oxfam America filed its lawsuit against the SEC in 2014, its partner Earth Rights International noted that "much of the rest of the world has already caught up by passing similar transparency legislation," referring to developments in Canada and the EEA, which had the U.K. as a Member State at the time.[86] The second iteration of Rule 240.13q-1 also refers to such developments, while the third iteration of Rule 240.13q-1 expresses that the EEA regime, included in the Accountability and Transparency Directives in 2013,

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79 *See generally* BAKER MCKENZIE, A REPORT ON DUAL LISTINGS BY AUSTRALIAN RESOURCES COMPANIES (2012), https://perma.cc/MV89-6HCS.

80 *See* BAKER MCKENZIE*, supra* note 79, at 11; Jiang Guangyu, *Comparative Study on the Characteristics and Development Modes of International Mining Capital Market*, 267 IOP CONF. SERIES: EARTH ENVTL. SCI. 1, 3 (2019), https://perma.cc/W3AA-FX7N.

81 *Id.*

82 LIST OF MINING COMPANIES ON TSX & TSXV, TMX (2021), https://perma.cc/Q2SK-DYWX.

83 15 U.S.C. § 78m(q)(2)(E).

84 *See* CECILY ROSE, INTERNATIONAL ANTI-CORRUPTION NORMS (2015), 138–39 and 163.

85 *See* ENKO KOCEKU ET AL., 2013 LOUGH ERNE G8 SUMMIT FINAL COMPLIANCE REPORT 106–07 (June 4, 2014), https://perma.cc/9MT9-TN2N; DANIËLLA DAM-DE JONG, INTERNATIONAL LAW AND GOVERNANCE OF NATURAL RESOURCES IN CONFLICT AND POST-CONFLICT SITUATIONS 395 (2015).

86 *Oxfam America Sues SEC For Failure to Issue New Transparency Rules Required by Dodd-Frank 1504*, EARTH RIGHTS INTERNATIONAL (2015), https://perma.cc/H8C4-H2BA.

and the Canadian Extractive Sector Transparency Measures Act in 2015, meet substantially similar requirements.[87]

According to the NGO Publish What You Pay Australia, regulation introduced in the U.S., the EEA, the U.K., and Canada jointly captures 87% of all mining companies.[88] This includes various companies from emerging markets. For example, Russia's Gazprom has secondary listings in London and Frankfurt, while major state-owned Chinese companies such as Petrochina, the principal holding company of China National Petroleum Company, and the Chinese National Offshore Oil Company Limited, are U.S.-listed. It is perhaps striking that Australia has not yet adopted regulation. While various Australian companies are cross-listed on regulated stock exchanges, approximately 4% of the extraction resource issuers are listed solely in Australia, mainly on the Australian Securities Exchange.[89] These Australian issuers remain outside any regulation, while Australia has created an incentive for the countries that have created regulation to defect.

The existing regimes have minimized the perceived competitive disadvantages of their rules by copying each other. The U.S. regime influenced the other regimes. Notably, the EEA, British, and Canadian regimes require similar types of payments to be captured as well as a similar de minimis threshold around $100,000.[90] Most recently, in June 2020, Switzerland also changed its *Code des Obligations* to regulate the disclosure of payments for resource extraction above a threshold of CHF 100,000.[91] The SEC also brought its rules in line with the other regimes. For example, the third iteration of Rule 240.13q-1 minimizes the accountability of issuers. In a departure from the second iteration of Rule 240.13q-1, disclosure information needs to be "furnished" rather than "filed," excluding the disclosures made from liability for false or misleading statements under Section 18 of the Securities Exchange Act.[92]

Yet, there remain considerable differences. The other regimes seem to go further than the U.S. regime in various respects. While it is not the aim of this

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87 Council Directive 2013/34/EU, art. 51, 2013 O.J. (L 182) 19; Parliament and Council Directive 2004/109/EC, 2004 O.J. (L 390) 38; Extractive Sector Transparency Measures Act (ESTMA), S.C 2014, c 39, s 376 (Can.).

