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2011

# Transnational Business and Environmental Harm: A TWAAIL Analysis of Home State Obligations

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



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# Trade, Law *and* Development

Vol. 3, No. 1

2011

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The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Sara L. Seck, *Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations*  
3(1) TRADE L. & DEV. 164 (2011)

TRANSNATIONAL BUSINESS AND ENVIRONMENTAL HARM:  
A TWAIL ANALYSIS OF HOME STATE OBLIGATIONS

SARA L. SECK\*

*Transnational corporate conduct that negatively impacts the environmental human rights of local communities is widespread in the operations of extractive sector companies. Yet, under principles of international environmental law, home states of transnational mining companies are neither obligated nor arguably even permitted to regulate and adjudicate environmental problems in host states. Proposals put forward in developed country home states to address these problems are often met with the claim that such regulations would be an imperialistic violation of host state sovereignty, and would create a competitive disadvantage for home state companies. This article will examine this problem by drawing upon insights from Third World Approaches to International Law (TWAIL).*

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## I. INTRODUCTION

Transnational corporate conduct that negatively impacts the environmental human rights of local communities is widespread. India has an intimate experience with this, as is evident from the legacy of the Bhopal gas plant disaster,<sup>1</sup> which continues to feature in courts in both India<sup>2</sup> and the United States.<sup>3</sup> Environmental human rights violations occur frequently in relation to the operations of mining or oil and gas extractive sector companies, as illustrated by examples from Nigeria<sup>4</sup>, Ecuador<sup>5</sup>, Guatemala,<sup>6</sup> the Philippines,<sup>7</sup> Canada<sup>8</sup> and the United States,<sup>9</sup> among

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<sup>1</sup> Upendra Baxi & Amita Dhanda, *Valiant Victims And Lethal Litigation: The Bhopal Case*, INDIAN LAW INSTITUTE, available at: <http://www.upendrabaxi.net/documents%5CValiant%20victims%20and%20lethal%20litigation%20the%20bhopal%20case.pdf>; Upendra Baxi, *Writing about Impunity and Environment: The 'Silver Jubilee' of the Bhopal Catastrophe*, available at: <http://www.upendrabaxi.net/Writing%20About%20Impunity%20-%20Bhopal%202009.pdf>.

<sup>2</sup> *SC to start day-to-day hearing of Bhopal Gas Tragedy Case tomorrow*, INDLAW NEWS.COM, Apr. 12, 2011, available at: <http://www.indlawnews.com/Newsdisplay.aspx?485f2d15-6c81-437a-8e1f-09954de20eb6>.

<sup>3</sup> See also, *Sabu v. Union Carbide*, EARTHRIGHTS INTERNATIONAL, available at: <http://www.earthrights.org/legal/sahu-v-union-carbide>; *Bano v. Union Carbide Case History*, EARTHRIGHTS INTERNATIONAL, <http://www.earthrights.org/legal/bano-v-union-carbide-case-history>; Commentary on the Bhopal disaster from the perspective of Union Carbide, BHOPAL INFORMATION CENTER, available at: <http://www.bhopal.com/>.

<sup>4</sup> Richard Boele, Heike Fabig & David Wheeler, *Shell, Nigeria and the Ogoni: A Study in Unsustainable Development*, 9 SUST. DEV. 7 (2001); Kaniye SA Ebeku, *The Right to a Satisfactory Environment and the African Commission*, 3 AFR. HUM. RTS. J. 149 (2003); See also Case profile: Shell lawsuit (Re oil pollution in Nigeria), BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, available at: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreoilpollutioninNigeria>.

<sup>5</sup> Case profile: Texaco/Chevron lawsuits (Re Ecuador), BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, available at: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador>.

others. Yet this type of harm is often perceived as falling outside the purview of international law, and in particular international environmental law, for a variety of reasons which will be elaborated and critiqued in this article. These problems are often considered as issues of international human rights law due to the intertwined nature of environment and human rights - whether conceived as procedural environmental rights to information, participation and justice, or substantive human rights to life, property or a healthy environment.<sup>10</sup> However, the premise of this paper is that it is also important to examine these problems through the lens of international environmental law.

The question of whether and what role a home state or a state of origin of foreign direct investment should, or even must, play in preventing and remedying environmental harms caused by transnational corporations is a controversial one. It is also one that calls out for Third World Approaches to International Law (TWAAIL). Proposals put forward in home states to regulate or adjudicate

<sup>6</sup> Shin Imai, Ladan Mehranvar & Jennifer Sander, *Breaching Indigenous Law: Canadian Mining in Guatemala*, 6 INDIGENOUS L. J. 101 (2007); Amanda M. Fulmer, Angelina Snodgrass Godoy & Philip Neff, *Indigenous Rights, Resistance, and the Law: Lessons from a Guatemalan Mine*, 50(4) LATIN AM. POL. & SOC'Y 91 (2008). See also GOLDCORP OUT OF GUATEMALA, <http://goldcorpoutofguatemala.com/>; Marlin Human Rights Impact Assessment of Marlin Mine, GOLDCORP, available at: <http://www.goldcorp.com/operations/marlin/hria/>.

<sup>7</sup> *Philippine Provincial Government Sues Multinational Mining Giant for Destroying Environment*, available at: [http://www.diamondmccarthy.com/media\\_center/49-us-press-release](http://www.diamondmccarthy.com/media_center/49-us-press-release) (hereinafter Marinduque litigation).

<sup>8</sup> Penelope Simons & Lynda Collins, *Participatory Rights in the Ontario Mining Sector: An International Human Rights Perspective*, 6(2) MCGILL INT. J. SUS. DEV. LAW & POL'Y 177 (2010) (hereinafter Simons & Collins). See also Platinex Inc. and Unwanted Mineral Exploration on Traditional Lands, CANADIAN BUSINESS ETHICS RESEARCH NETWORK, available at: [http://www.cbern.ca/research/projects/workspaces/cura\\_project/case\\_studies/platinex/](http://www.cbern.ca/research/projects/workspaces/cura_project/case_studies/platinex/); Archives of the various Canadian case studies, MINING WATCH CANADA, available at: <http://www.miningwatch.ca/>; FIRST NATIONS – LANDS AND ENVIRONMENTALISM IN BRITISH COLUMBIA, <http://www.firstnations.eu/mining.htm>.

<sup>9</sup> Case profile: Barrick Gold lawsuit (re Western Shoshone tribes, USA), BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, available at: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/BarrickGoldlawsuitreWesternShoshonetribesUSA>.

<sup>10</sup> John Knox, *Diagonal Environmental Rights*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS 86 (Mark Gibney & Sigrun Skogly eds., 2010) (hereinafter KNOX); ELISA MORGERA, CORPORATE ACCOUNTABILITY IN INTERNATIONAL ENVIRONMENTAL LAW 133-143 (2009) (hereinafter MORGERA); Dinah Shelton, *Environmental Rights*, in PEOPLE'S RIGHTS 185 (Philip Alston ed., 2001); HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan Boyle & Michael Anderson eds., 1996).

transnational corporate conduct to ensure compliance with international human rights and environmental norms are often met with explicit or implicit claims from industry and home state governments that this would be a neo-colonialist or imperialist violation of host state sovereignty.<sup>11</sup> Moreover, it is increasingly asserted that home state regulations by developed countries would create a competitive disadvantage, as multinationals based in developing countries would not be subject to similar requirements.<sup>12</sup> It is necessary to turn to TWAIL to understand these claims. Notably, a discussion of home state regulation and adjudication invariably presumes that the regulating home state is a “developed” or “First World” state, and that the victims of the environmental human rights violations are located in “developing” or “Third World” host states. While historically there has been some truth to this, the premise needs to be questioned, given both the increasing number of foreign investors from BRICS countries,<sup>13</sup> among others, and the increasing recognition of the rights of indigenous and tribal communities under international law, including those within First World states, as well as procedural and substantive environmental rights more generally.<sup>14</sup> A TWAIL analysis helps to reveal what is really at stake in the debate over home state obligations, and the importance of shining a spotlight on affected community environmental rights as a means of drawing attention to the local impacts of unsustainable global consumption patterns.

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<sup>11</sup> See, e.g., Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RTS. & DEV. L. J. 177, 180-2 (2008) (hereinafter Seck – *Home State Responsibility*) (describing the response of the Canadian Government in 2005 to recommendations of the Standing Committee on Foreign Affairs and International Trade, and the response of the Australian Parliamentary Joint Statutory Committee on Corporations and Securities to the substance of Corporate Code of Conduct Bill 2000).

<sup>12</sup> See, e.g., Submission to the Standing Committee on Foreign Affairs and International Development: Bill C-300, available at: [http://www.barrick.com/Theme/Barrick/files/docs\\_csr/Bill-C-300-Submission-to-the-Standing-Committee.pdf](http://www.barrick.com/Theme/Barrick/files/docs_csr/Bill-C-300-Submission-to-the-Standing-Committee.pdf).

<sup>13</sup> BRICS countries are Brazil, Russia, India, China, South Africa. See Full Text of Sanya Declaration of the BRICS Leaders Meeting, (April 14, 2011), available at: [http://news.xinhuanet.com/english2010/china/2011-04/14/c\\_13829453.htm](http://news.xinhuanet.com/english2010/china/2011-04/14/c_13829453.htm). See for example, Members of the International Council on Mining and Metals, <http://www.icmm.com/members/member-companies> (including two South African and one Brazilian-based firm) available at: <http://www.icmm.com/members/member-associations>.

<sup>14</sup> See for example U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 65<sup>th</sup> Session, (September 13, 2007) adopted by the U.N. General Assembly in September 2007. See, e.g., *United Nations adopts Declaration on rights Indigenous Peoples*, UN NEWS CENTRE (Sep. 13, 2007), available at: <http://www.un.org/apps/news/story.asp?NewsID=23794>. Canada, Australia, New Zealand and the United States all initially voted against the Declaration, although they all now support it.

The issue of home state obligations to prevent and remedy human rights harms has been the subject of recent attention at the United Nations Human Rights Council,<sup>15</sup> as well as the subject of much scholarly writing.<sup>16</sup> The most recent statement on the topic by Harvard Professor and International Relations scholar John Ruggie, the Special Representative of the Secretary-General (SRSG) on Business and Human Rights, may be briefly summarized by Principle 2 of the 2011 Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”<sup>17</sup>

Commentary following Principle 2 goes on to state that “[a]t present States are not generally required under international human rights law to regulate the extraterritorial activities of

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<sup>15</sup> U.N. Human Rights Council, 17<sup>th</sup> Sess., Report of the Special Representative of the Secretary-General on the issue 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, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (*prepared by* John Ruggie) (hereinafter *Guiding Principles*). See also, U.N. Human Rights Council, 8<sup>th</sup> Sess., 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, ¶ 19, U.N. Doc. A/HRC/8/5, (Apr. 7, 2008) (*prepared by* John G. Ruggie); U.N. Human Rights Council, 14<sup>th</sup> Sess., Business and Human Rights: Further Steps Toward the Operationalizing of the “Protect, Respect and Remedy” Framework, ¶¶ 46-49, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (*prepared by* John G. Ruggie); See also, *Extensive work conducted by the SRSG, Business and Human Rights Resource Centre, available at:* <http://www.business-humanrights.org/SpecialRepPortal/Home>.

<sup>16</sup> See for example Sara L. Seck, *Conceptualizing the Home State Duty to Protect Human Rights*, in CORPORATE SOCIAL AND HUMAN RIGHTS RESPONSIBILITIES: GLOBAL LEGAL AND MANAGEMENT PERSPECTIVES 25 (Karin Bhuman, Mette Morsing & Lynn Roseberry eds., 2011); Robert McCorquodale and Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MOD. L. REV. 598 (2007); Seck – *Home State Responsibility*, *supra* note 11; Jennifer A. Zerk, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY 133-142, 145-197 (2006); Olivier de Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, available at: <http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf> (report prepared as a background paper for the legal experts meeting with John Ruggie in Brussels, Nov. 3-4, 2006); Surya Deva, *Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should ‘Bell the Cat’?*, 5 MELB. J. INT’L. L. 37 (2004); Christen L. Broecker, *Better the Devil you Know: Home State Approaches to Transnational Corporate Accountability*, 41 N.Y.U. J. INT’L L. & POL. 159 (2008); Sara L. Seck, *Collective Responsibility and Transnational Corporate Conduct*, in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 140 (Tracy Isaacs and Richard Vernon eds., 2011).

<sup>17</sup> *Guiding Principles*, *supra* note 15, princ. 2.



*businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. ...*<sup>18</sup>

Thus, the Guiding Principles as well as earlier work of the SRSG support a distinction between the permissive exercise of jurisdiction by home states in accordance with principles of public international law – something to be encouraged – and the obligatory exercise of home state jurisdiction to regulate and adjudicate transnational corporate conduct under international human rights law – something that, according to the SRSG, is not required at present. Contrastingly, in the realm of international environmental law, there has been little academic commentary proposing home state obligations to regulate and adjudicate on transnational corporations (TNCs),<sup>19</sup> and no comparable international institution

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<sup>18</sup> *Id.* The Commentary to Principle 2 continues:

[W]ithin these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.

States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement.

<sup>19</sup> *But see* Seck – *Home State Responsibility*, *supra* note 11 (arguing that there is an emerging obligation for home state to regulate and adjudicate transnational mining corporations through the implementation of the three pillars of public participation rights). *See also* Robert V. Percival, *Liability for Environmental Harm and Emerging Global Environmental Law*, 25 MD. J. INT'L L. 37 (2010); Jonas Ebbesson, *Piercing the state veil in pursuit of environmental justice*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 270 (Jonas Ebbesson & Pheobe Okowa eds., 2009); MORGERA, *supra* note 10, at 30-34; Tetsuya Morimoto, *Growing Industrialization and our Damaged Planet: The Extraterritorial Application of Developed Countries' Domestic Environmental Laws to Transnational Corporations Abroad*, 1

to the UN Human Rights Council has explicitly considered the issue.<sup>20</sup> More significantly, approached through a traditional positivist interpretation of international environmental law, not only are home states not obligated to regulate and adjudicate TNC conduct to prevent and remedy environmental harm, but they are arguably prohibited from doing so.<sup>21</sup>

International environmental law has been described as being, by its very nature, concerned with “extraterritorial” harm.<sup>22</sup> Yet, as will be seen, it is this very nature that also categorizes “intra-territorial” harm as being beyond its scope, absent a global justification. This article first outlines the nature of the problem with which it is primarily concerned, that of transnational harm. Second, this problem is examined through the lens of traditional positivist understandings of international environmental law. This interpretation is then critiqued from a TWAIL perspective.

## II. THE PROBLEM: TRANSNATIONAL HARM

A topical Canadian example of the kind of problem being discussed here is that of mining companies operating internationally.<sup>23</sup> According to the Canadian government, Canada is the largest source of equity financing for global mining in the world and more mining companies are based in Canada than anywhere else.<sup>24</sup>

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UTRECHT L. REV. 134 (2005); Sara L. Seck, *Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law*, 37 CAN. Y.B. INT'L L. 139 (1999) (hereinafter Seck – *Environmental Harm*); Shinya Murase, *Perspectives from International Economic Law on Transnational Environmental Issues*, 253 RECUEIL DES COURS 287 (1995); Francesco Francioni, *Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin be Held Responsible?*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 275 (Francesco Francioni & Tullio Scovazzi eds., 1991).

<sup>20</sup> The failure of the International Law Commission to explicitly address this issue in the context of its work on transboundary environmental harm arising from hazardous activities will be examined below.

<sup>21</sup> This article will equate a traditional interpretation of international law with the application of a positivist theory of international law. See generally Anne-Marie Slaughter & Steven Ratner, *Appraising the Methods of International Law: A Prospectus for Readers*, 36 STUD. TRANSNAT'L LEGAL POL'Y 1 (2004).

<sup>22</sup> KNOX, *supra* note 10.

<sup>23</sup> See generally Seck – *Home State Responsibility*, *supra* note 11 ; See most recently the controversy surrounding Bill C-300, An Act Respecting Corporate Accountability for Mining, Oil and Gas Corporations in Developing Countries, available at: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4>.

<sup>24</sup> Government of Canada, Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector (March, 2009) at 3, available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/CSR-March2009.pdf>.

While mining companies are at times implicated in large-scale environmental disasters after operations have begun,<sup>25</sup> a more frequent problem is fierce opposition to proposed projects by local, often indigenous communities.<sup>26</sup> In many cases, those who oppose the mine do so out of fear that if the project is allowed to continue, the local environment will suffer irreparable harm. Despite the fact that companies may have obtained the necessary permits from various levels of government, including environmental permits, communities protest against the very establishment of the company. Too frequently the result is violent clashes with police and company security forces, even leading to the death of community activists in some cases.<sup>27</sup> A recent example from India is that of Vedanta Resources' proposed alumina refinery and mining on the lands of the Dongria Kondh in Orissa.<sup>28</sup> There are also many examples within Canada, involving indigenous communities and Canadian as well as foreign companies.<sup>29</sup>

It is often assumed by those who view global mining as a route to development for poor countries and communities, that these types of protests are designed to ensure that local communities receive a share (or a larger share) of the profits and benefits that mining will bring.<sup>30</sup> Accordingly, the solution most frequently proposed is consultations between communities and companies, which ideally lead to the signing of impact and benefit agreements. However, the issue is often not one of shared profits but of irreparable ecological harm which, in the

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<sup>25</sup> See for example the *Cambior* case as discussed in Seck – *Environmental Harm*, *supra* note 19, at 154-168; Marinduque litigation, *supra* note 7.

<sup>26</sup> See *supra* citations to Guatemala case study accompanying note 6; See also *Piedra v. Copper Mesa Mining Corporation*, 2011 ONCA 191 (Can.) (hereinafter *Copper Mesa*) (dismissing a lawsuit against the Toronto Stock Exchange and company directors); See further Plaintiff's website, <http://www.ramirezversuscoppermesa.com/>. Other similar case studies can be found at MININGWATCH CANADA, available at: <http://www.miningwatch.ca/>. See also Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570 (2009); Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69 (2008).

<sup>27</sup> *Id.*

<sup>28</sup> Case profile: Vedanta Resources lawsuit (re Dongria Kondh in Orissa), BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, available at: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/VedantaResourceslawsuitreDongriaKondhinOrissa> (including links to cases filed in India and complaints brought to the National Contact Point of the OECD Guidelines in the United Kingdom)

<sup>29</sup> See Simons & Collins, *supra* note 8.

<sup>30</sup> Saleem H. Ali, MINING, THE ENVIRONMENT, AND INDIGENOUS DEVELOPMENT CONFLICTS (2003). This is not to suggest that local communities are always or even often united in either supporting or opposing mining development. The proposed development often creates conflict within internally divided communities.

eyes of the community, has no price. As a result, the only process that can address community concerns is one that seeks their consent. Yet, the very existence of potential ecological harm is contested by companies and governments by pointing to scientific environmental impact studies which conclude that there are no serious threats of significant environmental harm, but which at the same time discount the value of local knowledge.<sup>31</sup> The question then, which merits discussion, is whose perception of ecological reality counts, and who gets to decide the appropriate level of precaution should be?

Various local, international, and transnational forums have been called upon to resolve these types of disputes, often with limited success.<sup>32</sup> One possibility that is raised is whether home states should play a role in regulating and adjudicating claims against transnational corporate actors like mining companies. Importantly, the state of origin of foreign direct investment provides many potential points of control, including corporate laws, stock exchanges, export credit agencies as well as prescriptive environmental laws which could be structured to give local communities the opportunity to voice their ecological concerns over proposed projects, seeking to prevent or remedy ecological harm. In Canada, new laws and new non-judicial mechanisms have been proposed over the last few years,<sup>33</sup> yet implementation has been limited to non-judicial mechanisms that reference international standards such as those established by the Organisation for Economic Co-operation and Development (OECD)<sup>34</sup> or the World Bank Group.<sup>35</sup>

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<sup>31</sup> See case studies cited above. See also Benjamin Richardson & Donna Craig, *Indigenous Peoples, Law and the Environment*, in ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER 195 (Benjamin J. Richardson & Stepan Wood eds., 2006); Deborah McGregor, *Linking Traditional Knowledge and Environmental Practice in Ontario*, 43 J. CAN. STUD. 3 (2009); Sheila D. Collins, *Interrogating and Reconceptualizing Natural Law to Protect the Integrity of the Earth*, in DEMOCRACY, ECOLOGICAL INTEGRITY AND INTERNATIONAL LAW 445 (J. Ronald Engel, Laura Westra & Klaus Bosselmann eds., 2010) (hereinafter Collins).

<sup>32</sup> See, e.g., Natalie L. Bridgeman & David B. Hunter, *Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism*, 20 GEO. INT'L ENVTL. L. REV. 187 (2008).

<sup>33</sup> See National Roundtables On Corporate Social Responsibility (CSR) And The Canadian Extractive Industry In Developing Countries, Advisory Group Report (Mar. 29, 2007) available at: <http://www.pdac.ca/pdac/misc/pdf/070329-advisory-group-report-eng.pdf>; Bill C-300, *supra* note 12; Bill C-354, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)* available at: <http://openparliament.ca/bills/40-3/C-354/>.

<sup>34</sup> OECD Guidelines for Multinational Enterprises, available at: <http://www.oecd.org/dataoecd/56/36/1922428.pdf>, (Paris: OECD, 2008) ; See, e.g., Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises, FOREIGN AFFAIRS AND INT'L TRADE CAN., [http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu\\_id=1](http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1).

Furthermore, home state courts remain reluctant to exercise adjudicative jurisdiction<sup>36</sup> or to recognize a cause of action<sup>37</sup> over environmental human rights claims involving foreign plaintiffs and home state companies or financiers.

The key question is whether, under international law, home state regulation is a neo-colonialist infringement of host state sovereignty, or alternately, whether it is a permissible, if not mandatory, exercise of jurisdiction that protects the ecological integrity of vulnerable local communities? The premise of this article is that there is an urgent need to respect the wishes of those who wish to preserve their local ecosystems and a corresponding need to draw the attention of rich over-consumers to the ecological and human rights impact of their destructive over-consumption habits. When vulnerable communities who are sensitive to ecological limits wish to preserve their local ecology, it is crucial that all possible levels of global, local and transnational governance are sensitive to their call, including potential mechanisms of control within home state jurisdictions. Yet the structural features of international law render this a difficult goal to achieve.

### III. INTERNATIONAL ENVIRONMENTAL LAW AND TRANSNATIONAL HARM

It is not clear whether international environmental law recognises the kind of environmental harm that arises in the context of transnational harm as falling within its scope of concern. Strictly speaking, the problem at issue is conveniently classified as “intraterritorial” harm that is suitably subject to the domestic laws of the host state, and has no “international” dimension absent additional features. International law divides global ecological issues into different categories of harm, depending upon the spatial dimensions of the problem at issue. This makes some sense given that states, usually thought of as the primary participants in the international legal system, are spatially defined, with state sovereignty equated with

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<sup>35</sup> *Environment and Social Policies and Procedures*, INT'L FIN. CORP., <http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards>. For Canada, see, BUILDING THE CANADIAN ADVANTAGE: A CORPORATE SOCIAL RESPONSIBILITY (CSR) STRATEGY FOR THE CANADIAN INTERNATIONAL EXTRACTIVE SECTOR, <http://www.cim.org/csr/MenuPage.cfm?sections=67&menu=69> (August 22, 2011); Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor, FOREIGN AFFAIRS AND INT'L TRADE CAN., *available at*: [http://www.international.gc.ca/csr\\_counsellor-conseiller\\_rse/About\\_us-A\\_propos\\_du\\_bureau.aspx](http://www.international.gc.ca/csr_counsellor-conseiller_rse/About_us-A_propos_du_bureau.aspx); Order-in-Council appointing the CSR Counsellor, FOREIGN AFFAIRS AND INT'L TRADE CAN., [http://www.international.gc.ca/csr\\_counsellor-conseiller\\_rse/mandate-mandat.aspx](http://www.international.gc.ca/csr_counsellor-conseiller_rse/mandate-mandat.aspx) (hereinafter Order-in-Council).

<sup>36</sup> See *Cambior* as discussed in Seck – *Environmental Harm*, *supra* note 19, at 154-168, *but see* the *Dagi* litigation as discussed in Seck – *Environmental Harm*, *supra* note 19, at 171-174. *See also* discussion of various cases in MORGERA, *supra* note 10, at 30-34, 119-133.

<sup>37</sup> *See for example*, *Copper Mesa*, *supra* note 26.

exclusive control over a defined territory.<sup>38</sup> A spatial perspective is therefore important for an international legal analysis of environmental problems, despite the fact that neither ecosystems, nor the global economy, respect state borders.

