

# Book Review: *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*

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*Penelope Simons and Audrey Macklin's book, The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage is a valuable contribution for researchers on the extraterritorial activities of the extractive sector, and in particular its impacts on the environment and human rights. The authors question what the development of domestic and international regulation would look like if governments took seriously the duty to protect human rights from the activities of their extractive sector corporations. The proposal outlined in the book will be of interest*

*to academics, politicians, and public servants working towards establishing a governing framework aligned with the much discussed and debated United Nations Guiding Principles on Business and Human Rights. However, certain aspects of the authors' proposal are impracticable and not the best alternative for addressing the problem of extraterritorial wrongdoing by the extractive sector. A more comprehensive analysis of private law strategies would have benefited the readers in communicating a thorough account of this fundamentally important issue of legal regulation.*

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*L'ouvrage de Penelope Simons et d'Audrey Macklin, The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage, est une contribution importante à la littérature sur les activités extraterritoriales de l'industrie de l'extraction et, plus particulièrement, sur les conséquences de ces activités sur l'environnement et les droits de la personne. Les auteures tentent de déterminer à quoi ressemblerait le développement de la réglementation domestique et internationale si les gouvernements prenaient au sérieux leur devoir de protéger les droits de la personne des activités de l'industrie de l'extraction. Le propos*

*de cet ouvrage sera d'intérêt aux universitaires, aux politiciens et aux fonctionnaires souhaitant instaurer un cadre de gouvernance en conformité avec les Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme. Par contre, certains aspects du propos des auteures sont irréalistes et ne constituent pas la meilleure solution pour régler le problème de la délinquance extraterritoriale de l'industrie de l'extraction. Une analyse plus exhaustive des stratégies de droit privé aurait offert aux lecteurs un portrait plus complet de cet important problème de réglementation.*

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Titre francophone : Recension : *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*

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## 1. INTRODUCTION

The activities of multinational corporations have received increased attention in both litigation and scholarly debate over the past decade. In particular, a salient topic has been the human rights track record of extractive sector corporations in overseas operations. Among the more comprehensive works on the subject, Penelope Simons' and Audrey Macklin's, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*,<sup>1</sup> is a timely and thorough review of this complicated issue. It explores what the authors characterize as a "governance gap" with respect to extractive sector corporations operating in zones of weak governance. This gap is due, according to the authors, to the failure of corporate self-regulation, host state protection,<sup>2</sup> and international mechanisms to curb wrongdoing by extractive sector corporations in the foreign communities in which they operate. The book questions what the development of home state regulation would look like if governments took seriously the duty to protect human rights.

As part of their analysis, the authors incorporate the role of markets and non-state actors in shaping legal processes. They propose various forms of regulation through private and public law enforcement mechanisms. It is a coherent proposal, however, there are concerns over the

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<sup>1</sup> Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge, Toronto: 2014). Penelope Simons is Associate Professor of Law at the University of Ottawa. Audrey Macklin is Professor of Law at the University of Toronto.

<sup>2</sup> A "home state" refers to the government of a country in which a multinational extractive sector corporation is domiciled, while a "host state" refers to the jurisdiction in which the extractive corporation operates.

feasibility of certain aspects, which detract from its overall quality. For instance, as explored further below, the authors do not place confidence in private law mechanisms such as those found in corporate law or civil litigation as a means to promote human rights. Using private law tools as a method of regulating the social and environmental performance of the extractive sector is thus left largely unexplored in the book.

Prior to this book, a reader seeking insight on the regulation of the extractive sector overseas conduct would consult a myriad of legal sources, and familiarize themselves with different export rules, corporate forms, market incentives, and common law doctrines. Compiling many of these sources for the book was an extensive project, however, Simons and Macklin managed to synthesize numerous topics with skillful precision. Their book is one of the first substantial overviews of the significant legal issues that arise on account of the adverse effects caused by extractive sector corporations in foreign operations. Its chief contribution to the ongoing scholarly debate is articulating a wide-ranging proposal, using a variety of legal tools, to compel extractive sector corporations to respect global human rights.

This paper aims to provide the reader an analytical and orderly discussion of the book and proceeds on a chapter-by-chapter basis. Chapter five is given particular attention as it consists of the authors' proposal for regulating the overseas conduct of the extractive sector. My critique of the proposal focuses on several features including the application of the nationality and territorial principles, the development of a home state corporate social responsibility (CSR) agency, the feasibility of labeling countries as "weak governance zones", and assumptions embedded in the proposal concerning whether civil society actors and extractive sector corporations will be receptive to a home state CSR agency.

## 2. STRUCTURE AND ANALYSIS

In chapter two, the authors describe their personal experiences as members of the 1999 Canadian Assessment Mission to Sudan (the "Harker Mission") involving Talisman Energy Inc., a Canadian extractive sector corporation that formerly operated in South Sudan with a consortium of multinational oil companies. The chapter gives the reader a journalistic account of Sudan's second civil war and Talisman's tenure in the country that allegedly resulted in the company aiding the Sudanese government in genocide, war crimes, and crimes against humanity.

In 2001, the Presbyterian Church of Sudan, as well as a number of Sudanese individuals, filed suit in US federal court against Talisman.<sup>3</sup> The case was eventually dismissed on the grounds that the plaintiffs failed to establish purposeful complicity by Talisman in the human rights abuses.<sup>4</sup> This case is a noteworthy example of the inability of home state judicial systems and international law to regulate the conduct of multinational corporations. Chapter two

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<sup>3</sup> They alleged that Talisman acted with complicity in the Sudanese Government's violations of its citizens' human rights. Given that Talisman is incorporated outside of the US, they initially argued that the court did not have personal jurisdiction over the claim. The court found that Talisman had numerous links to New York including a listing on the New York Stock Exchange, and at least two US based Talisman subsidiaries were found to have "significant operations in New York." See *Presbyterian Church of Sudan v Talisman Energy Inc.*, 244 F Supp (2d) 289 at 330 (2003).

<sup>4</sup> The second circuit held that to determine liability under the US *Alien Tort Statute* the plaintiffs must show that the defendant "purposefully" aided and abetted a violation of international law. See *ibid* at 259.

is particularly fascinating due to the authors' first-hand experiences, and sets the stage for discussing why a home state is required to deal with issues related to the interaction between extractive sector corporations and human rights. Chapter three covers a multitude of themes, including corporate self-regulation and international mechanisms for regulating the extractive sector. The overview explores international mechanisms such as the United Nations (UN) Norms on the Responsibilities of Transnational Corporations (UN Norms),<sup>5</sup> UN Guiding Principles on Business and Human Rights (UN Guiding Principles),<sup>6</sup> Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,<sup>7</sup> UN Global Compact,<sup>8</sup> Voluntary Principles on Security and Human Rights,<sup>9</sup> International Finance Corporation's Performance Standards,<sup>10</sup> Equator Principles,<sup>11</sup> Global Reporting Initiative,<sup>12</sup> and Extractive Industries Transparency Initiative.<sup>13</sup> Of these instruments, only the Extractive Industries Transparency Initiative and the Voluntary Principles on Security and Human Rights are specifically designed to target the unique concerns of the extractive sector. These concerns include the hazards of arming local security, police, and military to protect mining assets and voluntary disclosure of payments made to foreign governments. The other instruments listed are of general application and concern human rights associated with foreign direct investment in developing countries.

The review of international mechanisms begins with the UN Norms on the Responsibilities of Transnational Corporations, which was ultimately an unsuccessful attempt to regulate multinational conduct. The UN Norms would have placed the same human rights responsibilities on multinational businesses that states have accepted under treaties. As such, the enforcement of the UN Norms would have transferred to corporations the responsibilities

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<sup>5</sup> UNESCO, Commission on Human Rights, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (August 2003) online: <umn.edu/humanrts/business/norms-Aug2003.html>.

