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Home State Regulation of Environmental Human Rights Harms as Transnational Private Regulatory Governance

Sara L. Seck, *Dalhousie University Schulich School of Law*

Articles

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*By Sara L. Seck***

A. Introduction

Home state mechanisms designed to address harms arising from overseas resource extraction have recently been considered in Canada. This paper will examine whether such mechanisms could be viewed as an example of transnational private regulatory governance, and the implications of doing so for our understanding of both public international law and transnational private regulatory governance. After first briefly unpacking the idea of transnational private regulatory governance, the paper will compare common understandings of the scope of home state jurisdiction to regulate transnational corporations under international human rights and international environmental law. Recent developments in Canadian law and policy culminating in the creation of a Corporate Social Responsibility (CSR) Counsellor for the international operations of the Canadian extractive industry will then be described. This Canadian experience will serve an example of home state-based transnational private regulatory governance.

A frequently expressed critique of home state regulation is that, as an exercise of extraterritorial jurisdiction by a powerful state, it represents an imperialist infringement of the sovereignty of a disempowered host state. Concern with avoiding the infringement of host state sovereignty clearly informs the exercise of home state jurisdiction and is in part responsible for the emergence of non-judicial dispute resolution mechanisms like the CSR Counsellor. In order to take seriously the critique that home state regulation is imperialist, this paper will turn to Third World Approaches to International Law (TWAIL), an approach to international legal analysis that is committed to remedy and reform of global injustice. After unveiling TWAIL's claim that neo-colonialism is deeply imbedded within the very structure of international law, the paper will conclude by exploring the implications of this

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analysis for the scope of home state jurisdiction, the legitimacy concerns of local communities and the design of analogous non-state-based transnational private regulatory governance mechanisms.

B. Transnational Private Regulatory Governance

The phrase "transnational private regulatory governance" reflects a move away from both a Westphalian state-centric system of public international law and a welfare state-centric system of public law and government. Westphalian state public command and control law has for some time been accepted as *an* if not *the* most essential and effective form of response to environmental problems created by industrial activities like resource extraction. To be sure, contract and tort law also play a residual role in addressing environmental harms, while the use of state courts to enforce these private laws imbues them with a public aspect. However, the idea of private regulatory governance in the global resource extraction context shifts away from visions of even state-centric private law, to a new realm. Here, corporate actors – together with other carefully selected "stakeholders", including governments – "voluntarily" agree that certain standards would be desirable, but not so essential as to bind parties to them in court-enforceable contracts, much less to mandate their observance through coercive (and in theory more effective) enforcement in (home) state public law. Of course, this voluntary action occurs as a response to increasingly articulated social expectations, thus introducing a "mandatory" dimension, for those who do not meet these expectations risk losing their social license to operate. Private regulatory governance also exhibits a second curiously public dimension, for powerful corporate actors are simultaneously creatures of statute whose private and transnational characteristics are defined by and chained to ostensibly territorially bounded public state laws. This is despite claims that corporate law is merely a neutral facilitator of private contracts. Distinguishing public from private accordingly feels increasingly futile.

The transnational aspect of the phrase "transnational private regulatory governance" reminds us that the problems that must be solved are those that, as a consequence of "globalization", can no longer be confined within the territorial boundaries of a single regulating state (if they ever could be). Yet neither do they easily fit within the realm of public or private international law. The phrase "transnational law" has emerged to account for this reality,[1] while "governance", an ambiguous and interdisciplinary concept, has replaced "law" as the modus of operation.[2]

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[1] Peer Zumbansen, *Transnational Law, Evolving*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW (Jan Smits, ed., 2012), citing PHILIP JESSUP, TRANSNATIONAL LAW (1956) at 2 (stating that he: "shall use the term 'transnational law' to include all laws which regulate actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories"). *See also* GRAF PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW (2010); Craig Scott, *Transnational Law as Proto-Concept: Three Conceptions*, GERM. L. J. 859 (2010), available at:

Within this context, regimes that are based in one state but designed to address problems in another state with which the regulating state has a connection, must be viewed as more than simply an example of Westphalian state-centric public welfare law. Instead, as will be explored here, it is possible that they could, and perhaps should, be viewed differently, as an example of transnational (private) regulatory governance, rather than solely through the lens of international law.

C. Home State Regulation: Human Rights and Environment under International Law

States like Canada, which are home to extractive companies with operations around the world, have come under pressure to do something about the environmental and human rights problems associated with company operations. As will be seen below, in the international human rights law context, there has been an increased call for states other than the host state to take responsibility to regulate and adjudicate harms associated with foreign investor companies. On the other hand, when conceptualized through the lens of international environmental law, the host state is understood as having the right to exploit its natural resources in accordance with its own environmental and developmental policies, as long as it does not harm others in the process. This section will examine each of these perspectives in turn.

I. International Human Rights Law

The idea that states other than the host state, should play a role in regulating the conduct of transnational corporations so as to prevent and remedy human rights harms has recently received much attention under the mandate of Professor John Ruggie at the UN Human Rights Council. Appointed in 2005 by the then UN Human Rights Commission,[3] Ruggie's mandate included the need to "elaborate on the role of States in effectively regulating and adjudicating" business activities relating to human rights.[4] In 2006, Ruggie

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http://germanlawjournal.com/pdfs/Vol10No07/PDF_Vol_10_No_07_SI_859-876_Scott.pdf (last accessed: 1 December 2012).

[2] On governance, *see* Peer Zumbansen, *The Conundrum of Order: The Concept of Governance from an Interdisciplinary Perspective*, *in* THE OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur, ed., 2011); Larry Catá Backer, *Inter-Systemic Harmonization and Its Challenges for the Legal-State*, *in* THE LAW OF THE FUTURE AND THE FUTURE OF LAW (Sam Muller, Stavros Zouridis, Laura Kistemaker & Morly Frishman, eds., 2011), on polycentric governance and inter-systemic harmonization.

[3] UN Commission on Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises*, CHR Res 2005/69, UNCHR, 61st Sess, UN Doc E/CN.4/RES/2005/69 (2005).

[4] UN Commission on Human Rights, *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other*

noted that a recent survey identified the extractive industry (mining, oil and gas) as subject to the greatest number and most serious allegations of abuse.[5] His conclusions were presented to the Human Rights Council in the 2008 *Protect, Respect, Remedy Framework for Business and Human Rights*[6] and the 2011 *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*.[7] In the Introduction to *Protect, Respect, Remedy,* Ruggie describes the "root cause" of the problem facing the international community in the business and human rights context as

> [T]he governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.[8]

Protect, Respect, Remedy proposes three "differentiated but complementary responsibilities":[9] the state duty to protect against human rights abuses by business enterprises; the corporate responsibility to respect human rights; and the need for greater access by victims to effective remedy. While the state duty to protect is described as lying "at the very core of the international human rights regime",[10] the corporate responsibility

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Business Enterprises, United Nations High Commission for human Rights (UNCHR), 62nd Session, UN Doc E/CH.4/2006/97 (22 February 2006) [hereinafter "Interim Report"] at para. 1.