As a consequence, local (or domestic) harm, where the impact of the harm is felt exclusively within state territorial boundaries (“intraterritorial” harm), falls uneasily within international environmental law.<sup>39</sup> Unless a state has agreed to accept environmental obligations for its territory under a specific treaty, international environmental law “knows no obligation not to pollute the ‘national’ environment, nor is there an obligation to protect it”.<sup>40</sup> Indeed, the first clause of Principle 21 of the Stockholm Declaration,<sup>41</sup> restated as Principle 2 of the Rio Declaration,<sup>42</sup> clearly affirms this freedom: “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...”. Yet it is not quite as clear cut as this, for even with regard to purely “intraterritorial” environmental harm, international environmental law principles, as articulated in the Rio Declaration, encourage states to implement internal environmental measures. These include environmental impact assessment<sup>43</sup> and “effective environmental legislation” – or at least, effective enough so that the standards applied are not “inappropriate and of unwarranted economic and social cost” to developing countries.<sup>44</sup>

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<sup>38</sup> See generally Colin Warbrick, *States and Recognition in International Law*, in INTERNATIONAL LAW 217 (D. Evans ed., 2d ed. 2006); Thilo Maraun, *The Changing Role of the State*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 727, 730 (Daniel Bodansky, Jutta Brunnée, & Ellen Hey eds., 2007).

<sup>39</sup> Klaus Bosselmann, *Environmental Governance: A New Approach to Territorial Sovereignty*, in ENVIRONMENTAL ETHICS AND LAW 293, 299-300 (Robert J. Goldstein ed., 2004) (hereinafter Bosselmann – *Environmental Governance*). See also André Nollkaemper, *Sovereignty and Environmental Justice in International Law*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 253 (Jonas Ebbesson & Phoebe Okowa eds., 2009) (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).

<sup>40</sup> *Id.* at 299. See also Dan Tarlock, *Ecosystems*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 574, 582 (Daniel Bodansky, Jutta Brunnée, & Ellen Hey eds., 2007).

<sup>41</sup> United Nations Conference on the Human Environment, Stockholm, Swed., June 16, 1972, *Stockholm Declaration on Human Environment*, U.N. Doc. A/CONF.48/14.

<sup>42</sup> United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26.

<sup>43</sup> *Id.* princ. 17 (referring to the implementation of environmental impact assessment, as a national instrument.)

<sup>44</sup> *Id.* princ. 11 (stating in part: “Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they

Transboundary harm is defined by Xue Hanqin as “border-crossing damage via land, water or air in dyadic State relations.”<sup>45</sup> Common examples of transboundary harms arise where pollutants enter a river or lake shared by more than one state, or air pollution crosses state borders. As the second clause of Principle 2 of the Rio Declaration indicates, obligations do arise under international environmental law in relation to transboundary harm, for: “... [States have] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States ...”.<sup>46</sup> While this “do no harm” principle is sometimes described as the “cornerstone of international environmental law,” John Knox claims that it is also generally understood as merely requiring states to “undertake due diligence to prevent significant (or substantial) transboundary environmental harm from activities within their jurisdiction or control”, rather than as an acknowledgment by states that liability should be imposed where the principle is violated.<sup>47</sup>

Another category of harm recognized under international environmental law is labelled by Xue as global commons harm and defined as impacting areas “located beyond national jurisdiction and control”, that is, beyond any state’s territory.<sup>48</sup> Again, the second clause of Principle 2 of the Rio Declaration suggests that states have obligations here too: “... [States have] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of ... areas beyond the limits of national jurisdiction.”<sup>49</sup> According to Jutta Brunnée, common areas, such as the high seas, outer space, and Antarctica are “located beyond the limits of national jurisdiction” and are “not subject to appropriation by states.”<sup>50</sup> The concept of

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apply.”)

<sup>45</sup> XUE HANQIN, *TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW* 3 (2003) (hereinafter XUE). See also *supra* note 39, at 300, Bosselmann’s definition: “pollution that originates (wholly or in part) within the area under the jurisdiction of one country and which has effects in the areas under the national jurisdiction of another country.”

<sup>46</sup> *Rio Declaration, supra* note 42, princ. 2.

<sup>47</sup> John Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT’L. L. 291, 292-294 (2002) (noting further at 295 that states have been slow to “answer the call” of Principle 22 which requires states to further international law regarding liability and compensation for victims of environmental harm caused by transboundary harm.). See also *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* 2010 I.C.J. (Apr. 20), available at: <http://www3.icj-cij.org/docket/files/135/15877.pdf>; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Feb. 1, 2011) available at: [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/adv\\_op\\_010211.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf)

<sup>48</sup> XUE, *supra* note 45, at 15.

<sup>49</sup> *Rio Declaration, supra* note 42, princ. 2.

<sup>50</sup> Jutta Brunnée, *Common Areas, Common Heritage, and Common Concern*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 550, 557-561 (Daniel Bodansky,

common heritage of humankind, emerging at the time of calls for a New International Economic Order by newly independent states, applies to the seabed and ocean floor beyond the limits of national jurisdiction as well as the moon – it is concerned with the equitable sharing of the exploitation of non-living resources.<sup>51</sup>

The spatial category of harm that is the focus of this article is often not recognized by international environmental law scholars. It is, however, identified by Xue Hanquin, who, citing Ballarino, defines transnational harm as arising where the “activity and physical damage all occur within one country”, but nevertheless there is clearly “a transnational involvement” as: “*capital (including technological know-how) has been exported from another country in order to make possible the activity which has caused environmental damage and, presumably, any profits realized from such exported capital will be returned in one way or another to its country of origin*” .<sup>52</sup>

International law, as generally interpreted, does not treat transnational harm (harm arising from foreign direct investment) in the same way as transboundary or common area harms.<sup>53</sup> That is, the obligations flowing from Principle 2 are not seen as relevant to cases of transnational harm. This is evident from the history of the work of the International Law Commission, in both the 2001 ‘Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities (Prevention Articles)’<sup>54</sup> and the 2006 ‘Draft Principles on the Allocation of Loss in the Case of

Jutta Brunnée, & Ellen Hey eds., 2007) (hereinafter Brunnée – *Common Areas*). *But see* Bosselmann – *Environmental Governance*, *supra* note 39, at 302-303 (describing common areas as including those spaces that international law recognizes as humankind’s common heritage (seabed), common concern (Antarctica) or shared resources (high seas, airspace)).

<sup>51</sup> Brunnée – *Common Areas*, *id.* at 561-564. *But see* Karin Mickelson on the problem of co-option of this principle by international environmental lawyers, *infra* note 142.

<sup>52</sup> XUE, *supra* note 45, at 9-10, citing T. Ballarino, *Private International Law Questions and Catastrophic Damage*, 220 RECUEIL DES COURS 293 (1990-1991).

<sup>53</sup> While this article distinguishes between transnational harm and transboundary harm, the term transboundary harm is sometimes thought to implicitly include transnational harm, as will be evident from the discussion of the work of the International Law Commission. *See also* Int’l Law Ass’n, *Final Report of the Transnational Enforcement of Environmental Law Committee*, in Report of the 72nd Conference, Toronto, June 4-8, 2006, 655. 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. Note also that the phrase “transnational harm” must be distinguished from “transnational law”, which may be defined as “legal regimes which operate across national borders or which regulate actions or events that transcend national borders.”; DAVID SZABLOWSKI, *TRANSNATIONAL LAW AND LOCAL STRUGGLES: MINING, COMMUNITIES AND THE WORLD BANK* 4 (2007) (hereinafter SZABLOWSKI).

<sup>54</sup> Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, GAOR, 56th Sess., Supp. No. 10 (2001), 366-436, U.N. Doc. A/56/10 ) (hereinafter



Transboundary Harm Arising Out of Hazardous Activities (Loss Allocation Principles).<sup>55</sup> Early work of the ILC on the subject of “International liability for acts not prohibited by international law” grappled with the question of whether and how to include the export of hazardous technology by TNCs within the scope of the articles.<sup>56</sup> According to Shinya Murase, the original draft of the scope Article of the ILC’s work on “International liability for acts not prohibited by international law”, was designed in keeping with Principle 21 of the Stockholm Declaration, employing the phrase “jurisdiction or control.”<sup>57</sup> The concept of “control” was seen as critical to a definition that could encompass TNC exports of investments and technology from a home state to a host state.<sup>58</sup> In 1988, draft language introduced the notion of “effective control” into the scope of the article,<sup>59</sup> and in 1989, reference was made to “the process” that may have brought about the transboundary harm.<sup>60</sup> In addition, the burden of proof would have been placed on the state of origin to establish that it did not have knowledge or a means of knowing that the activity was being carried out under its jurisdiction or control.<sup>61</sup> However, “it was evident that these draft articles would face serious objections”<sup>62</sup> and by 1994, the scope article provisionally adopted was so limited that, according to Murase, “the fruits of debates concerning control over TNCs have seemingly disappeared from the project.”<sup>63</sup> The ILC does not appear to have considered the

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*Prevention Articles*) (recommended to the U.N. G.A. for the elaboration of a convention).

<sup>55</sup> Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, GAOR, 61th Sess., Supp. No. 10 (2006), 101-182, U.N. Doc. A/61/10 (hereinafter *Loss Allocation Principles*).

<sup>56</sup> Shinya Murase, *Perspectives from International Economic Law on Transnational Environmental Issues*, 253 RECUEIL DES COURS 287, 396-398 (1995). See also XUE, *supra* note 45, at 5, who notes that the early work of the ILC debated whether to confine the topic to environmental damage, or to cover all kinds of transboundary harm, such as harm arising from economic, financial and trade activities. XUE, *id.* at 5, citing *Yearbook of the International Law Commission*, 1978, VOL. 2, PART 2 at 150-151, para.13.

<sup>57</sup> Murase, *id.* at 397, referring to draft Article 1 by Professor Quentin-Baxter from the early 1980s.

<sup>58</sup> Murase, *id.* at 397, citing *Yearbook of the International Law Commission* 1982, VOL. 2, PART 1 at 60-61; *Yearbook of the International Law Commission* 1987, VOL. 1 at 162.

<sup>59</sup> Murase, *id.* at 398, citing *Yearbook of the International Law Commission* 1988, VOL.2, PART 1 at 255.

<sup>60</sup> Murase, *id.* citing draft Article 1 in *Yearbook of the International Law Commission* 1989, VOL. 2, PART 1 at 136.

<sup>61</sup> Murase, *id.*

<sup>62</sup> *Id.* See also Stephen McCaffery, *The Work of the International Law Commission Relating to Transfrontier Environmental Harm*, 20 N.Y.U. J. OF INTL L. & POL. 715, 731 (1988).

<sup>63</sup> Murase, *id.* at 399. The scope article adopted in 1994 provided for “activities ...carried out in the territory or otherwise under the jurisdiction or control of a State.” See “Report of the International Law Commission on the work of its forty-sixth Session”, UN Doc.

question of home state obligations since that time, although reference to the Bhopal disaster in the Commentaries of the Loss Allocation Principles suggests that this issue has not been completely purged from the work of the ILC.<sup>64</sup>

Both the Prevention Articles and the Loss Allocation Principles are, on the face of it, inherently limited in terms of their scope of application to home states as the state of origin of foreign direct investment. According to Article 1, the Prevention Articles apply to “activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.”<sup>65</sup> Principle 1 of the Loss Allocation Principles appears broader, stating that the Principles “apply to transboundary damage caused by hazardous activities not prohibited by international law”.<sup>66</sup> However, as the Loss Allocation Principles presuppose harm, they focus on “transboundary damage”, rather than upon “activities”, and the Commentaries make clear that the scope of the Loss Allocation Principles is the same as the scope of the Prevention Articles.<sup>67</sup> Thus, the activities “must be conducted in the territory or otherwise in places within the jurisdiction or control of one State, and have an impact within the territory or places within the jurisdiction or control of another State.”<sup>68</sup> Like the Prevention Articles, state policies in “trade, monetary, socio-economic or other similar fields” are excluded from the scope of the Loss Allocation Principles.<sup>69</sup> While it can be argued that both the Prevention Articles and the Loss Allocation Principles can – and perhaps should – be construed as applicable to home states as the state of origin of foreign direct investment, this was clearly not the intention of the drafters.<sup>70</sup>

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A/49/355, in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1994, VOL. 2 PART 2 (New York: UN, 1997) at 43, UNDOC. A/CN.4/SER.A/1994/Add.1.

<sup>64</sup> While the *Prevention Articles* and Commentary do not refer to the Bhopal case, the *Loss Allocation Principles* do in four different contexts. See *Commentary to the Loss Allocation Principles*, *supra* note 55, n.415, in relation to promptness; n.468 on consolidation of claims; n.473, on settlement of claims; n.478 on recognition and enforcement of foreign judgments. See also MORGERA, *supra* note 10, at 34-38.

