2008

Home State Responsibility and Local Communities: The Case of Global Mining

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Article

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Home states that are actively engaged in global mining have considered and rejected calls to regulate the conduct of transnational mining corporations so as to prevent and remedy human rights and environmental harms. This reluctance to regulate is often expressed as a concern that extraterritorial regulation will conflict with the sovereignty of foreign states. This paper argues that the public international law of jurisdiction is permissive of home state regulation that can be justified under the nationality or territoriality principles, provided that there is no true conflict with an exercise of host state jurisdiction. In the human rights and environment contexts, it is more likely that home state regulation would result in concurrent but not conflicting jurisdiction, particularly where the regulation is designed to further shared international norms. Beyond permissibility, this paper argues that international sustainable mineral development law imposes an emerging obligation on all states, including home states, to ensure that the three pillars of public participation rights are respected. These rights are access to information, public participation in decision-making, and access to justice in

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1. House of Commons, Subcomm. on Hum. Rts & Int'l Dev. of the Standing Comm. on Foreign Aff. and Int'l Trade, *Evidence* (Mar. 23, 2005) 15:35-16:45 (Can.) (describing TVI Pacific as a Calgary-based company with a 100% ownership interest in TVI Pacific Philippine Resources Inc., the Canatuan mine); RIGHTS & DEMOCRACY, INT'L CTR. FOR HUM. RTS. & DEMOCRATIC DEV., HUMAN RIGHTS IMPACT ASSESSMENTS FOR FOREIGN INVESTMENT PROJECTS 41 (2007), *available at* http://www.dd-rd.ca/site/_PDF/publications/globalization/hria/full%20report_may_2007.pdf (providing a more recent description of TVI Pacific as owning forty percent of TVI Resource Development through two wholly-owned subsidiaries based in Hong Kong and Anguilla, with at least nineteen other companies based in Canada, the Philippines and elsewhere owning the remaining sixty percent).

environmental matters, and they are formulated in the global mining context as a right of indigenous and local communities to free, prior and informed consent. Support for the existence of such a home state obligation may be found in the recommendations of international human rights treaty bodies, and in the work of the International Law Commission on both state responsibility, and the prevention and allocation of loss for transboundary harm.

I. INTRODUCTION

In November 2004, a delegation of community members from the municipality of Siocon, Zamboanga del Norte, in the Philippines came to Canada. The purpose of their visit was to raise concerns about alleged violations of environmental and human rights at the Canatuan mining project on the island of Mindanao, owned by Canadian mining company TVI Pacific,[1] and related concerns about Canadian government support for the mine.[2] In March 2005, two community members returned to Canada to testify before the Parliamentary Subcommittee on Human Rights and International Development (Subcommittee) of the Standing Committee on Foreign Affairs and International Trade (SCFAIT).[3] The Subcommittee then devoted much of the rest of its session to exploring the problems of Canadian mining companies in developing countries.[4]

This was not the first time that the Subcommittee had heard about problems with Canadian mining companies in developing countries.[5] In June 2005, the SCFAIT adopted a report of the Subcommittee (SCFAIT Report) and presented it to the Canadian Parliament.[6] The SCFAIT Report

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2. Conversations with Catherine Coumans, Ph.D., Research Co-ordinator of MiningWatch Canada, a Canadian non-governmental organization, in March and September 2006. *See generally* MiningWatch Canada Home Page, http://www.miningwatch.ca (last visited June 6, 2008). While in Ottawa, the community members met with Canadian MP Ed Broadbent, as well as with government officials from the Canadian International Development Agency (CIDA) and Natural Resources Canada.

3. *Evidence, supra* note 1. Testimony alleged that TVI Pacific Inc. violated the indigenous communities' rights to free, prior and informed consent by engaging in involuntary displacement and resettlement of communities, that TVI Pacific employed a large number of heavily armed security forces trained by the Philippine military to protect the mine in a heavily militarized area, and that environmental problems threatened food security, subsistence living and sustainable livelihoods of local communities. Canadian government support for the mine included CIDA Canada Fund money channelled through TVI Pacific, and positive endorsements of the project by current and former Canadian ambassadors to the Philippines, along with general support by the Canadian embassy in Manila. *Id.* Two villagers from Siocon made statements *in camera*. House of Commons, Subcomm. on Hum. Rts. & Int'l Dev. of the Standing Comm. on Foreign Aff. & Int'l Trade, 1st Sess., 38th Parl., *Minutes of Proceedings*, No. 012 (March 23, 2005) (Can.).

4. *See, e.g.*, House of Commons, Subcomm. on Hum. Rts. & Int'l Dev. of the Standing Comm. on Foreign Aff. & Int'l Trade, *Evidence* (May 18, 2005) 15:30-17:10 (Can.). Company evidence presented before the Subcommittee on May 18 countered allegations made on March 23 by claiming in part that they were being made by illegal small scale miners who were responsible for heavily polluting the area prior to TVI Pacific's involvement. TVI Pacific argued that the company should be credited with cleaning up environmental contamination and providing employment to local indigenous communities. Two indigenous representatives spoke in favor of TVI Pacific. *Id.*

5. HOUSE OF COMMONS, STANDING COMM. ON FOREIGN AFF. & INT'L TRADE, 1st Sess., 38th Parl., FOURTEENTH REPORT: MINING IN DEVELOPING COUNTRIES 1 (2005) (Can.) [hereinafter SCFAIT REPORT].

6. *Id.* The SCFAIT Report received all party unanimous support at the subcommittee level and was unanimously adopted by the SCFAIT. House of Commons, Standing Committee on Foreign Affairs and International Trade, *Evidence* (June 20, 2005) 15:35-16:15; House of Commons, Subcommittee on Human Rights and International Development of the Standing Committee on Foreign Affairs and International Trade, 1st Sess., 38th Parl., *Minutes of*

states as fact that

> mining activities in some developing countries have had adverse effects on local communities, especially where regulations governing the mining sector and its impact on the economic and social wellbeing of employees and local residents, as well as on the environment, are weak or non-existent, or where they are not enforced.[7]

The Subcommittee then expressed concern that "Canada does not *yet* have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards."[8]

The Subcommittee recommended that Canada put in place stronger incentives to encourage compliance with international human rights standards, as well as stronger monitoring and complaints mechanisms.[9] The SCFAIT Report also called for "clear legal norms" to ensure that Canadian corporations and residents were held accountable for environmental and human rights violations.[10] However, in October 2005, the government tabled a response which rejected many of the recommendations in the SCFAIT Report.[11] The Government Response noted that the international community is "still in the early stages of defining and measuring" corporate social responsibility (CSR), "particularly with regard to human rights."[12] The recommendation to

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Proceedings, No. 021 (June 15, 2005) (Can.).

7. SCFAIT REPORT, *supra* note 5. The SCFAIT Report made ten recommendations, eight of which were directed to the problems of mining companies generally, while two were reserved specifically for the case of TVI Pacific. *Id.*

8. *Id.* at 2 (emphasis added).

9. *Id.* at 2-3. The Subcommittee stated that measures "must include" making Canadian government financing and services conditional upon compliance with corporate social responsibility and human rights standard. *Id.* at 2.

10. *Id.* at 3. Other recommendations included the need to improve services to Canadian mining companies operating abroad so as to assist them in complying with environmental and human rights obligations; the need to build governance capacity in developing countries; and the need to ensure that projects supported by international financial institutions comply with international human rights standards. *Id.*

11. DEP'T OF FOREIGN AFF. & INT'L TRADE, MINING IN DEVELOPING COUNTRIES - CORPORATE SOCIAL RESPONSIBILITY: THE GOVERNMENT'S RESPONSE TO THE REPORT OF THE STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTERNATIONAL TRADE (2005) (Can.) [hereinafter GOVERNMENT RESPONSE]. *But see id.* at 11-15 (endorsing the recommendations to increase and improve services to corporations, to develop governance capacity in developing countries, and to integrate and mainstream international human rights standards in the work of international financial institutions).

12. *Id.* at 4. *Compare id.* at 4-5 (committing the Canadian government to working with other states to clarify a CSR framework, and expressing support for the work of Professor John Ruggie in his capacity as the Special Representative to the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises [hereinafter SRSG]). *See generally* U.N. Comm'n on Hum. Rts., *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 62nd Sess., U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter *Ruggie Interim Report*]; U.N. Hum. Rts. Coun., *Business and Human rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special*

establish clear legal norms to hold Canadian corporations accountable was rejected,[13] with a commitment only to examining the "best practices of other states."[14] While the Government Response did acknowledge that states are primarily responsible for the promotion and protection of human rights and the environment,[15] it also stated that Canadian law does not generally provide for "extraterritorial application."[16] Moreover, to do so could raise several problems including "conflict with the sovereignty of foreign states; conflicts where states have legislation that differs from that of Canada; and difficulties with Canadian officials taking enforcement action in foreign states."[17]

This Article argues that, despite the concerns expressed in the Government Response, Canada and other home states should have laws to ensure that the international operations of home state extractive companies do not violate international human rights and environmental norms, and to ensure that any local communities impacted by such violations have access to legal recourse in home state courts. Part II will outline how Australia and Canada have approached this question. Part III will argue that home state concerns that the exercise of jurisdiction over transnational corporate conduct violates jurisdictional principles of public international law are misplaced. Home state jurisdiction is clearly permissible. Part IV will examine whether, beyond permissibility, international sustainable mineral development law imposes an obligation on all states, including home states, to both prevent and remedy harm to local communities.

II. HOME STATE RELUCTANCE

Canada is not the first home state to question whether or not it should enact laws to address human rights and environmental concerns relating to the global mining activities of home state corporations.[18] In 2000 and 2001,

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Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN.Doc. A/HRC/4/35 (Feb. 19, 2007) [hereinafter *Ruggie Report 2007*]; Business and Human Rights Resource Centre http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative (providing general materials relating to the SRSG's work).

13. GOVERNMENT RESPONSE, *supra* note 11, at 10.

14. *Id.* at 10.

15. *Id.* at 8. *But see id.* at 2 (noting that there is a need to "reconcile the call for global business standards with the *primary responsibility of host governments* to ensure that companies act in compliance with domestic and international law") (emphasis added).

16. *Id.* at 9.

17. *Id.* (explaining that Canadian criminal and tort law may or may not be applied to provide legal accountability for corporate wrongs abroad; declining to address whether there is anything that the government could do legislatively to facilitate corporate accountability).