[5] *Id.* at para. 25. "The extractive sector – oil, gas, and mining – utterly dominates this sample of reported abuses, with two-thirds of the total. … The extractive industries also account for most allegations of the worst abuses, up to and including complicity in crimes against humanity, typically for acts committed by public and private security forces protecting company assets and property; large-scale corruption; violations of labor rights; and a broad array of abuses in relation to local communities, especially indigenous people."

[6] John Ruggie, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights*, UNHCR, 8th Session, UN Doc A/HRC/8/5 (2008) [hereinafter "Protect, Respect, Remedy"].

[7] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNHCR, 17th Session, UN Doc A/HRC/17/31 (2011) [hereinafter "*Guiding Principles*"]. *See also* other yearly reports to the UNHCR, as well as extensive additional material compiled in support of the mandate, online, Business & Human Rights website, available online at: http://www.business-humanrights.org/SpecialRepPortal/Home (last accessed: 18 November 2012).

[8] *See* Ruggie, *Protect, Respect, Remedy*, *supra* note 6, at 3.

[9] *Id.* at para 9.

[10] *Id*.

to respect is "the basic expectation society has of business in relation to human rights."[11] Access to remedy is essential because "even the most concerted efforts cannot prevent all abuse."[12]

According to *Protect, Respect, Remedy,* international human rights treaty bodies recommend that states take all necessary steps to protect against abuse by non-state actors, including prevention, investigation and punishment, and provision of access to redress.[13] The duty to protect has both legal and policy dimensions, and while states have discretion in terms of its implementation, both regulation and adjudication are appropriate.[14] However, home states "may feel reluctant to regulate against overseas harms" either because the "permissible scope of national regulation with extraterritorial effect remains poorly understood" or "out of concern that those firms might lose investment opportunities or relocate their headquarters."[15] In terms of the jurisdictional scope of the duty, international law provides that states are required to protect against human rights abuses by businesses "affecting persons within their territory or jurisdiction".[16] Yet:

> Experts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory. There is greater consensus that those States are not prohibited from doing so where a recognized basis of jurisdiction exists, and the actions of the home State meet an overall reasonableness test, which includes non-intervention in the internal affairs of other States. Indeed, there is increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas.[17]

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[11] *Id.* at para 55.

[12] *Id.* at para 82.

[13] *Id.* at para 18.

[14] *Id.*

[15] *Id.* at para 14.

[16] *Id.* at para 18.

[17] *Id.* at para 19.

Ruggie continued to pursue the idea that home states should play a greater role in closing the "governance gaps" created by globalization. In a 2009 keynote address in Stockholm, Ruggie notably described extraterritorial jurisdiction as "the elephant in the room that polite people have preferred not to talk about".[18] He further proposed a matrix consisting of a "range of measures":

> It has two rows: direct extraterritorial jurisdiction over parties or activities abroad, and domestic measures with extraterritorial implications. And it has three columns: public policies, prescriptive regulations, and enforcement action. The combination yields six cells – six broad types of measures with differing extraterritorial reach – not all of which are equally controversial or as likely to trigger objections and resistance.[19]

Yet, according to Ruggie, these are all "under-populated", "not only the most difficult or controversial". [20] This conceptualization of home state jurisdiction was reproduced in his 2010 Report to the Human Rights Council.[21]

Eventually, in the 2011 *Guiding Principles*, Ruggie settled on the following language in foundational Principle 2: "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."[22] The Commentary to this Principle reinforces the uncertainty identified in *Protect, Respect Remedy* regarding home state regulation under international law.[23] However, it also notes the existence of strong "policy reasons" for home states to clearly

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[18] John Ruggie, *Keynote Presentation at EU Presidency Conference on the 'Protect, Respect and Remedy' Framew*ork (November 2009), available online at: http://www.reports-and-materials.org/Ruggie-presentation-Stockholm-10-Nov-2009.pdf (last accessed: 18 November 2012) [hereinafter "Ruggie Stockholm"]. *See also* Sara Seck, *Conceptualizing the Home State Duty to Protect Human Rights*, *in* CORPORATE SOCIAL AND HUMAN RIGHTS RESPONSIBILITIES: GLOBAL LEGAL AND MANAGEMENT PERSPECTIVES, 25, 28, 31-32 (Karin Buhmann, Lynn Roseberry, & Mette Morsing eds.,2010).

[19] *Ruggie Stockholm, supra* note 18, at 4.

[20] *Id*.

[21] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Business and Human Rights: Further Steps toward the Operationalization of the "Protect, Respect and Remedy"*, UNHRC, 14th Sess, UN Doc A/HRC/14/27 (2010) at para. 48 [hereinafter "Steps towards PRR Operationalization"].

[22] *Guiding Principles, supra* note 7, at 7, at Principle 2.

[23] *Id.* at 7, Commentary to Principle 2.

set out expectations, in particular where the State is either involved in the business or supports it, justified by the need to preserve the reputation of the home state itself.[24]

II. International Environmental Law

John Ruggie's contributions to the discourse of business and human rights have brought increased attention to the promise and complexity of defining a role for states other than the host state. However, the same cannot be said if these issues are viewed through the lens of international environmental law.[25] Environmental harms that occur within host state boundaries are generally considered "intra-territorial" harms that fall exclusively within host state jurisdiction.[26] This concept is affirmed in Principle 2 of the 1992 *Rio Declaration*, understood as a foundational principle of international environmental law.[27] In its entirety, Principle 2 reads as follows:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.[28]

While the first clause of Principle 2 unambiguously affirms host state jurisdiction over intraterritorial environmental harms, which are subject to host state environmental

[24] *Id*. Following the matrix introduced in 2009, the Commentary highlights that a range of approaches have been adopted by States to date including both "domestic measures with extraterritorial implications" and "direct extraterritorial legislation and enforcement", and concludes that a variety of factors "contribute to the perceived and actual reasonableness of States' actions" including whether they are "grounded in multilateral agreement".

[25] *See* Sara Seck, *Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations* (2011) 3(1) TRADE, LAW & DEVELOPMENT (Special Issue: Third World Approaches to International Law) 164 [hereinafter "Seck in TLD"].

[26] *Id.* at 174. *See* Klaus Bosselmann, *Environmental Governance: A New Approach to Territorial Sovereignty* in (Robert Goldstein ed.), ENVT'L ETHICS AND L. 293, 299-300 (2004).

[27] United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development,* UN Doc A/CONF151/26 (1992); reaffirmed in Rio+20: United Nations Conference on Sustainable Development, *The Future We Want*, UN Doc A/CONF216/L1, at para. 15 (2012).