<sup>65</sup> *Prevention Articles*, *supra* note 54, at 380, art. 1 (emphasis added). “Transboundary harm” is then defined in Article 2 as “harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border”. *Prevention Articles*, *supra* note 54, at 386, art. 2.

<sup>66</sup> , *Id.* at 116, princ. 1.

<sup>67</sup> *Loss Allocation Principles*, *supra* note 55, ¶ 7, at 111-112; *Id.* ¶ 1, at 116,. The use of the phrase “transboundary damage” signifies elements essential to the scope, including transboundary physical consequences. *Id.* ¶ 4, at 117-118.

<sup>68</sup> *Id.* ¶ 10, at 120.

<sup>69</sup> *Id.* ¶ 12, at 121.

<sup>70</sup> See Seck – *Home State Responsibility*, *supra* note 11, at 202-203; Sara L. Seck, Home

Much could be said critically of the substance and form of the Loss Allocation Principles in particular.<sup>71</sup> Interestingly, the ILC was also criticized for its original formulation of the subject of non-wrongful liability, which was distinguished from the ILC's work on state responsibility for wrongful conduct, in part to reflect the sentiment that large scale industrial accidents were not considered wrongful under international law.<sup>72</sup> Notably, despite the feeling of some governments and some ILC members that it was no longer necessary to proceed with the liability project in light of both the Prevention Articles and the ILC's 2001 Draft Articles on State Responsibility,<sup>73</sup> in 2001, the UN General Assembly requested that the ILC resume work on liability "largely at the behest of developing states."<sup>74</sup>

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State Obligations for the Prevention and Remediation of Transnational Harm: Canada, Global Mining and Local Communities, ch. 4 (2008) (unpublished Ph.D. dissertation, Osgoode Hall Law School, York University).

<sup>71</sup> See A.E. Boyle, *Globalising Environmental Liability: The Interplay of National and International Law*, 17 J. ENVTL. L. 3 (2005) (commenting on the 2004 draft) (hereinafter Boyle *Globalising – Environmental Liability*). The ILC's 1996 draft Liability Articles imposed strict liability on source states for significant transboundary harm that the source state could not prevent by exercising due diligence. The aim was to ensure that the victim was not left to bear the entire loss by ensuring equitable but not full compensation. In resuming its work on liability for environmental harm in 2002, the ILC changed direction to one of loss allocation among different actors involved in the operation of the hazardous activities. The rationale was the ILC's assessment that strict liability was not accepted between states for activities that are lawful to pursue within the state's domestic jurisdiction in accordance with their sovereign rights. Thus, according to Alan Boyle, rather than "making states directly responsible in international law to compensate for damage, the Commission's intention is that states should make provision for other actors to compensate transboundary damage through national law." These actors are "much more likely to be corporations and other private parties than states", *Id.* at 4-6. See also Alan Boyle, *Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 61, 73-85 (A.E. Boyle & D. Freestone eds., 1999).

<sup>72</sup> Boyle – *Globalising Environmental Liability*, *id.* at 4-5. See also P.W. BIRNIE & A.E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 105-106, 182, 188-190 (2d ed. 2002); A.E. Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?*, 39 INT'L. & COMP. L. Q. 1 (1990); M.A. Fitzmaurice, *International Environmental Law as a Special Field*, 25 NETH. Y.B. INT'L L. 181 (1994).

<sup>73</sup> Draft Articles on State Responsibility, in Report of the International Law Commission, 53d Sess., 43-365, U.N. Doc. A/56/10 (Aug. 10, 2001).

<sup>74</sup> Boyle – *Globalising Environmental Liability*, *supra* note 72, at 5. See also René Lefebvre, TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE AND THE ORIGIN OF STATE LIABILITY 190-191 (1996): Report of the International Law Commission on the work of its forty-fifth session, GAOR, 48<sup>th</sup> Sess., Supp. No. 10. (1993) ¶ 109, at 48, UN Doc. A/48/10 (noting an "emerging view" reported by the ILC in 1993 that it might not be necessary to proceed with the formulation of rules on reparation following the adoption of rules on

The work of the ILC on transboundary environmental harm is thus focused on the prevention of harm by states and the allocation of the costs of such harm to the private sector. Yet, as discussed, ultimately the ILC did not explicitly address the problem of transnational harm – that is, whether the state of origin of foreign direct investment (the home state) has a role to play in the prevention and remedy of environmental harm in host states. Indeed, international environmental law and the work of the ILC suggest that home states are not even required to exercise due diligence to prevent harm in host states. According to Xue:

At a time when transnational corporations are more and more inclined to move their business to developing countries (among other reasons, to take advantage of more lenient environmental regulations), 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.<sup>75</sup>

There are signs that international environmental law is attempting to grapple with global ecological issues that cross state boundaries, as evident from the recognition of the concept of common concern. For example, according to Brunnée, the concept of common concern has emerged as a more conceptually open-ended notion that, unlike common area or common heritage, is not focused on geographic areas and their resources.<sup>76</sup> As such, it is not limited to areas beyond national jurisdiction or control, but rather applies equally to “environmental concerns arising beyond the jurisdiction of states and within the jurisdiction of

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prevention). The *Loss Allocation Principles* specifically indicate that they are without prejudice to the rules relating to State responsibility and any claim that may lie under those rules in the event of a breach of an obligation of prevention. (Preamble, *id.* at 114; *Id.* ¶ 6, at 111.) Moreover, both the *Loss Allocation Principles* and the *Prevention Articles* are described as concerned with primary rules. (*Id.* ¶ 6, at 118-119.) Thus, non-fulfilment of duty of prevention could give rise to state responsibility without any implication that activity is prohibited, and “State responsibility could be invoked to implement not only the obligations of the State itself but also the civil responsibility or duty of the operator.” (*Id.* This civil responsibility is to be created through national laws.)

<sup>75</sup> XUE, *supra* note 45, at 10. Beyond Xue’s critique, it is important to recognize that other categories of harms could arise simultaneously with transnational harm, and also that transnational harms may be multi-jurisdictional. For example, a mining development in a host state (A) may be financed by equity capital raised on a stock exchange in a second state (B) and the mine may release toxins into a river that flows through state (C). This example would raise both transnational and transboundary ecological harm issues. A multi-jurisdictional example of transnational harm would be where the mining development is operated by a joint venture of companies incorporated in states A, B, and C.

<sup>76</sup> Brunnée – *Common Areas*, *supra* note 51, at 564.

individual states.”<sup>77</sup> Brunnée suggests that Principle 7 of the Rio Declaration “delicately” reflects this idea by calling upon states “to cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem.”<sup>78</sup> The concept has been explicitly identified in treaties addressing climate change and biodiversity (while being implicit in others), and is “targeted more narrowly at specific environmental processes or protective actions”, rather than at “areas or resources.”<sup>79</sup> For example, the Preamble to the United Nations Framework Convention on Climate Change describes the “change in the Earth’s climate and its adverse effects” as a common concern, rather than the atmosphere itself.<sup>80</sup> Similarly the preamble to the Convention on Biological Diversity declares “conservation of biological diversity” as a common concern, rather than biological diversity itself.<sup>81</sup> The concept of common concern suggests that there may be an “international responsibility to cooperate”, subject to the common but differentiated responsibilities of states,<sup>82</sup> even with regard to intraterritorial environmental issues, but only if the environmental issue at stake is one that is considered a (global) common concern. Local community concerns regarding the preservation of local ecological integrity do not fit comfortably within international environmental law’s conception of common concern.

International environmental law, as generally understood, appears to offer little assistance to transnational environmental problems. The question which the next section seeks to address is whether examining international environmental law through TWAAIL provides any different insights.

#### IV. THIRD WORLD APPROACHES TO INTERNATIONAL LAW (TWAAIL)

Marxist scholar China Miéville believes that while international law is effective, it cannot further a just world order because the social content of international law is found in the struggle among capitalist states for domination over the rest of the

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<sup>77</sup> *Id.*

<sup>78</sup> *Rio Declaration*, *supra* note 42, princ. 7; *See infra* note 82.

<sup>79</sup> Brunnée – *Common Areas*, *supra* note 51, at 564-565.

<sup>80</sup> *Id.* at 565 (emphasis added by Brunnée).

<sup>81</sup> *Id.* at 565 (emphasis added by Brunnée).

<sup>82</sup> *See further Rio Declaration*, *supra* note 42, princ. 7:

[I]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

world in order to provide resources for capital.<sup>83</sup> However, TWAIL scholars, like B.S. Chimni, see re-examining international law from a Marxist perspective as useful for attempting to identify “an ensemble of methods, practices and understandings that go to empower the subaltern classes.”<sup>84</sup> Rather than rejecting the emancipatory potential of international law, TWAIL scholars seek to make the people of the Third World the ultimate decision makers when identifying and interpreting international legal rules.<sup>85</sup> Chimni criticises those who condemn international law for failing to recognize that “contemporary international law offers a protective shield, however fragile, to the less powerful states in the international system.”<sup>86</sup> Moreover, he states that making criticisms without offering any constructive suggestions for reform “amounts to an empty gesture” when compared to seeking imaginative solutions that exploit the contradictions of the international system.<sup>87</sup>

TWAIL has been described as “a broad dialectic (or large umbrella) of opposition to the generally unequal, unfair, and unjust character of an international legal regime that all too often (but not always) helps subject the Third World to domination, subordination, and serious disadvantage.”<sup>88</sup> According to Obiora

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<sup>83</sup> China Miéville, *The Commodity-Form Theory of International Law: An Introduction*, 17 LEIDEN J. INT’L L. 271, 291-293 (2004). See also CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW 3, 17, 25-27, 293 (2005). Miéville concludes: any attempts “to reform through law can only ever tinker with the surface level of institutions”. A world that is “structured around international law cannot but be one of imperialist violence. The chaotic and bloody world around us is the rule of law.” *Id.* at 317-319. See Critique of Miéville in Sara L. Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?*, 46 OSGOODE HALL L. J. 565,590-594 (2008), (observing that his reliance upon a theory of the legal form as backed up by coercive violence undermines his conclusions) (hereinafter Seck – *Unilateral Home*).

<sup>84</sup> B.S. Chimni, *An Outline of a Marxist Course on Public International Law*, in LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 53 (Susan Marks ed., 2008). See also B.S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 LEIDEN J. INT’L L. 1 (2004) (hereinafter Chimni – *Marxist* 2004); Obiora Chinedu Okafor, *Marxian Embraces (and De-couplings) in Upendra Baxi’s Human Rights Scholarship: A Case Study*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 252 (Susan Marks ed., 2008).

<sup>85</sup> Anne-Marie Slaughter & Steven R. Ratner, *The Method is the Message*, 36 STUD. TRANSNAT’L LEGAL POL’Y 239, 248-249 (2004). As international law provides Third World peoples with no real voice, TWAIL scholars themselves “must imagine or somehow approximate the actual impact of specific rules or practices on their daily lives and define or interpret those rules accordingly.”

<sup>86</sup> B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, in THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION 47, 72 (A. Anghie et al. eds., 2003) (emphasis in original).

<sup>87</sup> *Id.*

<sup>88</sup> Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our*

Okafor, TWAIL offers both theories of, and methodologies for, analysing international law and institutions, and is most usefully thought of as a broad approach.<sup>89</sup> TWAIL offers various models or frameworks for describing the behaviour of a related set of social phenomena (international law, justice, order institutions, etc.), including Antony Anghie's work on the colonial origins of international law, and Karin Mickelson's scholarship on international environmental law and the third world.<sup>90</sup> However, it is less clear whether TWAIL articulates a unified or general framework for analyzing, critiquing and reconstructing international law and institutions. While a theoretical school should be self-consistent, Okafor argues that it need not be *entirely* self-consistent, in the sense that all members of the school agree on everything.<sup>91</sup> TWAIL theories are connected by an overarching central set of ideas and a broadly shared approach. Thus although diverse, TWAIL scholars are:

[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.<sup>92</sup>

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*Time: A TWAIL Perspective*, 43 OSGOODE HALL L.J. 171, 176 (2005) (hereinafter Okafor – *Newness*). See also Makau Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31 (2000) (hereinafter Mutua – *What is TWAIL?*); Karin Mickelson, *Taking Stock of TWAIL Histories*, 10 INT'L COMMUNITY L. REV. 353 (2008). TWAIL scholarship is sometimes divided into TWAIL I (dating from the decolonization movement that swept the globe following WWII) and TWAIL II (representing more contemporary scholarship); See Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, 2 CHINESE J. INT'L L. 77, 79 (2003). There is some talk also of a post 9/11 TWAIL III, see Madhav Khosla, *The TWAIL Discourse: The Emergence of a New Phase*, 9 INT'L COMMUNITY L. REV. 291 (2007).