18. *See, e.g.*, JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY 160-71 (2006) (setting out examples of extraterritorial regulatory techniques considered by European countries, the U.S., and Australia); Surya Deva, *Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?*, 5 MELB. J. INT'L L. 37, 52-63 (2004) (describing proposed home state regulations in Australia and the U.S.); Adam McBeth, *A Look at Corporate Code of Conduct Legislation*, 33 COMMON L. WORLD REV. 222 (2004) (comparing corporate code of conduct bills proposed in the United States,

the Australian Parliamentary Joint Statutory Committee on Corporations and Securities held hearings[19] to determine whether to enact a proposed Corporate Code of Conduct Bill 2000 ("Bill 2000").[20] The object of Bill 2000 was to impose environmental, employment, health and safety and human rights standards on the conduct of Australian or related corporations operating in a foreign country.[21] It was brought to the Committee's attention that the purpose of Bill 2000 was not to impose Australian standards on other countries but rather to ensure that Australian and Australian-related companies acted in compliance with fundamental international law principles of human rights and environmental protection.[22] Nevertheless, the Committee concluded that the standards were Australian and could only be interpreted as implying that local standards are inferior.[23] Bill 2000 was then rejected as the legislation would be viewed overseas as "arrogant, patronising, paternalistic and racist."[24]

Bill 2000 would have allowed persons who have suffered loss or damage or who are reasonably likely to suffer loss or damage from activities of Australian corporations overseas to bring actions in Australian Federal Court seeking injunctions or compensation.[25] The fact that existing Australian law already permitted some similar types of actions contributed to the conclusion that at least parts of Bill 2000 were unnecessary.[26] Under

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Australia, and the U.K.).

19. PARLIAMENTARY JOINT STATUTORY COMMITTEE ON CORPORATIONS AND SECURITIES, REPORT ON THE CORPORATE CODE OF CONDUCT BILL 2000, at 1 (2001) (Austl.) [hereinafter COMMITTEE REPORT], *available at* http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/1999-02/corp_code/report/report.pdf..

20. Corporate Code of Conduct Bill 2000, No. 00163 (2000) (Austl.) [hereinafter Bill 2000], *available at* http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/oldBills/Linked/12110412.pdf. Bill 2000 was designed to apply outside of Australia, but only to corporations which employ or engage the services of 100 or more persons in a country other than Australia. Bill 2000 would have applied directly to companies incorporated in Australia that operated overseas, as well as to subsidiaries of Australian companies and holding companies that operated overseas but were not incorporated in Australia. *See also* Tania Penovic, *Undermining Australia's International Standing*, 11 AUSTL. J. HUM. RTS. 71, 106 (2005) (discussing unsuccessful revisions to Bill 2000 proposed in 2004).

21. Bill 2000, *supra* note 20, § 3. Companies would have been required to report their compliance with the standards and would have been subject to a civil penalty for contravention of the standards. *See also* Commonwealth, *Parliamentary Debates*, Senate, September 6, 2000, 17457-61 (Senator Vicki Bourne) (Austl.) (citing the need to address the problems associated with Australian mining companies operating internationally), *available at* http://www.democrats.org.au/speeches/index.htm?speech_id=459&display=1.

22. COMMITTEE REPORT, *supra* note 19, ¶¶ 3.68-.70.

23. *Id.*

24. *Id.* ¶¶ 4.47-.49.

25. Bill 2000, *supra* note 20, § 17.

26. COMMITTEE REPORT, *supra* note 19, ¶¶ 3.83-.109 (discussing Dagi v. B.H.P. (1997) 1 VR 428 (Austl.)). The *Dagi* litigation from 1997 is the clearest example of the possibility of successful litigation in Australian courts against an Australian mining company operating overseas for environmental harm. The parties settled after the court agreed to take jurisdiction over several of the claims put forward by the plaintiffs. *Forum non conveniens* was not argued. *Id. See also* Peter Prince, *Bhopal, Bougainville and Ok Tedi: Why Australia's Forum Non Conveniens Approach is Better*, 47 INT'L & COMP. L. Q. 573, 593-95 (1998) (arguing that the

Canadian interpretations of private international law doctrines, however, it is less likely that such an action would succeed.[27] Moreover, Australia took steps to investigate allegations of international criminal conduct by Anvil Mining Company regarding the facilitation of egregious rights-violating military conduct in the Democratic Republic of the Congo.[28] While Canada has similar legislation in place implementing its obligations under the statute of the International Criminal Court, Canada does not appear to have initiated any similar investigation, even though Anvil Mining is incorporated in Canada.[29] The Canadian government has also intervened twice[30] in support of Talisman Energy in New York state private law litigation under the Alien Tort Claims Act (ATCA)[31] that alleges Talisman

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Australian courts' refusal to adopt the U.S. and U.K. *forum non conveniens* approach enabled the peaceful resolution of the *Dagi* litigation).

27. *Cf.* Recherches Internationales Québec v. Cambior Inc. [1998] 1998 CarswellQue 4511 (C.S. Aug. 14, 1998), *available at* 1998 WL 1999921 (Can.) (dismissing the action on the basis of *forum non conveniens*, with a large costs award instituted against the plaintiff). *See also* Sara L. Seck, *Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Companies: the Interface of Public and Private International Law*, 37 CAN. Y.B. INT'L L. 139, 154-68 (1999) (providing a detailed comparison of *Cambior* and *Dagi*). Other jurisdictions are arguably more open to transnational litigation than Canada for a variety of reasons, including the absence of costs awards and the existence of facilitating legislation such as the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2000), in the United States, and the abolition of the doctrine of *forum non conveniens* in Europe, including the United Kingdom. *See, e.g.*, ZERK, *supra* note 18, at 124-27, 198-240.

28. Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code*, 5 J. INT'L CRIM. JUST. 809, 811 (2007). Three Anvil employees were prosecuted by a Congolese Military Court in 2007 and found not guilty. For a history and critique of the Congolese trial, see generally GLOBAL WITNESS, RAID, ACIDH, & ASADHO/KATANGA, KILWA TRIAL: A DENIAL OF JUSTICE, *available at* http://www.globalwitness.org/media_library_get.php/463/kilwa_chron_en_170707.pdf; Adam McBeth, *Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L. J. 127 (2008).

29. *Compare* Kyriakakis, *supra* note 28 (referencing a 2005 Australian newspaper report that Canadian authorities were also investigating Anvil Mining), *with* Samer Elatrash, *Making a Killing in the Congo: Controversy Dogs a Canadian-incorporated Mining Company at the Centre of a Massacre Investigation*, MONTREAL MIRROR, June 22-28, 2006, *available at* http://www.montrealmirror.com/2006/062206/news2.html (suggesting that Canadian authorities were not investigating Anvil's involvement in the Kilwa incident). The possibility of prosecuting corporations for violations of international criminal law has become a reality in many countries, despite the fact that the statute of the international criminal court does not extend ICC jurisdiction to corporate entities. ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW 13-29 (2006), *available at* http://www.fafo.no/pub/rapp/536/536.pdf.

30. Presbyterian Church of Sudan v. Talisman Energy, Inc., 2005 WL 2082846, at *1 (S.D.N.Y. Aug. 30, 2005) (discussing diplomatic note from the Canadian Embassy to the U.S. government); Brief of Amicus Curiae the Government of Canada in Support of Dismissal of the Underlying Action, Presbyterian Church of Sudan v. Talisman Energy Inc., No. 01-9882 (2d Cir. May 8, 2007).

31. 28 U.S.C. § 1350 (2000). ATCA is a jurisdictional statute that provides subject matter jurisdiction for civil actions brought before U.S. federal courts in relation to a modest number of clearly defined norms recognized under the law of nations (international law). Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S. Ct. 2736, 2755-2761 (2004). Without the ATCA, it is doubtful whether private parties would be able to sue perpetrators for violations of international criminal law norms.

was complicit with the Sudanese government in violations of international criminal law.[32]

While the Government Response rejected many of the recommendations in the SCFAIT Report, it did embrace with enthusiasm the idea of holding a multi-stakeholder public consultation on the problems of Canadian mining companies operating in developing countries.[33] The proposed outcome of the process was broadened to a commitment to providing the SCFAIT with a report presenting recommendations for not only the Canadian government, but also "NGOs, labour organizations, business and industry associations."[34] In essence, the government committed to participating in a process in which its role was equal to that of other stakeholders, rather than acknowledging that as a state, the government of Canada possesses the authority - and has a responsibility - to govern in the public interest.[35]

The National Roundtables on Corporate Social Responsibility and the Canadian Extractive Sector in Developing Countries were held from June to November 2006 in four Canadian cities.[36] A governmental steering committee worked closely with an Advisory Group composed of representatives of Canadian industry groups and civil society.[37] In March 2007, the Advisory Group issued a report replete with proposals for Canadian government action.[38] However, even the Advisory Group could

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32. The Talisman case was dismissed on a summary judgment motion in *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 453 F.Supp.2d 633 (S.D.N.Y. 2006), which is currently under appeal. Talisman was alleged to have aided and abetted the government of the Sudan in the commission of war crimes, genocide and crimes against humanity. Talisman Energy is a Canadian company, yet, as Canada does not have legislation similar to the ATCA, no private law action has been brought in Canadian courts in relation to the Sudanese allegations.

33. GOVERNMENT RESPONSE, *supra* note 11, at 4; SCFAIT REPORT, *supra* note 5, at 2.

34. GOVERNMENT RESPONSE, *supra* note 11, at 4.

35. Thus, Canada is a partner in a process, instead of taking on a mandating, facilitating or endorsing role. *See* TOM FOX, HALINA WARD & BRUCE HOWARD, PUBLIC SECTOR ROLES IN STRENGTHENING CORPORATE RESPONSIBILITY: A BASELINE STUDY 3-6 (2002). While there is nothing wrong with the state taking on a partnership role, it is problematic when the state refuses to concede that it might also have a part to play in a mandating role. *See, e.g.*, Timothy David Clark & Liisa North, *Mining and Oil in Latin America: Lessons from the Past, Issues for the Future, in* COMMUNITY RIGHTS AND CORPORATE RESPONSIBILITY: CANADIAN MINING AND OIL COMPANIES IN LATIN AMERICA 1, 8 (Liisa North et al eds., 2006); Joan Kuyek, *Legitimating Plunder: Canadian Mining Companies and Corporate Social Responsibility, in* COMMUNITY RIGHTS AND CORPORATE RESPONSIBILITY, *supra*, at 215-18.

36. Can. Dep't of Foreign Aff. & Int'l Trade, The National Roundtables on Corporate Social Responsibility Home Page, http://geo.international.gc.ca/cip-pic/current_discussions/csr-roundtables-en.aspx (last visited June 6, 2008).