88 *Submission to the Senate Economics References Committee into Australia's Oil and Gas Reserves*, PUBLISH WHAT YOU PAY AUSTRALIA (Nov. 8, 2019), https://perma.cc/XDQ8-ZEY6.

89 *Id.*

90 Based on CAD Morningstar exchange rates on 10 July 2021, 18:03 UTC, Canada has the lowest de minimis threshold at CAD 100,000 (USD 80,359) while the U.K. has the highest threshold at GBP 86,000 (USD 119,561).

91 CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS] June 19, 2020, FF 5409 (2020), arts. 964, 984 al. 1, 1077 al. 1 (Switz.). Based on CAD Morningstar exchange rates on 10 July 2021, 18:03 UTC, Switzerland's de minimis threshold is CHF 100,000 (USD 109,389).

92 15 U.S.C § 78p(b) (1970).

Article to provide a complete comparison, it is useful to report three major differences.[93] First, while Section 1504 of the Dodd-Frank Act is only applicable to listed issuers, the other regimes also cover "large" unlisted businesses that pass a de minimis threshold. Second, disaggregated statements—as formulated in the third iteration of Rule 240.13q-1—are not allowed in the other regimes. Third, a tyrant-friendly exemption is not allowed in the other regimes. Although the European Commission proposed such an exemption, it was deleted by an intervention from the European Parliament.[94] The impact of this clause has already been visible. For example, the amounts declared by the disclosure report of France's largest energy company, Total, differ by more than one hundred million U.S. dollars from the data available from the Angolan authorities.[95]

These observations might indicate that the U.S. regime is comparatively lax due to pressure from the U.S. business community. However, such a conclusion would be too hasty. Data needs to be accessible in order to be useful to users and their intermediaries. Accessibility "depends upon but does not end with the availability of information."[96] The information that needs to be made available under the U.S. regime is, in principle, far more accessible than the information made available by the other existing regimes.

Section 1504 of the Dodd-Frank Act requires issuers to submit information in an interactive data format.[97] The SEC determined that this format needed to be machine readable. Issuers are required to add tags to their reports in a specialized disclosure form to mark the seven categories described in Section II of this Article above. The data must be in an Extensible Markup Language-based (XML) structured software language, referred to as eXtensible Business Reporting Language. The SEC's Electronic Data Gathering, Analysis, and Retrieval system (EDGAR) enables users to freely and easily extract, aggregate, and analyze the information in a manner that is most useful to them. The U.S. further proposed that the disclosed data should be interoperable with data published under foreign regimes. Data has a multiplier effect: the more easily high-quality datasets can talk to each other, the more potential value users can get from them.[98]

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93 Contrary to the U.S. and Canadian regime, the EEA, British, and Swiss regimes cover the logging industry.

94 *See Oil, Gas, Mineral and Logging Firms Obliged to Disclose Payments to Governments*, EUROPEAN PARLIAMENT NEWS (Jun. 12, 2013), https://perma.cc/G8BB-7WQY.

95 Lucas Porsch et al., *Review of Country-by-Country Reporting Requirements for Extractive and Logging Industries*, at 38 (2018), https://perma.cc/TT9D-TV9M.

96 Fung, *supra* note 16, at 199.

97 *See* 15 U.S.C. § 78m(q)(2)(C).

98 *See Principles*: *International Open Data Charter*, OPEN DATA CHARTER, https://perma.cc/UH6Q-9BN4.

For the time being, however, there are considerable difficulties for citizens and NGOs, such as the Resource Projects Initiatives, to integrate the data of the other regimes with data that will be made available under the U.S. regime.[99] The other regimes are not as user-friendly as the U.S.[100] The U.K. regime lies most closely to the U.S. regime.[101] Information on payments by UK-registered companies within the scope of the legislation is freely accessible in a centralized repository established by Companies House.[102] The data needs to be provided in XML format and be able to be outputted in a Comma Separated Values format. The Canadian regime requires that reports are made available in XLS or Portable Document Format (PDF) on publicly accessible websites by reporting businesses.[103] The PDFs also need to be machine-readable. A link to every report submitted is made available on a website hosted by Natural Resources Canada for a period of no less than five years. This oversight website makes it easy to identify which companies have published disclosures.[104]

