EXPLODING THE MYTHS:
WHY HOME STATES ARE RELUCTANT TO REGULATE

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Regulating Canadian Mining Companies Operating Internationally

By Sara L. Seck
sseck@osgoode.yorku.ca
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Introduction:

The purpose of this talk is to explore why it is that home states like Canada are reluctant to regulate international activities of corporations, and, specifically, to "explode the myths" that are traditionally used to justify non-action in this area. I will divide my discussion of the myths into three categories: the sovereignty myth; the separate corporate personality myth; and the international comity myth. You will notice that these myths are all somewhat intertwined.

The myths that I am going to be discussing are rooted in international law doctrines. I have chosen this focus because I believe that many of these principles are commonly misunderstood. This misunderstanding contributes to reluctance to regulate on the part of governments, and bolsters some industry submissions against regulation. As far as the NGO community is concerned, a clearer understanding of these doctrines should lead to better proposals, or to better framing of existing proposals. My hope is that discussion could then focus more clearly on the real reasons governments are reluctant to regulate in this area – reasons that have more to do with economic self-interest than international law.

The discussion of sovereignty will explore the meaning of territorial jurisdiction, the central jurisdictional principle of international law. I will also spend some time exploring how the contents of proposed regulation can lead to differing perceptions of sovereignty infringement. The discussion of the separate corporate personality myth will explore the nationality principle of jurisdiction as applied to transnational corporations. The discussion of international comity will focus on what are commonly referred to as private international law issues, including specifically the methods that courts use to determine whether to exercise jurisdiction over a private law action, and the recognition, application and enforcement of foreign laws and judgements.

In conclusion, I will outline briefly what I believe are some of these real reasons for reluctance to regulate. Throughout the talk, I will refer to various proposals in the Policy Framework, as well as a few ideas of my own.

Before proceeding, there are some background issues I would like to clarify.

1. I will frequently use the term "home state regulation" to refer to the idea of Canada regulating corporate overseas activities. However, the topic is in fact broader and more complex than this. The term *home state* typically refers to the state of incorporation of a parent company, while *host state* refers to the state of incorporation of a subsidiary. But of course not all overseas activities will be structured through parent and subsidiary corporations, and certainly, most will not be structured through a wholly-owned subsidiary. Joint ventures are perhaps the most common form used in mining development, with shareholder corporations based in different countries and having differing degrees of ownership and control. A further point is that

regulation of corporate overseas activities need not be restricted to regulation of the parent company by its home state. There are other opportunities for state control, such as those associated with financing.

2. Advocating the feasibility of home state regulation should not be misinterpreted as suggesting that anything goes, or that this is the best or only solution. Rather, it is one tool among many government and governance mechanisms that are at play, whether arising from the host state or local government, voluntary industry or NGO standards, industry and local community agreements, and multilateral or international standards and treaties. While industry may cringe at the thought of more regulation rather than streamlining what is already there, keep in mind that home state regulation could offer significant benefits in terms of certainty, if crafted carefully, as well as reputational benefits. Significantly, different regulation need not be conflicting regulation.

3. Many international law commentators concerned about corporate social responsibility issues have focused on the question of whether corporate entities themselves are directly responsible under international law to respect accepted international human rights norms. Traditionally, the subjects of international law have been states, although individuals are recognised as having human rights owed to them by states. As investors – generally corporate entities – have gained recognition as persons entitled to rights under free trade agreements such as NAFTA – for example the right to sue states directly for losses under NAFTA Chapter 11 – pressure has mounted to balance corporate rights under international law with corporate obligations. However, it is generally accepted that, to date, the international law of direct corporate responsibility for human rights violations cannot be said to be a principle of customary international law, with the exception of a few norms that have always applied to private actors, such as slavery, piracy, and genocide. An alternate approach to CSR is to ask whether home states have a responsibility under international law to regulate international corporate activities, particularly in the human rights realm. The basis for the responsibility would be a non-territorial functional control – this is sometimes referred to as indirect home state responsibility. I want to highlight this, because it should not be assumed that home state regulation is somehow unusual or extraordinary – in fact, it may be arguable that in some circumstances it is mandatory. Having said this, I will not delve into the state responsibility analysis here, although I believe that in the near future this will become a more accepted analysis.

4. It might be assumed that a discussion of Canadian regulation of international corporate activities would focus on prescriptive or legislative jurisdiction – that is, the power of a state to have its constitutional, statutory or common law rules apply to persons or activities outside the state. However, it is equally important to speak about enforcement jurisdiction as well as adjudicative or civil jurisdiction. Enforcement jurisdiction refers to non-judicial means of state enforcement of the law through police or similar powers. Two principles may be stated at this point: (a) the mere existence of legislative jurisdiction is insufficient to justify the state to exercise enforcement jurisdiction in another state's territory; (b) the mere fact that a state can enforce its legislation within its own territory and in this sense has enforcement jurisdiction does not mean that it necessarily has legislative jurisdiction, and does not therefore render the enforcement valid in public international law.[1] The third type of jurisdiction, adjudicative or

[1] F.A. Mann, *The Doctrine of International Jurisdiction* (1984), Chapters I-V, in W. Michael Reisman, ed., *Jurisdiction in International Law* (1999) at 154-155. See also Craig Scott, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in Craig Scott, ed., *Torture as Tort, Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford - Portland Orgeon: Hart Publishing, 2001) 45 at 54-55.

civil jurisdiction, refers to the power of a tribunal or court to decide a particular dispute or hear a certain case. Significantly, when a Canadian court decides that it has adjudicative jurisdiction over an action (in tort, for example) this does not mean that it has the right to apply Canadian law. Instead, it is likely to apply the foreign law. Thus, of the three types of jurisdiction, an exercise of enforcement jurisdiction is clearly the most intrusive into a foreign state's affairs, while adjudicative jurisdiction is the least intrusive.