37. The National Roundtables were organized by an interdepartmental Steering Committee chaired by the Department of Foreign Affairs and International Trade, and included representatives from Natural Resources Canada, Environment Canada, CIDA, Indian and Northern Affairs Canada, the Department of Justice, Export Development Canada and the Privy Council Office. *See generally* NATIONAL ROUNDTABLES ON CORPORATE SOCIAL RESPONSIBILITY (CSR) AND THE CANADIAN EXTRACTIVE INDUSTRY IN DEVELOPING COUNTRIES, ADVISORY GROUP REPORT (2007), *available at* http://geo.international.gc.ca/cip-pic/library/Advisory%20Group%20Report%20-%20March%202007.pdf (providing a description of the process and resulting recommendations).

38. *Id.* Details of the extensive recommendations found in the Advisory Group Report are

not agree on whether Canada should implement legislation to ensure that corporate wrong-doers are held legally accountable in Canadian courts.[39] One year later, there has still been no indication from the Canadian government as to whether it plans to take any action in light of the Advisory Group Report. In the meantime, the Canadian government has joined the Extractive Industries Transparency Initiative as a supporting member.[40] In addition, a private member's bill has been tabled that would allow for private lawsuits to be brought by foreign plaintiffs in Canada's Federal Court seeking compensation for violations of universal human rights, as well as environmental and labour rights.[41]

The Canadian example, and to a lesser degree the Australian example, demonstrate that home states are reluctant to enact legally binding regulation of extractive companies operating internationally for compliance with international human rights and environmental norms, particularly where the conduct at issue falls short of universally condemned international criminal law norms. The following section will examine whether this reluctance is misplaced.

III. THE INTERNATIONAL LAW OF JURISDICTION

The term "jurisdiction" is used to describe "the limits of the legal competence of a State . . . to make, apply, and enforce rules of conduct upon persons."[42] No state has the right under international law to exercise jurisdiction over any circumstances it chooses, as this may impinge upon the sovereign interests of other states.[43] The phrase "extraterritorial

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beyond the scope of this paper. In brief, the Advisory Group Report recommended that the government develop a CSR framework composed of standards that Canadian extractive-sector companies operating abroad are expected to meet, with the expectation reinforced through "reporting, compliance and other mechanisms," including an independent ombudsman office, and a compliance review committee. *Id.* at 3. The standards would initially be composed of International Finance Corporation standards supplemented by the Voluntary Principles on Security and Human Rights, with a multi-stakeholder Canadian Extractive Sector Advisory Group advising the government on both implementation and further development of the CSR Framework. *Id.* at iv-v, 58-60.

39. *Id.* at 42-45. Civil society participants recommended that the Canadian government adopt federal legislation to regulate the foreign operations of Canadian extractive companies in accordance with the CSR Framework standards, linked to a civil liability system of enforcement. *Id.* Industry participants argued that existing criminal and civil liability regimes combined with voluntary guidelines were sufficient. *Id.* at 42-44. Moreover, industry participants expressed concern that new regulation would "violate rules against extraterritorial legislation, interfere with Canada's foreign policy objectives and damage international trade and investment." *Id.* at 42.

40. Press Release, Dep't of Fin. Can., Canada's New Government Supports An International Initiative to Improve Transparency in Resource-Rich Countries (Feb. 10, 2007), *available at* http://www.fin.gc.ca/news07/07-012e.html.

41. Bill C-492, An Act to amend the Federal Courts Act (international promotion and protection of human rights), 2nd Sess., 39th Parl., 2007.

42. Vaughan Lowe, *Jurisdiction*, *in* INTERNATIONAL LAW 335, 335 (Malcolm D. Evans ed., 2006).

43. OPPENHEIM'S INTERNATIONAL LAW 457 (Sir Robert Jennings & Sir Arthur Watts eds., 1992).

jurisdiction" is frequently used when referring to the regulation of activities that are not wholly within the regulating state,[44] and home state regulation is usually assumed to require the exercise of extraterritorial jurisdiction.[45] Yet the term "extraterritorial" is both notoriously difficult to define[46] and frequently characterized as "exorbitant," if not "illegal."[47] This sentiment is clearly evident in the Canadian Government Response.[48]

According to Jennifer Zerk, one of the problems with the traditional analysis of home state jurisdiction under public international law is the assumption that regulation means "command and control" regulation.[49] This both discounts modern notions of what regulation is, and obscures the regulatory role performed by judges in disputes requiring the application of the doctrines of private international law.[50] Zerk proposes that home state regulation is better understood if extraterritoriality is defined less formally, and recognition given to the legitimacy of alternate forms of home state practice that impose extraterritorial responsibilities, grant extraterritorial rights, or offer extraterritorial benefits.[51]

Despite the promise of Zerk's proposal, continued reference to extraterritoriality in relation to home state jurisdiction may serve only to disguise the existence of real territorial links that provide a solid if preliminary justification for the reasonable exercise of home state

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44. ANDREAS R. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW 15 (1996).

45. The most significant recent example of this is evident in the work of the SRSG. *See, e.g.*, Ruggie Report 2007, *supra* note 12, ¶ 15; U.N.G.A., Hum. Rts. Coun., *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Addendum 2, Corporate Responsibility Under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops*, U.N. Doc. A/HRC/4/35/Add.2 (Febr. 15, 2007) [hereinafter Ruggie Legal Workshops]; Ruggie Interim Report, *supra* note 12, ¶ 71("[O]ne critical area of legal standards that merits close attention is the possible extension in the extraterritorial application of some home countries' jurisdiction for the worst human rights abuses committed by their firms abroad."). *See also* OLIVIER DE SCHUTTER, EXTRATERRITORIAL JURISDICTION AS A TOOL FOR IMPROVING THE HUMAN RIGHTS ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS, *available at* http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf (report prepared as a background paper for the legal experts meeting with John Ruggie in Brussels, Nov. 3-4, 2006, December 2006) [hereinafter DE SCHUTTER REPORT].

46. *See, e.g.*, ZERK, *supra* note 18, at 140-42 (proposing an "alternative definition of 'extraterritoriality'"); DE SCHUTTER REPORT, *supra* note 45, at 8-10 (discussing "the meanings of extraterritorial jurisdiction"). *See also* LOWENFELD, *supra* note 44, at 16 (stating that a satisfactory definition of extraterritorial jurisdiction is "doomed to failure").

47. LOWENFELD, *supra* note 44, at 15. "[W]hen you read a book or article, or attend a symposium with 'extraterritorial jurisdiction' in the title, be advised that the authors or editors or sponsors are attempting to communicate an attitude before the audience has read or heard a single phrase." *Id.* at 16.

48. *Compare* SCFAIT REPORT, *supra* note 5 (supporting home state measures to ensure legal accountability but making no mention of extraterritoriality), *with* GOVERNMENT RESPONSE, *supra* note 11, at 9-10 (opposing additional measures of legal accountability and framing the analysis in terms of extraterritoriality).

49. ZERK, *supra* note 18, at 105.

50. *Id. See also* Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209, 209 (2002).

51. ZERK, *supra* note 18, at 140-42.

jurisdiction. This Part will first explore nationality and territoriality as preliminary justifications for the exercise of home state jurisdiction, then examine the resolution of jurisdictional conflicts where concurrent jurisdiction is exercised by both home and host states.

A. Nationality and Territoriality

A common justification for home state regulation under public international law is the nationality principle.[52] States are free to decide who their nationals are, and to "lay down the conditions for a grant of nationality in their own laws."[53] Thus, corporate nationality is determined by each state under its own laws, and state practice diverges.[54] Common law states tend to accord nationality on the basis of incorporation within their territory regardless of where the business or management is carried out, while civil law states confer nationality on the basis of where the corporation has the seat of its management (*siège sociale*).[55] As corporations frequently incorporate in one jurisdiction for tax or other purposes but undertake their business or management in another jurisdiction, corporations may in practice have more than one nationality.[56] Moreover, state regulatory practices diverge in different contexts, thus states may apply laws on the basis of incorporation in one context, then implicitly adopt a seat of management test when applying law on the basis of a control test that references owners, managers, or operators.[57]

Corporate nationality becomes even more complex when the conduct being regulated is undertaken by a transnational or multinational corporation.[58] While a state may apply its law directly to a corporate national that has set up a branch or an office in another state, it may not as a rule apply its laws directly to a foreign affiliate—whether a subsidiary or an associate[59]—that has been set up as a separate legal entity under the

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52. *See id.* at 106-09; Lowe, *supra* note 42, at 345.

53. Lowe, *supra* note 42, at 345. Nationality should, "in principle, be the juridical expression of a close factual link between the individual and the national State." *Id.* at 346. *Cf.* Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6); Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150 (June 8).

54. ZERK, *supra* note 18, at 147-49; Lowe, *supra* note 42, at 347.

55. Lowe, *supra* note 42, at 345-46. *Cf.* Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 42, ¶ 70 (Feb. 5, 1970). *But see* CYNTHIA DAY WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION 132-37 (2002) (calling the ultimate approach of the two theories "virtually synonymous").

56. Lowe, *supra* note 42, at 346.

57. DE SCHUTTER REPORT, *supra* note 45, at 30. In practice, then, corporate nationality may be most significant as a definitional issue in terms of assessing which firms qualify for government support, whether political, financial, or in terms of diplomatic protection. WALLACE, *supra* note 55, at 135-37; Linda A. Marby, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Nationality*, 87 GEO. L. J. 563, 593 (1999).

58. "Transnational corporation" and "multinational corporation" will be used interchangeably here.

59. A subsidiary is generally defined as a company in which a parent company has a

laws of the host state.[60] In the mining context, many projects are international joint ventures with several parent company shareholders of different nationalities investing in a company incorporated in the host state.[61] It is possible for home states to regulate parent companies that exercise control over foreign subsidiaries in such as way as to impose a course of conduct on the foreign subsidiary without directly regulating the subsidiary.[62] Where an associate company is not under the effective control of the parent company, a home state may be limited to attempting to influence the conduct of the associate through minority shareholders.[63] Corporate enterprise theory has emerged as an alternative to corporate entity theory in order to overcome the difficulties presented by corporate nationality in a multinational enterprise comprised of many separate legal entities.[64] Under corporate enterprise theory, entities that are sufficiently economically integrated are considered as a whole. Yet corporate enterprise theory remains an "emerging doctrine, not yet fully articulated or universally accepted."[65]

A better way to think about justifying home state regulation in

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majority or controlling interest, while an associate company is one in which the parent has a non-controlling or minority interest. Both subsidiary and associate companies are affiliates of the parent company. WALLACE, *supra* note 55, at 102-03.