<sup>89</sup> Obiora Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 INT'L COMMUNITY L. REV. 371 (2008) (hereinafter Okafor – *Critical Third World*). For the purpose of this article, a methodology for the analysis of international law will be defined as: "the application of a conceptual apparatus or framework – a theory of international law – to the concrete problems faced in the international community". A methodology may apply more than one theory of international law. See Anne-Marie Slaughter & Steven R. Ratner, *Appraising the Methods of International Law: A Prospectus for Readers*, 36 STUD. TRANSNAT'L LEGAL POL'Y 1, 3-4 (2004).

<sup>90</sup> Okafor – *Critical Third World*, *id.* at 374.

<sup>91</sup> *Id.* at 375. Otherwise, certain theories, such as Marxist or feminist theory, which are comprised of differing strains of thought, could not exist.

<sup>92</sup> *Id.* at 376.

TWAIL also offers a “body of methods” used in the “activity of international legal analysis”. According to Okafor, these are TWAIL’s methodological insistence:

[O]n global (as opposed to merely West-centric) historicisation; on identifying continuities amidst discontinuities that we behold; on centering the Third World (i.e. “the Rest and not merely the West”); on being wary of glib universality narratives; and on focusing on the under-studied resistance of third world peoples.<sup>93</sup>

Together, these methods allow TWAIL scholars to “more effectively write the Third World into international legal history and analysis.” Okafor concludes that TWAIL is best defined more broadly, as an ‘approach’ or ‘school of thought’, both of which incorporate theory and methodology in their definitions, although with more emphasis on methodology.<sup>94</sup>

## V. GLOBAL HISTORICISATION, CONTINUITIES AND THE THIRD WORLD

Global historicism is a key starting point for a TWAIL analysis, for TWAIL scholars claim that international law “makes sense only in the context of the lived history of the peoples of the Third World.”<sup>95</sup> Makau Mutua notes that TWAIL scholarship is born out of a fervent belief that:

[T]he regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West... The construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination.<sup>96</sup>

TWAIL scholarship explains how international law has historically suppressed Third World peoples by means of the framework of the “civilizing mission.” This concept justified the West’s intervention in the affairs of Third World states and “provided the moral basis for the economic exploitation of the Third World that has been an essential part of colonialism.”<sup>97</sup> The civilizing mission operates by

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<sup>93</sup> *Id.* at 377.

<sup>94</sup> *Id.* at 377-378.

<sup>95</sup> Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, 36 *STUD. TRANSNAT’L LEGAL POL’Y* 185, 186 (2004) (hereinafter Anghie & Chimni).

<sup>96</sup> Mutua – *What is TWAIL?*, *supra* note 88, at 31.

<sup>97</sup> Anghie & Chimni, *supra* note 95, at 192-193. *See also* Upendra Baxi, *Voices of suffering*



characterizing non-European peoples as the 'other', who are frequently identified "as the source of all violence, and who must therefore be suppressed by an even more intense violence." The violence is legitimized for a number of reasons, including seeking to save the non-European people from themselves.<sup>98</sup> Anghie notes that the Third World state itself has become a "site of conflict" due to the many different ethnic groups often contained within the territory of the state.<sup>99</sup> As the state itself was to be the agent of development of national society, cultural divisions were to be transcended and subsumed within the whole, thus justifying the intervention by the state into many social, economic and cultural spheres previously governed by the traditions of particular communities.<sup>100</sup> Furthermore, the new states understood development primarily "in terms of the furtherance of industrialization and modernization, and these processes were expected to marginalize ethnic identity."<sup>101</sup> Anghie concludes that the relationship between the state and minorities as characterized by international law reproduces the dynamic of difference, with the minority as the primitive that "must be managed and controlled in the interests of preserving the modern and universal state."<sup>102</sup>

The law of self-determination has developed to the extent that international law recognizes that indigenous and minority communities have interests that diverge from that of the nation-state to which they are attached. However, it presumes that those engaged in resistance seek to become states themselves, rather than acknowledging that other goals may be viewed as more important than the achievement of state sovereignty.<sup>103</sup> According to Rajagopal, dominant approaches to international law ignore both the fact that the development discourse is centrally important for the "very formation of international law and institutions", as well as the fact that social movements play an important role in the evolution of international law.<sup>104</sup> He argues that mainstream international law functions "within

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*and the future of human rights*, TRANSNAT'L L. & CONTEMP. PROBS., Fall 1998, at 125 (hereinafter Baxi – *Voices of Suffering*); Upendra Baxi, *Geographies of Injustice: Human Rights at the Altar of Convenience*, in TORTURE AS TORT (Craig Scott ed., 2001) (Baxi – *Geographies of Injustice*).

<sup>98</sup> Anghie & Chimni, *id.* at 192-193.

<sup>99</sup> ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 205 (2005) (hereinafter ANGHIE – IMPERIALISM): "Thus, the problem of cultural difference emerged once again, this time in the form of the difference between the post-colonial state and the entity that sought to secede from it". *Id.*

<sup>100</sup> ANGHIE, IMPERIALISM, *id.* at 205-206, citing PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES 205 (1994).

<sup>101</sup> ANGHIE, IMPERIALISM, *id.* at 206.

<sup>102</sup> *Id.* at 207.

<sup>103</sup> BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE 11 (2003) (hereinafter RAJAGOPAL – INTERNATIONAL LAW FROM BELOW).

<sup>104</sup> *Id.* at 1.

specific paradigms of western modernity and rationality, that predetermine the actors for whom international law exists.<sup>105</sup> These actors include political, economic and cultural actors such as state officials, corporations and the “atomized individual who is the subject of rights”, who interact in privileged institutional spaces.<sup>106</sup> At the same time, international law ignores the non-institutional spaces where most people in the Third World live and interact.<sup>107</sup> As international law does not provide a visible framework for considering these perspectives, a fundamental rethinking of international law is required.<sup>108</sup> Critically, there is a need to displace development as a “progressive Third World narrative” due to its contribution to the nation-building project, in light of: “*the realization among social movements and progressive intellectuals that it is not the lack of development that caused poverty, inflicted violence, and engaged in destruction of nature and livelihoods; rather it is the very process of bringing development that has caused them in the first place.*”<sup>109</sup>

According to Rajagopal, the “rhetoric of participation, empowerment, human rights, and democracy” are seen as “essential aspects of supposedly authentic ‘development’.”<sup>110</sup> He argues that the proliferation of international institutional actors engaged in the promotion of democracy has emerged as a consequence of the emergence of mass democratic movements in the Third World.<sup>111</sup> Rajagopal’s thesis is that international law and institutions “renew and grow more” as “social movements resist more”, and this “resistance-renewal” is the “central aspect of ‘modern’ international law.”<sup>112</sup> This rhetoric has become manifest in a recent World Bank discourse,<sup>113</sup> although the possibility that “after full ‘participation’, the

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<sup>105</sup> *Id.* at 2. On the framework of mainstream international law, see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

<sup>106</sup> RAJAGOPAL – INTERNATIONAL LAW FROM BELOW, *id.* at 2.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 3.

<sup>110</sup> Balakrishnan Rajagopal, *From Modernization to Democratization: The Political Economy of the “New” International Law*, in REFRAMING THE INTERNATIONAL: LAW, CULTURE, POLITICS 144 (Richard Falk *et al.* eds. 2002) (hereinafter Rajagopal – *Political Economy*). See also RAJAGOPAL – INTERNATIONAL LAW FROM BELOW, *id.* at 146.

<sup>111</sup> Rajagopal – *Political Economy*, *id.* at 149-151.

<sup>112</sup> Rajagopal – *Political Economy*, *id.* at 155; RAJAGOPAL – INTERNATIONAL LAW FROM BELOW, *supra* note 103, at 161.

<sup>113</sup> Rajagopal – *Political Economy*, *id.* at 144. Rajagopal focuses here on the World Bank’s Comprehensive Development Framework (CDF), citing James D. Wolfensohn, A Proposal for a Comprehensive Development Framework (discussion draft, January 21, 1999) and Joseph Stiglitz, Participation and Development: Perspectives from the Comprehensive Development Paradigm, Remarks at the International Conference on Democracy, Market Economy and Development, Seoul, Korea, (February 27, 1999).

people may prefer the 'traditional' over the 'modern' is not entertained."<sup>114</sup> The discourse of democracy is interpreted mostly in human rights terms, and serves as the sole "approved discourse of liberation and resistance."<sup>115</sup> Moreover, the "power to program" or to "select the voices that constitute 'legitimate' democratic ones in the Third World, including for funding" has the effect of both "containing and de-radicalizing mass resistance in the Third World."<sup>116</sup>

Rajagopal is less concerned with questions of whether the Bretton Woods institutions are basically "good" or "bad", or whether they have "succeeded" or "failed" at poverty alleviation.<sup>117</sup> Instead, he points out that while neither the World Bank nor the International Monetary Fund were initially envisioned as concerned with development in the Third World or sustainability, by 1991 the World Bank had declared "sustainable poverty reduction" as the Bank's "overarching objective."<sup>118</sup> According to Rajagopal, the Bretton Woods Institutions "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 in the 1960s and 1970s."<sup>119</sup> Thus, these institutions should be recognised as having a

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<sup>114</sup> Rajagopal – *Political Economy*, *id.* at 147. Rajagopal notes that Stiglitz uses a broad understanding of participation, and emphasizes the importance of making corporations accountable by extending participatory processes to corporate governance. *See also* Balakrishnan Rajagopal, *Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, 27 *THIRD WORLD QUARTERLY* 767, 776 (2006) (hereinafter Rajagopal – *Counter-hegemonic*).

<sup>115</sup> Rajagopal – *Political Economy*, *id.* at 137. *See also* Rajagopal – *Counter-hegemonic*, *id.* at 768. Rajagopal states: "... the human rights discourse has also turned out to be a core part of hegemonic international law, reinforcing pre-existing imperial tendencies in world politics. ... The Third World, in all its complexity, needs to internalise the uncomfortable fact that the human rights discourse is part of the problem of global hegemony and the absence of global justice."

<sup>116</sup> Rajagopal – *Political Economy*, *id.* at 150-151. *See also* RAJAGOPAL – INTERNATIONAL LAW FROM BELOW, *supra* note 103, at 155.

<sup>117</sup> RAJAGOPAL – INTERNATIONAL LAW FROM BELOW, *id.* at 99.

<sup>118</sup> *Id.* at 96, 104. *See generally id.* at ch. 5.

<sup>119</sup> *Id.* at 49 [emphasis added].

[T]he "Third World" that these institutions encountered in the 1970s was not just an agglomeration of states at the United Nations, but an effervescent and troublesome cauldron of peasants, women, environmentalists, human-rights activists, indigenous people, religious activists, and other individuals that challenged the political and economic orders of the time. In particular, the late 1960s and 1970s witnesses a series of popular movements – both in the traditional Marxist sense and in the sense of "new social movements" – that put the issues of equity and justice squarely on the political agendas of ruling elites.

“complex relationship with mass resistance.”<sup>120</sup> More specifically, the “invention of poverty and environment as terrains of intervention” demonstrate how subaltern resistance “feeds the proliferation and expansion” of the Bretton Woods Institutions and simultaneously how “Third World resistance itself gets moderated and acted upon.”<sup>121</sup> It is not surprising then that the World Bank has been unable to grapple with the imperative of according indigenous and local communities a right to consent as opposed to mere consultation.<sup>122</sup>

Questioning development discourse raises doubts about international law’s assumption that host states can effectively regulate to prevent and remedy domestic environmental harm in the first place. While the story of international trade and competitive advantage tells of how poor host states voluntarily choose lower environmental standards in order to attract foreign direct investment and thereby increase economic growth and “development”, the reality is that Third World states have never experienced the sovereign equality presumed to be foundational under international law. As TWAAIL scholars have carefully documented, the impoverished sovereignty of Third World states is no accident, but the direct result of the power exerted by the Bretton Woods institutions on the economic sovereignty of newly decolonized states. This demonstrates continuity from the mandate system, despite the illusion of change.<sup>123</sup> As the World Bank has since evolved to embrace an environmental and social agenda as a direct result of the resistance by subaltern social movements, it could be said that Third World states have never had true sovereignty with regard to environmental or human rights either. This is evident in the manner in which the World Bank’s Environmental and Social Policies have become de facto international standards for extractive sector projects operating in developing countries whether supported directly by the World Bank’s International Finance Corporation,<sup>124</sup> or the

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*Id.* at 96.