5. The need for regulation by home states is often posited upon the fact that many resource rich poor countries that are the recipients of foreign direct investment (FDI) lack the capacity to regulate effectively, whether with regard to the environment, labour standards, human rights, corruption, etc. Indeed, FDI in resource extraction is frequently made in countries experiencing conflict. BUT it is important to keep in mind that problems also arise in developed states such as Canada, especially (but not only!) with regard to mining development on First Nations lands. So, I believe it is important to always have in the background an understanding that just as Canada could regulate with regard to investments internationally, so too could Australia, for example, regulate with regard to investments internationally, including in Canada. Now replace Australia with China. The instinctual response of some in the audience may be to say that this would be an unacceptable infringement of Canada's sovereignty. I highlight this because there are two different ways to approach home state regulation of international corporate activities. One way would be to follow the OECD model, in which developed states impose themselves on developing states whether through investor rights or investor duties. An alternate approach would be to view transnational legal mechanisms as a potential means of ensuring that **all** states – developed and developing – meet their international human rights (and other) obligations. In this vision, each state could be seen to be assisting every other state as an equal in a horizontal relationship. As an example, indigenous communities of northern Canada would be able to access legal mechanisms in a second state (such as Australia) to ensure that Canada respects its international obligations with regard to First Nations when considering mining development in the North with which Australia has a connection.

THE MYTHS:

I. Sovereignty

Home state regulators often express their discomfort with regulation of corporate international activities as a fear of infringing the sovereignty of the host state. The sovereign equality of states constitutes the basic constitutional doctrine of the law of nations, or public international law. This notion of sovereignty is said to have originated in 17th century Europe at which time the decentralised arrangements of feudal society gave way to a system of territorially bounded states.

The central principle of territorial sovereignty is the understanding that the host state alone is responsible for governing activities on host state soil. In other words, each sovereign state has the right to freely choose and develop its political, social, and economic systems free from interference in any form by another state. For our purposes, this freedom could include the freedom of the host state to choose environmental and labour standards, for example, that are lower than those in the home state. This freedom is entrenched in the international environmental law context in Principle 2 of the 1992 Rio Declaration, which states in part: "States have, in accordance with the Charter of the

United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies …".[2]

The principal jurisdictional basis under international law for prescriptive jurisdiction is also understood to be territoriality. But there are other bases of jurisdiction as well, especially, for our purposes, the nationality of the offender.

I will focus for the moment on territoriality. So far I have avoided referring to the Canadian regulation of overseas corporate activity as extraterritorial regulation. This has been deliberate due to misinterpretations over the meaning of territoriality and thus extraterritoriality. My key point here is that while it is commonly thought that regulation of corporate activities in another country is extraterritorial by nature, this depends both on the understanding of **territoriality** and on the **content** of the legislation.

First, territoriality: The objective territoriality principle was adopted by the Supreme Court of Canada in the 1985 *Libman* case, a criminal fraud case concerning telephone sales solicitation from Toronto to residents of the United States.[3] The object of the calls was to induce the victims to buy shares in two companies purportedly engaged in gold mining in Costa Rica, with money for the shares sent to the accused's associates in Central America. According to *Libman,* 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 offence took place in Canada. To be legitimate, a "real and substantial" link must exist between the offence and the country in question. An important point to understand here is that transnational crimes or activities can legitimately be regulated by more than one state – this is the idea of concurrent jurisdiction.

The big question in many of the proposed regulatory ideas in the policy paper is, what is the activity?

Propose: decision-making as activity.

For example, a decision made in Canada by a branch of the Canadian government to contribute financially to a mining development in another country would be within the territorial jurisdiction of Canada. Thus, the imposition of human rights or environmental requirements on financing decisions made by Export Development Canada (EDC) would fall within Canadian territorial prescriptive jurisdiction. A similar argument could be made if Canada were to impose human rights or environmental requirements on Canadian private banks with regard to the financing of overseas operations. As an aside, I note that this avenue has not been proposed in the Policy Frameworks, but I do not think it would be an illegitimate approach to pursue under international law rules of jurisdiction. There may be stronger moral reasons for arguing that EDC should impose these requirements due to its use of taxpayer money, but these are moral, not legal arguments. Alternately, a legal argument could be made under the doctrine of state responsibility. If EDC is viewed as an arm of the Canadian government in a way that a private bank is not, it might be

[2] U.N. Conference on Environment and Development, Rio Declaration on Environment and Development and Agenda 21, U.N. Doc. A/CONF.151/26 (1992) ILM 874 (1992).
[3] *Libman v. The Queen*, [1985] 2 S.C.R. 178, 21 C.C.C. (3d) 206. See also discussion of *Libman* in Sara L. Seck, "Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law" (1999) 37 *Canadian Yearbook of International Law* 139 at 153 and 197-198.

possible to argue that Canada has a responsibility to regulate EDC (Canada **must** regulate EDC) whereas Canada **may** regulate the private bank (but it is not mandatory).

A similar argument could be made with regard to regulation imposed through corporate law. If the idea of the corporate law is to influence decisions made in Canada, then the territoriality argument again holds if one accepts the presumption that Canadian-based (incorporated) companies make decisions in Canada. At this point, I would like to comment briefly on the Federal Government Response to the SCFAIT Report.[4] There is some very curious language here. The government states that "while the Government of Canada can influence companies that are headquartered in Canada and where officers are subject to domestic law, it has few mechanisms at its disposal with which to influence companies that are headquartered abroad and managed by non-residents but incorporated in Canada …".[5] Leaving aside the obvious significance of the nationality doctrine (which will be discussed below), if the point that the government is trying to make is that Canada has no territorial connection to the activities of companies incorporated in Canada but headquartered abroad and managed by non-residents, then the question has to be asked, why is Canada letting these companies incorporate in Canada? Corporate entities are not entitled to legal personality by some divine law. Their existence is the direct result of corporate law statutes that define the precise conditions under which they may exist, including things like the number of Canadian directors. It is frequently forgotten that when the idea of limited liability and corporate structure first came into existence, it was not possible for one corporation to hold shares in another corporation, let alone an entity incorporated in another jurisdiction. This came later.[6] If the corporate structure described in the Government Response creates a situation in which the government can in fact exert no influence over some companies despite the fact that they are incorporated in Canada, then surely the answer is to make amendments to Canadian corporate law so that these companies are not granted Canadian incorporation status in the first place.