<sup>6</sup> UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Respect, Protect and Remedy" Framework* (New York: UN Human Rights High Commission, 2011) online: <ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\_EN.pdf>.

<sup>7</sup> The OECD Guidelines are aimed at governing multinational corporate conduct abroad and provide "voluntary principles and standards for responsible business conduct consistent with applicable laws." See OECD, *Guidelines For Multinational Corporations* (OECD, 2011) online: <oe.cd.org/corporate/mne/48004323.pdf> at 13.

<sup>8</sup> "UN Global Compact", online: UN Global Compact <unglobalcompact.org>.

<sup>9</sup> The Voluntary Principles were the result of an eleven-month dialogue between the UK Foreign and Commonwealth Office, the US Department of State, major corporations in the extractive industry, and representatives of civil society. For a list of the contents in the Voluntary Principles, see "What Are The Voluntary Principles?" (2015) online: Foley Hoag LLP <voluntaryprinciples.org/what-are-the-voluntary-principles>.

<sup>10</sup> International Finance Corporation, *IFC Performance Standards on Environmental and Social Sustainability* (Washington, DC: IFC, 2012) online: <ifc.org/wps/wcm/connect/c8f524004a73daeca09afd998895a12/IFC\_Performance\_Standards.pdf?MOD=AJPERES>.

<sup>11</sup> See "The Equator Principles III" (2013) online: Equator Principles <equator-principles.com/index.php/ep3>.

<sup>12</sup> See "About GRI" (2011) online: Global Report Initiatives <globalreporting.org/Pages/default.aspx>.

<sup>13</sup> The EITI International Secretariat, *The EITI Standard* (Oslo: EITI, 2013) online: <eiti.org/files/English\_EITI%20STANDARD\_11July\_0.pdf>.

of the state. The UN Norms faced significant opposition by the business community, which argued that any shift towards mandatory compliance would violate international law. For this reason, among others, the UN Norms were effectively abandoned, but they are still considered an important step towards an international regime to govern corporate responsibility and set the stage for the UN Guiding Principles.

The UN Guiding Principles are the result of the work of John Ruggie, who was given the mandate in 2005, from what is now the Human Rights Council, to explore the impacts of business on human rights. Ruggie was charged with identifying international human rights standards that apply to corporate conduct, as opposed to states and individuals, and described what responsibilities are placed on states and multinational corporations in safeguarding human rights in international law. In 2008, Ruggie developed the “Protect, Respect, Remedy” Framework, which involves three pillars: 1) the state duty to protect human rights; 2) the businesses’ responsibility to respect human rights; and 3) access to remedy for victims of business-related abuses.<sup>14</sup> Ruggie’s team was given a further mandate to develop the framework, which cumulated in the UN Guiding Principles. The Human Rights Council unanimously endorsed these principles in 2011, making it the first corporate human rights responsibility initiative to be endorsed by the UN.<sup>15</sup> The UN Guiding Principles have not been opposed by the private sector in the same way as the UN Norms.<sup>16</sup>

A central aim of the authors’ proposal is to operationalize the UN Guiding Principles into a coherent legal process for individual states. Their attention is on “legal” processes, as opposed to the UN Guiding Principles that are “mainly focussed on policy and not law.”<sup>17</sup> For instance, the UN Guiding Principles do not clearly elaborate on whether it is appropriate for a home state to exercise extraterritorial jurisdiction.<sup>18</sup> Quite rightly, the authors point out the prevailing limitations of the UN Guiding Principles, including their failure to recommend new legal requirements on business and individual states.

Beyond the UN Guiding Principles, various other international instruments attempt to generate “soft norms and private self-regulation” in promoting human rights accountability in the extractive sector.<sup>19</sup> However, as the authors illustrate, other international mechanisms such as the OECD Guidelines for Multinational Enterprises, UN Global Compact, Voluntary Principles on Security and Human Rights, Global Reporting Initiative, and Extractive Industries Transparency Initiative avoid the mandatory provisions that characterized the UN Norms. In other words, these international mechanisms are not equipped to deal effectively with wrongdoing by extractive sector corporations operating in foreign countries. Collectively, they do not create mandatory rules or provide sanctions for failure to abide by their measures. The authors do not view these initiatives as a viable solution without the addition of home

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<sup>14</sup> For a comprehensive overview of the Protect, Respect, Remedy Framework, see John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: WW Norton & Company, 2013) at 81-127.

<sup>15</sup> *Ibid* at xx.

<sup>16</sup> *Ibid* at xvii.

<sup>17</sup> Simons & Macklin, *supra* note 1 at 277.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid* at 11.

state regulations. The pervasive voluntariness of these international instruments is only one of their several shortcomings, which also include vagueness, ineffective compliance mechanisms, and a lack of focus on human rights. These shortcomings are the main reason why the authors propose to develop home state regulations to govern the extractive sector.

After criticizing many of the current international mechanisms, the authors build on the analysis introduced in chapter one concerning “new governance” as being a middle ground between “hard” and “soft” law.<sup>20</sup> Some commentators have suggested that by following best practices through self-regulation, corporations are creating a form of “new governance.”<sup>21</sup> The authors set out to challenge certain aspects of this viewpoint by delving into the debate on voluntary and mandatory regulation. They draw attention to the work of Larry Catá Backer, who uses a legal pluralism theory to argue that the international mechanisms developed through the UN and OECD, among others, are collectively creating a soft law approach that corporations are compelled to follow. According to the authors’ characterization of Backer’s argument, the systems that emerge from the international mechanisms create a “polycentric global law under which corporate actors may be subject to the domestic laws of the states in which they operate and to soft law standards of intergovernmental organizations like the UN and OECD, as well as to their ‘own internal governance systems.’”<sup>22</sup>

As a supporter of soft law approaches, Backer believes that international mechanisms can play a decisive role in regulating the human rights track record of multinational corporations. For instance, two UK OECD National Contact Point cases are cited by Backer to demonstrate his view that soft law mechanisms imposed by intergovernmental organizations such as the OECD and UN are becoming “as binding as hard law.”<sup>23</sup> Though, as the authors indicate, in these particular UK OECD National Contact Point cases, the companies involved did not adopt corrective changes in corporate behavior or act in a way that suggested the OECD Guidelines for Multinational Enterprises were binding.<sup>24</sup> The authors are not persuaded by Backer’s assertions. They argue that the soft law approaches cannot meaningfully reduce adverse human rights impacts by multinational corporations without a mandatory component of home state regulation.

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<sup>20</sup> *Ibid* at 85. Soft law is often described as voluntary, market-based, whereas hard law is often referred to as “command-and-control” and is based on legally binding obligations. See Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto, University of Toronto Press: 2009) at 32–35. For a distinction between the hard and soft law approaches, see Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, ON: LexisNexis Canada, 2009) at 153. As a middle ground between hard and soft law, some commentators have called for “responsive regulation”, in which policy makers should seek to promote private market governance. See Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) at 4.

<sup>21</sup> One commentator referred to this notion as a new “customary global law” (Joe W Pitts III, “Business, Human Rights, and the Environment: The Role of the Lawyer in CSR & Ethical Globalization” (2008) 26:2 *BJIL* 479 at 488).

<sup>22</sup> Simons & Macklin, *supra* note 1 at 90, citing Larry Catá Backer, “The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity” (2012) 17 *Tilburg L Rev* 177 at 195.

<sup>23</sup> Simons & Macklin, *supra* note 1 at 90–91.

<sup>24</sup> *Ibid* at 92.