60. *Cf.* Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AMER. J. COMP. L. 493, 499 (2002); Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT'L & COMP. L. REV. 297, 299 (2001); F.A. Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years*, 186 REC. DES COURS 9, 56 (1984) (describing parent and subsidiary companies as having different "sovereigns"). *See also* ZERK, *supra* note 18, at 106 (reproducing the U.S. position as set out in RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 213 (1987)) and 166 (noting that one particularly problematic aspect of the Australian Bill 2000 was the direct application of law to subsidiaries, despite obvious enforcement difficulties raised by this approach, without any consideration given to the use of indirect parent-based methods of regulation).

61. JAMES OTTO & JOHN CORDES, THE REGULATION OF MINERAL ENTERPRISES: A GLOBAL PERSPECTIVE ON ECONOMICS, LAW AND POLICY 4-29 (2002). *Cf.* Robert Pritchard, *Safeguards for Foreign Investment in Mining*, *in* INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY: TRENDS AND PROSPECTS 73, 73-79 (Elizabeth Bastida et al. eds., 2005). One of these companies may also be incorporated in the host state, and could be a host state-owned company.

62. Mann, *supra* note 60, at 60-63. *See also* ZERK, *supra* note 18, at 108 (describing this as "parent-based" extraterritorial regulation). *Compare* WALLACE, *supra* note 55, at 140-47 (arguing that "it is not so much the actual amount of capital interest (or ownership) as it is the extent of managerial participation on the part of the parent company in the operations of the affiliated company that determines *de facto* control"), 159-88 (discussing the lack of international consensus on the meaning of "control").

63. William F. Flanagan & Gail Whiteman, *Ethics Codes and MNCs as Minority Shareholders: The Case of a Bauxite Mine in Brazil*, *in* ETHICS CODES, CORPORATIONS AND THE CHALLENGE OF GLOBALIZATION 212, 234-38 (Wesley Cragg ed., 2005). *Cf.* John Child & Suzana B. Rodrigues, *Corporate Governance in International Joint Ventures: Toward a Theory of Partner Preferences*, *in* CORPORATE GOVERNANCE AND FIRM ORGANIZATION 89, 108 (Anna Grandori ed., 2004).

64. LOWENFELD, *supra* note 45, at 85-86; ZERK, *supra* note 18, at 228-33. *See also* Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, 276 REC. DES COURS 297, 399-401 (1999) (noting that the principle of absolute multinational enterprise liability has been adopted by the courts of India).

65. LOWENFELD, *supra* note 44, at 85.

jurisdictional terms is to focus on territorial points of control linking the home state with the conduct being regulated. These territorial links may be found in home state institutional structures without which transnational corporate conduct could not take place. These include stock exchanges, financial institutions and enabling corporate laws, as well as specific support mechanisms associated with services provided by export credit agencies and trade commissioners.[66]

The territorial principle is a "corollary of the sovereignty of a State over its territory,"[67] and states "enjoy 'plenary' jurisdiction over their territory."[68] Subject to duties under international human rights and other similar laws, states may "legislate as they please, on any matter whatsoever" within state territory.[69] Yet many "incidents" are not confined to a single jurisdiction, with some straddling many different states, while in other cases it is not always easy to say where "the act" was committed.[70] Accordingly, several variations on territorial jurisdiction have emerged. The phrase "subjective territorial jurisdiction" is sometimes used where an incident is initiated within state territory but completed elsewhere, while "objective territoriality" describes an incident completed within state territory but initiated outside.[71] A third doctrine, the effects doctrine, has been used by the United States to justify assertions of jurisdiction over conduct with no physical link to U.S. territory, but rather on the basis that the conduct was intended to produce economic effects within the U.S.[72] It has been argued that the effects doctrine could be used to justify home state regulation in the human rights and environmental realm on the basis that without it, the reputation of the home state would be undermined, jeopardizing home state foreign policy initiatives.[73]

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66. All of these institutional structures are created to some degree through an exercise of legislative jurisdiction that provides the institution created with powers that allow it—or even mandate it—to participate in the global economic order for the benefit of the home state. *See generally* ADVISORY GROUP REPORT, *supra* note 38 (providing an overview of Canadian institutional structures that support global mining).

67. Lowe, *supra* note 42, at 342.

68. *Id.*

69. *Id.* at 342-43.

70. *Id.* at 343, 347-48.

71. *Id.* at 343-44. *Cf.* Libman v. The Queen, [1985] 2 S.C.R. 178, 178 (Can.) (finding that, while there is a presumption against the application of laws beyond the realm tied to the territoriality principle, jurisdiction may be taken over acts taking place in another state if a sufficient portion of the activities constituting the offense took place in Canada, providing a "real and substantial link" between the extraterritorial offense and the regulating state). The Supreme Court of Canada found that such a link existed in a criminal fraud case concerning telephone sales solicitations originating in Toronto and made to U.S. residents for the purpose of inducing them to buy shares in purported gold mining companies in Costa Rica, with money for the shares sent to associates of the accused in Central America. *Id.* at 210-14. *See also* Seck, *supra* note 27, at 153.

72. Lowe, *supra* note 42, at 344-45 (arguing that U.S. reliance upon the effects doctrine has been foremost in the antitrust context, and noting that the claim that other states have relied upon the effects doctrine is not entirely accurate because these laws usually only apply where there is "some element of intraterritorial conduct").

73. ZERK, *supra* note 18, at 110 (citing the work of the Australian Parliamentary Committee examining Bill 2000).

Whether conduct comes within state territorial jurisdiction thus depends in part on what is understood to comprise the conduct or activities.[74] For example, a decision made in Canada by a branch of the Canadian government to contribute financially to a mining development in another country could be considered an activity that takes place in Canada, although the mining development itself would take place outside of Canada. Accordingly, legislation mandating human rights or environmental requirements on financing decisions made by Export Development Canada (EDC), Canada's export credit agency, would fall within Canadian territorial jurisdiction. Similarly, a decision made in Canada by a Canadian private bank to finance or insure an overseas mining project (or not to finance the project, as the case may be) could be considered an activity that takes place within Canadian territorial jurisdiction. In an analysis of the territoriality of decision-making, there is no distinction between financing by the Canadian government and financing by a private Canadian financial institution. This suggests that, as a preliminary matter, it is *permissible* for a home state government to regulate both its own export credit agency and private financial institutions that make decisions within its territory.[75] These mechanisms could then serve indirectly to regulate the international activities of companies that rely on these services.

A similar argument could be made with regard to regulation imposed directly through corporate law. If corporate law can be used to influence decisions made in Canada,[76] then the territoriality principle again provides a connecting factor on the assumption that Canadian-based (incorporated) companies make decisions in Canada.[77] Companies incorporated in Canada but headquartered abroad and managed by non-residents pose a challenge to the territorial decision-making presumption, as it cannot obviously be presumed that they make decisions in Canada.[78] On the other hand, corporations organized under foreign state laws that have their registered main office or principle place of business in Canada could be presumed to make decisions in Canada.[79]

Requirements imposed through securities regulation or stock exchange listing requirements may require a different justification from corporate law, as listing on a Canadian stock exchange does not require a company to be based (incorporated) in Canada.[80] It might be presumed that a company

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74. Lowe, *supra* note 42, at 353.

75. Indeed, both EDC and Canadian financial institutions already operate subject to federal legislation. *See, e.g.*, Export Development Act, R.S.C., ch. E 20 (1985); Bank Act, S.C., ch. 46 (1991).

76. *Cf.* GOVERNMENT RESPONSE, *supra* note 11, at 3 (suggesting that "the Government of Canada can influence companies that are headquartered in Canada").

77. *Id.* at 9 (stating that "the court must consider the facts that took place in Canada at the corporate headquarters, for example, in the case of a Canadian company operating outside Canada") (internal punctuation omitted).

78. *Id.* at 3.

79. This would accord with a determination of nationality in civil law jurisdictions. Lowe, *supra* note 43, at 345-46.

80. *See, e.g.*, TORONTO STOCK EXCHANGE & TSX VENTURE EXCHANGE, LISTING

listed on the Toronto Stock Exchange (TSX) but incorporated in a foreign country and without a Canadian headquarters would not make decisions in Canada. Despite this, requiring a foreign company listed on a Canadian stock exchange to comply with environmental and social disclosure requirements could be justified on the basis of the effects doctrine.[81]

The above analysis of the location of corporate decision-making may seem overly simplistic given the transnational nature of decision-making in the twenty-first century – both the internet and ease of transportation from one country to another make a focus on territoriality in the world of international business meaningless.[82] Despite this, the existence of extensive professional expertise in global mining in key cities like Toronto, and the use of this expertise by companies listing on Canadian stock exchanges provide another territorial connection that is often overlooked.[83] Adopting a presumption that decision-making is territorially-based is justified if corporations incorporated in Canada or listed on a Canadian stock exchange take advantage of the professional expertise found in Canadian mining centers, regardless of the location of their headquarters or managers.[84] This would not necessarily overcome concerns about the potential effectiveness of the exercise of enforcement jurisdiction in this

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REQUIREMENTS FOR EXPLORATION AND MINING COMPANIES, *available at* http://www.tsx.com/en/pdf/TSXandTSXVenture_MiningListingRequirements.pdf.

81. In the U.S. context, the effects doctrine is an established test of jurisdiction under federal securities laws. H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239, 330-31 (2001). Justification under the effects doctrine would assume that Canadians who invest in securities sold on Canadian exchanges would be negatively impacted by not having access to social and environmental information in order to make their investment decisions. This also assumes that Canadians are the investors.

82. This is particularly so given the polycentric nature of the corporate organization, as even within one parent company, decisions of relevance could be made in multiple locations. *See* Nancy T. Gallini & Aidan Hollis, *A Contractual Approach to the Gray Market*, 19 Int'l Rev. L. & Econ. 1, 2 n.3 ("[M]any multinational corporations are organized around subsidiaries or head offices in each country that have substantial decision-making power for the local market; this is the efficient means of organization.").

83. TORONTO STOCK EXCHANGE & TSX VENTURE EXCHANGE, A GLOBAL RESOURCE FOR CAPITAL 7-24 (2007), *available at* http://www.tsx.com/en/pdf/Mining_Sector_Sheet.pdf (highlighting the fact that the TSX has the largest listing of mining companies in the world, and describing its advantages for mining companies as including the "largest peer group in the world," "mining expertise" and "trading and investing depth," "the large analyst community that covers both seniors and juniors," and the ability "to finance international projects even in high risk places"). *See also* TSX Oil and Gas Listings Page, http://www.tsx.com/en/listings/sector_profiles/oil_gas.html (last visited June 6, 2008) (highlighting the fact that the TSX has the largest listing of oil and gas companies in the world).