[28] *Id.* at Principle 2.

policies,[29] the second clause provides a limitation on the first to the extent that intraterritorial activities might inadvertently cause transboundary or global commons environmental harm.[30] Transboundary harms may be defined as "border-crossing damage via land, water or air in dyadic State relations",[31] while global commons harms may be understood as those that cause damage to common areas like the high seas, outer space and Antarctica.[32] Yet, this second clause is generally not understood as imposing a duty on states that provide foreign investment to ensure that their export of technological know-how does not cause environmental damage in the host state.[33] This conclusion is supported by an examination of the contributions of the International Law Commission[34] in the 2001 *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*[35] as well as the 2006 *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*,[36] although it may be argued that both could be interpreted to also apply to transnational harm.

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[29] *But see* André Nollkeamer, *Sovereignty and Environmental Justice in International Law*, *in* ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT (Jonas Ebbesson & Phoebe Okowa, eds., 2009) 253 (noting that both an intergenerational justice and a social justice perspective provide contours for the exercise of states' sovereign rights to determine their own environmental and developmental policies).

[30] Seck *in* TLD, *supra* note 25 at 175-176.

[31] Seck *in* TLD, *ibid* at 175, citing Xue Hanqin, *Transboundary Damage in International Law* (Cambridge University Press, 2003) 3 [hereinafter "Xue"].

[32] *Id.* at 175-176, drawing upon Jutta Brunnée, *Common Areas, Common Heritage, and Common Concern*, in (Daniel Bodansky, Jutta Brunnée, and Ellen Hey, eds.), THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, (Oxford University Press, 2007) 550 at 557-561.

[33] *Id.* at 176. According to Xue, "the exclusion from the category of transboundary damage of cases which involve transboundary movement of capital or technology, rather than the harmful act or effects, is not reflective of reality." Xue, *supra* note 31 at 9-10.

[34] *Id.* at 176-180. The work of the ILC in this area was originally conceived as focused on state liability for acts not prohibited by international law, and in this form at one time included consideration of how to include the export of hazardous technology by TNCs within the scope of the articles. However, as this aspect proved too controversial, it was dropped. *See* further Shinya Murase, *Perspectives from International Economic Law on Transnational Environmental Issues*, (1995) 253 RECUEIL DES COURS 287, 396-398. *See also* the work of the International Law Association on this issue, International Law Association, *Final Report of the Transnational Enforcement of Environmental Law Committee*, *in* REPORT OF THE 72ND CONFERENCE 655 (2006). While "transnational" is used in the title, the committee report indicates that due to a lack of time, the liability of multinationals for their subsidiaries was not addressed. *Id.* at 657.

[35] UN Office of Legal Affairs, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, GAOR, 56th Session, Supp No. 10 (2001), 366-436, UN Doc A/56/10.

[36] UN Office of Legal Affairs, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*, GAOR, 61st Sess, Supp No10 (2006), 101-182, UN Doc A/61/10. Unlike the *Prevention Articles, id*, the *Loss Allocation Principles* do refer to the Bhopal gas disaster, a primary example of the problem of transnational environmental harm, in four different contexts, suggesting a certain ambiguity as to their scope.

Of course, this story is incomplete without acknowledgement of the increasingly explicit recognition of intersections between environment and human rights in international law. For example, a Special Rapporteur has for many years conducted a mandate under the United Nations Human Rights Council (formerly Commission) on the topic of the environmentally sound management and disposal of hazardous wastes,[37] and recently issued a report dedicated to extractive industries.[38] Also recently, the UN Human Rights Council appointed Professor John Knox as an Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.[39] Human environmental rights intersections are evident in procedural rights to information, participation in decision-making and access to justice in environmental matters,[40] and substantive human rights to environmental protection,[41] as well as indigenous rights relating to the environment.[42] It is therefore far too simple to suggest that home states may or even must exercise jurisdiction to prevent and remedy human rights violations by businesses, but are not permitted to do the same where intraterritorial harm is at issue.[43]

D. Home State Regulation and the Canadian International Extractive Sector

Within this context, domestic pressure has built for a Canadian response to allegations of human rights and environmental wrongdoing by Canadian mining companies operating

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[37] For information on the current Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, and on the work of previous mandate holders, Office of the High Commissioner for Human Rights, *Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, and on the work of previous mandate holders*, UNITED NATIONS HUMAN RIGHTS, available at: http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx (last accessed: 1 December 2012).

[38] *Report of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, Calin Georgescu,* UNHRC 21st Sess, A/HRC/21/48 (2 July 2012), available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-48_en.pdf (last accessed: 1 December 2012).

[39] *Resolution: Human Rights and Environment*, UNHRC 19th Sess, A/HRC/RES/19/10 (19 April 2012), available at: http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/131/59/PDF/G1213159.pdf?OpenElement (last accessed: 1 December 2012).

[40] *See* for example, DONALD ALTON & DINAH SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS (2011), at Ch. 6.

[41] *Id.* at Chapter 7.

[42] *Id.* at Chapter 8.

[43] *See also* John Knox, *Diagonal Environmental Rights*, *in* UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS (Sigrun Skogly & Mark Gibney, eds., 2010).

internationally.[44] In June 2005, an all-party report of the Parliamentary Subcommittee on Human Rights and International Development entitled *Mining in Developing Countries* [SCFAIT Report] was adopted by the Canadian Parliament's Standing Committee on Foreign Affairs and International Trade (SCFAIT).[45] The SCFAIT Report concluded that "mining activities in some developing countries have had adverse effects on local communities", and expressed concern that "Canada does not yet have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards."[46] In October 2005, the Canadian government tabled a response (Government Response) rejecting many of the SCFAIT Report's recommendations due in part to the view that the international community was "still in the early stages of defining and measuring" corporate social responsibility (CSR), "particularly with respect to human rights."[47]

The Government Response did embrace a proposal in the SCFAIT Report to hold multi-stakeholder public consultations on the problem, in order to provide the SCFAIT with recommendations for not only the Canadian government but also "NGOs, labour organizations, businesses and industry associations."[48] National Roundtables on Corporate Social Responsibility and the Extractive Sector in Developing Countries were held in four Canadian cities from June to November 2006. An Advisory Group, composed of representatives of Canadian industry and civil society working closely with an inter-governmental steering committee, issued a report in March 2007.[49] The Advisory Group Report consisted of extensive consensus-based recommendations, which notably did not include a recommendation that Canada should implement legislation to ensure that allegations of transnational corporate wrongdoing could be heard in Canadian courts.[50]

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[44] *See generally* Sara Seck, *Canadian Mining Internationally and the UN Guiding Principles on Business and Human Rights* (2011) 49 CAN. Y.B. INT'L. LAW. 51 [hereinafter "Seck in CYIL"]; Sara Seck, *Home State Responsibility and Local Communities: The Case of Global Mining* (2008) 11 YALE HMN. RTS. & DEV. L. J. 177 [hereinafter "Seck in YHRDLJ"]; Sara Seck, *Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law* (1999) 37 CAN. Y.B. INT'L. LAW 139.