There are other theories that are not discussed in the chapter that support Backer's argument. For example, John Coffee used the term "bonding hypothesis" to describe when corporations raise governance standards by agreeing to follow robust compliance rules as a condition of selling their stock on public markets.<sup>25</sup> Even John Ruggie, the father of the UN Guiding Principles, envisions the development of a "slow and gradual accretion of customary international law standards."<sup>26</sup> Going one step further, Ralph Steinhardt believes that corporate self-regulation represents the emergence of a new *lex mercatoria* that expands beyond purely commercial concerns to incorporate hard law with voluntary initiatives.<sup>27</sup> Today, this concept is supported by the growth of ubiquitous corporate compliance programs.<sup>28</sup> The whistleblower provisions of the *Dodd-Frank Act*,<sup>29</sup> the US Federal Criminal Sentencing Guidelines, and the New York Stock Exchange listing requirements further support the rising of corporate governance standards on the international level.<sup>30</sup> The addition of these theories in the literature review of Simons and Macklin's book would have strengthened the authors' criticism of new governance models. Despite these omissions, the analysis in this chapter is strongly supported.

In chapter four, the authors cast a wide net and are very meticulous in outlining the various due diligence measures provided by the US Overseas Private Investment Corporation, Export Development Canada, and UK Export Finance. Additionally, there is a comprehensive overview of prescriptive and facilitative mechanisms such as import-export controls, criminal law involving corporations, pension fund/corporate disclosure laws, shareholder activism, and whistleblowing provisions. The securities law disclosure and whistleblowing sections will be of particular benefit to practitioners interested in the procedural requirements surrounding conflict minerals and human rights reporting standards. This is followed by a rather cursory review of civil litigation against the extractive sector in various common law judicial systems.

The brief attention paid to civil litigation is likely intentional, as a major theme in the book appears to be a focus on public law in contrast to private law mechanisms for holding extractive sector corporations to account. As noted in the forward of the book by former Supreme Court

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<sup>25</sup> John C Coffee Jr, "The Future as History: The Prospects of Global Convergence in Corporate Governance and Its Implications" (1999) 93:3 NW U L Rev 641 at 651–52, 692, see also John C Coffee Jr, "Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance" (2002) 102:7 Colum L Rev 1757 at 1780.

<sup>26</sup> Ruggie, *supra* note 14 at xxii.

<sup>27</sup> See Ralph G Steinhardt, "Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 177. The *lex mercatoria* was a form of ancient merchant law that filled the gaps of Roman civil law. It included medieval cities known as the Hanseatic League of trading guilds from the 13th to 17th century. They relied upon best practices of their time to determine trustworthiness and business reputation (Kerr, Janda & Pitts, *supra* note 20 at 329–30, 546).

<sup>28</sup> As an example, there are indications that directors' fiduciary duties require the corporation to have adequate compliance programs. See e.g. Chancellor Allen's comments in *Re Caremark International Inc Derivative Litigation*, 698 A (2d) 959 (Del Ch 1996) at paras 22–27. This is also supported by *Sarbanes-Oxley Act* 15 USC 7201 § 406 (2002) (disclosure on whether a corporation has a Code of Conduct).

<sup>29</sup> US, Bill HR 4173, *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 111th Cong, 2010, §§ 748, 922–924 [*Dodd-Frank Act*].

<sup>30</sup> See Ralph G Steinhardt, "Soft Law, Hard Markets: Competitive Self-Interest and the Emergence of Human Rights Responsibilities for Multinational Corporations" (2008) 33:3 Brook J Intl L 933.



Justice Ian Binnie, Canadian courts have an “undistinguished record” in dealing with global human rights concerns attributed to the Canadian extractive sector.<sup>31</sup> However, Canadian courts have largely not had a chance to address these issues and various new cases are giving them that opportunity.<sup>32</sup> I suggest that there are promising recent developments in Canadian case law that demonstrate a willingness to adjudicate extractive sector corporations for their overseas conduct. The prospect of Canadian courts adjudicating over the foreign activities of the extractive sector suggests a viable alternative to the public law strategies proposed by the authors. For instance, in the *Choc v Hudbay* trilogy, three related actions against Hudbay Minerals Inc. have alleged human rights abuses in Guatemala, and have been allowed to proceed to trial by the Ontario Superior Court of Justice.<sup>33</sup> The allegations include rape of indigenous women and the murder of a community leader who advocated against Hudbay’s mining project. Both crimes are alleged to have occurred in the course of an ongoing dispute over land rights at the site of a mine owned by Hudbay’s Guatemalan subsidiary. Hudbay brought three pre-trial motions to strike the actions but curiously withdrew their motion to dismiss based on *forum non conveniens*, a procedural doctrine rooted in the common law system. The doctrine permits a court to dismiss a claim if an alternative forum is more appropriate to consider the matter. It has been reported that Hudbay potentially withdrew this portion of their motion because they believed the position was unwinnable.<sup>34</sup>

In finding that the Hudbay case may proceed to trial, the court ruled that a Canadian parent corporation may be liable in failing to adequately supervise a subsidiary operating in another country. This was the first time that a claim against a mining corporation over human rights abuses abroad has been permitted to go to trial in Canada.<sup>35</sup>

These pre-trial rulings are not a substantive precedent, although similar cases are emerging.<sup>36</sup> For example, in late 2014 three Eritreans filed a lawsuit against Nevsun Resources

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<sup>31</sup> Simons & Macklin, *supra* note 1 at xi.

<sup>32</sup> There are a handful of cases in Canada concerning extraterritorial human rights abuses by the extractive sector. In *Recherches Internationales Québec v Cambior Inc*, [1998] QJ No 2554, JE 98-1905, the court dismissed a class action against a Quebec corporation initiated by victims of an environmental spill from a gold mine in Guyana for *forum non conveniens* since the parties had a closer connection to Guyana. In *Anvil Mining Ltd c Association canadienne contre l’impunité*, 2012 QCCA 11, [2012] JQ no 3687, leave to appeal to SCC refused, 2012 SCC 66221, a Canadian a mining corporation was accused of supporting the army of the Democratic Republic of the Congo that raped, murdered, and brutalized citizens. The Quebec Court of Appeal overturned the trial court’s decision based on the forum of necessity. In *Piedra v Copper Mesa Mining Corporation*, 2011 ONCA 191, 332 DLR (4th) 118 the Ontario Court of Appeal dismissed a claim launched by Ecuadorian peasants, who alleged they had been assaulted by security forces hired on behalf of a Canadian mining company, for lack of reasonable cause of action.

<sup>33</sup> *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414, 116 OR (3d) 674.

<sup>34</sup> See Gwynne Skinner, Robert McCorquodale & Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (December 2013) at 37, online: <accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar.pdf>.

<sup>35</sup> Lexpert Magazine, “Ontario Superior Court Decision in Choc v. Hudbay Minerals paves way for defining responsibility of Canadian companies with foreign operations” (December 2013) online: Lexpert: Business of Law <lexpert.ca/article/ontario-superior-court-decision-in-choc-v-hudbay-minerals-paves-way-for-defining-responsibility-of-canadian-companies-with-foreign-operations>.