For their part, the EEA Member States are not required to publish the reports in an easily accessible and machine-readable format. A copy of the whole or any part of the disclosure report must be obtainable on application, and it is helpful that some of these Member States—including France and Italy—require that the reports are published on companies' websites. Some Member States require the statements to be gathered in a national registry. This is often a national registry where accounting and financial information about companies can be consulted. While some Member States such as Belgium provide disclosure reports for free, other Member States such as Finland and Sweden charge to access their registry.[105] There is a central portal connecting business registries, but not all EEA Member States are currently connected, and it is difficult to conduct searches. To add to the confusion, the E.U. refers to the relevant disclosure rules for extractive industries as "country-by-country reporting," a label that it also uses for another

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99 *See Open Data on Oil, Gas and Mining Payments*, RES. PROJECTS, https://resourceprojects.org (last visited Jul. 30, 2021).

100 The Swiss regime is not yet operative at the time of writing. It requires that the electronic reports are publicly accessible for six months and leaves open the door for additional requirements. *See* CODE DES OBLIGATIONS, *supra* note 90, art. 964d (Switz.).

101 *See generally* U.K. Secretary of State, *Reports on Payments to Governments Regulations*, S.I. 2014/3209 (2014).

102 Non-U.K. registered companies within the scope of the legislation need to submit their data to a National Storage Mechanism.

103 *See generally Extractive Sector Transparency Measures Act: Technical Reporting Specifications,* GOV'T OF CANADA (2018), https://perma.cc/L4DD-J236.

104 *Cf.* Rachel Chambers & Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 CHI. J. INT'L L. 323, 256 (2021).

105 *See* Porsch et al., *supra* note 95, at 22.

draft transparency initiative regarding taxes.[106] In practice, this makes it hard to find online information disclosed under the E.U. disclosure rules.

There was not much motivation in the EEA to make data more accessible to users whilst the U.S. had put the brakes on the creation of rules to implement Section 1504 of the Dodd-Frank Act. In "stag hunt" language, the U.S. gave the impression that it had shifted its strategy to "hunting hares," instead of working together to capture the "very valuable stag." In a review commissioned by the European Commission, stakeholders noted that they did not think that the reporting requirements would place European companies at a disadvantage, but there were nevertheless concerns about the invalidation of the second iteration of Rule 240.13q-1 in the Trump era.[107] It was said to be unfair that the bulk of U.S. oil and gas issuers were not facing the compliance costs imposed by the reporting obligations,[108] thus impeding the creation of a level playing field for 40% of oil, gas and mineral resource issuers.

The tables have turned since the adoption of the third iteration of Rule 240.13q-1 by the SEC. To capture the "valuable stag" and ensure that the U.S. does not defect, the E.U. will need to move forward and ensure that data is accessible to users. The E.U. is currently exploring opportunities to establish a single access point for public corporate information.[109] There are plans to require compulsory and machine-readable digitization of corporate disclosure information, whereby information is tagged according to a categorization system that will facilitate wider access to data.[110]

That being said, if the E.U. does not make transparency data more accessible to users, the U.S. can still stop the stag hunt to go after a much smaller "hare." This would deal a major blow to the progress that has been made to date regarding anti-corruption efforts in the extractive industries. There seems to be precedent for this. Section 1502 of the Dodd-Frank Act inspired the E.U. to adopt the Conflict Minerals Regulation in 2017.[111] While the E.U. regulation covers a wider geographical area than Section 1502, its substantive provisions are not applicable to the derived metals tin, tantalum, and tungsten.[112] The Conflict Minerals

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106 *See id.*

107 *See id.* at 59.

108 *See id.* at 55, 59; PUBLISH WHAT YOU PAY AUSTRALIA, *supra* note 88.

109 *See generally Targeted Consultation on the Establishment of a European Single Access Point (ESAP) for Financial and Non-Financial Information Publicly Disclosed by Companies*, EUROPEAN COMM'N (2021), https://perma.cc/V38V-3SF2.