84. By adopting such a presumption, I mean to suggest that Canadian legislators could rely upon the territoriality principle to regulate the human rights and environmental conduct of mining companies whether through Canadian securities or corporate law. Such legislation could be structured to simply apply in all cases, or could be structured with a rebuttable presumption that the relevant decision was made in Canada, as opposed to applying only to decisions made in Canada. *See generally* Andy Hoffman, *China Mines Canadian Advice*, GLOBE & MAIL, Jan. 7, 2008, at B3 (emphasizing the importance of Toronto-based bankers and lawyers to state-owned Chinese firms bidding for foreign mining companies).

context, unless corporate law or listing requirements mandated sufficient territorial links for effective enforcement.[85] Alternately, enforcement could be linked to the conduct of Canadian-based professionals.[86]

B. The Resolution of Jurisdictional Conflicts

The preceding section suggests that in principle a home state could justify the regulation of transnational corporate conduct under either the nationality or territoriality principle, with the territoriality principle ultimately providing a more satisfactory justification. However, the real issue is whether the exercise of jurisdiction by a home state conflicts with the exercise of jurisdiction by another state—perhaps most importantly, that of the host state. Concurrent or overlapping jurisdiction arises when more than one state regulates the same transnational conduct in accordance with established jurisdictional principles.[87] Incidents of concurrent jurisdiction are not unusual. Indeed they are quite normal, even commonplace.[88] Objections to jurisdiction may arise where one state perceives the assumption of jurisdiction by a second state as involving unwarranted interference in matters which have little or nothing to do with that second state and are more properly the concern of the first state.[89] This unwarranted interference is generally thought of as contravening the fundamental international law principle of non-intervention or non-interference, which is breached "by an assertion of jurisdiction which interferes with another state's political, economic, social or cultural system."[90] The question, then, is how to resolve contested situations of concurrent jurisdiction. In a true conflict, it is impossible to comply with the laws of both forums at the same time. Thus, compliance with the law of one forum results in violation of the law of the other forum.[91] It is

85. For example, if enforcement difficulties are created by corporate laws that allow for incorporation in Canada without any Canadian directors or officers, then these laws should be changed. *See, e.g.*, Yukon Business Corporations Act (YBCA), R.S.Y., ch. 20 (2002) (Can.).

86. *See generally* JOHN C. COFFEE, GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 192-244 (2006).

87. Lowe, *supra* note 42, at 354.

88. D.W. Bowett, *Jurisdiction: Changing Patterns of Authority Over Activities and Resources*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 555, 565 (R. St. J. Macdonald & Douglas Johnston eds., 1983). *See also* OPPENHEIM, *supra* note 43 ("In practice . . . it is only in relatively few cases that overlapping claims to jurisdiction cause serious problems, usually where the states concerned attach importance to the assertion of their competing claims . . . Usually the coexistence of overlapping jurisdiction is acceptable and convenient"); WALLACE, *supra* note 55, at 590 (describing jurisdictional conflicts as "inevitable wherever a serious conflict of interests arises between the law and policy of the home state and that of the host"); ZERK, *supra* note 18, at 133 ("The presence of multinationals makes jurisdictional conflicts between states inevitable.").

89. Bowett, *supra* note 88, at 565.

90. *Id.* at 566. *See also* ZERK, *supra* note 18, at 105 ("[S]o far as social and environmental regulation is concerned, indirect or 'parent-based' forms of extraterritorial regulation are generally permitted, provided they do not violate the international law duty of 'non-intervention'").

91. *See, e.g.*, H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 325 (1983)

clearly not acceptable for a home state to require a company in the host state to break host state law, even if this is done indirectly through the parent company.[92] However, even where the laws in question do not create a true conflict, the exercise of concurrent jurisdiction by a home state may still be viewed as intrusive by a host state, particularly if the subject matter touches on matters that are considered central to the "very idea" of state sovereignty.[93]

This leads to a third possible justification for the exercise of home state jurisdiction under international law, the principle of universal jurisdiction. Universal jurisdiction is concerned first and foremost with the subject matter that is being regulated, thus violations of international criminal law norms are considered to be sufficiently serious that any state can and even should exercise jurisdiction to bring perpetrators to justice, no matter where in the world the crimes were committed.[94] This basis of jurisdiction provides additional justification for existing home state legislation that in theory could lead to the prosecution of transnational corporations for complicity in egregious human rights violations.[95]

Despite this, Canada appears reluctant to prosecute corporations criminally, as evident from both the Talisman and Anvil Mining examples above. The reluctance to prosecute Anvil may be due to the fact that a

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(explaining that an "intuitively acceptable" definition of a conflict as "between two rules requiring or prohibiting actions is to be understood in terms of the logical possibility of joint obedience to them. Two such rules conflict if and only if obedience to them both . . . is logically impossible"). According to this definition, a home state law that prohibited home state gold mining companies from using cyanide in global mining operations would not conflict with a host state law that required cyanide use to be in compliance with the UNEP International Cyanide Management Code, nor with a host state that had no law in place on the use of cyanide in gold mining. In both cases, if the company did not use cyanide, it would not breach host state law. The home state prohibition would, however, conflict with a host state law explicitly requiring cyanide use in gold mining.

92. WALLACE, *supra* note 55, at 590; Mann, *supra* note 60, at 59-63.

93. *Cf.* Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms, in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 45, 53 (Craig Scott ed., 2001) (arguing that the more extraterritorial regulation moves away from matters of common criminality to matters of economic policy, the greater sensitivity states feel, because of the "dominant view that economic policy belongs in some more intrinsic way to the very idea of sovereignty"). *See also* U.N. Conference on Environment and Development, June 3-14, 1992, *Río Declaration on Environment and Development and Agenda 21*, 8, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) (Principle 2) (providing support in the environmental context for host state conceptions of state sovereignty).

94. THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW 259 (2006) ("Some international obligations are . . . so basic that they run equally to all other States, and every State has the right to demand respect for those obligations"). *Cf.* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. Rep. 3, at 76-77 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal); DE SCHUTTER REPORT, *supra* note 45, at 15. *See generally* MERON, *supra*, at 256-70, 392-98 (2006) (discussing the relationship among *jus cogens* norms, *ergo omnes* obligations, and international crimes; citing Giorgio Gaja's description of this relationship as a "set of three overlapping, concentric circles" which permits any state to regulate to ensure compliance with and punish violators of these norms); LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 28-42 (2003) (providing an overview of theories of universal jurisdiction).

95. RAMASASTRY & THOMPSON, *supra* note 29, at 16-17.

military court in the Democratic Republic of the Congo has already tried and acquitted three of Anvil's employees. A Canadian prosecution of the same employees could give rise to a situation of double jeopardy, although this would not be the case if Canada were to prosecute the corporation itself.[96] In the Talisman case, the reason for the reluctance to prosecute is less clear. What is clear is that Canada's interventions in support of Talisman in the private law tort action in the state of New York would be less controversial if either criminal prosecution or a parallel civil action were underway in Canadian courts.[97]

Many matters of concern to local communities impacted by global mining are not violations of international criminal law or matters of universal jurisdiction, but rather involve the realization of indigenous or local community rights to have a say in whether or how global mining is to be carried out, and to seek remediation in the event that global mining activities cause harm.[98] These concerns touch upon economic, social, and cultural rights; environmental rights; indigenous rights; and the right to development.[99] Accordingly, home state regulation of these matters is more likely to be perceived as infringing host state sovereignty than is home state legislation that addresses an international criminal law norm.

Thus, a critical question in the extractive industries context is how to address potential problems that might arise in the exercise of concurrent jurisdiction over non-egregious human rights violations. Returning to first principles, the starting point must be that the exercise of concurrent jurisdiction is not unusual, but commonplace, particularly with regard to activities involving transnational corporations. With this understanding, the question becomes how to satisfactorily resolve jurisdictional disputes, or, more precisely, how to minimize host state perceptions of impermissible intervention.[100] The resolution of jurisdictional "conflicts" is

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96. McBeth, *supra* note 28. This is not to say that Canada should refrain from prosecuting Anvil in light of the due process concerns that have arisen in relation to the military court trial. *See generally* GLOBAL WITNESS ET AL., *supra* note 28. *See also* Libman, *supra* note 71, at 212 (holding that Canadian courts make use of the principles of *autrefois acquit* and *autrefois convict* to take cognizance of acquittals and convictions in other jurisdictions for the same conduct).

97. This is not to say that the interventions would be acceptable in either of these circumstances, merely that they would be easier to understand. As it is, Canada's interventions amount to an insistence that Canada wants the United States to refrain from exercising jurisdiction over Talisman, so that Canada can exercise its jurisdiction to do nothing free from outside interference.

98. *See generally* COMMUNITY RIGHTS AND CORPORATE RESPONSIBILITY, *supra* note 36. On Peru, see Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69 (2008).

99. These rights may be viewed as people's rights. *See generally* PEOPLE'S RIGHTS (Philip Alston ed., 2001); Ruggie Report 2007, *supra* note 12, ¶¶ 22-30 (discussing the distinction between international criminal law norms and other human rights norms in relation to direct corporation obligations under international law); Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards A Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL L.J. 769, 771-72 (1989) (examining the interdependence of human rights).

100. Perhaps the better question is how to minimize the reliance of home states upon the principle of non-intervention as a justification for inaction. *See* ZERK, *supra* note 18, at 136 (describing international statements of the principle of non-intervention as "deliberately

frequently said to depend upon a test of reasonableness involving a balancing of state interests, which includes consideration of links to the territory of the regulating state, and the importance of the regulation to the international system.[101]

A related approach to the resolution of jurisdictional conflicts is through recourse to notions of shared international interests.[102] As August Reinisch notes:

> States are using their extraterritorial jurisdiction in order to enforce not (only) their own policy goals, but also international ones. Of course, one has to be very careful in assessing whether states truly enforce international law or whether they use this as a pretext to pursue their own national policies.[103]

To the extent that some cases may validly be described as attempting to enforce international human rights norms through national legal systems, the issue becomes a clash of substantive international law principles relating to human rights, and formal international law principles relating to jurisdiction.[104] Reinisch suggests that in this case, "'substance' might override 'form'", as "affected states will have a hard time justifying their disregard of human rights in rejecting the extraterritorial acts of others."[105]

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woolly" and nearly "impossible to interpret" in the globalization context).

101. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987); ZERK, *supra* note 18, at 136-39; Bowett, *supra* note 79, at 566-72; DE SCHUTTER REPORT, *supra* note 45, at 27. Among the factors considered in the Restatement's reasonableness test are: the links to the territory of the regulating state; the character of the activity being regulated; its importance to the regulating state; the extent to which other states regulate the activity; whether such regulation is considered desirable; and the importance of the regulation to the international system. RESTATEMENT (THIRD) OF FOREIGN RELATIONS (as discussed in LOWENFELD, *supra* note 44, at 18-19).

102. *See, e.g.*, August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 37, 58 (Philip Alston ed., 2005). *See also* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 77 (1994) (arguing that "the key issue lies in the protection of common values rather than the invocation of state sovereignty for its own sake . . . the exercise of extraterritorial jurisdiction to protect common values to that end seems to me as acceptable as other non-territorial bases"); DE SCHUTTER REPORT, *supra* note 45, at 27 (arguing that a reasonable exercise of extraterritorial jurisdiction to protect human rights in a host state cannot "fall under the category of forms of extraterritorial jurisdiction which primarily benefit the State, thus extending the reach of its national laws," and instead must be "justified in the name of international solidarity").

103. Reinisch, *supra* note 102. *See also* ZERK, *supra* note 18, at 137-38.

104. Reinisch, *supra* note 102.

105. *Id.* Reinisch continues:

> While international law only provided a value-neutral framework within which states were free to adopt and pursue their own policy through legislation, each state could easily defend its own sovereign right to determine its own policies and thus to legislate and remain unaffected by the legislation of other states. The growing convergence of policies, or at least the increasing substantive determination of national policy choices through international law, for our purposes the increasing pressure to

It thus becomes important to examine the substance of the international norms that home state regulation might address. Ultimately, according to Lowe: "Where other States consider that a jurisdictional claim has gone too far . . . they will protest. Those protests generally hold jurisdictional claims within reasonable bounds. If other States choose to acquiesce in the claim, it will become established in customary law."[106]

IV. HOME STATE OBLIGATIONS

A. Sustainable Mineral Development and the Three Pillars of Public Participation

Unlike other renewable resources such as forestry and fisheries, "there is no global governance regime or extensive statement of principles for mining or mineral resources."[107] However, many multilateral environmental agreements do have an impact on the minerals industry, as do many other sources of international environmental law.[108] Moreover, in recent years, sustainable development has become the mantra of the global mining industry, with a focus on sustainable development changing both corporate strategies and the "goals and objectives of mining law reform."[109] Indeed, while the *Río Declaration on Environment and Development* and *Agenda 21* did not directly address the mining industry,[110] the Commission on Sustainable Development, the United Nations body established to oversee its implementation, later listed "mineral, metals and rehabilitation

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> fulfil [sic] human rights obligations by enacting implementing legislation, has weakened the shield of national sovereignty and territorial jurisdiction.

Id. at 58-59.

106. Lowe, *supra* note 42, at 354. Protest could take the form of blocking legislation, a fairly common occurrence in relation to perceived jurisdictional overreaches relating to transnational corporations. *See, e.g.*, LOWENFELD, *supra* note 44, at 166-79; WALLACE, *supra* note 55, at 617-22. While Lowenfeld considers blocking statutes to represent "the opposite . . . of accommodation, reasonableness, balancing of interests, [and] 'comity,'" he arguably overlooks the usefulness of blocking statutes as tools of communication between states that ultimately reveal the existence of common purposes by exposing existing impediments to their realization. LOWENFELD, *supra* note 44, at 153.

107. Maria Cecilia G. Dalupan, *Mining and Sustainable Development: Insights from International Law, in* INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY, *supra* note 62, at 155.

108. George (Rock) Pring, James Otto & Koh Naito, *Trends in International Law Affecting the Minerals Industry (Pt. I)*, 17 J. ENERGY & NAT. RESOURCES L. 39 (1999) & George (Rock) Pring, James Otto & Koh Naito, *Trends in International Law Affecting the Minerals Industry (Pt. II)*, 17 J. ENERGY & NAT. RESOURCES L. 151 (1999) (dividing the analysis into trends that affect access to land, the implementation of process operations, or the sale of end products and waste commodities).

109. John P. Williams, *Legal Reform in Mining: Past, Present, and Future, in* INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY, *supra* note 61, at 37, 62. *See also* David Humphreys, *Corporate Strategies in the Global Mining Industry, in* INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY, *supra* note 61, at 451, 463-66.

110. Río Declaration on Environment and Development and Agenda 21, *supra* note 93.

in the context of sustainable development" as a priority area for future work.[111]

The *Johannesburg Plan of Implementation* of the World Summit on Sustainable Development (WSSD) in Johannesburg in 2002 does explicitly address mining, stating in part that "[m]ining, minerals and metals are important to the economic and social development of many countries", and that "[m]inerals are essential for modern living."[112] This agreed-upon text was condemned by environmentalists and affected community representatives, who boycotted the WSSD process several days into PrepCom IV in Bali, Indonesia in protest.[113] Among the complaints were the sense that the statement that "minerals are essential for modern living" was "skewed towards the satisfaction of the consumption patterns of the north,"[114] and that participation in the WSSD process was not furthering their struggles for human rights and ecological justice.[115] Mining will be on the agenda of the 2010/11 meeting of the Commission on Sustainable Development, a meeting that the Canadian government is actively preparing for in part through its central role in the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development.[116]

The *Johannesburg Plan of Implementation* lists three specific actions designed to enhance the contribution of mining, minerals and metals to sustainable development.[117] The second action focuses upon the need to "[e]nhance the participation of stakeholders, including local and indigenous communities and women, to play an active role in minerals, metals, and mining development."[118] This focus is in keeping with what has been described as perhaps the most significant trend in sustainable

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111. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Sustainable Dev., *Report on the Eighth Session*, ¶¶ 4, 25, U.N. Doc. E/CN.17/2000/20 (April 24-May 5, 2000).

112. World Summit on Sustainable Development, Aug. 25-Sept. 4, 2002, *Johannesburg Declaration on Sustainable Development and Plan of Implementation*, 37, UN Doc. A/CONF.199/20 [hereinafter Johannesburg Plan of Implementation].

113. Project Underground, *Affected Communities and Non-Governmental Organizations Boycott the WSSD*, DRILLBITS & TAILINGS (Project Underground, Berkeley, Cal.), June 30, 2002, http://lists.topica.com/lists/englishdrillbits/read/message.html?sort=&mid=803599138 (last visited Apr. 11, 2008); Statement, Participants of the International Mining Workshop, No Tears for the WSSD (June 4, 2002), *available at* http://www.minesandcommunities.org/Action/press43.htm. According to members of the Africa Initiative on Mining, Environment and Society (AIMES), the Canadian delegation at the Bali PrepCom were "among the architects of the mining section", and were alleged to have been one of the official delegations for whom mining was a "non-negotiable issue", unless the outcome could be reworked to "promote increased mining within the framework of voluntary codes and high privileges for companies." Statement by AIMES on Mining (June 5, 2002), *available at* http://twnafrica.org/news_detail.asp?twnID=229.

114. AIMES, *supra* note 113.

115. No Tears for the WSSD, *supra* note 113. However, the *Johannesburg Plan of Implementation* as a whole has been described as noteworthy for treating poverty and unsustainable production and consumption patterns as cross-cutting issues. MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES, & PROSPECTS 29 (2004).

116. Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development Home Page, http://www.globaldialogue.info (last visited June 6, 2008).

117. Johannesburg Plan of Implementation, *supra* note 112, at 37.

118. *Id.* at 37.

mineral development: the increasing recognition of the right of local communities, especially but not exclusively indigenous peoples, to participate in decision-making relating to mineral development.[119]

The three "pillars" of public participation rights are access to information, public participation in decision-making, and access to justice in environmental matters.[120] Together, they form an integral part of international sustainable development law.[121] While each pillar is separate and distinct, "no one of the three can succeed without the other two."[122] As Pring and Noé note, "a considerable amount of the public-participation law arises in response to and therefore specifically applies to the mining, energy, and natural resources industries."[123] Moreover, as many issues have "transboundary or multi-state impacts," a significant consideration is the extent to which the three pillars apply to "nationals of countries other than the decision-making country."[124]

Numerous international environmental law and sustainable development law sources provide support for the three pillars of public participation.[125] Public participation is often a component of an

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119. George (Rock) Pring & Susan Y. Noé, *The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resources Development, in* HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: PUBLIC PARTICIPATION IN THE SUSTAINABLE DEVELOPMENT OF MINING AND ENERGY RESOURCES 11, 12 (Donald N. Zillman, Alastair R. Lucas & George (Rock) Pring eds., 2002) ("Public participation promises to define and redefine the major economic development projects of the Twenty-First Century—and few sectors will be more impacted on by this than the mining, energy, and resources-development industries.").

120. *Id.* at 28. The right to access information places both a reactive duty and a proactive duty upon governments who must both respond to requests for information and "compile, prepare, and disseminate" certain information to the public without first being asked. *Id.* at 29-30. The right of public participation in decision-making has emerged both through environmental assessment processes, and new laws that impact other processes of decision-making. This pillar is particularly significant for mining development, serving to "inject new 'players'—citizens, NGOs, indigenous peoples' interests, local communities, etc. - and therefore new challenges into . . . decision-making that were previously the province only of the project developer, landowner, financier, and government officialdom." *Id.* at 37, 38. Finally, access to justice needs arise in three distinct situations: first, to challenge a refusal to provide access to information; second, to prevent or seek damages related to harmful activities; and third, to directly enforce existing environmental laws. *Id.* at 44.

121. *Id.* at 28; SEGGER & KHALFAN, *supra* note 115, at 101, 156-66.

122. Pring & Noé, *supra* note 120, at 28.

123. *Id. See also* Barry Barton, *Underlying Concepts and Theoretical Issues in Public Participation in Resources Development, in* HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT, *supra* note 119 at 77 (noting that "the extent to which there should be participation, and how it should occur, go straight to the heart of a nation's political values"). For rationales and critiques of public participation, see Barton, *supra*, at 99-109; Pring & Noé, *supra* note 119, at 22-26; Benjamin J. Richardson & Jona Razzaque, *Public Participation in Environmental Decision-making, in* ENVIRONMENTAL LAW FOR SUSTAINABILITY 165, 191-94 (Benjamin J. Richardson & Stepan Wood eds., 2006).