<sup>36</sup> At least one commentator has suggested that the decisions are simply a precedent that these claims can survive a dispositive motion to strike. See e.g. Peter Koven, “HudBay case raises litigation risk

in British Columbia, where the corporation is located. Nevsun operates the Bisha gold, copper and zinc mine in western Eritrea. The plaintiffs allege that Nevsun was complicit in the use of forced labour by Nevsun's contractor in Eritrea, which was owned by the country's ruling party. Use of the particular contractor was required by the Eritrean government as a condition of the license to operate the mine. This lawsuit is the first in Canada where claims are based directly on violations of international law.<sup>37</sup>

Some commentators are suggesting that Canadian courts will see more cases alleging corporate human rights abuses overseas.<sup>38</sup> It should be noted that unlike the United States and United Kingdom, Australia and Canada's highest courts have not considered a direct case involving the extraterritorial human rights track record of an extractive sector corporation.<sup>39</sup> However, Canada's highest court has permitted foreign claimants to bring an action for recognition and enforcement of an \$8-billion Ecuadorian judgment against the energy giant Chevron.<sup>40</sup> The judgment is a result of a trial in a class action lawsuit claiming the company caused extensive destruction to the Amazon rainforest, which harmed the traditional lifestyles of local indigenous tribes and allegedly contributed to an increase in cancer and other various health issues. In its decision, the Supreme Court confined itself to the procedural question of whether Canadian courts had jurisdiction over Chevron for the purpose of enforcing a foreign judgment. The Court did not address the merits of the claimant's action or assess the Ecuadorian judgment to determine whether it can be enforced in Canada.<sup>41</sup> These questions have been left to further litigation at the trial level. The Ecuadorian plaintiffs have not attempted to have the judgment enforced in the United States, however Chevron brought a case to invalidate the Ecuadorian judgment. A critique of this litigation is included in Simons and Macklin's book. In sum, a US federal court agreed with Chevron by holding that the judgment was procured by deceptive practices, and thus was unenforceable.<sup>42</sup> When addressing this case, the authors

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for Canadian resource companies" *Financial Post* (30 October 2013) online: <business.financialpost.com/2013/10/30/hudbay-case-raises-class-action-risk-for-canadian-resource-companies> ("It's not a ruling that tells us anything definitive about how the law is going to shake out when the case goes to trial").

<sup>37</sup> See Jeff Gray, "Nevsun Resources faces lawsuit over 'forced labour' in Eritrea" *The Globe and Mail* (20 November 2014) online: <theglobeandmail.com/report-on-business/qatar-backed-qkr-close-to-1-billion-bid-for-nevsun/article21670095/>. See also Scott Fairley & Anastasija Sumakova, "Tort Liability at Home for Alleged Wrongs Abroad: The Common Law Goes Extraterritorial?" (November 2014) at 2, online: WeirFoulds LLP <weirfoulds.com/files/14464\_Anti-Corruption\_Nov2014\_Newsletter.pdf> (several Guatemalans have sued Tahoe Resources for injuries suffered when Tahoe security personnel allegedly fired weapons at them in 2014).

<sup>38</sup> See Mark Anderson, "Eritreans sue Canadian mining firm Nevsun over human rights abuses" *The Guardian* (9 December 2014) online: <theguardian.com/global-development/2014/dec/09/eritrea-canadian-mining-nevsun-human-rights-abuses> (Renu Mandhane, director of the University of Toronto's International Human Rights Program thinks that "Canadian courts are going to see more and more of these types of cases").

<sup>39</sup> Note that this assertion is based on my own research and assessment of case law.

<sup>40</sup> *Chevron Corp v Yaiguaje*, 2015 SCC 42, [2015] SCJ No 42.

<sup>41</sup> *Ibid.*

<sup>42</sup> In his comprehensive and lengthy opinion, Justice Kaplan described the case as "extraordinary" and outlined his concerns with the judgment, including judicial incompetence, and that the judgment was

mention that Chevron accused some of the plaintiffs and their lawyers of fraudulent activity.<sup>43</sup> Subsequent to the publication of the book, a US federal court substantiated some of these allegations.<sup>44</sup>

The Chevron case is problematic for those concerned with human rights. However, I disagree with the authors' suggestion that the primary obstacle is the "deep pockets" of multinational corporations, which allows them to engage in tactics that "undermine civil proceedings."<sup>45</sup> This analysis is missing the more troubling aspect. For instance, the case succinctly demonstrates the two-pronged approach of US federal courts in using the common law doctrine of *forum non conveniens* and the enforcement of foreign judgments. In this case, a US federal court declined to consider the matter on *forum non conveniens* grounds and ruled that the Ecuadorian judicial system was the preferable forum. Ten years later a US federal court firmly denied the legitimacy of an Ecuadorian legal decision in this matter and prevented the plaintiffs from enforcing the judgment in the United States.

This case reveals the irony of a court permitting a foreign legal system to be the appropriate forum for the purposes of *forum non conveniens*, and yet when it comes to the enforcement of judgments, applying a different standard that invalidates the foreign judicial process. This point is somewhat lost in the book, which focused on the ability of multinational corporations to manipulate judicial processes and not the deficiencies in the US federal courts' application of *forum non conveniens*. The latter concern is a factor that leads to an inability for victims to seek redress against a foreign corporation, whether the corporation's legal defense is particularly well funded or not. Chapter four concludes with a review of failed legislative initiatives in

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obtained through bribery and coercion. See *Chevron Corp v Donziger*, 974 F Supp (2d) 362 at 384, 556–559 (2014) [*Donziger*].

<sup>43</sup> Simons & Macklin, *supra* note 1 at 257.

<sup>44</sup> *Donziger*, *supra* note 42 at 556–559.

<sup>45</sup> Simons & Macklin, *supra* note 1 at 256. In his article "American Jurisprudence through English Eyes," HLA Hart quotes from Henry James, *The American Scenes*: "the seer of great cities is liable to easy error, I know, when he finds this, that or the other caught glimpse the supremely significant one..." This is a warning against hasty generalization and oversimplification." [Citation omitted].

Australia,<sup>46</sup> the United Kingdom,<sup>47</sup> the United States,<sup>48</sup> and Canada<sup>49</sup> that were aimed at regulating corporations operating in host state countries and benefiting from the financial support of home state governments. Despite these failed efforts to govern the extraterritorial conduct of corporations, the authors conclude that home state regulation is possible, and they transition into the final chapter that sets out a proposal for home state regulation of the extractive sector.<sup>50</sup>

A general comment should be made before exploring the authors' proposal, which is that the lack of attention paid to private law as a source of possible international and domestic regulation is rather surprising. The overall analysis would have benefited from exploring solutions arising out of corporate law, specifically the fiduciary duties of corporate directors. For instance, there are claims brought forward in the book that suggest that the exclusive purpose of a corporation is to maximize shareholder wealth.<sup>51</sup> There is more of a role for corporate law to confront the problem of multinational human rights abuses than what is indicated by this viewpoint. Today, corporate directors have fiduciary obligations beyond increasing profits for shareholders in several legal systems, including the United Kingdom and Canada. In the United Kingdom, corporate directors are required to "promote the success of the company for the benefit of its members as a whole" by taking into account the long-term considerations of, among others, employees, suppliers, customers, the community and the environment.<sup>52</sup> In 2004, the Supreme Court of Canada rejected the argument that directors owe fiduciary duties to any particular corporate constituent. Instead, directors should seek to create "a 'better'

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<sup>46</sup> The Australian Senate introduced legislation in 2001 that would have imposed standards on the conduct of Australian extractive sector corporations that undertake business activities in other countries. In 2001, the government determined the bill was "both unnecessary and unworkable." Mark Schwartz, "Legally Mandated Self-Regulation: The Potential of Sentencing Guidelines." in Wesley Cragg, ed. *Ethics Codes, Corporations, and the Challenge of Globalization*, (Cheltenham: Edward Elgar Publishing, 2005) at 294. To view the bill itself see *Corporate Code of Conduct Bill 2000* (2002) online: Australian Government <comlaw.gov.au/Details//C2004B01333>.

<sup>47</sup> In 2003, a bill was developed in the UK that promoted corporate responsibility, however the bill was not approved. See Jonathan Lux, Sune Skadegaard Thorsen & Annemarie Meisling, "The European Initiatives" in Ramon Mullerat, ed, *Corporate Social Responsibility: The Corporate Governance of the 21st Century*, 2nd ed (The Hague: Kluwer Law International, 2011) 325 at 346.