[45] House of Commons, Standing Committee On Foreign Affairs & International Trade, *Fourteenth Report: Mining in Developing Countries*, 38th Parl, 1st Session (June 2005) [hereinafter "*SCFAIT Report*"].

[46] *Id.* at 1-2.

[47] Canada, Department of Foreign Affairs & International Trade, *Mining in Developing Countries – Corporate Social Responsibility: The Government's Response to the Report of the Standing Committee on Foreign Affairs and International Trade* (October 2005) at 4, 2-3 [hereinafter "*Government Response*"].

[48] *Id.* at 3 (embracing a proposal in the *SCFAIT Report, supra* note 1 at 2).

[49] National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, *Advisory Group Report*, 29 March 2007, available at: http://www.mining.ca/www/media_lib/MAC_Documents/Publications/CSRENG.pdf (last accessed: 1 December 2012). [hereinafter "Advisory Group Report"].

[50] *Id.* at 41-45.

Instead, the Advisory Group Report recommended that the government develop a CSR framework composed of standards for Canadian extractive-sector companies operating abroad, reinforced through "reporting, compliance and other mechanisms," including an independent ombudsman office and a tripartite compliance review committee.[51] The framework would initially comprise International Finance Corporation (IFC) sustainability standards,[52] supplemented by the Voluntary Principles on Security and Human Rights,[53] with a multi-stakeholder Canadian Extractive Sector Advisory Group advising the government on both implementation and further development of the CSR framework.[54] The Global Reporting Initiative (GRI) was endorsed for the reporting component of the CSR Framework.[55]

In March 2009, the Canadian government responded with a policy paper entitled *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector.*[56] *Building the Canadian Advantage* provides a "comprehensive strategy on corporate social responsibility for the extractive sector operating abroad"[57] that will "*improve the competitive advantage* of Canadian international extractive sector companies by *enhancing* their ability to manage social and environmental risks."[58] Accordingly, *Building the Canadian Advantage* makes a number of proposals, including that the Canada's Department of Foreign Affairs and International Trade (DFAIT) and Natural Resources Canada (NRCan) commit to promoting three "widely-recognized" international corporate social responsibility (CSR) performance guidelines with

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[51] *Id.* at iii; for details see *ibid at* 8-24.

[52] *Id.* at 11-14 (stating also that the application and interpretation of these standards "shall observe and enhance respect for principles of the Universal Declaration of Human Rights and other related instruments," and that "[s]pecific guidelines related to the application and interpretation of human rights principles will be developed.") See further International Finance Corporation of the World Bank Group, *Environment and Social Policies and Procedures*, and related *Guidelines*, available at: http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards (last accessed: 1 December 2012).

[53] *Advisory Group Report, ibid* at 11-14. *See* further *Voluntary Principles on Security and Human Rights*, available at: http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf (last accessed: 1 December 2012) [hereinafter "Voluntary Principles"].

[54] *Advisory Group Report, ibid* at iv-v, 58-60.

[55] *Id.* at 15-19. *See* further *Global Reporting Initiative*, available at: https://www.globalreporting.org/Pages/default.aspx (last accessed: 1 December 2012) [hereinafter "GRI"].

[56] Canada, Department of Foreign Affairs and International Trade, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian Extractive Sector* (2009), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-stategie.aspx?view=d (last accessed: 1 December 2012) [hereinafter "*Building the Canadian Advantage*"].

[57] *Id.* at 4.

[58] *Id.* [emphasis added].

Canadian extractive companies operating abroad,[59] and that Canada will set up an Office of the CSR Counsellor for the Canadian Extractive Sector.[60]

Building the Canadian Advantage provides a justification for promoting each of the chosen international performance guidelines. The IFC Performance Standards on Social & Environmental Sustainability are described as "*de facto* performance benchmarks for projects in developing countries that require substantial financial investment,"[61] due to their adoption by financial institution signatories to the Equator Principles.[62] The Voluntary Principles on Security and Human Rights, developed through a partnership of states, corporations and non-governmental organizations in 2000, are said to have been "designed specifically" to address the challenges of "violence-related risk assessment," including security provider and extractive industry relations.[63] The Global Reporting Initiative (GRI), "developed ... via a multi-stakeholder process involving industry, investors, civil society and labor", is characterized as "broadly recognized as the *de facto* international reporting standard".[64] By contrast, *Building the Canadian Advantage* takes the position that international human rights conventions "apply to states and do not directly create obligations for companies".[65] However, "such obligations can serve to guide the development of CSR standards", and "the international legal environment is under pressure for change and adaptation."[66]

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[59] *Id.* Not surprisingly, these are the same as those identified in the Advisory Group Report, *supra* note 49.

[60] *Id.* In addition, a CSR Centre of Excellence will be created to develop and disseminate CSR information, and the capacities of developing countries to manage extractive sector development will be enhanced with Canadian government support.

[61] *Id.* at 8. The Performance Standards "set expectations of conduct in eight issue areas, including Social and Environmental Assessment and Management Systems; Labour and Working Conditions; Pollution Prevention and Abatement; Community Health, Safety and Security; Land Acquisition and Involuntary Resettlement; Biodiversity Conservation and Sustainable Natural Resource Management; Indigenous Peoples; and Cultural Heritage" (*id*).

[62] *Id.* at 8. Eighty percent of global financing for extractive sector projects is provided by these institutions, which agree to adopt lending practices consistent with the IFC Performance Standards (*id*); see also Equator Principles, available at: http://www.equator-principles.com/ (last accessed: 1 December 2012).

[63] *Id.* at 9; Voluntary Principles, *supra* note 53.

[64] *Id.* at 9. *See* GRI, *supra* note 55; GRI, *Reporting Framework*, available at: GRI https://www.globalreporting.org/reporting/reporting-framework-overview/Pages/default.aspx (last accessed: 1 December 2012); GRI, *Mining and Metals Sector Supplement*, available at: GRI https://www.globalreporting.org/resourcelibrary/MMSS-Complete.pdf (last accessed: 1 December 2012).

[65] *Building the Canadian Advantage, id* at 8.

