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Review of The Governance Gap: Extractive industries, human rights, and the home state advantage By Penelope Simons and Audrey Macklin

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Book Review

THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS, AND THE HOME STATE ADVANTAGE, by Penelope Simons & Audrey Macklin¹SARA L. SECK²

THE GOVERNANCE GAP IS A LONG-AWAITED CONTRIBUTION to the literature, advocating a stronger role for home state governments in the regulation of extractive companies operating abroad. This book arises from the experience of the authors as members of the Harker Commission on human security in the Sudan in the late 1990s.³ Written by Penelope Simons⁴ and Audrey Macklin,⁵ *The Governance Gap* provides a detailed case study of Canadian company Talisman Energy Inc. and its operations in the Sudan between 1998 and 2003—a period during which the Sudan was “in the midst of a violent civil war” and Talisman was operating through a subsidiary as a 25 per cent partner in the Greater Nile Petroleum Operating Company (“GNPOC”).⁶ The appointment of the Harker Commission—a fact-finding mission sent to the Sudan to examine “the alleged

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1. (New York: Routledge, 2014).
 2. Associate Professor, Faculty of Law, Western University.
 3. Simons & Macklin, *supra* note 1 at xiv.
 4. Associate Professor, Faculty of Law, University of Ottawa. Penelope Simons was the author of chapters 1, 3, and 4.
 5. Professor, Faculty of Law, University of Toronto. Audrey Macklin was the author of chapters 2 and 5.
 6. *Supra* note 1 at 1.

link between oil development and human rights violations”⁷—was in part a response to the actions of the US government, which had imposed sanctions and trade restrictions against the Sudan and was pressuring the Canadian government to do the same.⁸ The Harker Commission concluded that the conflict had intensified due to the operations of GNPOC. Various reasons for this were cited, including the fact that GNPOC had provided the Sudanese government with access to airstrips and roads, thus “increas[ing] the weight of the firepower it [could] bring to bear.”⁹

Ultimately, Foreign Affairs and International Trade Minister Lloyd Axworthy, the initiator of the Commission, accepted some of the Commission’s recommendations by encouraging Talisman to continue its attempts at constructive engagement with the Sudanese government. At the same time, he chose not to impose even the weak economic measures also recommended by the Commission.¹⁰ This failure, in Simons and Macklin’s view, was the result of lobbying by Talisman CEO James Buckee, who warned that criticism from the Canadian government had led to a decline in Talisman’s share price and eroded investor confidence. He also warned that Talisman’s departure from Sudan would leave the Sudanese people exposed to “other GNPOC partners (China, Malaysia and Sudan) who have less regard for their welfare than Talisman.”¹¹ Talisman ultimately pulled out of GNPOC in May 2002, selling to an Indian company. According to the authors, Talisman withdrew at least in part because of threatened changes to US capital markets rules, under which companies operating in countries against which the United States had imposed sanctions would be prohibited from listing on US exchanges.¹² Flowing from this case study, *The Governance Gap* canvasses a wide range of multi-stakeholder and legal governance initiatives in great depth. The book culminates in the elaboration of a comprehensive home state regulatory proposal aimed at addressing human rights concerns arising from extractive industry operations in “weak governance zones.”¹³

After setting the stage via the case study, the analysis begins usefully by exploring the merits of distinguishing “mandatory” from “voluntary” approaches to regulation of transnational corporate activity.¹⁴ The authors acknowledge the

7. *Ibid* at 40.

8. *Ibid* at 37-39.

9. *Ibid* at 42.

10. *Ibid* at 53-54.

11. *Ibid* at 52.

12. *Ibid* at 61-64.

13. *Ibid* at 291.