<sup>48</sup> A 2006 proposed law in the United States would have forced companies operating overseas to implement a specified Corporate Code of Conduct regarding a safe and healthy workplace and internationally recognized environmental, human rights, worker rights and core labor standards. The proposed law did not pass a referral to a committee of Congress (US, Bill HR 5377, *Corporate Code of Conduct Act*, 109th Cong, 2006).

<sup>49</sup> Bill C-300 was introduced in Canadian Parliament in 2009. Bill-300 would have made Canadian extractive sector corporations subject to withdrawal of funding if its environmental and human rights performance abroad violated international standards. Bill C-300 (Canada, Bill C-300, *Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act*, 2nd Sess, 40th Parl, 2009). For a thorough analysis of the events leading up to the failing of Bill C-300 see Richard Janda, "Note: Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries [Bill C-300]: Anatomy of a Failed Initiative" (2010) 6 JSDLP 97.

<sup>50</sup> Simons & Macklin, *supra* note 1 at 270–71.

<sup>51</sup> *Ibid* at 18, 87–88.

<sup>52</sup> *Companies Act 2006* (UK), c 46, s 172(1).

corporation, and not to favour the interest of any one group of stakeholders.”<sup>53</sup> Four years later, the Supreme Court heightened this standard in *BCE Inc. v 1976 Debentureholders* by linking directors’ fiduciary duties with “fairness” and good corporate citizenship.<sup>54</sup> In this light, directors are invited to consider adverse impacts on foreign communities in which they operate as part of their fiduciary duties to the corporation. Thus, corporate law can provide solutions to the issue of multinational human rights abuses, even though this angle has not been explored in the book.

Additionally, it appears that the authors are skeptical of private law solutions and prefer a public law approach. Generally speaking, most of the substantive focus of the book indicates a strong preference for public law accountability, including international and domestic criminal law. One example using the extremes of public law, is criminal liability. For example, consider the International Criminal Court that deliberately negates the possibility of putting corporations and other business entities on trial.<sup>55</sup> Practically speaking, even if jurisdiction is extended to corporations, the chief limitation of the International Criminal Court as a means of ensuring corporate accountability is the lack of US participation, which likely exempts all US corporations.<sup>56</sup> Further, the question of whether a non-living corporate entity can be the subject of criminal proceedings has been the subject of considerable debate. The principle that juridical persons cannot be responsible for international criminal conduct goes back to at least the Nuremberg trials. The rationale was explained succinctly in *United States v Goering*, where the adjudicators wrote that crimes of international law “are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>57</sup> Thus, public international law, and, in particular international criminal law, is not well suited to deal with the concerns of extractive sector overseas conduct.

While some cases of corporate abuse may clearly warrant criminal sanctions and condemnation, the private law causes of action have achieved noteworthy results. For instance, at least two prominent cases against extractive sector corporations have been permitted to proceed in common law courts and resulted in significant settlements. The Australian case of

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<sup>53</sup> *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 28, [2004] 3 SCR 461 at para 47. In previous case law on this point, the court said directors should attempt to make the company a “better corporation.” See *820099 Ontario Inc v Harold E Ballard Ltd*, [1991] OJ No 266, 25 ACWS (3d) 853 at para 171, aff’d [1991] OJ No 1082, 27 ACWS (3d) 1160

<sup>54</sup> *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at paras 71, 81, [2008] 3 SCR 560 [BCE].

<sup>55</sup> See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544 at art 25 (entered into force 1 July 2002). The Rome Statute is a 1998 Treaty that established the International Criminal Court.

<sup>56</sup> Barnali Choudhury, “Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses” (2005) 26 Nw J Intl L & Bus 43 at 57.

<sup>57</sup> *United States v Goering*, 6 FRD 69, Final Judgment (1946) at 110 (International Military Tribunal at Nuremberg) online: <uniset.ca/other/cs4/6FRD69.html>. See also M W Janis, “Individuals as Subjects of International Law” (1984) 17:61 Cornell Intl LJ for a discussion of individual responsibility under international law.

*Dagi v BHP Billiton*<sup>58</sup> settled for an estimated US\$28.6-million while *Lubbe v Cape Plc*<sup>59</sup> in the UK settled for a total of £21-million.<sup>60</sup> As the authors point out, civil liability can only be applied retroactively to human rights abuses and is not overtly preventative in the way of a public law tool, which may deter corporate wrongdoing prior to it being inflicted.<sup>61</sup> While I agree with this point, overall a comprehensive review of private law means for achieving corporate accountability would benefit the reader and likely the authors' proposal to correct the governance gap that is outlined in chapter five of the book.

### 3. PROPOSAL TO CORRECT THE "GOVERNANCE GAP"

After setting out the various dimensions of possible international and domestic regulation, the authors begin to carve out several solutions to the governance gap. Their vision is based on the premise that home states should take the duty to protect human rights seriously.<sup>62</sup>

This proposed strategy for home state regulation is a multifaceted and nuanced approach. However, in the following critique I argue that certain aspects of the authors' proposal are unrealistic and not the best alternative for addressing the problem of extraterritorial wrongdoing by the extractive sector.

The various propositions put forward by the authors are divided into two different forms of regulation. Some propositions are mandatory provisions or "sticks" and others propositions are incentives or "carrots" meant to nudge extractive sector corporations along in their human rights performance.<sup>63</sup> The authors propose a combination of incentives based on home state fiscal and political support,<sup>64</sup> the creation of a public CSR agency,<sup>65</sup> market mechanisms, and statutory remedies.<sup>66</sup>

My analysis will address four features of the authors' proposal for regulating the overseas conduct of the extractive sector: 1) the application of the nationality and territorial principles; 2) the development of a home state CSR agency; 3) the feasibility of labeling countries as "weak governance zones"; and 4) assumptions embedded in the proposal concerning whether civil society actors and extractive sector corporations will be receptive to a home state CSR agency.

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<sup>58</sup> *Dagi, Shackles, Ambetu and Maun v Broken Hill Proprietary Co Ltd (No 2)* (1995), [1997] 1 VR 428; see also Owen Webb, "Kiobel, the Alien Tort Statute and the Common Law: Human Rights Litigation in this 'Present, Imperfect World'" 9 *Australian Int'l LJ* 131 at 158, online: <austlii.edu.au/au/journals/AUIntLawJl/2013/9.pdf>.

<sup>59</sup> *Lubbe and others v Cape Plc*, [2000] 1 WLR 1545 (HL(Eng)).

<sup>60</sup> See Alan Dignam & John Lowry, *Company Law*, 7th ed (Oxford: Oxford University Press, 2012) at 45.

<sup>61</sup> Simons & Macklin, *supra* note 1 at 286.

<sup>62</sup> *Ibid* at 273.

<sup>63</sup> *Ibid* at 280, 346.

<sup>64</sup> The first premise of the proposal is that the home state government will not provide public financial, fiscal, or political support to a "corporate citizen for investment projects in weak governance zones where that corporate citizen, directly or indirectly, intentionally or negligently, engages in, or is complicit in, actions that are likely to cause, or have caused, stipulated forms of serious harm" (*ibid* at 278).

<sup>65</sup> *Ibid* at 273, 278.

<sup>66</sup> For a brief overview of the proposal, see *ibid* at 278.