[66] *Id.* at 8. While *Building the Canadian Advantage* highlights the UN Human Rights Council's 2008 unanimous endorsement of the *Protect, Respect and Remedy Framework,* it makes no reference to the three pillars or what these might mean for the Canadian government's own responsibility to address problems associated with Canadian global mining companies. By contrast, reference is made to Canada's international anti-bribery

Building the Canadian Advantage does identify steps that have been taken by Canada to "ensure that government services align with high standards of corporate social responsibility", including by Export Development Canada.[67] The most interesting proposal for the purpose of this paper is the creation of the Office of the CSR Counsellor. *Building the Canadian Advantage* notes that "[u]nresolved disputes directly affect business through expensive project delays, damaged reputations, high conflict management costs, investor uncertainty, and, in some cases, loss of investment capital."[68] Accordingly, a CSR Counsellor would enable CSR disputes related to extractive activity abroad to be resolved in a "timely and transparent manner."[69]

The CSR Counsellor position was created by Order in Council,[70] and is structured so that the Counsellor "report[s] directly to and [is] accountable to" the Minister of International Trade.[71] The first CSR Counsellor was appointed in October 2009, and the Office officially opened in Toronto in March 2010.[72] Before accepting complaints, the CSR Counsellor held public consultations regarding the rules that should govern the review process.[73] Notably, consultations were held not only in Canada, but also overseas, and included stakeholders from "industry, civil society, host country governments and Canadian government

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obligations, although not to the fact that Canada has been criticized for being non-compliant. *See Building the Canadian Advantage, supra* note 56 at 14-15; Seck in CYIL, *supra* note 44.

[67] *Building the Canadian Advantage*, *ibid* at 11-14, discussing initiatives relating to Export Development Canada (EDC), the Canadian International Development Agency's Canada Investment Fund for Africa, and CPPIB. *See* further Seck in CYIL, *supra* note 44.

[68] *Building the Canadian Advantage*, *id* at 10.

[69] *Id.*

[70] Privy Council Office, *PC 2009-0422*, available at: http://www.pco-bcp.gc.ca/oic-ddc.asp?lang=eng&Page=secretariats&txtOICID=20090422&txtFromDate=&txtToDate=&txtPrecis=&txtDepartment=&txtAct=&txtChapterNo=&txtChapterYear=&txtBillNo=&rdoComingIntoForce=&DoSearch=Search+%2F+List&viewattach=20393&blnDisplayFlg=1 (last accessed: 1 December 2012). [hereinafter "*Order in Council*"].

[71] *Order in Council*, *id.* at s 7(1).

[72] Office of the Extractive Sector Corporate Social Responsibility Counsellor, *Building a Review Process for the Canadian International Extractive Sector: A Backgrounder* (June 2010) at 2, available at: Department of Foreign Affairs and International Trade, available at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/building%20a%20review%20process%20backgrounder%20FINAL%20June%202010.pdf (last accessed: 1 December 2012).

[73] *See* Office of the Extractive Sector Corporate Social Responsibility Counsellor, *Public Consultations Summary Report: Building a review process for the Canadian international extractive sector: A summary of public consultations held June-August 2010* at 4-5 (2010), available at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Consultations%20Summary%20Report%20Sept%202010.pdf (last accessed: 1 December 2012). [hereinafter "*CSR Consultations Summary*"].

officials."[74] The Rules of Procedure were released in October 2010,[75] and in April 2011, a Review Process Participant Guide was unveiled, identifying six guiding principles: "Accessible, Effective, Independent, Transparent, Responsive, Predictable."[76]

Without providing full details on the CSR Counsellor's review process, a few key features will be noted here.[77] Importantly, the content of the Rules of Procedure were limited by the mandate given to the Counsellor in the Order in Council.[78] Thus, in terms of scope, "oil, gas or mining" companies that are "incorporated in Canada" or have a "head office" in Canada are included,[79] while those whose only connecting factor is listing on a Canadian stock exchange are excluded, despite the inclusion of the GRI as a performance standard.[80] There is, however, no limitation of review to companies operating only in developing

[74] *Id.* at 2. *See further* individual consultation reports, available at: Department of Foreign Affairs and International Trade, http://www.international.gc.ca/csr_counsellor-conseiller_rse/presentations-publications.aspx (last accessed: 1 December 2012). See also description of stakeholders in Office of the Extractive Sector Corporate Social Responsibility Counsellor, *Annual Report to Parliament October 2009 – October 2010* (February 2011) at 3, online: Department of Foreign Affairs and International Trade, available at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/presentations-publications.aspx (last accessed: 1 December 2012): "[T]he Counsellor has spent much of the past year in conversations with the multitude of constituencies who have an interest in the issues.... These stakeholders include Canadian companies, host country authorities, project affected communities and individuals, joint venture partners, Canadian industry associations, overseas industry associations, professional associations, Canadian NGOs, non-Canadian civil society groups, Canadian parliamentarians, host country regulators, service providers including the legal and consulting communities, socially responsible investors, academics, international financial institutions, global initiatives, and others."

[75] Canada, *Rules of Procedure for the Review Mechanism of the Office of the Extractive Sector Corporate Social Responsibility Counsellor* (20 October 2010), available online at: Department of Foreign Affairs and International Trade, available at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Rules%20of%20procedure%20FINAL.pdf (last accessed: 1 December 2012) [hereinafter "*CSR Rules of Procedure*"].

[76] Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor, *The Review Process Participant Guide* (2011), available at: Department of Foreign Affairs and International Trade available at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Participant%20guide%20April%202011.pdf (last accessed: 1 December 2012)[hereinafter "Review Process Participant Guide"].

[77] For details, *see* Seck in CYIL, *supra* note 44.

[78] *CSR Consultations Summary*, *supra* note 73, at 4.

[79] *Order in Council, supra* note 70, s 1. This definition is repeated in the *CSR Rules of Procedure*, *supra* note 75, at s. 1.

[80] For a typology of Canadian mining companies, categorizing them according to their head office and government jurisdiction, among other factors, *see* Foreign Affairs and International Trade Canada, *Discussion Paper, prepared for the National Roundtables on Corporate Social Responsibility and the Extractive Sector in Developing Countries* at 26-27, at Table 2 (2006).

countries, as evident in other recent Canadian proposals.[81] More restrictively, the Counsellor must have the "express written consent of the parties involved" in order to undertake a review.[82] Furthermore, the Counsellor is not permitted to make "binding recommendations" or "policy or legislative recommendations", or to "create new performance standards."[83] Nor may any standards be applied other than the designated performance guidelines (the IFC Performance Standards, the Voluntary Principles, and the GRI),[84] together with the OECD Guidelines for Multinational Enterprises.[85]

The Counsellor may review a complaint if requested by "an individual, group or community" that "reasonably believes" it is or may be affected by activities of a Canadian extractive sector company that are inconsistent with the performance guidelines.[86] More strikingly, the Counsellor may also review a complaint if approached by a Canadian extractive sector company that "believes it is the subject of unfounded allegations concerning its corporate conduct outside Canada in relation to the performance guidelines."[87] While the Counsellor is not to review the activities of a Canadian extractive sector company on her own initiative, she "may informally approach a company if ... she

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[81] *See* for example, Bill C-354, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 2d Sess, 40th Parl, 2009 and the extensively debated Bill C-300, *An Act Respecting Corporate Accountability for Mining, Oil and Gas Corporations in Developing Countries*, 2d Sess, 40th Parl., 2009, both discussed *in,* Seck in CYIL, 2011, *supra* note 44. *See also* Richard Janda, *Note: An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries (Bill C-300): Anatomy of a Failed Initiative*, 6 JSDLP 97 (2010).