Securities regulation would require a slightly different justification from corporate law, as listing on a Canadian stock exchange does not require a company to be based (incorporated) in Canada. Presumably, then, a company listed on the TSE but incorporated in Ghana would not make decisions in Canada. However, requiring a foreign company listed on a Canadian stock exchange to comply with environmental and social disclosure requirements could easily be justified on the basis of the effects doctrine – another version of the territoriality doctrine. The assumption here is 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 would apply whether this information was considered necessary for ethical reasons or over concern for stock prices.

If any of you are thinking that the above analysis of the location of corporate decision-making is rather simplistic and superficial given the transnational nature of decision-making in the 21st century – cell phones, email, not to mention ease of transportation from one country to another make a focus on territoriality in the world of international business somewhat meaningless – you may be right. A slightly different concern is expressed by those commentators who speak of how economic globalisation has eroded the nation state and principles of state sovereignty. By this, it is

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[4] Department of Foreign Affairs and International 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" (October 2005).
[5] *Ibid.* at 3.
[6] Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (New York, Oxford: Oxford University Press, 1993) at Chapter 3, "The Emergence of Corporate Groups".

often said that individual states are no longer free to choose their social systems, instead finding that as they compete with each other for foreign direct investment they must lower their standards (such as environment and labour) in order to remain economically competitive. This is said to be so for all states, but especially for developing countries.

Other commentators, notably Saskia Sassen, argue that sovereignty and territory are not irrelevant concepts today, but have instead been reconstituted and partly displaced onto other institutional areas outside the (host) state.[7] This has occurred in part through corporate practices involving geographic dispersal of factories, offices and service outlets in an integrated corporate system with centralised top-level control. The central functions involve all top-level financial, legal, accounting, managerial, executive and planning functions necessary to run a corporate entity operating in several countries. These central planning functions take place in part at corporate headquarters, and in part at specialised firms of corporate services complexes which are disproportionately concentrated in highly developed countries. I would note that in the mining context, it could be said that these are disproportionately located in Toronto.

According to Sassen, the implications of this reconfiguration of sovereignty and territory have "profoundly disturbing" repercussions for distributive justice and equity. My interpretation of Sassen's analysis is that viewing decision-making as territorially-based is not unreasonable, and may even be in keeping with home state responsibility for the international activities of corporate actors. With regard to the corporate structure described above in the Government Response, it could be argued that regardless of where the corporation is headquartered and who is managing it, any mining company incorporated in Canada is likely to be taking advantage of the professional expertise found in a mining centre such as Toronto. It could thus still be said that Canada has a strong territorial connection to the location of its decision-making activities. A similar argument may be made for companies that list on the TSX despite not being incorporated in Canada.

I would like to follow up on my point earlier that two aspects were important in understanding whether legislation may be described as extraterritorial – first, the understanding of territoriality, which we have covered, and:

Second, the content of the legislation:

The significance of the content of the legislation is that different content can lead to different perceptions – real or imagined – of sovereignty infringement. Going back to the earlier examples, requiring companies that seek financing from the EDC to comply with environmental or social criteria would fall within Canadian territorial jurisdiction. But it would be disingenuous to suggest that these requirements might not have an impact on countries that wish to encourage mining investment from Canada. The degree of impact will largely be dependent on the content of the legislation.

If home state legislation imposed a specific labour or environmental standard that differed from the environmental standard imposed in the host state (and for which there is no existing international standard), a conflict might exist between the home state law and the host state law. However, not all apparent conflicts are really conflicts. The general rule is that a conflict exists if compliance with one forum's law results in violation of the other forum's law. In other words, if it is impossible to comply with both laws at the same time, there is a conflict. The general rule for resolving conflicts, is that the law of the state with the closest connection to the activity is

[7] Saskia Sassen, *Losing Control? Sovereignty In An Age Of Globalization* (New York: Columbia University Press, 1996).

paramount. As described in the 1998 Supreme Court of Canada case *R. v. Cook* (which concerned the application of the Canadian Charter of Rights to Canadian police activity in the United States), concurrent claims to jurisdiction are "circumscribed to ensure that a state purporting to exercise jurisdiction over events occurring abroad has a significant connection, or in the case of conflict with another jurisdiction, the *most significant* connection to the events in questions."[8]

For example, Canada could pass a law stating that no Canadian mining companies operating in Canada or internationally use cyanide in their gold mining operations. Meanwhile, host country A might have a law stating that cyanide can only be used by companies that have adopted the International Cyanide Management Code. Does this constitute a conflict? If the company chooses not to use cyanide, there is in fact no violation. Similarly, country B may have no law in place at all specifically addressing cyanide use. Again, if the company doesn't use cyanide, there is technically speaking no conflict. If country C has a law stating that cyanide must be used in gold mining, there is definitely a conflict as it is impossible to both use cyanide and to not use cyanide. I should note that in the two earlier examples it is also arguable that the host states deliberately chose to allow cyanide use (even though its use is not compulsory), and so discouraging companies that use cyanide in gold mining from investing in their countries is an infringement of host state sovereignty, regardless of the lack of actual conflict. However, the counterargument is that companies incorporated in other jurisdictions are most welcome to invest in these countries, just not companies incorporated in Canada. As the exercise of jurisdiction by Canada in these examples is a legitimate exercise of concurrent jurisdiction, there is no sovereignty infringement.

In situations in which there is a conflict, the next step in the analysis would be to ask, which state is most closely connected? This is somewhat tricky. Should it matter whether the legislation is Canadian corporate law or law applicable to the EDC? Are stock exchanges different? Does it matter whether it is provincial or federal legislation (how would this impact stock exchanges?) I believe that there is an argument to be made that in some circumstances home state legislation should be paramount, although it may be very factually specific.

