

Narrowing the Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage

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The Governance Gap

- International law does not require:
 - TNCs to respect and ensure respect for human rights
 - But some accountability under ICL
 - Home states to regulate the extraterritorial behaviour of TNCs to ensure respect for human rights

The Governance Gap

- International and domestic law allows transnational business groups to structure themselves to avoid regulatory oversight
 - At international law – seen as disaggregated entities subject to domestic laws of state where incorporated or operate
 - Domestic law generally does not legally recognize integrated nature of corporate group – reticence to pierce corporate veil

The Governance Gap

- Regulation left to host state
 - May be hampered by their ability to regulate foreign investors
 - IIAs
 - Desire to attract foreign investment
 - Lack of effective institutional structures
 - Where operating in weak governance zone
 - Where government is perpetrator human rights violations in which company may be complicit
 - Multistakeholder and intergovernmental initiatives

Governance Gap

- Extensively studied by academics, NGOs, UN SRSG
- Why continue to talk about it?
 - UN has abandoned a legal approach to this issue in favour of the status quo
 - No home states have adopted legislation
 - Arguments that ‘voluntary isn’t voluntary’ anymore
 - Some accounts in regulatory scholarship literature
 - Equate all state law with command-and-control law
 - Suggest there is a shift away from traditional state based law to ‘new governance’

Home State Legislation

- Not a silver bullet
 - Problem needs to be dealt with at a variety of levels
- But home state regulation has a critical and unique role to play in addressing corporate behaviour for two reasons:
 - Can employ a range of mechanisms to incentivize, facilitate and/or coerce compliance
 - Can act as a catalyst for other states to develop similar regulation and so contribute to development of international consensus for a global legal response

Governance Lessons from Talisman

Canada

Special Export
Measures Act
(SEMA)

Shareholder
Advocacy /
divestment

Self-Regulation

US

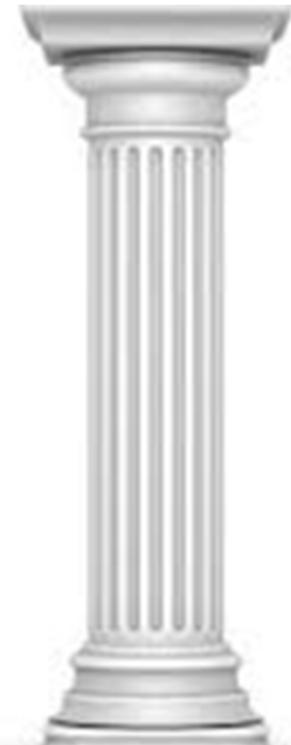
Capital Market
Sanction

divestment

Alien Tort
Claims Act

John Ruggie's Pillars

Corporate Responsibility
to Respect



State Legal Duty to
Protect



The Question

What would home state regulation look like if states took seriously their duty to protect human rights within their [territorial and national] jurisdiction?

- Brackets absence of political will
- Assumes that duty applies to home as well as host states

Our Answer

- A. Carrots (Public incentives)
- B. Sticks (state enforced prescriptions)
- C. Nudges (facilitation of private action)

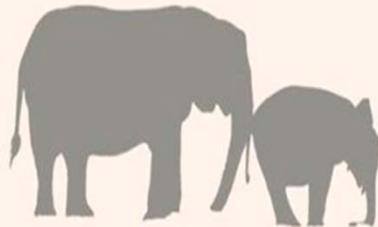
Corporate Social Responsibility Agency



- Public support for corporate citizen for investment projects in weak governance zones contingent on human rights due diligence/non-complacency in stipulated forms of harm
 - *Export Credits, loan guarantees, loan deferrals, political risk insurance, investment by state pension funds, access to gov't procurement, IIA beneficiary)*
- Independent CSR Agency will perform:
 - ex ante human rights impact assessment
 - ongoing monitoring
- Outcomes will be made public and will guide provision or continuation of public support

Civil Liability

Nudge



- Corporate citizen is liable for intentionally or negligently inflicting severe harm upon persons or environment in weak governance zone
- Corporate citizen owes duty of care to supervise affiliate or other business entity under its control
- Corporate citizen liable for complicity in infliction of severe harm by 3rd parties in stipulated relationship to corporate citizen

Prescriptive



- Criminal Prosecution for international crimes
- Sanctions on trade/investment/capital market access
- Disclosure obligations

Who is the Corporate Citizen?

... and what about extraterritoriality?



The CSR Agency: Citizenship for Corporations

- ‘corporate citizen’ is whoever is eligible for the benefits of public support (self-selected)
- Not coercive
 - *no obligation to seek benefits / no right to obtain benefits*
- Not extraterritorial

Civil Liability: Functional Citizen Parent-Based Liability



- Corporate nationality based on functional test for 'locus of management and control'
- Parent-based liability for actions of affiliates operating in weak governance zone
- Relationship entails following:
 - Parent accrues profits [in]directly from operation of affiliate/entity
 - Parent can/does control conduct of affiliate/entity through
 - Direction of conduct
 - exercise of contractual rights to assert dominant influence
 - Power to appoint directors/management

Governance Models

The Governance Gap

Subject public support for private actors to public norms and public scrutiny of corporate conduct; enable public and market accountability

Building the Canadian Advantage

Direct public support, development aid and civil society toward encouraging corporate citizens' to engage in self-regulation and avoiding reputational harm