[82] *Order in Council, supra* note 70, at s. 6.

[83] *Order in Council, id.* at s. 5(5).

[84] *Id.*

[85] *Id.* at s 1. However, the National Contact Point for the OECD MNE Guidelines is to remain the "primary authority" concerning these (*ibid,* s 5(2)-(4)). *See* Department of Foreign Affairs and International Trade Canada, *Canada's National Contact Point for the OECD MNE Guidelines*, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1 (last accessed: 1 December 2012).

[86] *Order in Council, supra* note 70, s. 6(1)(a). An "individual, group or community" may authorize an "individual or organization" to aid or assist them in the submission of a request for review, thus allowing for the possibility that Canadian civil society organizations could assist foreign complainants in accessing the review process: *CSR Rules of Procedure, supra* note 75, s. 5(a). Anonymous requests may not be submitted, although submissions may be made that request confidentiality (*ibid,* s 3(c)). The Participant Guide identifies the need for the requester to ensure that they have "adequate resources and capacity" to continue the process through to its conclusion, yet no resources are specifically designated to support requestors' capacity to engage the process. Review Process Participant Guide, *supra* note 76, at 17.

[87] *Order in Council, supra* note 70, s. 6(1)(b). Such a request must "clearly name the Responding party": *CSR Rules of Procedure, supra* note 75, s. 5(b). Presumably this responding party must then consent in writing to the review process under s. 5(6) of the *Order in Council*.

believes that early dialogue could prevent a dispute from arising or escalating".[88] The aim of the five-stage review process is "to foster constructive collaboration and dialogue between stakeholders."[89] Once a review has been concluded, the Counsellor is to issue a "written public statement"[90] and is also to submit an annual report that is to be tabled in Parliament by the Minister of International Trade.[91] If this report "would reflect adversely on any person or organization", the Counsellor is to give them an opportunity to comment and "shall include a fair and accurate summary" of their comments in the report.[92] Ultimately, if the CSR Counsellor finds that company operations are "inconsistent with the performance guidelines", the Counsellor is to "make recommendations to assist the company in ensuring that its activities are consistent."[93] No sanction follows, beyond the presumed shaming inherent in the making of the written public statement.

The CSR Counsellor review mechanism was greeted with some enthusiasm by industry representatives, including the Prospectors and Developers Association of Canada (PDAC)[94] and the Mining Association of Canada (MAC).[95] Many civil society groups were less enthusiastic, noting that while the CSR Counsellor might be of some use in less serious cases, companies were unlikely to consent to the process in the case of more serious allegations, which represented the bulk of the complaints they received.[96] Moreover, it

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[88] *Order in Council, ibid,* s. 6(2).

[89] *Ibid,* s. 6(3). The five stages are: (a) initial assessment; (b) informal mediation; (c) fact-finding; (d) access to formal mediation; and (e) reporting (*ibid,* s 6(4)). The CSR Counsellor may exercise discretion and decide not to deal with a request for review, but must consider listed factors when conducting a review. *Ibid* ss. 6(5), (6)(6).

[90] *Order in Council, ibid*, s 6(8). Before issuing the public statement, the Counsellor is to inform the parties of the result and share the statement with the Ministers of International Trade and Natural Resources, as well as the Minister of International Cooperation if relevant: *see* s. 6(9). The Minister of International Trade may direct the Counsellor to study additional matters: *see* s. 6(10).

[91] *Id.* at s 7(2).

[92] *Id.* at s 7(4).

[93] *Id.* at s. 8(2).

[94] Press Release, *Canada's Exploration and Mining Companies Welcome Canada's Independent CSR Counsellor*, PROSPECTORS AND DEVELOPERS ASSOCIATION OF CANADA, 2010, available at: http://www.pdac.ca/pdac/misc/101020.html (last accessed: 1 December 2012). However, *see* Seck in CYIL, *supra* note 44, for discussion of the timing of the release of the CSR Counsellor Rules of Procedure, relative to a Parliamentary vote on the controversial, and ultimately unsuccessful, private member's bill, Bill C-300, *supra* note 81.

[95] Press Release, *Mining Association of Canada Welcomes the Launch of the CSR Counsellor's Review Mechanism*, MINING ASSOCIATION OF CANADA (20 October 2010), available at: http://www.mining.ca/www/media_lib/MAC_News/2010/10_20_10_Press_Releaserev.pdf (last accessed: 1 December 2012).

[96] Press Release, *Civil Society Statement on CSR Counsellor: Government's New Toothless Review Mechanism Underlies Why Responsible Mining Bill C-300 Is Necessary*, CANADIAN NETWORK ON CORPORATE ACCOUNTABILITY (26

was argued that the CSR Counsellor's review process "lacks a transparent fact-finding function and will lead to neither recommendations to government nor to sanctions."[97] As of August 2012, one review process begun in relation to a mine in Mexico concluded unsatisfactorily as the company subsequently withdrew from the process.[98] A second request for review was received and subsequently closed as the CSR Counsellor encouraged the requesters to first seek help through an operational level grievance process.[99] A third request was received in July 2012.[100]

E. CSR Counsellor as Transnational Private Regulatory Governance?

The CSR Counsellor, despite being a home state mechanism, clearly provides an example of transnational private regulatory governance. That it is transnational is undeniable. It may also be seen as an example of private regulatory governance. For example, the requirement of party consent to the process, combined with the ability to withdraw at any stage without penalty, distinguishes it from traditional understandings of public law and moves it into the private realm of contract law. That conduct is to be measured against international CSR standards that are either the creation of non-state-based multi-stakeholder processes, or endorsed by such processes signifies again a move beyond traditional understandings of domestic public law, even of an "extraterritorial" nature, and into the realm of regulatory governance. The lack of explicit endorsement of international human rights law, the product of our state-centric system of international law, is also notable; yet, in practice, revisions to many international CSR standards including some

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October 2010), available at: http://www.halifaxinitiative.org/content/civil-society-statement-csr-counsellor (last accessed: 1 December 2012). According to the civil society statement, the most common complaints received were "allegations of serious environmental pollution, collaboration with paramilitary networks and deliberate attempts to corrupt government and the judiciary of the host country where the Canadian company establishes its operations." Moreover, as the CSR Counsellor mechanism "lacks an investigative function to clarify disputed facts", it is unclear how she would be able to resolve disputes without establishing first "whether the allegations are well founded."

[97] *Ibid.*

[98] Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor, *Closing Report, Request for Review File #2011-01-MEX* (October 2011), available at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Closing_report_MEX.pdf (last accessed: 1 December 2012).

[99] Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor, *Closing Report, Request for Review File # 2011-02-MAU* (February 2012), available at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/2011-02-MAU_closing_report-rapport_final-eng.pdf (last accessed: 1 December 2012).