As a second example, let's turn back to the disclosure of social and environmental criteria as part of a stock exchange listing. If the Canadian requirement is phrased so as to require disclosure of this type of information, but no guidelines are in place that must be followed, this is unlikely to involve a conflict with another jurisdiction. But what if the requirement is for disclosure to follow the Global Reporting Initiative guidelines on mining? If the company is also listed on a stock exchange in state A which requires disclosure of this information following a different set of guidelines, the company has to do twice the work in order to comply with both. But there is again technically speaking no conflict, as the company can disclose the information in two different forms, and that is arguably the price to pay for listing on two exchanges. A conflict would exist, however, in the highly unlikely event that the host state of the mine passed a law stating that no social or environmental information shall be disclosed with regard to mining development within its territory. It is hard to imagine such a law in this context, although blocking statutes (laws essentially forbidding compliance with the law of another state) are certainly not unheard of.

Now for a harder example. Several of the items in the Policy Framework speak of community impact assessments or human rights impact assessment, or environmental assessments including public consultation. Similar to the disclosure example discussed above, it could probably be said that any legislation requiring an impact assessment (IA) without specifying the form would be unlikely to create a conflict, while legislation that specified the manner in which the IA is to be

[8] *R. v. Cook*, (1998) 164 D.L.R. (4th) 1 (S.C.C.) at 60 per Bastarache J. (CONFIRM). See also discussion of *Cook* in Seck, *supra* note 5 at 152-153, and 197-198.

carried out would be more likely to create a conflict in that it would require the company to do twice the work or more, depending on the requirements of other financiers. As there can be many financiers per project, especially large projects where banks spread the risk through syndicates or consortia, this is not an insignificant concern in practical terms. So, the closer the IA requirement is to an established international standard (such as, for example, the World Bank), the less likely there is to be the appearance of conflict, and the less likely to cause practical implementation issues. The question then from the NGO perspective is how to "lead the pack" in the sense of making the standard international IA procedure more in line with the CIA proposal discussed in the policy frameworks, and specifically how to convince Canada to take on a role as leader (possibly together with other countries with an interest in mining) instead of as follower.

A different point is that the imposition of an IA requirement that is different from that in place in the host state (and most host states do at present have some environmental assessment legislation in place) creates the perception that the host state law is somehow inadequate, and leads to accusations of paternalism or even imperialism. This type of argument can be countered. For example, some legal scholars from the third world such as M. Sornorajah argue that the present system of international law that allows protection of TNC assets in the host state without inquiring into the duties owed by TNCs to host states is what is imperialist.[9] According to Sornorajah, home states have a responsibility to regulate the overseas activities of their corporate nationals, and also have a responsibility to ensure that those harmed by corporate activities abroad may seek recourse in home state courts.

The Policy Framework proposes several items in connection with community impact assessment (CIA) at the EDC that go beyond the standard IA requirement and require a more complex analysis for justification. For example, it is proposed that not only should consultations be held with local communities, but agreements should be reached with affected communities outlining compensation, among other items. The difficulty with this requirements is that assessment of whether the requirement has been complied with in a meaningful way would require on the ground assessment. For example, who is to verify that all affected communities have been included in the negotiations? Should only indigenous peoples with completed land claims agreements be included, or all local communities whether indigenous or not? How are we to be sure that conflicts between communities or within communities have been equitably resolved? How is it going to be verified that communities have access to adequate resources to prepare for negotiations such that agreements reached with the company (or government) can be truly said to be made with voluntary fully informed consent? If these assessment are not made, then the requirement is less meaningful. If these assessments are made, then this brings up issues of enforcement jurisdiction and the reality that on the ground verification by Canadian officials on foreign land is inevitably intrusive, and only possible at all with host state consent and cooperation. There are many, many other questions that could be asked in connection with this proposal. I should note that I think it is a very good one, but want to point out the issues that might come up in implementing it in practice.

Of course, on the ground verification need not be made by Canadian officials. An alternate approach would be to require assessments of the circumstances surrounding the agreements to be conducted by independent auditors, or perhaps local and/or international NGOs. Regardless of who makes the assessment, though, the criteria for making the assessment would be defined (presumably) by or in conjunction with citizens of a developed state, likely the home state. So the

[9] Muthucumaraswamy Sornarajah, "Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States", in Craig Scott, editor, *Torture as Tort, Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford - Portland Oregon, 2001) 491.

perception of sovereignty infringement would not necessarily go away, although it could be certainly be greatly diminished.

Another proposal in the Policy Framework may help to move this analysis along. It is suggested that companies establish a grievance mechanism so that dissatisfied stakeholders may have their interests accommodated. This is an important proposal, but it is unclear why the company should have the responsibility of ensuring the existence of such an accountability mechanism (if this is indeed the proposal in the policy framework). I think reference to Saskia Sassen's work may assist here. As discussed above, according to Sassen, the implications of the reconfiguration of sovereignty and territoriy have "profoundly disturbing" repercussions for distributive justice and equity. For example, Sassen notes that while citizenship in the national (host) state ensures some sort of accountability through the electoral and judicial process, the question in the global context is what form this accountability might take, and to what constituencies it would respond. It seems to me that the accountability mechanism should not rest with the company, but rather could – indeed should – be properly located in the home state. I will suggest here two possible approaches of many: (a) EDC financing decisions under the proposed CIA model should be subject to judicial review with standing granted to affected citizens of the host state; (b) the existing National Contact Point established under the OECD Guidelines for MNEs (or a different body perhaps modelled on the proposed Corporate Global Accountability Agency) should permit affected citizens of the host state to petition for inclusion in a comprehensive CIA defined perhaps by the CGAA and again subject to judicial review. The concept underlying these accountability mechanisms is the idea that we are all entitled as individuals or members of a community to access information, to participate in decision-making, and to access justice with regard to decisions made anywhere in the world that affect our human and environmental rights. I will not expand on these ideas at this time, but note that the issue of access to justice through home state mechanisms, including courts, will be discussed in greater detail in the analysis of international comity, below.

II. Corporate Personality

The above discussion of sovereignty focused on territoriality-based justifications for regulation of international corporate activities. A much easier justification would seem to be the nationality doctrine, according to which a state may take jurisdiction over any activity conducted by its nationals, whether within the territorial state or outside its borders, even if within the territory of another state. A frequently used example of this type of legislation is child sex tourism legislation. Another example is anti-bribery legislation. However, like the territoriality principle discussed above, where there is a conflict with the laws of the foreign state, the laws of the state with the most significant connection to the events is considered paramount.