<sup>120</sup> *Id.* at 49. Rajagopal describes the Bretton Woods institutions as “Foucaultian, complex and austere institutions.” *Id.* at 49, 133.

<sup>121</sup> *Id.* at 133-134. Thus, for Rajagopal, “it matters less that poverty alleviation programs never alleviate poverty or that conditionalities never achieve their policy goals.” Rather, these specific interventions have their “instrument-effects” that redound to the authority and expansion of “international institutions.” *Id.* at 134.

<sup>122</sup> See for example the reluctance of the World Bank to embrace the right to free, prior and informed consent, as compared to the right to consultation. Compare EMIL SALIM, STRIKING A BETTER BALANCE 21, 50 (2003) (supporting consent) with WORLD BANK GROUP MANAGEMENT, STRIKING A BETTER BALANCE: WORLD BANK GROUP MANAGEMENT RESPONSE 7 (2004) (supporting consultation).

<sup>123</sup> ANGHIE – IMPERIALISM, *supra* note 99, at 117, 179-180, 191-192.

<sup>124</sup> *Policy and Performance Standards on Social & Environmental Sustainability*, INT’L FIN. CORP., <http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards>.

Multilateral Investment Guarantee Agency,<sup>125</sup> or indirectly through financing by the Equator Principles banks<sup>126</sup> or OECD export credit agencies.<sup>127</sup> This lack of environmental and social sovereignty is even more evident given that bilateral investment treaties provide investors with a right to sue for regulatory expropriation, thus undermining the ability of the host state to regulate in keeping with the public interest of protection of human rights and the environment.<sup>128</sup>

As richer states are presumed to have good laws already on the books, they are also less likely to run into difficulty with regulatory freeze provisions in investor-state mining agreements (and are less likely to be subject to these types of agreements in the first place).<sup>129</sup> However, they too are not immune from charges of regulatory expropriation due to environmental measures, as is evident from both the United States' and Canadian experience under the North American Free Trade Agreement (NAFTA).<sup>130</sup> Indeed, the creation of the North American Commission on Environmental Cooperation (NACEC) in a side agreement to NAFTA is evidence of the concern that, without additional protections, trade could undermine environmental protection.<sup>131</sup> Yet the NACEC is often criticised for the weak protections it provides, when compared with the rights accorded to

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<sup>125</sup> *Policy and Performance Standards on Social & Environmental Sustainability*, MULTILATERAL INV. GUAR. AGENCY, WORLD BANK GROUP, [http://www.miga.org/policies/index\\_sv.cfm?stid=1589](http://www.miga.org/policies/index_sv.cfm?stid=1589).

<sup>126</sup> EQUATOR PRINCIPLES, <http://www.equator-principles.com/>.

<sup>127</sup> Trade Committee, *Revised Council Recommendation on Common Approaches on Environment and Officially Supported Export Credits*, WORKING PARTY ON EXPORT CREDITS AND CREDIT GUARANTEES, TRADE AND AGRICULTURE DIRECTORATE, OECD (June 12, 2007) [http://www.oecd.org/departement/0,3355,en\\_2649\\_34181\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/departement/0,3355,en_2649_34181_1_1_1_1_1,00.html).

<sup>128</sup> Teresa McGhie, *Bilateral and Multilateral Investment Agreements*, in LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 116 (Daniel D. Bradlow & Alfred Escher eds., 1999); KYLA TIENHAARA, *THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE* (2009).

<sup>129</sup> DANIELE BARBERIS, *NEGOTIATING MINING AGREEMENTS: PAST, PRESENT AND FUTURE TRENDS* 13-14, 18-19 (1998); JAMES OTTO & JOHN CORDES, *THE REGULATION OF MINERAL ENTERPRISES: A GLOBAL PERSPECTIVE ON ECONOMICS, LAW & POLICY* 5-14, 5-21 (2002); ANDREA SHERBERG, *STABILIZATION CLAUSES AND HUMAN RIGHTS: A RESEARCH PROJECT CONDUCTED FOR IFC AND THE SPECIAL REPRESENTATIVE TO THE UN SECRETARY GENERAL ON BUSINESS AND HUMAN RIGHTS* (2008).

<sup>130</sup> Judith Wallace, *Corporate Nationality, Investment Protection Agreements, and Challenges to Domestic Natural Resources Law: The Implications of Glamis Gold's NAFTA Chapter 11 Claim*, 17 GEO. INT'L ENVTL. L. REV. 365 (2005); Sanford E. Gaines, *Protecting Investors, Protecting the Environment: The Unexpected Story of NAFTA Chapter 11*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 173-196 (David L. Markell & John H. Knox, eds. 2003) (hereinafter GREENING NAFTA).

<sup>131</sup> North American Agreement on Environmental Cooperation, 17 Dec. 1993, Can.-Mex.-U.S., (1993) 32 ILM 1480; GREENING NAFTA, *id.*

foreign investors.<sup>132</sup> Whether or not environmental claims by investors are ultimately successful, they are expensive to defend and create a “regulatory chill” that makes host states reluctant to regulate environmental concerns in the first place. Ultimately, even rich countries like Canada do not have full environmental sovereignty, although the nature of Canada’s sovereignty clearly differs from that of developing states. This arguably has implications for indigenous communities within Canada protesting against mining development.

Thus, historical Third World scholarship highlights the colonial origins of international law, revealing how despite international law’s universal claims, it was used to justify, manage and legitimize the subjugation and oppression of Third World peoples. Colonialism was central to the formation of international law, and neo-colonialism continues to be central to the structure of international law today through contemporary initiatives such as the discourse of development that presents Third World peoples as deficient and in need of international intervention. Yet what or who is the Third World that TWAIL scholars tell us must be brought to the centre?

While some claim that the expression “Third World” is no longer a useful analytical category in a post-cold war era, TWAIL scholars reject this.<sup>133</sup> For example, Okafor suggests that the significance of the expression is tied to the group of states and populations which self-identify as Third World. They coalesce “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 monolithic third-world category.”<sup>134</sup> The expression therefore needs to be understood as embracing a more “flexible geographic sensibility.”<sup>135</sup> There is then “a sense in which states or societies or even scholars must *choose* whether or not to self-identify as Third World.”<sup>136</sup> Karin Mickelson notes that the validity of the term “Third World” has been increasingly called into question given the growing diversity among the various countries that have been identified by the label.<sup>137</sup> Mickelson sees the definition of Third World as not only descriptive but also normative, in the sense that the disadvantage experienced by Third World countries is seen as an intolerable situation that demands a response. This

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<sup>132</sup> Patricia Isela Hansen, *The Interplay Between Trade and the Environment Within the NAFTA Framework*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 340 (Francesco Francioni ed., 2001)

<sup>133</sup> Okafor – *Newness*, *supra* note 88, at 174.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 175.

<sup>136</sup> *Id.*

<sup>137</sup> Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT’L L.J. 353, 357 (1997-1998).

definition, she argues, draws attention to justice posited by social movements.<sup>138</sup> For example, in her work on climate change, Mickelson highlights the existence of a North within the South and a South within the North, citing the indigenous peoples in the North as one of the populations most vulnerable to climate change.<sup>139</sup> For Rajagopal, decentering the Third World from its physical geography enables a focus on the various levels at which power operates to subjugate, followed by engagement in oppositional practices that challenge those power structures.<sup>140</sup> Dominant discourse would then be compelled to rethink the relationship between the local and the global, for if the Third World is not geopolitically defined, it becomes possible to “think of transnational linkages among the oppressed.”<sup>141</sup>

## VI. TWAIL AND INTERNATIONAL ENVIRONMENTAL JUSTICE

According to Karin Mickelson, the “colonial background of international law is one that international environmental law shares.”<sup>142</sup> Mickelson sees the failure of international environmental lawyers to confront the differing perspectives of the South and North as “*a* central, if not *the* central, debate regarding the conceptual foundation of their discipline.”<sup>143</sup> As a result, international law as a discipline has failed to respond to Third World concerns in a meaningful way, marginalising them instead of incorporating them into the core of the discipline.<sup>144</sup> Two reasons for the failure are the tendency to provide an ahistorical account of the evolution of international law,<sup>145</sup> and the South’s portrayal as a grudging participant, rather than an active partner, in environmental regimes.<sup>146</sup>

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<sup>138</sup> *Id.* at 360.

<sup>139</sup> Karin Mickelson, *Beyond a Politics of the Possible? South-North Relations and Climate Justice*, 10 MELBOURNE J. INT’L L. 411, 419 (2009) (hereinafter Mickelson – *Beyond a Politics*).

<sup>140</sup> Rajagopal – *Counter-hegemonic*, *supra* note 114, at 768; Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, THIRD WORLD LEGAL STUD. 1, 19 (1998-1999). *See further* Rajagopal’s comprehensive definition of Third World as: an ideological model; a geopolitical model (the national allegory of the dominant discourse of development); the historical deterministic model; and the popular representational model (as a set of images). *Id.* at 1-19.

<sup>141</sup> *Id.* at 20.

<sup>142</sup> Karin Mickelson, *South, North, International Environmental Law, and International Environmental Lawyers*, 11 Y.B. INT’L ENVTL. LAW 52, 57-58 (2000) (hereinafter Mickelson – *South, North*). *See also* Karin Mickelson, *Critical Approaches*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 262, 274 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007) (hereinafter Mickelson – *Critical Approaches*); Mickelson – *Beyond a Politics*, *supra* note 139.

<sup>143</sup> Mickelson – *South, North*, *id.* at 53.

<sup>144</sup> *Id.* at 54.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 54, 60.

Specifically, international environmental law (IEL) has accommodated the concerns of the Third World through acceptance of principles such as common but differentiated responsibilities, and the inclusion of technology transfer and financial assistance provisions as inescapable features of international diplomacy. Yet the South has not been recognized as an active partner “in an ongoing effort to identify the fundamental nature of environmental problems and appropriate responses thereto.”<sup>147</sup> Instead, there is a tendency to see the developmental aspects of IEL as “concessions” to the Third World, or a political compromise. This is based upon the assumption that the Third World would “take a stand against the environment”, rather than understanding that at the time of such significant events as the Stockholm conference, the Third World was seeking fundamental change and recognition that “environmentalism” itself be open to interpretation.<sup>148</sup> Mickelson suggests that while the environmentalism of the rich might have the luxury of valuing the environment for its own sake, quite apart from its value to humans, the environmentalism of the poor “originates as a clash over productive resources”, with the result that “issues of ecology are often interlinked with questions of human rights, ethnicity and distributive justice.”<sup>149</sup>

Mickelson uses the phrase “South-North” to refer to an alternate way of conceptualizing the relationship between developed and developing nations.<sup>150</sup> She cites the role of the South in the context of hazardous waste regime building as an example of developing countries taking a lead role in attempting to develop effective international regimes, only to be met with the unsatisfactory (and somewhat paradoxical) arguments from developed countries ranging from the importance of freedom of movement to the sovereign rights of receiving states.<sup>151</sup> Mickelson has also critiqued the “co-option” of the “common heritage of mankind” principle by international environmental lawyers.<sup>152</sup> Specifically, Mickelson is concerned with the discarding of aspects of common heritage such as “property rights, resource exploitation and equitable sharing of benefits.” These aspects relate to the historical development of the principle which “at its very core” is “about global redistributive justice” and “part of an overall package of

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<sup>147</sup> *Id.* at 54.

<sup>148</sup> *Id.* at 62-66.

<sup>149</sup> *Id.* at 65, citing Guha and MARTINEZ-ALIER, VARIETIES OF ENVIRONMENTALISM: ESSAYS NORTH AND SOUTH (1997).

<sup>150</sup> Karin Mickelson, *Co-opting Common Heritage: Reflections on the Need for South-North Scholarship*, in HUMANIZING OUR GLOBAL ORDER: ESSAYS IN HONOUR OF IVAN HEAD 112, 113 (Obiora Chinedu Okafor & Obijiofor Aginam eds., 2003) (hereinafter Mickelson – *Co-opting*). She credits Ivan Head with first using this phrase.

<sup>151</sup> Mickelson – *Co-opting*, *id.* at 66-67. See also discussion of hazardous waste issues in the human rights context, and the reaction of developed states in KNOX, *supra* note 10.

<sup>152</sup> Mickelson – *Co-opting*, *id.* at 115, critiquing PRUE TAYLOR, AN ECOLOGICAL APPROACH TO INTERNATIONAL LAW (1998).