14. *Ibid* at 81-93.

work of others who claim that the line between mandatory and voluntary is increasingly meaningless due to the complex influence and interaction between self-regulatory and regulatory initiatives, including hybrid approaches.¹⁵ Providing insights into theories of new governance, reflexive law, and legal pluralism, the authors conclude that at least with regard to weak governance zones, neither self-regulatory nor hybrid initiatives are sufficiently effective, either individually or collectively. They then proceed to examine and critique in detail the 2011 United Nations Guiding Principles on Business and Human Rights, the Organisation for Economic Co-operation and Development (“OECD”) Guidelines for Multinational Enterprises, the Global Compact, the Voluntary Principles on Security and Human Rights, the Performance Standards of the International Finance Corporation, the Equator Principles, the Extractive Industries Transparency Initiative, and the Global Reporting Initiative. The authors recognize the value of these initiatives in aiding the development of an agreement on new norms and in inducing companies to build “processes and procedures to demonstrate compliance”—yet they also claim that in order to increase their effectiveness, these initiatives must be “embedded in a legal framework.”¹⁶

They turn next to the role of domestic home state law, first examining whether states have an obligation to regulate corporate nationals operating abroad so as to prevent and remedy violations of human rights.¹⁷ There is a brief but important clarification that canvassing legislative mechanisms should not be equated with a pejorative understanding of the label “command and control”—that is, while “there is both room and need for state-generated legal norms that impose consequences,” it is at the same time “a mistake to associate all state regulation with direct prescriptive/coercive laws.”¹⁸ The authors then examine a range of existing legislative mechanisms—drawn largely but not exclusively from Canada, the United States, Australia, and the United Kingdom—that adopt a variety of approaches, from prescriptive or coercive to incentive and

15. See especially Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, Ont: LexisNexis, 2009); Doreen McBarnet, “Corporate social responsibility beyond law, through law, for law: the new corporate accountability” in Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007) 9. For an examination and critique of the work by Larry Cata Backer, see Simons & Macklin, *supra* note 1 at 88-93.

16. *Ibid* at 176.

17. *Ibid* at 179-86.

18. *Ibid* at 187.

facilitative. Materials covered include incentive mechanisms adopted by export credit agencies; prescriptive measures such as sanctions, export-control laws, and corporate criminal liability; and facilitative mechanisms ranging from corporate and securities disclosure laws and socially responsible investment to unfair competition and misleading advertising laws. This part concludes with an examination of transnational civil litigation as a facilitative mechanism before moving on to four examples of failed legislative initiatives, including Canada's Bill C-300.¹⁹ Ultimately, the authors reiterate the claim that home state regulation by itself is not sufficient, but it can "act as a catalyst for other states to develop similar regulatory frameworks" and so "contribute to the development of a global consensus for an international response."²⁰

The book then proposes a detailed home state regulatory model comprised of five components: withdrawal of public support for proscribed conduct; the creation of an independent Corporate Social Responsibility ("CSR") agency; civil enforcement by private actors; public disclosure and market responsiveness; and various ancillary components designed to complement the proposed regime.²¹ Notably, the application of this regulatory framework is limited to operations in "weak governance zones," a phrase that the authors claim "has recently entered the international business lexicon," through the OECD and is said to "[encompass] states that are unable or unwilling to protect the fundamental human rights of some or all of its population over some or all of its territory."²² The authors acknowledge that corporate abuse is not "confined exclusively to weak governance zones."²³ They impress that "circumscribing the scope" of the proposed framework's application to operations in these countries "does not denote that the responsibilities of business vary according to the host state."²⁴ Yet, while insisting that it would be a mistake for a home state to craft criteria designating weak governance zones purely for the purpose of administering the proposed regulatory regime, the authors do not wed themselves to one of the many "credible, independent indices of governance that incorporate human rights indicators" and that could serve to identify such governance zones.²⁵

The focus on weak governance zones is strategically important, designed to draw attention to contexts in which the worst cases of abuse are most likely to

19. *Ibid* at 260.

20. *Ibid* at 271.

21. *Ibid* at 278.

22. *Ibid* at 291.