[100] *See* request for review file # 2012-03-ARG, requested July 9, 2012 by The Center for Human Rights and Environment (CEDHA) with regard to McEwen Mining Inc, available at: <http://www.international.gc.ca/csr_counsellor-conseiller_rse/Registry-web-enregistrement.aspx?view=d (last accessed: 1 December 2012).

endorsed in the CSR mechanism increasingly include a human rights dimension that is explicitly designed to build upon *Protect, Respect, Remedy* and the *Guiding Principles*.[101]

Still, it is undeniable that the fact that this mechanism is state-based changes the manner in which it is perceived, and in which it perceives itself. This is evident from the extensive consultations both within Canada and outside held to inform the CRS Counsellor's Rules of Procedure. The unstated rationale for these consultations relates to the fear of "extraterritoriality" and host state sovereignty infringement, a fear that is legitimized if these issues are viewed through the lens of international environmental law as "intra-territorial" harm. While this paper is concerned with the "transnational", and has suggested in the international environmental law context that "transnational" is a more useful framing of this type of problem, the fact remains that much discussion of home state regulation uses the language of extraterritoriality, a language that reflects the state-centered nature of the international legal system. The rhetoric of extraterritoriality and the resultant dampening of any public law response calls out for analysis of whether or not in fact home state regulation constitutes an imperialist infringement of host state sovereignty.

F. Sovereignty, Imperialism and Third World Approaches to International Law (TWAIL)

Proposals put forward in home states to regulate or adjudicate transnational corporate conduct to ensure compliance with international human rights and environmental norms are frequently met with explicit or implicit claims that this would be an imperialist violation of host state sovereignty.[102] These concerns inform the treatment of transnational harm elaborated above in relation to both international human rights and environmental laws. Moreover, the CSR Counsellor example demonstrates that when home state mechanisms are in fact implemented, they are likely to be structured without legal sanction at least partly as a result of efforts to avoid perceptions of host state sovereignty infringement. But is in fact this fear of imperialism justified? To answer this question this paper will turn to Third World Approaches to International Law (TWAIL).

While TWAIL has been said to offer both theories of, and methodologies for, analyzing international law and institutions, it is most usefully thought of as a broad approach.[103] TWAIL scholars are diverse, yet are also:

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[101] *See* Seck *in* CYIL, *supra* note 44 (discussing updates to various CSR standards).

[102] *See* Seck in YHRDLJ, *supra* note 44 at 180-182 (discussing this issue in the Canadian and Australian context); Seck in CYIL, *supra* note 44 (for references to this idea in Bill C-300 discourses).

[103] Obiora Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?* (2008) 10 INT'L COMM. L. REV. 371. *See* also Seck in TLD, *supra* note 25, at 181-200.

> [S]olidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order … a commitment to centre the *rest* rather than merely the *west*, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case.[104]

The significance of the term "Third World" for TWAIL scholars is tied to the group of states and populations that self-identify as Third World, coalescing "around a historical and continuing experience of subordination at the global level that they feel they share – not the existence and validity of an unproblematic and monolithic third-world category."[105] Significantly, the term embraces a "flexible geographic sensibility"[106] as well as a normative understanding in the sense that this disadvantage is an intolerable situation that demands a response.[107] De-centering "Third World" from its physical geography enables a focus on power and oppositional challenges to power,[108] and draws attention to justice as posited by social movements, notably including the "South" within the "North".[109]

Historical TWAIL scholarship has documented how international law has suppressed Third World peoples, justifying the West's intervention in Third World affairs on the basis of a "civilizing mission" which provided the "moral basis for the economic exploitation of the Third World that has been an essential part of colonialism."[110] International legal doctrines, including the sovereignty doctrine, were formulated as part of the colonial encounter, with

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[104] Okafor, *id.* at 376.

[105] Obiora Okafor, *Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective* (2005) 43 OSGOODE HALL L.J. 171 at 174.

[106] *Ibid* at 175.

[107] Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse* (1997-98) 16 WIS. INT'L. L .J. 353 at 357 [hereinafter "Mickelson Rhetoric"].

[108] Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography* (1998-1999) THIRD WORLD LEG. STUD. 1 at 19; Balakrishnan Rajagopal, *Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy* (2006) 27 THIRD WORLD QTRL'Y 767, at 768.

[109] *Mickelson Rhetoric*, *supra* note 107, at 360; Karin Mickelson, *Beyond a Politics of the Possible? South-North Relations and Climate Justice*, 10 MELB. J. INT'L. L. 411 at 419 (2009). Similarly the power of the "North" within the "South" emerges.

[110] Antony Anghie & Bhupinder Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, 36 STUD. TRANSNAT'L. LEG. POL'Y. 185 at 192-193 (2004).

the "dynamic of difference" generating "the concepts and dichotomies – for example, between private and public, between sovereign and non-sovereign – which are traditionally seen as the foundations of the international legal order."[111] Neo-colonialism has continued to be embedded within the very structure of international law, with the developmental state given the predominant role as the source and implementer of the normative framework, including that of human rights.[112] Consequently, human rights remains a state-centered discourse, ignoring resistance movements within societies and rendering invisible private forms of violence committed in the name of development.[113] Yet, contemporary "rhetoric of participation, empowerment, human rights and democracy" as "essential aspects of supposedly authentic 'development'" has emerged as a consequence of mass democratic movements, while the Bretton Woods Institutions, including the World Bank, have "acquired their present agenda of sustainable human development, with its focus on poverty alleviation and environmental protection, as a result of their attempts to come to grips with grassroots resistance from the Third World."[114] Recognition of the agency of the Third World is thus a critical part of the TWAIL project of writing resistance into international law.

As I have discussed elsewhere, the unilateral exercise of home state jurisdiction in the human rights and environmental realm creates a curious problem from a TWAIL perspective.[115] If in fact home states only ever exercise jurisdiction to promote internal economic goals, then unilateral home state regulation, even if ostensibly designed to protect universal values such as human rights or global ecological integrity, is innately problematic as an imperialist infringement of host state sovereignty. Moreover, if such home state regulation were to become routine state practice it would contribute to the development of customary international law norms, thus reinforcing the neo-colonialist tendencies of international law even if supporting human rights and environmental protection at the same time. On the other hand, to the extent that neo-colonialist tendencies are already embedded within the structure of international law, the principles of international law that suggest the illicitness of home state regulation designed to prevent and remedy intra-territorial environmental human rights harm of concern to local communities, could themselves be neo-colonialist. As revealed in Karin Mickelson's work on TWAIL and international environmental justice, the concepts of "ecological debt" and "environmental space" highlight the unfairness of existing distributions of resources and

[111] ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 9 (2005).

[112] BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE at 187 (2003).

[113] *Id.* at 194-5.

[114] *Id.* at 49.