124. Pring & Noé, *supra* note 119, at 28-29. Accordingly, the principle of non-discrimination is often used in this context, along with equal access and national treatment.

125. *Id.* at 27-50. *See, e.g.*, U.N. Econ. Comm. for Eur., June 23-25, 1998, *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, U.N. Doc. ECE/CEP/43 (Oct. 30, 2001). *Accord* 1 EMIL SALIM, STRIKING A BETTER BALANCE 24 (2003), *available at* http://go.worldbank.org/380ODLX6N0 (citing the three pillars as set out in the Aarhus Convention as providing a "long-term model for addressing community access to grievance mechanisms"); Pring & Noé, *supra* note 119, at 36

environmental impact assessment (EIA), so international law sources mandating EIA processes often make reference to public participation rights.[126] Support for public participation rights are found in the practices of international financial institutions,[127] Equator Principles financial institutions,[128] and export credit agencies.[129]

Support for the three pillars of public participation is also found in many sources of international human rights law.[130] Of particular significance in the global mining context is that local communities, especially indigenous communities, are often said to have a right to free, prior and informed consent[131] with regard to development projects that could affect local community rights.[132] Another formulation of the public

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(quoting former U.N. Secretary-General Kofi Annan as saying that, while the Aarhus Convention is regional in scope, it is global in significance, "by far the most impressive elaboration of principle 10 of the Rio Declaration," and the "most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the United Nations").

126. *See* Pring and Noé, *supra* note 120, at 38-43. Most countries around the world require EIA as a national instrument for proposed projects, although there is a huge variation in the number and type of assessments carried out, and in the degree of public participation. *See, e.g.*, ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITION COUNTRIES (Norman Lee & Clive George eds., 2000).

127. *See, e.g.*, WORLD BANK GROUP, INTERNATIONAL FINANCE CORPORATION, INTERNATIONAL FINANCE CORPORATION'S PERFORMANCE STANDARDS ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY 1-6, 28-32 (Apr. 30, 2006), *available at* http://www.ifc.org/ifcext/enviro.nsf/Content/PerformanceStandards (providing for free, prior, and informed consultation with indigenous peoples).

128. *The Equator Principles* (July 2006), *available at* http://www.equator-principles.com/documents/Equator_Principles.pdf.

129. Org. of Econ. Co-operation and Dev. (OECD), Trade and Agriculture Directorate, Trade Committee, Working Party on Export Credits and Credit Guarantees, *Revised Council Recommendation on Common Approaches on Environment and Officially Supported Export Credits* (June 12, 2007), *available at* http://www.olis.oecd.org/olis/2007doc.nsf/linkto/tad-ecg(2007)9.

130. *See* Pring & Noé, *supra* note 119, at 50-52.

131. Whether this is a right of indigenous peoples alone or of both indigenous and local communities is contested, as is whether they have a right to free, prior and informed consent, or to free, prior and informed consultation. *See* FOREST PEOPLES PROGRAMME & TEBTEBBA FOUNDATION, INDIGENOUS PEOPLES' RIGHTS, EXTRACTIVE INDUSTRIES AND TRANSNATIONAL AND OTHER BUSINESS ENTERPRISES, A SUBMISSION TO THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES 45-54 (2006), *available at* http://www.business-humanrights.org/Documents/Forest-Peoples-Tebtebba-submission-to-SRSG-re-indigenous-rights-29-Dec-2006.pdf. The distinction between consultation and consent has been controversial at the World Bank. *Compare* SALIM, *supra* note 125, at 21, 50 (supporting consent) *with* WORLD BANK GROUP MANAGEMENT, STRIKING A BETTER BALANCE: WORLD BANK GROUP MANAGEMENT RESPONSE 7 (2004) (supporting consultation).

132. U.N. Hum. Rts. Coun., *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties*, ¶ 46, U.N. Doc. A/HRC/4/35/Add.1 (Feb. 13, 2007) [hereinafter Ruggie Addendum 1] (referring to the recommendations of the UN human rights treaty bodies). The most recent statement of this principle is the U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc.. A/RES/61/295 (Oct. 2, 2007), adopted by the U.N. General Assembly in September 2007. Canada was one of only four countries voting against the Declaration.

participation pillars may be found in the 1986 Declaration on the Right to Development[133] which has subsequently been reaffirmed as an "integral part of fundamental human rights."[134]

B. An Obligation of Home States

Having established that the three pillars of public participation have support in sources of international law of significance to global mining, the question remains as to whether home states are obligated to ensure that the participation rights of local communities in host states are respected. The Declaration on the Right to Development is potentially helpful in this regard, for Article 2(3) formulates the right as both a right and duty of states, with the state holding the right as an agent for the individuals and the entire population.[135] This suggests that the state right to development must be exercisable against outside actors, including conceivably a home state.[136] Moreover, states have the duty "individually and collectively" to facilitate the full realization of the right to development in the formation of development policies, while states must also take steps to eliminate obstacles to development resulting from the failure to observe other human rights.[137] Taken together, it is clearly possible to argue that home states as well as host states must ensure that the three pillars of rights of participation in development are fully protected. The more recent Declaration on the Rights of Indigenous Peoples also provides support for a home state obligation, both "before adopting and implementing legislative or administrative measures that may affect [indigenous peoples],"[138] and "prior to the approval of any project . . . affecting their land" in relation to the development of mineral resources.[139]

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133. Declaration on the Right to Development, G.A. Res. 41/128 Annex, at 186, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/41/53 (Dec. 4, 1986).

134. Anne Orford, *Globalization and the Right to Development*, *in* PEOPLE'S RIGHTS 127, 131-34 (Philip Alston ed., 2001). *See also* Scott, *supra* note 99, at 824 (stating that the right to development may be viewed at least in part as a "synthetic right premised on the interdependence of existing human rights," and that "[p]articipation, which entails the active exercise of a whole cluster of civil and political rights, is practically a leitmotif of the Declaration").

135. Declaration on the Right to Development, *supra* note 134. *See also* Orford, *supra* note 135, at 137 (describing the rights and duties of states under Article 2(3) as working to "formulate appropriate national development policies" with a goal to "constant improvement of the well-being of the entire population and all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom").

136. Declaration on the Right to Development, *supra* note 133, at 186-87. *See also* Orford, *supra* note 135, at 141-44 (citing Articles 2(3) and 8 without mentioning home states, but suggesting that the Declaration provides that the right could be exercised against transnational companies or international institutions, as well as other powerful states).

137. Declaration on the Right to Development, *supra* note 133, at 187. *See also* Orford, *supra* note 134, at 142 (citing Articles 4(1) and 6(3)).

138. Declaration on the Rights of Indigenous Peoples, *supra* note 132, at 6. In this case, the obligation attaches to "states."

139. *Id.* at 9. Many other provisions of the Declaration are also relevant. Given the length of time involved in the drafting of the Declaration and the amount of attention and effort

A second source of support for home state obligations lies in recommendations of human rights treaty bodies with regard to the regulation and adjudication of human rights violations by transnational corporations. The state duty to protect against non-state actor human rights abuses requires states to take steps to "regulate and adjudicate abuses by all social actors, including businesses."[140] The treaty bodies frequently specifically recommend that states take steps to regulate and adjudicate the acts of mining and extractive companies.[141] The recommendations generally concern "regulation through legislation and adjudication through judicial remedies, including compensation where appropriate."[142] Moreover, states may breach their obligations "whether they permit or fail to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."[143] In light of the analysis earlier in this Part, it could be said that obligations to prevent and redress harm can only be implemented in the mineral development context if the three pillars of public participation have also been implemented. Accordingly, the state obligation to regulate and adjudicate business must include the obligation to implement the three pillars of public participation.

While the treaty bodies have clearly stated that the duty to protect applies to host states, the duty has not been clearly articulated in relation to home states, although the treaty bodies also do not interpret their treaties so as to prohibit the exercise of home state jurisdiction.[144] Moreover, the treaty bodies do appear to be increasingly suggesting that a role does exist for home states in relation to the duty to protect.[145] Indeed, in March 2007, the Committee on the Elimination of Racial Discrimination (CERD) noted

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given to it by states as well as by indigenous peoples, it is of considerable weight. Stefan Matiation & Josée Boudreau, *Making a Difference: The Canadian Duty to Consult and Emerging International Norms Respecting Consultation with Indigenous Peoples, in* THE GLOBALIZED RULE OF LAW 397, 423-26 (Oonagh Fitzgerald ed., 2006).

140. Ruggie Report 2007, *supra* note 12, ¶ 10 (stating that the duty to protect is found under core U.N. human rights treaties as elaborated by the treaty bodies, and its content has been unanimously affirmed by the treaty bodies). *See also* Ruggie Addendum 1, *supra* note 132, ¶ 7 ("The duty to protect includes preventing corporations—both national and transnational, publicly or privately owned—from breaching rights and taking steps to punish them and provide reparation to victims when they do so"). The state duty to protect against non-state actor human rights abuses has also been affirmed by the regional human rights systems with similar requirements established for states to "regulate and adjudicate corporate acts." Ruggie Report 2007, ¶ 16.

141. Ruggie Addendum 1, *supra* note 132, ¶¶ 30, 45-46.

142. *Ruggie Report 2007, supra* note 12, ¶ 14.

143. *Id.* ¶ 13 (internal punctuation omitted). The concept of due diligence is not used explicitly by all treaty bodies. Ruggie Addendum 1, *supra* note 132, ¶ 9.

144. Ruggie Report 2007, *supra* note 12, ¶ 15; Ruggie Addendum 1, *supra* note 132, ¶¶ 84-92.

145. Ruggie Report 2007, *supra* note 12, at n.9. For example, the Committee on Economic, Social and Cultural Rights has indicated that states should "take steps to 'prevent their own citizens and companies' from violating the right to water of individuals and communities in other countries." U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 15: The right to water*, ¶ 33, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); Ruggie Addendum 1, *supra* note 132, ¶¶ 86-87.

in its Concluding Observations on Canada that the CERD

> encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable.[146]

Interestingly, these comments were made after the CERD had received submissions from indigenous peoples in the United States complaining about the conduct of Canadian mining companies on indigenous lands in the United States.[147] This would suggest that the role of home states in assisting host states to comply with international human rights obligations should not be conceived of as one that revolves around rich home states and poor incapacitated host states, particularly in the extractive industries context. Indeed, large-scale mineral extraction by its very nature pits central governments hungry for the financial returns of mineral investment against rural, often poor, often politically disempowered and internally divided local communities who bear the brunt of mining's impacts. This is equally true of rich and poor states.