Third World aspirations and demands for a more equitable international system.”<sup>153</sup>

Mickelson also explores how the fundamental principle of common but differentiated responsibilities can “reflect totally different ways of thinking about the respective ways of South and North in addressing environmental degradation.”<sup>154</sup> The North’s perspective reflects the different financial and technological capacities, and the imbalance of the consumption of resources, thus leading to a focus on ability to pay. The South’s perspective, on the other hand, reflects an understanding of responsibility to pay:

[A]n acknowledgment of the historic, moral, and legal responsibility of the North to shoulder the burdens of environmental protection, just as it has enjoyed the benefits of economic and industrial development largely unconstrained by environmental concerns. Implicit in the latter view is a sense that the North has received a disproportionate share of the benefits of centuries of environmentally unsustainable development, and the underprivileged in the South have borne many of its costs.<sup>155</sup>

In examining climate change as a “problem of global injustice”<sup>156</sup> Mickelson highlights the resistance to viewing climate change as being (at least in part) about “sustainable development and international equity.”<sup>157</sup> She proposes two concepts for reconceptualising the relationship between the South and the North: ‘ecological debt’ and ‘environmental space’.<sup>158</sup> The concept of ‘ecological debt’ views the North as “owing an enormous amount to the peoples of the South, who have borne many of the costs of environmentally unsustainable development but have reaped few of its benefits.”<sup>159</sup> Mickelson traces the origins of the concept of ecological debt to Latin American authors and activists in the early 1990s, inspiring

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<sup>153</sup> *Id.* at 116. The result is that the concept is “wrenched out of context, pulled apart, and reassembled in new incarnations that are little more than hollow mockeries of the original”. *Id.* at 119.

<sup>154</sup> *Id.* at 70; Mickelson – *Critical Approaches*, *supra* note 142, at 274.

<sup>155</sup> Mickelson – *South, North*, *supra* note 142, at 70.

<sup>156</sup> Mickelson – *Beyond a Politics*, *supra* note 139, at 413.

<sup>157</sup> *Id.* at 415.

<sup>158</sup> Karin Mickelson, *Leading Towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories about International Environmental Cooperation*, 43 OSGOODE HALL L.J. 137, 137 (2005) (hereinafter Mickelson – *Leading Towards*).

<sup>159</sup> *Id.* at 153. A third story, that of “leading towards a level playing field”, is also described by Mickelson as reflecting a U.S. approach toward environmental challenges. *Id.* at 140-150.

NGO networks in both the South and North to subsequently work on the issue.<sup>160</sup> The solution proposed is to bring about a “more equitable and sustainable allocation of global resources”. The North would make changes to reduce its environmental impacts and the South would increase development to meet the aspirations of its peoples.<sup>161</sup> In contrast, the “underpinnings” of the concept of ‘environmental space’ are ecological limits and equity.<sup>162</sup> Originally introduced without a distributional element by an academician named J.B. Opschoor in the late 1980s, this concept was given a wider audience in the 1990s after having been adopted by NGOs who introduced equity as an integral component.<sup>163</sup> According to the concept of environmental space, there are limits to the amount of environmental pressure that the Earth’s ecosystems can handle without irreversible damage, and these limits must be understood within the context of equal rights to resource consumption and concern for the quality of life for all people.<sup>164</sup> Linking equity with space is essential, for otherwise “to speak of limits without speaking of equity, risks perpetuating an international distribution of resources that is fundamentally skewed in favour of the North.”<sup>165</sup> The difference between this idea and ecological debt is that environmental space does not take into account historical responsibility for resource depletion.<sup>166</sup>

Both ecological debt and environmental space critique the existing distribution of resources as unfair and demonstrate this unfairness by highlighting the discrepancy in consumption patterns between the North and South.<sup>167</sup> Both theories allocate the burden of resolving international environmental problems to the North. Developed countries must radically shift their current consumption levels, while developing countries must attempt to live within their own environmental space, which will require reassessing current understandings of development.<sup>168</sup>

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<sup>160</sup> *Id.* at 150-153, citing JUAN MARTINEZ-ALIER, *THE ENVIRONMENTALISM OF THE POOR: A STUDY OF ECOLOGICAL CONFLICTS AND VALUATION* 213 (2002) as the best known academic proponent of the idea.

<sup>161</sup> *Id.* at 157.

<sup>162</sup> *Id.* at 158.

<sup>163</sup> *Id.* at 158-159. Mickelson credits J.B. Opschoor with introducing the phrase “environmental utilisation space” in 1987, and FOE Netherlands and FOE Europe with promoting the modified version of the concept.

<sup>164</sup> *Id.* at 158-159.

<sup>165</sup> *Id.* at 162 (commenting on the critique of Agarwal and Narain in the climate change context: Anil Agarwal & Sunita Narain, *The Sharing of Environmental Space on a Global Basis*, in MICHAEL CARLEY & PHILIPPE SPAPENS, *SHARING THE WORLD: SUSTAINABLE LIVING & GLOBAL EQUITY IN THE 21ST CENTURY* (1998).)

<sup>166</sup> *Id.* at 160.

<sup>167</sup> *Id.* at 162.

<sup>168</sup> *Id.* at 166.

If the theory of ecological debt is applied to the problem of transnational harm, then developing countries should be entitled to engage in development to meet the aspirations of their people, while developed countries should bear the burden of reducing consumption patterns. This would suggest that developed countries have no business regulating to prevent or remedy environmental harm in developing countries. Yet, if the theory of ecological space is applied to the transnational harm problem, then regulation and adjudication of transnational environmental claims could be seen as contributing to the protection of the ecological space of vulnerable communities whose space is at risk of being infringed by the colonialist consumption patterns of the rich. Recognition of ecological debt could then offer support for the creation of forums, including in home states, for the adjudication of past transnational infringements of ecological spaces, and prevention of future infringements.

This analysis is supported by the work of Obijiofor Aginam, who argues that there is a need to pay closer attention to local customary ecological norms and practices.<sup>169</sup> Aginam specifically highlights indigenous conservation practices in Africa and South America as examples of the creativity of postcolonial societies in the South, and argues that “global environmentalism must move beyond the narrow confines of state-centric interests to holistically incorporate ecologically sound practices of indigenous societies.”<sup>170</sup> Aginam claims that the pressures of globalization, fuelled by the operations of transnational corporations, including oil operations in Nigeria and Ecuador, has led to “an erosion of multicultural ecological values.”<sup>171</sup> He proposes a “South-North” ecological dialogue that is “sensitive to the customary enforcement of ecological norms and practices... handed down from past generations in the South” as a means of counteracting the “hegemonic globalism” and “complicity of international law in impoverishing conceptions of sustainable development and in suffocating Third World contributions.”<sup>172</sup> This is consistent with an understanding of TWAIL as anti-hierarchical, in that it “assumes the moral equivalency of cultures and peoples and rejects ‘othering’”. Rather than promoting the universalisation of specific cultures, TWAIL calls for dialogic manoeuvres across cultures to establish the content of universally acceptable norms.<sup>173</sup>

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<sup>169</sup> Obijiofor Aginam, *Saving the Tortoise, the Turtle and the Terrapin: The Hegemony of Global Environmentalism and the Marginalization of Third World Approaches to Sustainable Development*, in HUMANIZING OUR GLOBAL ORDER: ESSAYS IN HONOUR OF IVAN HEAD 12 (Obiora Chinedu Okafor & Obijiofor Aginam eds., 2003) (hereinafter Aginam).

<sup>170</sup> Aginam, *id.* at 14.

<sup>171</sup> *Id.* at 25.

<sup>172</sup> *Id.*

<sup>173</sup> Mutua – *What is TWAIL?*, *supra* note 88, at 36.

## VII. TWAIL, UNIVERSALITY NARRATIVES AND UNDERSTUDIED RESISTANCE

There is no doubt that the unilateral exercise of home state jurisdiction in the human rights and environment realm creates a curious problem from a TWAIL perspective. On the one hand, as I have examined elsewhere in relation to business and human rights,<sup>174</sup> if in reality home states only ever exercise jurisdiction to promote internal economic goals, then unilateral home state regulation, even while claiming to be designed to protect universal values such as international human rights or global ecological integrity, is innately problematic as an imperialistic infringement of host state sovereignty. Moreover, if home state regulation designed to prevent and remedy harms were to become routine state practice that contributed to the development of customary international law norms, it could unintentionally serve to reinforce the neo-colonialist tendencies of international law (even if it also supported human rights and environmental protection at the same time).<sup>175</sup> On the other hand, to the extent that neo-colonial tendencies are already embedded within the structure of international law, the principles of international environmental law and the public international law rules of jurisdiction which suggest that home state regulation is illicit and a violation of international law could themselves be neo-colonialist. Home states are thus shielded from pressure to take action to ensure home state TNCs respect the environmental rights of citizens in Third World host states. It also shields the home state from the fear that another home state might take action to protect the environmental rights of the Third World within its own borders, including indigenous peoples.<sup>176</sup>

The unilateral exercise of home state jurisdiction is often justified by reference to universal norms, yet TWAIL scholars are suspicious of assertions of universality that mask underlying politics of domination. This is because ‘universality’ and ‘common humanity’ claims often historically facilitated and justified Europe’s colonial subjugation and continuing exploitation of much of the Third World.<sup>177</sup>

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<sup>174</sup> Seck – *Unilateral Home*, *supra* note 83.

<sup>175</sup> *Id.*

<sup>176</sup> See for example, U.N. Comm. On the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding observations of the Committee on Elimination of Racial Discrimination*, ¶ 17, U.N. Doc. CERD/C/CAN/CO/18 (March 5, 2007); Western Shoshone Defense Project, Report On Effects Of Canadian Transnational Corporate Activities On The Western Shoshone Peoples of The Western Shoshone Nation, Report Submitted to CERD in relation to Canada’s 17<sup>th</sup> And 18<sup>th</sup> Periodic Reports to CERD, 4 (2007). The Western Shoshone lands are in California, Idaho, Nevada and Utah.

<sup>177</sup> Okafor – *Newness*, *supra* note 88, at 179.

Indeed, Anne Orford in her work on humanitarian intervention notes that “international law and the narrative of empire are inextricably intertwined” in a “heroic narrative of the march of civilisation” which “supplies international law with its ‘history and destiny, beginning and end, explanation and purpose’, while international law as a universal system of humanitarian values supplies the narrative of empire with its moral.”<sup>178</sup> Yet Orford then quotes a passage from the work of Gayatri Chakravorty Spivak: “as the North continues ostensibly to ‘aid’ the South – as formerly imperialism ‘civilised’ the New World – the South’s crucial assistance to the North in keeping up its resource-hungry lifestyle is forever foreclosed.”<sup>179</sup> This suggests that a re-examination of universal norms is necessary to uncover hidden unsustainable consumption patterns.

Chimni, for example, is critical of the unilateral exercise of jurisdiction designed to address global common harm as discussed in the Appellate Body decisions in the *Shrimp/Turtle* cases. Chimni views the Appellate Body as too permissive of extraterritorial prescriptions which are deemed legitimate subject to the “precondition of carrying out good faith dialogue with other state(s) to arrive at a bilateral or multilateral solution to the environmental ‘problem’ in question.”<sup>180</sup> Chimni also critiques the exercise of unilateral extraterritorial jurisdiction by advanced capitalist states, in particular the U.S., through both certification

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<sup>178</sup> ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* 50 (2003) citing Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983).

<sup>179</sup> ORFORD, *id.* at 50, citing GAYATRI CHAKRAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT*, 6 (1999). With regard to foreign direct investment in the context of economic restructuring, Orford notes that international economic texts “make sense of the relations between ‘investors’ and ‘developing states’ in terms of a narrative of progress and development, in which a character called Foreign Capital is the agent of wealth and prosperity. This creates a sense that actions undertaken to enable the exploitation and control of people and resources in such states are in fact about charity and benevolence.” ORFORD, *id.* at 77. *See also* ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (1995).