23. *Ibid* at 292.

24. *Ibid* at 292.

25. *Ibid* at 293.

arise. It is also under-inclusive, however, particularly in the extractive industries context, where community or company conflicts are prevalent in many countries that would probably not meet any definition of weak governance. The dispute between Talisman and the Peruvian Achuar people, discussed several times in the text, is one example.²⁶ Notably, the authors insist that their proposed CSR Agency should “play an active and direct role in evaluating the content and quality of consultation”²⁷ that a company has conducted with local communities (whether indigenous or not) as part of a mandatory pre-investment human rights impact assessment.²⁸ They acknowledge that this would be logistically very challenging to implement and must be undertaken delicately. It is therefore intriguing that the authors chose to limit the scope of their proposed regime to weak governance zones rather than including all operations by extractive companies operating “internationally” or “abroad,” as has been the Canadian government’s choice of language in its 2009 and recently updated 2014 CSR Strategy for the Canadian extractive industry.²⁹

Clearly, evaluating the quality of consultation processes with indigenous communities is a sensitive topic in the domestic Canadian context. A curious omission, then, is the lack of reference to or assessment of the sustainable mining policy framework prepared by the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, in which Canada plays a lead role and

26. *Ibid* at 72-75, 325.

27. *Ibid* at 323.

28. *Ibid* at 320-23. The authors draw upon my work here, noting that the “quality and effectiveness of participatory processes are central to the legitimacy of home state regulation itself” (*ibid* at 323). See Sara L Seck, “Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?” (2008) 46:3 *Osgoode Hall LJ* 565 at 603; Sara L Seck, “Home State Responsibility and Local Communities: The Case of Global Mining” (2008) 11:1 *Yale Human Rts & Dev LJ* 177.

29. Global Affairs Canada, “Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector” (March 2009), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng>; Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad* (14 November 2014), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf>.

which refers to the importance of consultation with indigenous peoples.³⁰ Would implementation of this framework suggest that a state is not a weak governance zone? Or is the framework itself weak? Another curiosity is the authors' explicit attempt to refute claims that China's growing role in extractive operations in Africa would create a competitive disadvantage for companies operating from a human rights-friendly state that chose to implement the proposed regime.³¹ The authors commendably grapple with this claim, suggesting that "Chinese companies cannot ignore the business case for CSR."³² This has proven true with the release in October 2014 of CSR guidelines for outbound investment by Chinese mining companies.³³ Yet Simons and Macklin do not take a stand on whether or not China itself would qualify as a weak governance zone nor on the implications of this question for Canadian mining companies proposing to operate in Tibet, for example.

The Governance Gap is an important contribution to ongoing debates over the role of home states in regulating transnational extractive corporations so as to prevent and remedy violations of human rights. While many unanswered questions remain, the authors are to be commended for covering such a wealth of material, for raising so many of the right questions, and for providing such careful and thought-provoking answers.

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30. Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, "A Mining Policy Framework: Mining and Sustainable Development," revised ed (October 2013), online: <www.globaldialogue.info/MPFOct2013.pdf>. As of 2013, there are 47 member states of the Intergovernmental Forum, including several BRIC countries (Brazil, Russia, India, and South Africa, but not China), as well as many economically poor countries (such as Sierra Leone, Bolivia, and Papua New Guinea). See also Sara L Seck, "Transnational Corporations and Extractive Industries" in Shawkat Alam et al, eds, *International Environmental Law and the Global South* (New York: Cambridge University Press, 2015) 380.
 31. Simons & Macklin, *supra* note 1 at 351-55.
 32. *Ibid* at 354.
 33. China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, "Guidelines for Social Responsibility in Outbound Mining Investment," online: Emerging Market Multinationals Network for Sustainability <www.emm-network.org/wp-content/uploads/2015/03/Guidelines_for_Social_Responsibility_in_Outbound_Mining_Investments.pdf>.