Firstly, the authors' proposal includes a very innovative application of the nationality and territorial principles to regulate parent and subsidiary corporations' overseas conduct. In suggesting that legislation may apply extraterritorially, the authors cite the nationality principle, which deems that a corporation effectively has "citizenship" of the home state.<sup>67</sup> The authors also consider the territorial principle, which suggests that a home state has jurisdiction over activity that substantially takes place within its territory.<sup>68</sup> Whether these concepts would work in all countries is unclear. Take the United States as one example where, under the US Restatement (Third) of the Foreign Relations Law (Restatement), a foreign subsidiary does not acquire the nationality of the parent corporation.<sup>69</sup> The Restatement suggests that US legislation may have extraterritorial application that captures the parent corporation and foreign subsidiaries for very limited purposes.<sup>70</sup> However, the regulation of a foreign subsidiary should not interfere with local activities, such as it would impact labour law, health and safety, or the preservation of the local environment.<sup>71</sup> These "local activities" are directly related to human rights, and are outside the scope of what may be regulated through extraterritorial application of law under the Restatement. As a consequence, the Restatement does not support the notion that US legislation may apply extraterritorially to regulate foreign subsidiary corporations for human rights purposes. This finding conflicts with the authors' proposal concerning the nationality and territorial principles applying in the United States to combat overseas human rights abuse by the extractive sector.

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<sup>67</sup> As stated by the authors: "there is no disputing that nationality is a legally permissible and domestically, regionally, and internationally recognized basis of jurisdiction to regulate conduct that occurs in part or in whole outside the territory of the regulating state" (*ibid* at 300-01). The authors use tax law as an example to demonstrate the use of the citizenship principle. See *De Beers Consolidated Mines Ltd v Howe (Surveyor of taxes)*, [1906] AC 455 (HL (Eng)) at 458.

<sup>68</sup> For a classic review of the territorial principle under American law see e.g. *American Banana Co v United Fruit Co*, 213 US 347 at 357 (1909), in which Justice Holmes held that the territorial principle limited the application of the Sherman Act against a corporate defendant for activities occurring in foreign countries). Conversely, the effects doctrine extends territorial jurisdiction to include activities outside of the home state when that activity has a substantial impact on the home state. It is difficult to apply the effects doctrine to human rights and environmental concerns abroad, as these alleged violations do not generally impact activity in the home state in an obvious or measurable way. For an overview on the application of the effects doctrine see e.g. *United States v Aluminum Co of America*, 148 F (2d) 416 (2d Cir 1945). Taken together, these concepts support limited, if any, extraterritorial jurisdiction by home states for environmental and human rights abuses that occur abroad.

<sup>69</sup> See e.g. *Sumitomo Shoji America Inc v Avagliano*, 457 US 176 (1982).

<sup>70</sup> See *Restatement (Third) of the Foreign Relations Law of the United States* § 414(2)(a) (1987) [*Restatement*] ("under §§ 403 and subject to § 441, it may not be unreasonable for a state to exercise jurisdiction for limited purposes with respect to activities of affiliated foreign entities by direction to the parent corporation in respect of such matters as uniform accounting, disclosure to investors, or preparation of consolidated tax returns of multinational enterprises").

<sup>71</sup> See *ibid* at § 414 Comment c ("[j]urisdiction may be exercised [...] over activities of a branch or subsidiary related to international transactions, such as export and import, foreign exchange and credits, and transborder investment; but not generally over predominantly local activities, such as industrial and labor relations, health and safety practices, or conduct related to preservation or control of the local environment").



Moreover, beyond the Restatement, there are other factors that hinder foreigners from bringing legal disputes to common law courts in the United States.<sup>72</sup> These include issues of international comity and limitations of jurisdiction.<sup>73</sup> Arguably, if a host state has investment-friendly laws that are harmful to the local environment or do not protect the human rights of its citizens, this alone does not justify the extraterritorial application of US law.

On the other hand, other sources of US law are more promising in the use of extraterritorial regulation. For instance, the authors cite the Cardin-Lugar provisions in the US *Dodd-Frank Act*<sup>74</sup> that require extractive sector corporations listed on US stock exchanges to disclose payments made to foreign governments.<sup>75</sup> Additionally, consider the US *Foreign Corrupt Practices Act* (FCPA) that uses the territorial principle to claim jurisdiction over nearly any act by any corporation in the world so long as it is an act in furtherance of a bribery that takes place in the United States.<sup>76</sup> Thus, some examples using the application of the nationality and territorial principles in the United States suggest that the authors' proposal is workable, while other precedents, such as those found within the Restatement, do not support the authors' proposal. Given these conflicting precedents, it appears that the United States is willing to apply extraterritorial application to legislation concerning financial markets and corruption, although it is unwilling to give extraterritorial effect to legislation aimed at local concerns of foreign states, such as labour law, health and safety, or the preservation of the local environment as reflected in the Restatement.

Further, it should be noted that the Restatement itself provides interpretation on American law and, as such, its guidance is not mandatory. It is also fairly dated given that its last revision was in 1987. One could reasonably suggest that the substantially broad jurisdiction granted under the FCPA may represent the evolution of a modern form of regulation, and that the rules under the Restatement have become obsolete. The authors do not make this argument in the book, nor do they directly address the Restatement, although they do point to the FCPA as a potential model for the kind of regulation they are proposing.<sup>77</sup>

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<sup>72</sup> Compared to the common law, civil law legal systems have distinct concepts for determining corporate nationality such as siege social, domicile and economic control as different models.

<sup>73</sup> One major limitation for raising a case concerning activity that occurred in a foreign jurisdiction is the issue of international comity. See *Hilton v Guyot*, 159 US 113 at 163–164 (1895) [*Hilton*] (Justice Grey described comity as the “recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws”). In *Hartford Fire Insurance Co v California*, 509 US 764 (1993) Justice Souter’s use of comity differs from the *Hilton* definition. This decision allowed the *Sherman Antitrust Act* to have extraterritorial effect against foreign companies acting in foreign countries if they succeeded in restraining trade within the United States.

<sup>74</sup> *Dodd-Frank Act*, *supra* note 29 §1504.

<sup>75</sup> Simons & Macklin, *supra* note 1 at 275.

<sup>76</sup> This may include a “telephone call to the United States, a letter mailed to the United States, the use of air or road travel, or the clearing of a check or wire transfer of funds through a financial institution in the United States (see H Lowell Brown, “Extraterritorial Jurisdiction Under the 1998 Amendments to the *Foreign Corrupt Practices Act*: Does the Government’s Reach Now Exceed Its Grasp?” (2001) 26 NCJ Intl L & Com Reg 239 at 359).

<sup>77</sup> Simons & Macklin, *supra* note 1 at 308.

Another proposition put forward in the book is the development of a home state CSR agency that engages in monitoring and dispute resolution concerning extractive sector corporations.<sup>78</sup> The CSR agency would also determine whether a particular extractive sector corporation has undertaken appropriate due diligence in accordance with the voluntary measures of the UN Guiding Principles. In this way, the CSR agency would play an active role in the human rights due diligence process of business.

This proposed model is strong on accountability and will likely be explored by governments currently working on implementing the UN Guiding Principles, such as the United States, among several others.<sup>79</sup> The development of a CSR agency is an ambitious project and the authors provide extensive details about its purpose, function, and structure in order to demonstrate its feasibility.

A CSR agency would be implemented at the national or regional level and operate at arm's length from government. This agency, as contemplated by the authors, would provide "home state auditing" and "independent surveillance."<sup>80</sup> Its primary function would be to assess, monitor, and evaluate the impact of extractive sector corporations in zones of weak governance. In doing so, a CSR agency would have the mandate to determine which states are considered weak governance zones. This determination would directly impact the ability of foreign plaintiffs to seek civil liability against multinational corporations in home state courts. For example, in the case that a state is held to be a zone of weak governance by the CSR agency, the authors propose an alternative implementation of the *forum non conveniens* doctrine where the home state of a parent corporation will be considered the preferable forum for litigation.<sup>81</sup> Similarly, the authors propose the creation of a cause of action targeting corporations that are responsible for human rights abuses in zones of weak governance.