For purposes of international law, a corporation has the nationality of the state under the law of which is has been organized, that is, the place of incorporation and the place of the registered office.[10] The difficulty with the nationality doctrine is how to apply it to transnational or multinational corporations. A fundamental principle of corporate law is the separate legal personality of the shareholders and corporation, or in the case of parent and subsidiary corporations, the separate legal personality of the parent and the subsidiary. What this means is that the nationality of the parent company will not be the same as the nationality of the subsidiary – or to put it differently, the parent and the subsidiary have different sovereigns. The implications of this are that, generally speaking, while the home state sovereign (Canada) could make laws that apply to the corporate parent (or to Canadian directors of either the parent or subsidiary), the home state

[10] *Barcelona Traction, Light and Power Company, Limited* (1970) I.C.J. Reports 3.

sovereign cannot make laws that apply directly to the subsidiary. Both are distinct entities subject to distinct jurisdictions. This is so even if the foreign subsidiary is wholly owned. Similarly, while the host state sovereign can apply laws to the subsidiary, it cannot apply law to the parent.[11]

Having said this, in situations where the parent company holds all the shares in the subsidiary corporation, or situations in which the parent is in control of the subsidiary (perhaps through ownership or managerial control), home state laws applied to the parent company can in effect apply to the subsidiary, even if they are not stated as applying directly to the subsidiary. That is, the parent may lawfully exercise its corporate rights to impose upon the subsidiary a course of action provided that the course of action is consistent with the law of both the parent's and the subsidiary's sovereign. Significantly, international law does not permit the indirect application of home state law that would compel the foreign subsidiary to act in a manner that was unlawful under its own laws.[12] But international law does **not** say that the home state law cannot require the parent to impose on the subsidiary a course of action that is different from one that would otherwise have been taken under host state law. The unlawful threshold here parallels the conflict requirement discussed earlier which states that a conflict only exists where it is **impossible** to comply with both home and host state legislation.

While some may argue that the distinction drawn between direct and indirect application of the parent's sovereign law to the subsidiary is artificial, others argue that it is important to distinguish between the command of the parent's sovereign and the lawful exercise of the parent's corporate control over the subsidiary. This is because the "control theory of nationality" has not been generally recognised as an internationally permissible test.[13] However, it is a theory that is being increasingly articulated in academic writings, and may be gaining acceptability.[14]

In situations where the parent company does not exercise control, the analysis is somewhat more complex. The presumption is usually that in these cases the home state is incapable of regulating in such a way as to influence the activities of the subsidiary, but this is not necessarily true. While in joint ventures a seemingly complex arrangement exists as each parent shareholder may have a different nationality, this does not mean that parent sovereign law cannot be applied so as to exert influence on the venture. Indeed, it has been documented in one example involving a mine in Brazil, that a shareholder corporation with a mere 5% interest was able to exert considerable influence on corporate social responsibility issues (CSR) due to its commitment to the implementation of its voluntary CSR code.[15] Thus, a law that is designed so as to require a joint venture participant to exert its influence may not be as ineffectual as it might seem at first glance. I would suggest possible language could be drawn from commercial contract language, such as requiring Canadian investor corporations to use their "best efforts in good faith" to influence the joint venture corporation to do X.

Despite all this discussion of principle, it is important to note that the United States frequently rejects the principle of separate legal personality of parent and subsidiary corporations.

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[11] Mann, *supra* note 1 at Chapter IV.
[12] *Ibid.* at 179.
[13] *Ibid.* at 180.
[14] See for example Shinya Murase, "Perspectives from International Economic Law on Transnational Environmental Issues" (1995) 253 Receuil des Courses 287 as discussed in Seck, *supra* note 3 at 204-207. See also discussion below of enterprise entity doctrine.
[15] William F. Flanagan and Gail Whiteman, "Ethics Codes and MNCs as Minority Shareholders: The Case of a Bauxite Mine in Brazil" in Wesley Cragg, ed., *Ethics Codes, Corporations and the Challenge of Globalization* (UK: Edward Elgar, 2005).

Instead, it often applies laws directly to foreign corporations that are substantially owned or controlled by nationals of the US, including US corporations. (Other countries have protested strongly about this long arm jurisdiction.) In addition, the US often exercises jurisdiction over a foreign parent on the basis of unity or integration of the enterprise theories, or some version of piercing the corporate veil, even where there is no misuse of corporate structure as is generally required. (The doctrine of corporate veil piercing is somewhat confusing, but generally is said to require not only control, but control used to commit fraud or a wrong so as to avoid legal liability.)[16] The US approach is arguably in line with competing theories of corporate structure for multinational enterprises such as enterprise entity doctrine, according to which parent company liability is deduced from the fact of economic integration between itself and the subsidiary.[17] Whether the entities are sufficiently integrated is determined on the facts of each case. Again, these theories are not yet fully accepted, and the US actions in this area are considered by most states to be unacceptable.

Another technique is used in some US environmental legislation (and Canadian) is likely unobjectionable. This legislation is generally structured so as to apply to the "owner or operator", and is often used in legislation designed to recover environmental clean-up costs.[18] In practice, it can result in lifting of the corporate veil. A possible approach to consider would be for Canada to impose requirements on Canadian companies that operate or manage mines anywhere in the world. Of course, another problem that often arises in connection with clean-up costs is the situation in which both parent and subsidiary company have declared bankruptcy. Amendments to bankruptcy and other laws may be necessary to fully rectify this problematic area.