<sup>180</sup> Chimni – *Marxist* 2004, *supra* note 84. *See further* B.S. Chimni, *WTO and Environment: The Legitimization of Unilateral Trade Sanctions*. *ECON. & POL. WKLY.*, Jan. 12-18, 2002, at 133. The two key WTO Appellate Body decisions in the *Shrimp/Turtle* cases are Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998); and Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001). While the first Appellate Body decision concluded that the U.S. measures were not consistent with GATT Article XI as a quantitative restriction on trade that was not justifiable under Article XX, the second decision rejected Malaysia’s complaint that revised U.S. measures were not being applied in accordance with the requirements of Article XX.

mechanisms, and “substantivism” by U.S. courts that choose to apply the “better law” in economic conflicts.<sup>181</sup> Both methods use power to universalise the national laws of imperial states, and Chimni is critical of them even where a reasonable link exists between the conduct being addressed and the state enacting the rule or making the juridical determination.<sup>182</sup> Chimni is also cautious of the evolving realm of universal jurisdiction over international crimes due to the danger that it may be exercised mainly by Western powers against Third World persons, and may thus be perceived as hegemonic jurisdiction.<sup>183</sup> However, Chimni is equally critical of the denial of what he calls “justice jurisdiction” by advanced capitalist state courts in the context of mass torts committed by TNCs in third world states, such as the use of *forum non conveniens* to deny U.S. jurisdiction over the Bhopal case.<sup>184</sup> Nor is Chimni alone among TWAIL scholars on this point, as Baxi and Sornarajah have both complained that home state courts have been reluctant to exercise “justice jurisdiction” over TNC conduct that has violated the rights of communities within developing countries, while at the same time according protection to developed State investors.<sup>185</sup>

From an environmental human rights perspective, however, it is notable that the “universality” of the claimed harm is contested under traditional positivist understandings of international law. As discussed above, the environmental harms typically at issue tend to be classified as “intraterritorial” harms that fall within the boundaries of the territorial state and thus outside the boundaries of international environmental law. There has been some effort, particularly in U.S. courts, to claim that environmental harm that rises to a certain level of seriousness should be equated with a universal human rights or *jus cogens* norm. However, this has been unsuccessful.<sup>186</sup> Meanwhile, indigenous rights to consent or local community rights

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<sup>181</sup> Chimni – *Marxist* 2004, *id.* at 19.

<sup>182</sup> *Id.* at 19, n.76. Chimni notes that “in the era of globalization a ‘reasonable link’ is not always difficult to establish for imperial states, especially when it is backed by power.” *Id.* See also H.L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT’L L. 932 (2002).

<sup>183</sup> Chimni – *Marxist* 2004, *id.* at 20-21.

<sup>184</sup> *Id.* at 20.

<sup>185</sup> *Id.* at 20. See generally, Upendra Baxi, *Mass Torts, Multinational Enterprise Liability, and Private International Law*, 276 RECUEIL DES COURS (1999); Muthucumaraswamy Sornarajah, *Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States*, in TORTURE AS TORT 491 (Craig Scott ed., 2001); Baxi – *Voices of Suffering*, *supra* note 97 ; Baxi – *Geographies of Injustice*, *supra* note 97. See also UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 276 (3<sup>rd</sup> ed. 2009), especially Ch. 9 *Market Fundamentalisms: Business Ethics at the Altar of Human Rights* .

<sup>186</sup> See for example discussion of cases in MORGERA, *supra* note 10, at 125-133, referring to among others: *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008); *Beanal v. Freepport-Moran*, 197 F.3d 161 (5th Cir. 1999); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140

to participate in environmental decisions are not accorded the status of *jus cogens* norms, even if they are recognized as existing rights.<sup>187</sup> While TWAIL scholars may have good reason to be suspicious of the colonial implications of universality narratives, and unilateral regulation designed to implement them, international law's refusal to acknowledge the universal seriousness of local ecological harm appears equally suspicious from a TWAIL perspective. Notably, Aginam favours the evolution of an "effective framework for *erga omnes* obligation on environmental issues",<sup>188</sup> a sentiment reflected in Justice Weeramantry's well known separate opinion in the *Gabcikovo-Nagymoros* case<sup>189</sup> and recognized by the "ecology of knowledges" and holistic versions of natural law rooted in diverse cultures around the world.<sup>190</sup>

Ultimately, if resistance is to be written into international law, the critical question is, would Third World subaltern communities, whether in the South or North, define threatened or actual destruction of local ecosystems by foreign transnational corporations as sufficiently serious to fall within the concern of international law? Moreover, would subaltern communities wish the option of voicing their resistance to home state TNCs through mechanisms associated with home state points of control? The answer would be likely to depend, at least in part, on the structure of the mechanism and the extent to which it accorded priority to the views of subaltern voices, heard on their own terms.

## VIII. CONCLUSIONS

An analysis that draws upon TWAIL suggests support for home state regulation that gives voice to all local communities who wish to protect local ecological integrity through resistance to global mining. This would include giving voice to resistance by the South within the North – including indigenous peoples. However, TWAIL appears to necessitate a distinction between regulation that enables host state individuals and local communities to seek redress from

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(2d Cir. 2003); *Amlon Metals v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002). See also N. L. Bridgeman, *Human Rights Litigation under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L. J. 1 (2003).

<sup>187</sup> Simons & Collins, *supra* note 8, at 13-19.

<sup>188</sup> Aginam, *supra* note 169. See also LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF INDIGENOUS PEOPLES 61-64 (2008).

<sup>189</sup> *Gabcikovo-Nagymaros Dam (Hungary v. Slovakia)*, 1997 I.C.J. 7 (Sep. 25) (separate opinion of Judge C. Weeramantry).

<sup>190</sup> Weeramantry, *id.*; Collins, *supra* note 31, at 445. Collins attributes the phrase "ecology of knowledges" to Boaventura de Sousa Santos, *Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges*, EUROZINE (18 February, 2008), <http://www.eurozine.com>.

environmental harm (and to seek to prevent such harm in the first place), and regulation that imposes home state environmental values on communities in host states without their participation, consultation or consent. Notably, when local communities support mining development instead of resisting, it may be that home states should resist the imposition of environmental values against their wishes. Even if regulation is ostensibly designed in the interest of global ecological integrity, giving voice to protest by Third World peoples may be essential. Direct application of substantive home state environmental laws appears problematic.

But is it necessarily problematic? And what does it mean to give voice to subaltern resistance? In litigation that is brought after the fact of environmental harm, the claim is frequently made by plaintiffs that environmental standards adopted by a company with the explicit agreement of the host state are inadequate precisely because the standards permit greater environmental harm than would be allowed in the home state.<sup>191</sup> This raises the question of why the default standard should be one that defers to inadequate host state standards (whether developed or developing), in which disempowered local communities may have had little or no say, rather than home state standards (developed or developing) in which these communities equally had no say, but may be a higher standard in keeping with the preservation of local ecological space. The puzzling development in home state regulation in Canada is that fear of infringing host state sovereignty has led to increased support for reference to international standards, most notably the World Bank's Environmental and Social Policies, as the *de facto* standard of choice for transnational corporations operating internationally, rather than domestic Canadian environmental standards. If writing resistance into international law suggests that Third World peoples contributed to the formation of World Bank standards, then this raises the question of whether these standards are indeed a more "legitimate" choice of standards for home states to apply overseas? Answering this question is beyond the scope of this article.<sup>192</sup>

Another question is the implications of this choice for the scope of the home state regulation. In Canada, some proposed home state measures have been targeted at extractive industry operations in "developing countries"<sup>193</sup> while others have taken a broader scope and apply to all companies operating

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<sup>191</sup> This was clearly the sentiment of some participants at the Vancouver Annual Meeting of the International Bar Association in October 2010 who participated in a full day session titled *Environmental Responsibilities of Resource Companies Under Host Country and Home Country Laws – The Growing Demand for Extraterritorial Liability* (October 6, 2010). See programme, available at [http://www.int-bar.org/conferences/Vancouver2010/program\\_detail.cfm?uid=3df04295-95c3-420e-88e1-c68ccc949ce5](http://www.int-bar.org/conferences/Vancouver2010/program_detail.cfm?uid=3df04295-95c3-420e-88e1-c68ccc949ce5).

<sup>192</sup> The legitimacy of World Bank standards as a form of transnational law has been the subject of analysis in the mining context. See SZABLOWSKI, *supra* note 53.

<sup>193</sup> See s.4 of Bill C-300, *supra* note 12.



“internationally.”<sup>194</sup> Taken together with the initial reluctance of Canada, the United States, New Zealand and Australia – developed countries with colonial histories and large populations of politically disempowered indigenous peoples – to support the UN Declaration on Indigenous Peoples, and one is left with the sense that more creativity will be needed to overcome the neo-colonialist continuity in international law. In particular, should “developing country” home states also consider the implementation of measures to ensure the protection of ecological space of indigenous and local communities in the developed world in which their companies are operating? It is appropriate to recall yet again that TWAAIL is, in Mutua’s words, anti-hierarchical, “assumes *the moral equivalency of cultures* and peoples and rejects ‘othering’”. TWAAIL calls for dialogic manoeuvres across cultures to establish the content of universally acceptable norms, rather than promoting the universalisation of specific cultures.<sup>195</sup> Aginam too calls for an ecological dialogue across cultures. Yet the dialogue about home state obligations to regulate and adjudicate transnational corporate environmental harms has been confined to First World states discussing the rights of Third World peoples. There is a need to open that conversation to the states of the Third World and the subaltern peoples of the First, at the very least when transnational corporate actors call a developing state “home”. It may be that the appropriate response to claims that developing country home states should regulate and adjudicate transnational corporate conduct, is to turn to the well established IEL principle of “common but differentiated responsibilities” as a justification for more limited action. Equally, claims by developed country home states and their industry that home state regulation creates a competitive disadvantage, should perhaps be exposed as examples of a third story of IEL described by Mickelson in the climate change context as that of “leading towards a level playing field.”<sup>196</sup> Further analysis of these points is also beyond the scope of this article.

Finally, there is a danger that interpreting TWAAIL to provide support for substantive home state environmental regulation might reflect wishful thinking on the part of a developed country international environmental lawyer. Mickelson cautions that environmental lawyers need to “acknowledge that their vision of international environmental law reflects one version of environmentalism”.<sup>197</sup> This requires an acknowledgement that one is advocating for a particular interest – the environment. Secondly, international environmental lawyers must “inhabit the same historical reality” as the Third World – thus Maurice Strong’s desire for an Earth Charter to hang on every child’s bedroom wall unintentionally reflects a lack

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<sup>194</sup> See Order-in-Council, *supra* note 35, s. 4.

<sup>195</sup> Mutua – *What is TWAAIL?*, *supra* note 88, at 36.

<sup>196</sup> Mickelson – *Leading Towards*, *supra* note 158, at 140-150 (describing the U.S. response).

<sup>197</sup> Mickelson – *South, North*, *supra* note 142, at 80.

of appreciation for the reality that children in many parts of the world do not have bedrooms.<sup>198</sup> In Mickelson's words: even "the most wonderfully inspiring document in the world will not mean anything as long as there are these terrible disparities between those who have and those who have not."<sup>199</sup>

It would be both hypocritical and imperialist for home states that engage in destructive consumption patterns to be able to limit the potential consumption of poor communities in other states by denying them the possibility of development without their consent. A TWAAIL analysis suggests that the real question we should be asking is whether all state-created institutional structures of the global economic order must regulate the transnational corporate conduct that they facilitate so as to give voice to local communities protesting the infringement of their environmental space. The spatial dimensions of the global economic order of the 21<sup>st</sup> century include built-in silences that perpetuate the ignorance of consumers who, increasingly mobile, often have no experience of attachment to a local place that might call out for ecological protection. The combination of mobility and silence prevents consumers in all parts of the world from being confronted with the local impacts of their unsustainable consumption patterns. Only if the voices of those who protest the infringement of local ecological spaces can be heard loud and clear, could we hope to both shame and enlist the rich into respecting ecological imperatives, and perhaps one day to even acknowledge historic responsibility for past harms.

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<sup>198</sup> *Id.* at 80. For more on the *Earth Charter*, see Brendan Mackey, *The Earth Charter, Ethics and Global Governance*, in RECONCILING HUMAN EXISTENCE WITH ECOLOGICAL INTEGRITY 61 (Laura Westra, Klaus Bosselmann & Richard Westra eds., 2008). See also Bosselmann – *Environmental Governance*, *supra* note 39, at 303-304, at n. 91 and accompanying text, noting that the *Earth Charter* was not designed as a draft covenant, but as a stand-alone 'peoples' charter, to avoid the 'pact with the devil' potential of a treaty solution. For Bosselmann, the inclusive civil society initiated *Earth Charter* presents an "ethical framework for sustainable development" that sees "the global environment and global civil society – not states – as referential points for rights and duties." In this light, Bosselmann proposes an additional category for understanding environmental harms, which he detaches from state-centric understandings of international law. According to Bosselmann, "global harm" is neither confined to national jurisdiction nor to areas beyond national jurisdiction, but includes both and "embraces the earth as a whole". *Id.* at 303.

<sup>199</sup> *Id.* at 80.