There are at least two concerns with this approach. First, it is not clear by what method this *forum non conveniens* test would be implemented or whether it is the most practical solution for promoting human rights overseas. Second, the definition of weak governance zones is a fairly malleable and subjective standard. In practice, classifying sovereign states in such a fashion is unrealistic, and perhaps inappropriate. In terms of the first concern, it is not clear how this modification of the *forum non conveniens* test would be implemented. For instance, it could be left to judges acting within the parameters of a case before them to adapt the common law doctrine of *forum non conveniens* in order to align with the authors' proposal that the home state of a parent corporation will be considered the preferable forum for litigation. Alternatively, it might be achieved through a legislative directive from a government in order to clarify new requirements in the *forum non conveniens* test.<sup>82</sup> The authors do not address

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<sup>78</sup> *Ibid* at 329. According to the authors, a CSR agency would provide a market incentive for responsible human rights practices, as the various assessments, audits, and reports will enhance the basis upon which investors, shareholders and consumers make economic decisions concerning the extractive sector.

<sup>79</sup> In September 2014, President Obama announced that the US would develop a National Action Plan consistent with both the UN Guiding Principles and the OECD Guidelines on Multinational Enterprises.

<sup>80</sup> Simons & Macklin, *supra* note 1 at 316, 346.

<sup>81</sup> The presumption is rebuttable if the host state is no longer a weak governance zone at the time of the litigation (*ibid* at 286).

<sup>82</sup> The Uniform Law Conference of Canada provided provincial legislatures a template to codify the application of *forum non conveniens* through the *Court Jurisdiction and Proceedings Transfer Act* (April

these particular methods for implementation and both options present unique challenges that suggest that they are impracticable solutions. As such, it is difficult to conceive of workable solution for implementing the proposed changes to the *forum non conveniens* test and the authors do not provide a means to this end. Further, common law courts have adopted less prescriptive versions of the *forum non conveniens* test that do not exclusively target entities that operate overseas in so-called weak governance zones. For instance, the High Court of Australia devised a *forum non conveniens* test in which a claim will only be dismissed if the plaintiff is using the forum “vexatiously, oppressively or in abuse of process.”<sup>83</sup> On account of this narrow standard, only a claim brought to Australian court for abusive or oppressive reasons would be dismissed on the grounds of *forum non conveniens*.<sup>84</sup> As such, Australia has a rather lenient approach to exercising jurisdiction over extraterritorial matters, which does not specifically target Australian extractive sector corporations operating overseas. For those advocating for stronger pressure on extractive sector corporations concerning their overseas human rights track record, the Australian application of *forum non conveniens* is likely preferable to the authors’ recommendations. The Australian approach allows plaintiffs to overcome this procedural doctrine and bring claims in the home state without limiting this ability to only impact communities in a subjectively declared “weak governance zone.”

This leads into the second concern with the authors’ proposal regarding the CSR agency. Using the concept of a weak governance zone elevates a rather nebulous and potentially inconsistent standard to be used in determining the *forum non conveniens* test or civil liability in general. The authors counter this assertion with a reliance on transparent and impartial data in determining if a state is a weak governance zone. For instance, as reported by the authors, the UN Development Programme defines a weak governance zone as places with “extremely low ‘human development’ indicators” such as infant mortality, literacy, life expectancy, and various measures of material standard of living.<sup>85</sup> Although numeric indicators can potentially identify weak governance zones, there is a deep and abiding concern when a country in the developed world attempts to influence the internal affairs of a country in the developing world. On this point, Sara Seck observes that extraterritorial home state regulation could amount

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1996) online: Uniform Law Conference of Canada <ulcc.ca/en/uniform-acts-en-gb-1/183-court-jurisdiction-and-proceedings-transfer-act/1092-court-jurisdiction-proceedings-transfer-act> [CJPTA] which has been modified and adopted in Saskatchewan, British Columbia, and Nova Scotia. As of 2015, the CJPTA has been passed, but not currently in force in Prince Edward Island and the Yukon. The provincial law reform bodies in Alberta and Manitoba have recommended the enactment of the CJPTA, without any progression by the respective legislatures. There are differences between the provinces that have adopted the CJPTA. For example, Saskatchewan has not enacted the provision on forum of necessity while British Columbia and Nova Scotia did. Given the variety of provincial responses to adopting a uniform code concerning *forum non conveniens* emphasizes the difficulty of using a legislative directive to implement the proposed changes suggested by the authors in Canada. For more information on the CJPTA see Vaughan Black, Stephen GA Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012).

<sup>83</sup> *Oceanic Sun Line Special Shipping Co v Fay* (1988), 165 CLR 197 at para 24, Brennan J (HCA).

<sup>84</sup> Similar to Australia, some US states have very limited versions of *forum non conveniens*. Most notably, Texas state courts use a very liberal application of the doctrine. See Louise Ellen Teitz, *Transnational Litigation* (Charlottesville, Va: Michie, 1996) at 27, 35.

<sup>85</sup> Simons & Macklin, *supra* note 1 at 291. Further, the authors contend that the impartiality and independence of the CSR agency will act as a buffer from political interference.

to a neo-colonial incursion.<sup>86</sup> Beyond a concern of appearing imperialistic, this policy would erode important legal principles such as international comity and limitations of jurisdiction.<sup>87</sup> As pointed out by the authors, another notable critic of this approach is John Ruggie, primary developer of the UN Guiding Principles, who described the concept of labeling a state a weak governance zone as “inherently political.”<sup>88</sup> While there is a compelling argument that more interference by developed states would be beneficial in ameliorating the adverse impacts of the extractive sector, I am skeptical that labelling states in this way is an appropriately tailored and overall productive strategy to achieve that result. My preference would be to follow the Australian model of *forum non conveniens* that does not limit the ability of plaintiffs to bring claims concerning only corporate activity in a subjectively declared “weak governance zone.” However, as pointed out above, it would be difficult to promote such a change either legislatively or through common law intervention by the courts.

A final concern is that different CSR agencies from around the world may come to different conclusions on whether the same state is a weak governance zone, which could have consequential economic and human rights implications. For instance, if three large extractive sector economies, such as the United Kingdom, Canada, and Australia treat a particular state as a weak governance zone, the extractive sector companies from those countries will likely avoid investment in that host state, given the additional regulatory requirements imposed on them there. However, imagine another large extractive sector economy, such as Russia, that does not declare the host state a weak governance zone or does not maintain a CSR agency for this purpose. Effectively, Russian corporations in this scenario would operate as a monopoly in the host state, which would potentially reduce the standards of human rights even further because of a lack of competition and oversight.

I note two other concerns with labeling a country a weak governance zone. First, if a host state is labeled by a home state’s CSR agency as a weak governance zone, it might reject investment from that home state in order to avoid being transparent about the human rights and environmental conditions of its extractive sector. Conversely, a host state may manipulate the circumstances of their classification by a CSR agency in order to gain perceived benefits from the status of “weak governance zone.” Moving on from these criticisms, there are certain assumptions embedded in the proposal concerning whether civil society actors and extractive sector corporations will be receptive to a CSR agency. For instance, the authors suggest that recruiting civil society participation “may prove challenging” because it will be seen to compromise the advocacy mandate of civil society actors.<sup>89</sup> The authors further suggest that corporations, which have experienced reputational damage through campaigns by civil society actors, “may grasp more readily the comparative advantage of scrutiny by a body that is embedded within a home state architecture of public accountability.”<sup>90</sup> The assumption is that civil society actors will not be inclined to actively participate, whereas corporations

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<sup>86</sup> See Sara L. Seck, “Conceptualizing the Home State Duty to Protect Human Rights” in Karin Buhmann, Lynn Roseberry & Mette Morsing, eds, *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (London, UK: Palgrave Macmillan, 2011) 25.