Two proposals in the Policy Framework deserve comment at this point. First, the extension of the Westray legislation's negligence provisions to senior officers no matter where the accident occurred could likely be justified on the basis of nationality (assuming the senior officers were Canadian citizens), or under the territoriality principle and transnational crime justification as discussed above (*Libman*) assuming that the senior officers made the relevant decisions in Canada. Depending on the exact wording of the provision, it may be necessary to lift the corporate veil in the international context or to use the enterprise theory to justify the extension to officers of subsidiary corporations. A further issue arises if the officers are not Canadian citizens – in this case enforcement jurisdiction issues would potentially become problematic if it is necessary to request the extradition of the officer from another country. (For extradition to be successful, an extradition treaty must exist between Canada and the requested country, and the action must be criminal in both states). Regardless of the wording of the statute, consent and/or cooperation from the foreign state would almost certainly be required for investigation purposes. It is possible that some states might object to this extension of jurisdiction. However, given the difficulties that many developing states have had in prosecuting corporate officials from developed states, this type of provision may not be objectionable at all. (As an example, Warren Anderson, the former CEO of Union Carbide is I believe considered a fugitive from justice in India as he has refused to answer charges in India courts relating to his role in the Bhopal disaster.) The bigger issue in my mind with this type of legislation is whether it would be one that Canadian government officials would choose to enforce except perhaps in the most egregious of circumstances, given lack of political will (funding) plus the complexities of investigating and prosecuting transnational offences.

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[16] Seck, *supra* note 3 at 147.
[17] Seck, *supra* note 3 at 148-150. See also Blumberg, *supra* note 6 at Chapter 11 "The Jurisprudence of Enterprise Law".
[18] See for example discussion of CERCLA in Seck, *supra* note 3 at 182.

Second, the proposed corporate code legislation would clearly be justified on the basis of the nationality doctrine, provided that it is worded so as to apply to parent corporations, and to require parents or shareholder corporations to require compliance from subsidiaries. In the case of minority shareholder corporations, the requirement would have to be to (use best efforts in good faith to) exert their influence on subsidiaries. Corporate code legislation of this type has been proposed in several other jurisdictions (Australia, UK, US), although to date none has been enacted. It is not entirely clear from the policy framework what exactly this proposal would encompass, but it would probably be fruitful to evaluate other proposed legislation in this context.

One aspect of the Australian Bill that contributed to its rejection by the Parliamentary Joint Standing Committee on Corporations and Securities is of great interest in the Canadian context.[19] The Code 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 Federal Court seeking injunctions or compensation. The fact that existing Australian law permitted (at least some of) these types of actions already contributed to the conclusion that the Bill (or at least parts of it) were unnecessary. In the Canadian context, however, it is not so clear that these types of actions would proceed, due to differing interpretations over private international law doctrines such as *forum non conveniens*. This will be discussed more fully below.

Another question is how the Australian Bill imagined that an injunction would be made effective in a foreign territory. At common law, foreign decrees granting injunctions or other equitable remedies are not entitled to enforcement in Canada.[20] The big question under theories of corporate legal personality is whether an injunction restraining the defendant (parent corporation or officer) from doing something in a foreign country or an injunction ordering the defendant to do something in a foreign country could be enforced. It has been suggested that an injunction could be enforced by contempt of court proceedings in the state in which it is granted, though its effect would take place abroad.[21]

III. International Comity

The above discussion of territoriality (sovereignty) and nationality (corporate personality) has focused on the issues arising in prescriptive jurisdiction with some reference made to considerations of enforcement jurisdiction. This section will also bring into focus some of the bigger issues connected with adjudicative jurisdiction.

Adjudicative jurisdiction is important to consider in part because it is the least intrusive into the affairs of the foreign state. As I noted earlier, this is because a decision by the home state court to hear a private law action (exercise jurisdiction over the proceeding) does not mean that the court will necessary apply home state law – indeed, it will often find that the most appropriate law to apply is that of a foreign state. As such, you would think that legislators would be happy to encourage access to Canadian courts to resolve issues arising between Canadian companies operating overseas and foreigners impacted by these operations. In fact, no effort has been made to facilitate such litigation, and at present many hurdles exist making it extremely difficult to access justice through Canadian courts. For convenience (this is a very complex area), I will attribute this

[19] "Corporate Code of Conduct Bill 2000: Report of the Parliamentary Joint Statutory Committee on Corporations and Securities" (Commonwealth of Australia, June 2001).
[20] Seck, *supra* note 3 at 179.
[21] Mann, *supra* note 1 at 167.

difficulty to doctrine of international comity. This is a very brief summary of a few of many potential problems.

International Comity and a brief introduction to the principles of Private International Law or Conflicts of Laws

The Supreme Court of Canada has adopted the following definition of international comity:[22] "…the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard to both international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." According to the SCC, the twin objectives of private international law and the doctrine of international comity are order and fairness. Of the two, the Court gives pre-eminence to the objective of order, as order is a precondition to justice.

Comity, order and fairness guide the understanding of private international law issues: **jurisdiction *simpliciteur*, *forum non conveniens*, choice of law and recognition of foreign judgments**. The focus here will be on common law doctrines.

Jurisdiction *simpliciteur*: At common law, courts are entitled to assume jurisdiction over any person, including a corporation, present in the jurisdiction upon whom a writ can be served. However, *in juris* service alone is not enough to satisfy the legitimate exercise of jurisdiction, as a **threshold "real and substantial** connection" must be found to exist between the court and the parties to the action."[23]

Assuming that jurisdiction *simpliciteur* is achieved, the big hurdle becomes the doctrine of ***forum non conveniens***. According to Canadian law, a court may refrain from exercising jurisdiction where a **more appropriate forum** is clearly established to displace the forum selected by the plaintiff. The natural forum is the one with which the action and the parties have the **"most real and substantial connection**".[24] A variety of factors are to be considered in making this determination. In litigation involving foreign plaintiffs and harm in a foreign country, the hurdle is difficult to jump even where the defendant corporation is based in Canada, unless the foreign forum is clearly flawed, such as in the case of a conflict zone without a functional judiciary.