110 *Id.*

111 15 U.S.C. § 78m(p); Parliament and Council Regulation 2017/821, ¶ 9, 2017 O.J. (L 130/1); Nissen, *supra* note 32.

112 *Compare* 15 U.S.C. § 78m (p)(1)(A), (4)(A), *with* Parliament and Council Regulation 2017/821, arts. 1(1), 2(f), 2017 O.J. (L 130/1).

Regulation only substantially regulates gold, cassiterite, coltan, and wolframite.[113] Subsequently, the SEC's Rule 240.13p-1 stripped Section 1502 of its impact.[114] Companies that are listed in the U.S. now have to report on conflict minerals on the specialized disclosure form, but they can decide autonomously whether they believe that conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, and this decision does not need to be audited. In reality, most companies declare themselves conflict-mineral "indeterminable."[115] The other countries in the stag hunt can also employ various strategies to defect. For example, the Canadian regime contains a rule to reduce or revise the required content of reports. Similarly, non-profit organizations have complained about the limited enforcement of disclosure obligations in the U.K. Companies reportedly failed to report payments to governments in the XML format without consequences.[116] In other words, companies are listed in the U.K. have been allowed to limit the accessibility of available information.

V. CONCLUSION

Since 2010, various countries have adopted regulations that require extraction issuers to publicly report the type and total amounts of payments made for the "commercial development of oil, natural gas, or minerals" per project and per government.[117] This Article has conceptualized the extensive delays and relaxations of implementing rules in the U.S. as a stag hunt. Alongside the U.S., the bulk of the countries that host extraction issuers on their stock exchanges are participants in this game. Canada, the Member States of the EEA, the U.K., and Switzerland have started regulating issuers. The stag consists of good corporate governance. Aliens can seize the opportunities that the revenues of resource extraction might bring, while issuers can enhance their reputations and create more certainty regarding resource supply, prices, and investments in unstable regions. The participants can also decide to take the stag hunt to the next level. The SEC and the U.K. signaled their willingness to expand the stag hunt to commodity traders buying oil, gas, and minerals abroad.[118] Switzerland went a step

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113 *See* Parliament and Council Regulation 2017/821, arts. 3-7, 2017 O.J. (L 130/1); Nissen, *supra* note 32.

114 17 C.F.R.§ 240.13p–1.

115 Thomas Schneider, Giovanni Michelon & Mari Paananen, *Environmental and Social Matters in Mandatory Corporate Reporting: An Academic Note*, 17 ACCT. PERSP. 275, 296 (2018).

116 *See* Joseph Williams & Miles Litvinoff, *Financial Regulator Confirms Extractive Companies Must Name Government Entities to Which They Make Payments*, NAT. RES. GOVERNANCE INST. (Apr. 25, 2019), https://perma.cc/3XXC-H3JF.

117 The U.S. was the first. *See* Nissen, *supra* note 53, at 151.

118 *See Switzerland Adopts Extractive Sector Transparency Law, Opens Door to Improved Commodities Trading Transparency*, NAT. RES. GOVERNANCE INST. (Jun. 19, 2020), https://perma.cc/2U6Z-VC4M.

further by including a provision to this effect in its new law.[119] This provision is set to be activated by the Swiss government if other countries make a similar move.

However, it is too soon to predict such developments. This Article described that the ongoing stag hunt might still fail. In particular, the U.S. seems to have defected long ago, thus creating little incentive for other participants to make data on government payments easy to find and process for users. Fortunately, the recent creation of the new implementing rules by the SEC, which presents data in a comparatively advanced way, creates an incentive for the other participants to step up their game. In particular, the EEA now needs to develop a single collection point for public corporate information, which would make published information more easily accessible to users. It makes sense to accelerate such alignment efforts now to allow yet-to-be developed regulations in Australia and other countries to catch up and copy the features of the existing regimes. The greater the transparency and due diligence measures adopted in other countries, the greater the resources needed to make national regimes interoperable.

119 *See* CODE DES OBLIGATIONS, *supra* note 91, art. 964f (Switz.).