[115] *See* Seck *in* TLD, *supra* note 25; Sara Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?* (2008) 46 OSGOODE HALL L.J. 565 [hereinafter "Seck in OHLJ"].

discrepancies in consumption patterns between North and South.[116] This suggests that it would be both hypocritical and imperialist for home states that engage in destructive consumption patterns to regulate so as to limit the potential consumption of poor communities in other states by denying them the possibility of development without their consent. It also suggests that governance mechanisms should be structured to give voice to communities who protest infringement of their local environmental space, and to provide a means for these communities to seek compensation for past ecological debts. For the purpose of this paper, there is no reason to suggest that this should apply differently to transnational private regulatory governance mechanisms whether based in home states or in analogous non-state mechanisms.

G. Implications

As illustrated above, the exercise of home state jurisdiction to regulate and adjudicate environmental and human rights harms raises concerns of illicit extraterritoriality and neo-colonialist sovereignty infringement that typically does not arise when considering analogous non-state-based private governance mechanisms. A TWAIL analysis of home state jurisdiction suggests that the legitimacy of a home state mechanism may be based upon the extent to which it gives voice to communities protesting infringement of local environmental space. As I have suggested elsewhere, home state regulation could be structured so as to contribute to a counter-hegemonic project of writing subaltern resistance into international law, consistent with a reshaping of the international law principles of sovereign equality and non-interference, as inspired by Susan Marks' principle of democratic inclusion.[117] This suggests that non-state private transnational governance mechanisms could and indeed should also strive to increase their legitimacy by building the "giving of voice to resistance" into their structures.

Even if the conclusion above is correct, this does not answer the technical question of how to build such regimes, or of whether this is in fact possible either theoretically or pragmatically. For example, a significant question is whether a pre-determined structure can give voice to resistance. Indeed, as argued by Nancy Fraser, if the "all-affected principle" informs the "meta-political framing of justice, there is a need to embrace "parity of participation" in the meta-discourses that "determine the authoritative division of political space."[118] Interestingly, the *Guiding Principles* hint at this tension in Principle 31's

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[116] Karin Mickelson, *Leading Towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories about International Environmental Cooperation* (2005) 43 OSGOODE HALL L. J. 137 at 150-166.

[117] Seck *in* OHLJ, *supra* note 115 at 598-601, drawing upon SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS (2000).

[118] Nancy Fraser, *Reframing Justice in a Globalizing World* (2005) 36 NEW LEFT REV. 69 at 82, and crediting John Ruggie's "immensely suggestive essay" for the idea of a post-territorial mode of political differentiation. *See* John Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L. ORG. 139 (1993).

discussion of effectiveness criteria applicable both to state-based and non-stated-based mechanisms.[119] Specifically, Principle 31 notes that operational or company level grievance mechanisms should, in addition to other listed factors, be "[b]ased on engagement and dialogue," including by "consulting stakeholder groups for whose use they are intended on their design and performance."[120] Yet this recommendation to consult stakeholder groups on *design* is made only with regard to company-level grievance mechanisms, and not more broadly as an integral feature of the design of *all* state-based or non-state-based mechanisms.

With regard to the CSR Counsellor, it may be said that many of the international standards applied and even the rules of procedure themselves were informed by explicitly multi-stakeholder processes, bringing industry, civil society and even governments to the table to participate in the discourse surrounding their creation.[121] Yet, while the participation of "civil society" might suggest that the views of the "subaltern" were at the table, recognition of the ability of powerful voices to choose the civil society voices that will be invited to the table in the first place, and to provide them with the resources necessary for meaningful participation, clearly moderates this observation. Despite this, as Rajagopal has established, even such powerful institutions as the World Bank must respond to the often unacknowledged power of subaltern resistance movements, with the emergence of World Bank sustainability policies as an example of such a counter-hegemonic response.

A related question is whether giving voice to resistance includes a right to say no to a proposed project. In the Canadian mining context, for example, a distinction is often made between "development NGOs" and "anti-development NGOs", a distinction that is arguably crucial if the issue under consideration is the extent to which local or indigenous communities might in some instances have a right to veto a proposed mining development on their lands, as opposed to merely a right to be consulted.[122] And while arguments can be put forward about the importance of including subaltern voices in the political space creating transnational governance frameworks, whether state-based or not, it is equally important to consider how to respond to situations where those voicing resistance choose of their own accord not to come to the table, out of fear that engagement will undermine their rights. Indeed, those who protest mining development at times face imprisonment or

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[119] *Guiding Principles, supra* note 7, at Principle 31.

[120] *Id.*

[121] But *see* critique of government coming to the table as a stakeholder equal to industry, rather than acknowledging its responsibility to regulate in the public interest. Seck *in* YHRDLJ, *supra* note 44, at 184.

[122] Further discussion of the nuances underlying the right of free, prior and informed consent or consultation is beyond the scope of this paper.

worse.[123] Not surprisingly, then, some have on occasion chosen to create their own governance response to what they view as corporate impunity, whereby the transnational corporate culprit is sanctioned in a process to which it has not been invited to participate.[124]

H. Conclusion

In conclusion, it is useful to consider a home state regulatory regime like the CSR Counsellor as an example of transnational private regulatory governance for at least two reasons. First, lessons about the legitimacy of home state structures drawn from TWAIL suggest the importance of ensuring that those who resist development projects are given an opportunity to voice their concerns within all transnational private regulatory governance regimes, if not also to participate in the creation of the governance structure itself. While this may be idealistic and unachievable in some cases, it remains valid as an aspirational goal designed to take seriously the justice concerns of host state local communities. The design of the CSR Counsellor mechanism can clearly not be said to meet these goals.

Secondly, lessons from transnational private regulatory governance suggest that concerns with the illicitness of "extraterritorial" home state regulatory imperialism are misguided. Rather than considering the exercise of jurisdiction by a state other than the host state as an illegitimate example of extraterritorial sovereignty infringement, it should be seen as a legitimate example of transnational governance designed to address problems with connections and even responsibilities that extend from beyond the walls of the host state. If structured so as to give voice to those expressing environmental human rights concerns with the infringement of local ecological space, this type of transnational mechanism could serve to empower the very people for whom sovereignty as a construct was imagined to exist. In a world in which transnational economic pressures make it harder for states to regulate in the public interest both with regard to those within their borders and to those outside, this is the only way governance gaps can legitimately be filled.

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[123] *See* for example, Graham Mayeda, *Access to Justice: The Impact of Injunctions and Contempt of Court Proceedings, and Costs Awards on Environmental Protestors and First Nations*, 6 J.S.D.L.P. 143 (2010); Charis Kamphuis, *Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security Company in Peru*, 37 BROOK. J OF INT'L. L. (2011); Shin Imai, Bernadette Maheandiran & Valerie Crystal, *Accountability Across Borders: Mining in Guatemala and the Canadian Justice System*, 26 OSGOODE CLPE RESEARCH PAPER SERIES (2012), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2143679 (last accessed: 1 December 2012).

[124] *See* for example the trial of Goldcorp by the Peoples' International Health Tribunal, available online: http://healthtribunal.org/resources/the-tribunal-live/ (last accessed Nov 18, 2012).