In Australia, however, the onus lies on the defendant to prove that the forum is so inappropriate that continuation of the proceedings would be **oppressive and vexatious**. Thus in the *Dagi* litigation in Australia concerning the Ok Tedi mine in Papua New Guinea, *forum non conveniens* was not argued, whereas in the *Cambior* litigation in Canada concerning the Omai mine in Guyana, *forum non conveniens* led to the dismissal of the case.[25] In addition, cases from the United Kingdom suggest that in complex litigation against transnational corporations, **access to justice** in home state courts due to existence of legal aid and class action procedures may be enough to overcome *forum non conveniens*.[26]

Forum non conveniens has also been argued frequently in US jurisprudence where it has follows a quite different test, including the balancing of public and private interest factors. It has often but not always led to a dismissal of the action. In least one case, a host state has attempted to

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[22] *Spar Aerospace Ltd. v. American Mobile Satellite Corp.* [2002] S.C.J. No. 51 (SCC) at 78.
[23] Seck, *supra* note 3 at 154-155.
[24] *Ibid.* at 157-158.
[25] See extensive discussion of *Cambior* and *Dagi* litigation in Seck, *ibid.*.
[26] Seck, *ibid.* at 145-146, 166, and subsequent case law.

get around *forum non conveniens* by enacting legislation stating that if litigation is launched in home state courts, the host state courts have no jurisdiction to hear the action.[27]

Another doctrine that could be problematic particularly in cases involving environmental harm is the **Mozambique doctrine** which was applied in the *Dagi* litigation in Australia. Under this doctrine, actions for nuisance and negligence involving foreign land may be barred outright as the court has no jurisdiction to entertain an action for the determination of title to or right of possession of a foreign land. Title may arise incidentally, however. The result in the *Dagi* case was that only certain causes of action were accepted.[28]

Choice of Law: When a foreign law is applicable to a case by virtue of a choice of law rule, Canadian courts will generally apply the foreign law even if it is contrary to the result that would apply were Canadian law applied. Note that in the rare case that foreign law offends fundamental values of Canada (its essential public or moral interest), the foreign law may not be applied due to the public policy exception.

Issues may arise in negligence actions where environmental standards, for example, are set by an agreement between the host state and company, or between the local community and company. For example, an agreement to which the state is a party may be viewed as non-justiciable under the Act of State doctrine as occurred in the *Dagi* litigation, although it should more correctly be viewed as the choice of law.[29]

Recognition and Enforcement of Foreign Judgements: For private law actions such as tort, the general rule is that Canadian courts will enforce foreign judgments for monetary damages, but will not enforce foreign decrees granting injunctions. Public law judgments are also important to consider for two reasons. First, if Canada doesn't regulate because it believes that the host state is more properly suited to be the regulator, then in situations in which the host state wishes to pursue an action against the parent company (possibly because insufficient assets are available in the host state, or because of allegations of direct liability), it must be possible for host state judgments to be enforced against the parent company in Canadian courts. Second, if Canada does regulate, it may be important to think about in what situations it would be necessary to seek enforcement of a judgment (perhaps against a subsidiary or a corporate officer) in the foreign state. Mutual legal assistance and extradition may assist in these problems, but do not fully address the issues outlined here.

Canadian common law courts will not enforce a foreign judgment that was made under a revenue or tax law, a penal or criminal law, or another public law that is seen as an assertion of foreign power such as antitrust, securities, import and export regulations, and national security laws.[30] In addition, Canadian courts will not recognize or enforce a foreign law or judgment that is contrary to fundamental public policies. **Significantly, judgments made under regulatory laws that have a compensatory purpose (like environmental laws focused on liability for clean-up costs) are likely to be enforced due to the principles of comity and reciprocity.** Of course, in situations in which both parent and subsidiary companies have declared bankruptcy, there may be further problems that perhaps call out for amendments to bankruptcy laws.

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[27] See for example Ecuador's Interpretive Law 55 as discussed in *Aguinda v. Texaco, Inc.*, *Ashanga Jota* v. *Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).
[28] Seck, *supra* note 3 at 168.
[29] *Ibid.* at 193.
[30] *Ibid.* at 178-187.

Summary? Implications?

1) International comity and the rules of private international law can be interpreted so as to encourage and discourage the adjudication of disputes and the enforcement of judgments in the Canada (mostly discourage). It is important to think through private international law rules when considering proposed legislation especially if requiring enforcement of judgments.

2) Legislators could amend or replace problematic common law rules of private international law through an exercise of prescriptive jurisdiction. This may or may not raise issues of provincial jurisdiction. If it does, the federal government should raise this issue with the provinces as it surely does when it enters into treaty obligations that affect areas coming under provincial jurisdiction. It is interesting to note that the Government Response to the SCFAIT Report states somewhat cryptically that "civil law remedies **may** be available to foreign plaintiffs in Canadian courts. As such, Canadian corporations or their directors and employees **may** be pursued in Canada for their wrongdoing in foreign countries."[31] Given the use of the word "may" in bold, it can be assumed that the federal Government is aware that there may be difficulties, perhaps insurmountable ones, in bringing these types of claims.

3) Legislators could also create specific opportunities for foreign litigants to access justice through home state courts. While some people see tort actions as expensive, time wasting, and non-productive procedures particularly class actions addressing harm in a foreign state, it is clear that tort provides an opportunity to bring attention to issues where there is no other forum. In my view, tort is necessary to fill the regulatory gap. There is clearly a huge gap in the transnational regulation of corporate activities in the human rights and environmental realm. Alternately, it could be argued that access to justice in home state courts is a **right**: the right to access courts that provide oversight over decisions wherever they are made, that affect you.

One of the Policy Framework Proposals is for Canada to adopt an Alien Tort Claims Act (ATCA) type legislation, perhaps modeled on the US law. However, ATCA is a procedural statute only, with the available substantive causes of action being a modest number of clearly defined norms recognized under the law of nations (international law).[32] Thus, only certain very egregious acts appear to be included, such as genocide and crimes against humanity. It would be equally important to create a clear right of action (absent or in addition to reforms to private international law doctrines) for other types of harm, such as negligence relating to environmental harm in a foreign country.

At this point, the Talisman litigation ongoing in the New York District Court provides an interesting example. The (private law) litigation was launched by current and former residents of southern Sudan who allege, pursuant to ATCA, that they were victims of genocide and crimes against humanity perpetrated by the government of Sudan and Talisman Energy. The general personal jurisdiction exercised in New York and many other US states goes beyond what I described earlier as being acceptable under doctrines of separate legal personality. Jurisdiction was exercised over Talisman on the basis of a subsidiary's contacts with NY, essentially by lifting the corporate veil – the subsidiary was said to be a "mere department" of Talisman.[33] If Canada were to decide to open its courts to this type of litigation, it would have to determine whether jurisdiction should be extended in line with the US, or whether there are good reasons for limiting the exercise of personal jurisdiction to corporations with closer contacts to Canada.