A third source of support for home state obligations is by analogy to the International Law Commission's (ILC) work on the prevention and reparation of transboundary environmental harm. While initially conceived of as secondary rules of liability,[148] both the ILC's *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*[149] and the *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*[150] are better understood as primary

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146. U.N. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding observations of the Committee on Elimination of Racial Discrimination*, ¶ 17, U.N. Doc. CERD/C/CAN/CO/18 (March 5, 2007).

147. WESTERN SHOSHONE DEFENSE PROJECT, REPORT ON EFFECTS OF CANADIAN TRANSNATIONAL CORPORATE ACTIVITIES ON THE WESTERN SHOSHONE PEOPLES OF THE WESTERN SHOSHONE NATION, REPORT SUBMITTED TO CERD IN RELATION TO CANADA'S 17TH AND 18TH PERIODIC REPORTS TO CERD, 4 (2007). The Western Shoshone lands are in California, Idaho, Nevada, and Utah. *Id.*

148. *See, e.g.*, A.E. Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?*, 39 INT'L & COMP. L. Q. 1, 24 (1990) (arguing that the "principle of causal liability provides a largely novel basis for reparation complementing State responsibility or operating in cases where responsibility does not arise"). On the conceptual difference between state liability and state responsibility, *see* XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 75-76 (2003).

149. Int'l Law Comm'n, *Report of the International Law Commission: Fifty-third Session*, 366-436, U.N. Doc. A/56/10 (Aug. 10, 2001) [hereinafter *Prevention Articles*].

150. Int'l Law Comm'n, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*, 101-82, U.N. Doc. A/61/10 (2006) [hereinafter *Loss Allocation Principles*].

rules.[151] According to the ILC, a "state of origin" is under an obligation to exercise due diligence to prevent harm in other states by taking necessary legislative, administrative or other action.[152] The state of origin is also required to provide the "public likely to be affected" with relevant information, and to "ascertain their views."[153] Furthermore, access to justice in state of origin courts is to be provided to affected citizens of other states in accordance with the principle of non-discrimination.[154] The ILC's early work in this area conceived of the scope as applying to both transboundary environmental harm and transnational harm associated with the export of hazardous technology by transnational corporations.[155] While the wording of the scope of the Prevention Articles now suggests that transboundary harm was at the forefront of the drafters' thoughts, it is still possible to read both the ILC Prevention Articles and Loss Allocation Principles as encompassing transnational harm.[156] Thus, support could be found for home state obligations by analogy with the ILC's work on the prevention and remediation of transboundary harm.

Finally, support for home state obligations can also be found through a better understanding of the attribution rules of the ILC's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* ("Draft Articles on Responsibility").[157] Generally speaking, discussions of home state responsibility have focused upon the question of how to attribute corporate conduct directly to the state, and concluded that this is conceptually difficult in the absence of an agency relationship between the state and the corporate actor.[158] However, a better approach would be to focus on the

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151. *Loss Allocation Principles*, *supra* note 150, at 118.

152. *Prevention Articles*, *supra* note 149, at 372-73. A "state of origin" is defined as a state "in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are planned or carried out." *Id.* at 371.

153. *Id.* at 375.

154. *Id.* However, states may agree on alternate means of providing protection or redress to persons who may suffer significant harm. *See* Principle 6(1) of the *Loss Allocation Principles*, *supra* note 151 (providing that states "shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control"). This goes beyond the non-discriminatory access of the Prevention Articles. For a critique of an earlier version of the *Loss Allocation Principles*, *see* A.E. Boyle, *Globalising Environmental Liability: The Interplay of National and International Law*, 17 J. ENVTL. L. 3 (2005).

155. Shinya Murase, *Perspectives from International Economic Law on Transnational Environmental Issues*, 253 REC. DES COURS 287, 396-98 (1995).

156. For a detailed analysis, *see* Sara L. Seck, Home State Obligations for the Prevention and Remediation of Transnational Harm: Canada, Global Mining and Local Communities 290-413 (Dec. 2007) (unpublished Ph.D. dissertation, Osgoode Hall Law School, York University) (on file with author). *See also* XUE, *supra* note 148 at 9-10 (discussing the distinction between transnational harm and transboundary harm, which she describes as difficult to draw in practice and not always reflective of reality).

157. Int'l Law Comm'n, *supra* note 148, at 43-365.

158. Many scholars do not specifically state that an agency relationship is required, but implicitly assume so by relying upon Articles 5 and 8 of the Draft Articles on Responsibility, if, indeed, they address attribution at all. Article 5 attributes conduct of persons or entities empowered by state law to exercise elements of governmental authority, *id.* at 44, while

conduct of home state organs themselves, and whether or not their conduct is in keeping with the home state duty to prevent and remedy human rights violations by non-state actors. Article 4 of the Draft Articles on Responsibility, which provides that "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions . . ."[159] thus becomes crucially important. The argument here is as follows: under the primary rules of international environmental and human rights law, states are under a duty to regulate private actor conduct so as to prevent harm and to provide a remedy if harm ensues. To the extent that home states do not exercise due diligence to prevent harm and to the extent that home states neither prosecute private actors that have caused harm nor provide access to justice for the victims of harm, the home state has itself engaged in wrongful conduct for which state responsibility is applicable.[160] Under the Draft Articles on Responsibility's principle of independent responsibility, the home state may be viewed as directly responsible for its own wrongful conduct - that is, for its failure to regulate, including its failure to provide a remedy. However, the home state is not directly responsible for the conduct of the private corporate actor.

This understanding of responsibility has been described by some scholars as indirect responsibility for private actor conduct,[161] and by others as responsibility under the separate delict theory, with the term indirect responsibility reserved for historical cases of complicity or condonation.[162] It has been suggested that as the distinction between direct responsibility for private actor conduct and responsibility under the separate delict theory has no significant consequences in terms of remedies under both international environmental and human rights law, the analysis

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Article 8 attributes conduct of a person or group who are "in fact acting on the instructions of, or under the direction or control of" the state, *id.* at 45. *See, e.g.*, NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS 139-75 (2002); XUE, *supra* note 149, at 73-80; ZERK, *supra* note 18; Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights* 5 MELB. J. INT'L L. 1 (2004); Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law, in* NON-STATE ACTORS AND HUMAN RIGHTS 227, 235-37 (Philip Alston, ed., 2005); Muthucumaraswamy Sornarajah, *Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States, in* TORTURE AS TORT 491 (Craig Scott ed., 2001). More recent work has begun to focus attention on the attribution of conduct to state organs such as export credit agencies either directly or through a complicity analysis. *See, e.g.*, ÖZGÜR CAN & SARA L. SECK, THE LEGAL OBLIGATIONS WITH RESPECT TO HUMAN RIGHTS AND EXPORT CREDIT AGENCIES (2006); Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MODERN L. REV. 598 (2007).

159. *Draft Articles on Responsibility, supra* note 156, at 43-365.

160. Note that conduct encompasses actions and omissions.

161. *See, e.g.*, Scott, *supra* note 93, at 47-48.

162. *See* TAL BECKER, TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY 11-42 (2006). According to Becker, state responsibility is engaged under the separate delict theory for the state's own violation of a separate and distinct duty to exercise due diligence in preventing and punishing a private offense, rather than for the private conduct itself after it has either directly or indirectly been attributed to the state. *Id.* at 24.

undertaken in these contexts has not always been rigorous.[163] Yet, for an analysis of home state obligations, the distinction may be significant to the extent that separate delict responsibility focuses attention on the territorial conduct of state organs, rather than upon the extraterritorial conduct of transnational corporate actors.[164]

V. CONCLUSION

This paper has argued that there is an emerging obligation for home states to regulate and adjudicate transnational mining corporations through the implementation of the three pillars of public participation rights. In contrast to the reluctance exhibited in the Canadian Government Response, it is clearly permissible for home states to implement legislative and adjudicative measures through home state institutional structures that support and promote global mining. These institutional structures include financing mechanisms such as stock exchanges, export credit agencies and private financial institutions, as well as non-financing structures such as trade commissioner services and even corporate laws.

What could this mean in practice? As an example, a precondition for mining development project support by home state financing mechanisms should be that local communities have received full information about the proposed project and fully participated in decision-making in the host state on whether or not the project is to go ahead.[165] The adequacy of such participation might be measured by proof of an agreement between the company, community, and local government as to the environmental standards that are to govern the project, along with provision for ongoing project monitoring throughout the life of the mine and plans for mine closure.[166] Any such financing decisions might then be subject to judicial review, with standing given to host state local communities in home states courts to seek reconsideration of the financing decision if community participation has been inadequate. If financing is sought for mineral exploration, this too must be conditional upon ensuring that concrete plans are in place to implement community participation rights at the earliest possible stage. Finally, home state implementation of the access to justice pillar of public participation rights must include ensuring that home state

163. *Id.* at 53, 62.

164. For an analysis of attribution under the secondary rules of state responsibility, see Seck, *supra* note 157, at 196-289.

165. The importance of local community capacity to participate in this decision-making cannot be underemphasized, along with the importance of the decision-making process itself being defined from the ground-up by the community itself, rather than being imposed from the outside in a pre-set form. *See, e.g.*, the North-South Institute, Indigenous Perspectives on Consultation and Decision-Making About Mining and Other Natural Resources in Latin America, the Caribbean and Canada (Phase II) Project Description, http://www.nsi-ins.ca/english/research/progress/56.asp (last visited June 6, 2008).

166. Other signs of adequate participation might be an impact and benefit agreement and the creation of an environmental monitoring agency with local community participation to monitor agreed-upon standards.

courts are able and willing to hear actions brought by host state local communities in home state courts against transnational mining corporations, absent evidence that the local community and company have mutually agreed on another forum that is able and willing to hear the claim.

If host states were to find this type of legislation intrusive, they could protest, perhaps through the implementation of blocking statutes, the ultimate power advantage conferred by territorial jurisdiction.[167] This would require a host state to explicitly state that it does not want local communities to participate in decisions relating to mining development. Alternately, protest could take the form of host state refusal to cooperate should a home state find that full implementation of the participation rights requires the exercise of investigative jurisdiction in cooperation with host state officials on host state soil. Should implementation of participation rights prove impossible in conflict zones or undemocratic states, then development could not proceed. If host states were to acquiesce in recognition of the shared understanding that mining cannot accord with the promise of sustainable development without full implementation of the three pillars of participation rights, then home state practice would contribute to the development of customary international law.

167. MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES 67 (1999).