<sup>87</sup> See *Hilton*, *supra* note 73 at 163–164.

<sup>88</sup> Simons & Macklin, *supra* note 1 at 292.

<sup>89</sup> *Ibid* at 317.

<sup>90</sup> *Ibid* at 316–17.

will be motivated to engage with an independent CSR agency rather than face the public scrutiny and “shaming” of a civil society actor.<sup>91</sup> However, the experience of the existing Office of the Extractive Sector CSR Counsellor in Canada suggests otherwise. The Canadian CSR Counsellor has a mandate to reduce and to constructively resolve conflicts between foreign communities and the Canadian extractive sector. Similar to the proposal of the authors, the CSR Counsellor is a body that is embedded within Canada’s “architecture of public accountability” at the national level.<sup>92</sup> From 2010 to 2013, almost all of the complaints filed with the CSR Counsellor ended with the corporate respondent refusing to participate in the process.<sup>93</sup> In many cases, civil society actors were assisting impacted communities in bringing claims to the CSR Counsellor, and in one case the complainants were two civil society organizations in their own right representing an environmental cause.<sup>94</sup> The involvement of the CSR Counsellor provided the companies an opportunity to elect to have the matter scrutinized by a public institution as opposed to campaigns by civil society actors that tend to view the extractive sector in a negative light. However, in most cases, the companies refused the intervention of the Counsellor.

Thus, it does not appear that Canada’s extractive sector prefers public institutions to review disputes with overseas communities in contrast to the more predictable attention paid by civil society organizations. Comparatively, the involvement of various non-governmental organizations in preparing complaints to the CSR Counsellor suggests that civil society actors are highly motivated to participate in reviews by public institutions.

Curiously, little was mentioned in the book about the Canadian CSR Counsellor. While this was likely intentional given that the book had an international scope, one strand for further research is whether the CSR agency model as proposed by the authors can be implemented into

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<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> For a review on the Office of the CSR Counselor see Charis Kamphuis, “Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account” (2012) 13 German Law Journal 1456 at 1469-70, 1483. Also see Catherine Coumans, “Op-Ed: Canada needs effective mining oversight”, *Ottawa Citizen* (31 October 2013) online: Network for Justice in Global Development <[justinvestment.org/2013/10/op-ed-canada-needs-effective-mining-oversight/](http://justinvestment.org/2013/10/op-ed-canada-needs-effective-mining-oversight/)>.

<sup>94</sup> In 2012, the CSR Counsellor received a compliant from two non-governmental organizations pertaining to alleged impacts on glaciers caused by a copper mining project in Argentina. The company withdrew from the case and the matter was closed (The Office of the Extractive Sector CSR Counsellor, “Closing Report: Request for Review File Number 2012-03-ARG” (October 2012) online: Foreign Affairs, Trade and Development Canada <[international.gc.ca/csr\\_counsellor-conseiller\\_rse/publications/2012-03-ARG\\_closing\\_report-rapport\\_final.aspx](http://international.gc.ca/csr_counsellor-conseiller_rse/publications/2012-03-ARG_closing_report-rapport_final.aspx)>). In a prior case, the CSR Counsellor received a request for review concerning the operations of a mining operation in Mexico. The complainants were assisted by a Mexican civil society organization in raising their concerns. The Canadian mining company withdraw from the review before proceeding to any mediation (The Office of the Extractive Sector CSR Counsellor, “Closing Report: Request for Review File 2011-01-MEX” (October 2011) online: Foreign Affairs, Trade and Development Canada <[international.gc.ca/csr\\_counsellor-conseiller\\_rse/publications/2011-01-MEX\\_closing\\_rep-rap\\_final.aspx](http://international.gc.ca/csr_counsellor-conseiller_rse/publications/2011-01-MEX_closing_rep-rap_final.aspx)>). In the most recent case, an impacted community was again assisted by a non-governmental organization in making their compliant to the CSR Counsellor. The company declined to participate in the review process prior to any informal mediation (The Office of the Extractive Sector CSR Counsellor, “Closing Report: Request for Review File Number 2013-05-ARG” (September 2013) online: Foreign Affairs, Trade and Development Canada <[international.gc.ca/csr\\_counsellor-conseiller\\_rse/publications/2013-05-ARG\\_closing\\_report-rapport\\_final.aspx](http://international.gc.ca/csr_counsellor-conseiller_rse/publications/2013-05-ARG_closing_report-rapport_final.aspx)>).

the existing office of the Canadian CSR Counsellor or in the various OECD National Contact Points in member countries. Concerning the latter point, the OECD National Contact Points are almost exclusively organized in government departments and lack independence. As the authors emphasize, “the CSR Agency we propose would not be an arm of the national [export credit agency], or sovereign wealth or pension fund, or trade department.”<sup>95</sup> On this note, it is clear to the authors that most OECD National Contact Points are not an ideal archetype for a robust CSR agency, unless a member country is willing to furnish its National Contact Point with significant neutrality. One example that potentially meets this standard is the Dutch National Contact Point, which, as suggested by the authors, is more independent of the Dutch government than its counterparts.<sup>96</sup> I would posit that the Dutch National Contact Point potentially meets the independence requirement of a CSR agency, however, the authors do not explore this potential in the book.

#### 4. CONCLUSION

In sum, Penelope Simons and Audrey Macklin’s book, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* is a welcome addition and will have much use in this crucial and developing field of regulating the human rights performance of extractive sector corporations. Despite its focus on the extractive sector, the book is of wider application to the more general theme of human rights associated with foreign direct investment in developing countries.

As a critique, certain aspects of the authors’ proposal are impracticable and lack sufficient rigor given their overreliance on public law solutions. For this reason, I suggest the proposal in its current form is not the best alternative for addressing the problem of extraterritorial wrongdoing by the extractive sector. Private law mechanisms have a greater role to play in promoting nimble and efficient corporate regulation without the substantial intervention that characterizes public law reform. The book remains a useful contribution despite these criticisms on account of its bold approach in tackling a complicated and prevalent issue of legal regulation. The authors have contributed to the academic discourse on the methods by which home states may intrude on the foreign operations of its extractive sector.

The second chapter concerning the Talisman case study in Sudan provides a good balance to the more theoretically abstract sections. Given the authors’ personal experiences as part of the Harker Mission, chapter two, in particular, is compelling and highly readable.

Chapter three is occupied primarily with theory as an academic endeavor. This may detract from the book’s usefulness for civil society or lay readers interested in a practical account of regulating the overseas conduct of the extractive sector. As expressed in the review, a more comprehensive analysis of private law strategies would be of benefit to this particular

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<sup>95</sup> Simons & Macklin, *supra* note 1 at 318.

<sup>96</sup> *Ibid* at 313. Further, in the Netherlands, companies applying for financial support from the Dutch government in their foreign operations must sign a declaration that they will adhere to the OECD Multinational Guidelines and accept recommendations from the Dutch National Contact Point. See Government of the Netherlands, “Contribution by the government of the Netherlands to the renewed EU-strategy for CSR” (1 July 2102) at 2, online: Business & Human Rights Resource Centre <[business-humanrights.org/en/pdf-contribution-by-the-government-of-the-netherlands-to-the-renewed-eu-strategy-for-csr](http://business-humanrights.org/en/pdf-contribution-by-the-government-of-the-netherlands-to-the-renewed-eu-strategy-for-csr)> at 2.

audience. On the other hand, it is a valuable contribution for researchers on governance, corporate regulation and human rights. The proposal outlined in the last chapter will be of interest to academics, politicians, and public servants working towards establishing a governing framework aligned with the UN Guiding Principles. Despite my noted criticisms, overall this book contains illuminating and instructive insights on a challenging and significant issue of legal regulation.