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[31] Government Response, *supra* note 4 at 10 (emphasis in original).
[32] *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (USSC 2004).
[33] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2004 WL 1920978 (S.D.N.Y.).

Another interesting aspect about the Talisman case is the discussion of the doctrine of international comity. Talisman argued unsuccessfully that the lawsuit should be dismissed under the doctrine of international comity.[34] This argument was based in part upon a statement of interest submitted by the US government expressing concern regarding the impact of the litigation on US foreign affairs and on the government of Canada's policies towards Sudan. The US statement included a diplomatic note from the Embassy of Canada. The diplomatic note expressed concern with the court's exercise of extraterritorial jurisdiction over Talisman on the basis that it frustrates Canadian policies towards Sudan – essentially, the policy of constructive engagement. In addition, the letter notes that Canada objects to the exercise of jurisdiction under ATCA to "activities of Canadian corporations that take place entirely outside the US".[35]

Talisman also argued that the doctrine of international comity should be invoked because Canadian courts can adjudicate the action. However, the New York court did not accept that Canadian courts are able to entertain civil suits for violations of the law of nations.[36] Moreover, as discussed above, it seems clear that the Canadian government is not convinced that it is indeed possible to successfully launch these types of private actions in Canadian courts.

The Canadian letter in the Talisman litigation suggests that New York courts should leave Talisman alone, as Talisman is within Canadian jurisdiction. Yet, by providing neither an ATCA-type statute nor other effective mechanisms of oversight over corporate activities overseas, Canada's exercise of jurisdiction amounts to jurisdiction to do nothing.

I would like to make a final point about comity. There is a distinction between sanctions legislation and other extraterritorial regulation – when sanctions are imposed, the home state is not concerned about international comity or respecting comity of the host state. Instead, the idea is that sanctions are imposed on a rogue state that is either not in compliance with international law itself, or is perceived as being opposed to the political interests of the state imposing the sanctions. Sanctions-type legislation could include the taxation policy reform proposal in the Framework Proposals (the withholding of tax incentives for companies complicit in human rights abuses), as well as trade sanctions law such as that proposed under the Special Economic Measures Act. While this type of legislation is potentially useful, surely it is an inadequate response to the types of human rights abuses being targeted here. If there should be no-go states due to their status as conflict zones or due to their human rights records, surely it would be better to clearly structure legislation in this way. Removal of incentives does not seem to be enough. Surely if the International Council on Metals and Minerals (ICMM) can agree to recognize existing World Heritage properties as "no-go" areas that they will neither explore nor mine, there must be some sort of mechanism for determining whether other areas should be off limits due to significant human rights concerns.[37] An alternate non-political approach that might reach the same goal would be to make community impact assessment mandatory in all situations, combined with access to justice mechanisms in home state courts. If egregious human rights violations are occurring, or if the area is experiencing serious conflict, it would presumably be impossible for a meaningful community impact assessment to be

[34] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846 (S.D.N.Y.).
[35] *Ibid.* at 2. Furthermore, the letter states that Canada passed the *Foreign Extraterritorial Measures Act* so that the Attorney General of Canada can be authorized to prohibit anyone in Canada from complying with measures from a foreign state or tribunal affecting international trade or commerce. However, the letter does not state that the government will ask the Attorney General to make such an order in this case. *Ibid.* at 8.
[36] *Ibid.* at 7-8.
[37] *ICMM Position Paper on Mining and Protected Areas* (August 18, 2003).

completed. Thus, the project could not go ahead. If it did, the right of access to home state courts should provide at least some recourse to those affected.

IV. Real Reasons:

1. Home state regulators are concerned that increased regulations on companies will lead to companies leaving the jurisdiction, relocating elsewhere, or that more stringent regulation will make it impossible for home state corporations to compete globally leading to a loss of home state competitive advantage. Yet ultimately Canadian competitive advantage should not rest on exploitation of land and peoples in other jurisdictions. It is also arguable that the certainty offered by adopting the highest possible ground could serve as an incentive for companies, as it is not obvious that all want to converge on the lowest common denominator.

2. Some proposals in the Policy Framework seem to involve neither extraterritoriality nor competitiveness concerns. Examples of this are the consideration of social and environmental criteria in pension funds and the empowerment of shareholders in corporations laws so that human rights and environment concerns may be considered in shareholder proposals. The real issue here seems to be the unquestioned acceptance of the shareholder model of the firm (as opposed to the stakeholder model), and specifically the idea that investors are only interested in short-term money making. There is perhaps a good reason for this assumption, as laws currently encourage quick turnover of shareholdings rather than encouraging long term investments with real legal liability for disasters. This goes to the need for corporate governance and securities law reform generally, but also to the reforms suggested above with regard to adjudicative jurisdiction. For example, if a company is unlikely to be held liable for environmental problems in a foreign jurisdiction, then shareholders who are focused on financial returns are not likely to be interested in knowing about environmental issues for which the company may never be held to account.

3. A third reason is Canada's desire to work multilaterally rather than being seen as a unilateral leader of the pack. Yet, for international law to develop (as it does) it needs state practice to emerge showing a new direction. There are four sources of international law: treaties; general principles of law; customary international law; and judicial decisions and the teachings of the most qualified publicists.[38] Customary international law is a combination of state practice plus the corresponding views of states. Unilateralism is not necessarily evil under international law, it depends on the response of other states. If Canada acts unilaterally but other states do not object, if instead some follow Canada's example, customary international law will develop to reflect this new understanding. If Canada acts and other states respond negatively (as has been the case with many exercises of unilateral action by the United States), then Canada's action will not lead to the development of new international law. But without action, there can be no movement. The OECD agreements on export credit financing and bribery arguably were reached only after at least one state (arguably the US) had taken the lead in a non-self-interested way. If Canada feels that it does not have the political clout to act unilaterally in this area in an effective way, perhaps Canada could find a partner country (Australia?) with a similar interest in mining overseas with whom it could take the first steps.

[38] Article 38, Statute of the International Court of Justice.