Shareholder Engagement in the Embedded Business Corporation: Investment Activism, Human Rights, and TWAIL Discourse

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ABSTRACT: The expansion of extractive corporations' overseas business operations has led to serious concerns regarding human rights–related impacts. As these apprehensions grow, we see a countervailing rise in calls for government intervention and in levels of socially conscious shareholder advocacy. I focus on the latter as manifested in recent use of the shareholder proposal mechanism found in corporate law. Shareholder proposals, while under-theorized, provide a valuable lens through which to consider the argument that economic behaviour is embedded within social relations. In doing so, I situate my analysis within Third World Approaches to International Law (TWAIL) scholarship. Elsewhere, I have supported the use of corporate law tools in advancing the international human rights enterprise and argued that investment activism can be an essential component of this advancement. This paper represents a reflexive pause. Using the case study of a recent proposal submitted to Goldcorp Inc., I seek to problematize the shareholder proposal as a human rights advocacy tool and to examine it as a site of contestation.

KEY WORDS: corporate law, shareholder rights, corporate accountability, Third World Approaches to International Law

I. INTRODUCTION AND CONTEXT

AS INTERESTS, ARRANGEMENTS, AND LANDSCAPES are constantly formed and reformed in the contemporary business corporation, those of us preoccupied with issues of corporate accountability are well-advised to recall the intellectual project of Karl Polanyi.[1] In various respects, tension serves as a key motif in the work of the Hungarian economic historian, whose most significant contribution is arguably the concept of "embeddedness." While Polanyi's seminal text—"The Great Transformation"—did not explicitly accentuate this idea, it firmly planted the necessary conceptual seeds.[2]

Polanyi illustrates the existence of society and the market in a state of "related tension."[3] The latter is embedded within the former and in order to protect against the risks that follow self-interested gain, "market societies must construct elaborate rules and institutional structures."[4] This engages the "double movement" thesis. As the negative effects of economic activity emerge, protective reactions are generated. With these reactions, there is an attempt to resist efforts to decontextualize

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the economy from societal institutions.[5] Block discusses these themes by invoking the image of a rubber band. Attempts to enhance market sovereignty raise the degree of tension as the band is stretched. As this elongation continues, the band will eventually break (i.e., social dissolution) or retract (i.e., the market will go back to an embedded state).[6]

At its core, this analytical structure is concerned with the state necessarily imposing a regulatory and institutional framework that constricts unbridled market movements, thereby docking the market in the "moral fabric of society."[7] This approach has obvious applicability to contemporary debates surrounding globalization, deregulation and the global financial crisis. In this paper, I explore another issue of current importance. The expansion of extractive corporations' overseas business operations has led to serious concerns regarding human rights–related impacts. As these apprehensions grow, we see a countervailing rise in calls for government intervention[8] and in levels of socially conscious shareholder advocacy.[9]

I focus on the latter as manifested in recent use of the shareholder proposal mechanism found in Canadian corporate law. Shareholder proposals, while undertheorized, provide a valuable lens through which to consider the argument that economic behaviour is embedded within social relations. In doing so, I situate my analysis within Third World Approaches to International Law (TWAIL) scholarship.[10] Indeed, it seems particularly fitting to establish linkages between the concept of "embeddedness" and TWAIL literature given Polanyi's seething indictment of the colonial encounter and his contention that the forced adoption of market economies led to the "rapid and violent disruption of the basic institutions" of the Third World.[11]

Elsewhere, in the context of a burgeoning business and human rights–related literature, I have supported the use of corporate law tools in advancing the international human rights enterprise and argued that investment activism can be an essential component of this advancement.[12] This paper represents a reflexive pause. I seek to problematize the shareholder proposal as a human rights advocacy tool and to examine it as a site of contestation.

More specifically, in 2008 a consortium of investors[13] submitted a shareholder proposal to Vancouver-based Goldcorp Inc.[14] Goldcorp, one of the largest global gold mining companies, has received scathing critique pertaining to the ecological and human rights impacts of its overseas operations.[15] The consortium requested that the firm's Board commit to an independent human rights impact assessment of business practices in Guatemala, in particular, with respect to the Marlin mine in the western highlands. This mine is operated by Montana Exploradora de Guatemala S.A., a wholly-owned Goldcorp subsidiary.[16] Human rights impact assessments are a relatively new tool that allow a firm "to systematically identify, predict and respond to the potential human rights impacts of a business project."[17]

In May 2010, the results of the assessment were released. The investigation, conducted by the consulting firm "On Common Ground," found, *inter alia*, that the mine "is affecting the full spectrum of internationally recognized human rights" and that the company should cease all exploration and mine expansion until there has been state-involved consultation with locally affected communities.[18]

While the final assessment may be seen as a positive step for those who are concerned with the rights-related implications of transnational corporate conduct, there are also concerns with the process leading up to its release. These concerns will be unpacked after an introduction to the shareholder proposal's legal structure and a discussion of its role in corporate law.

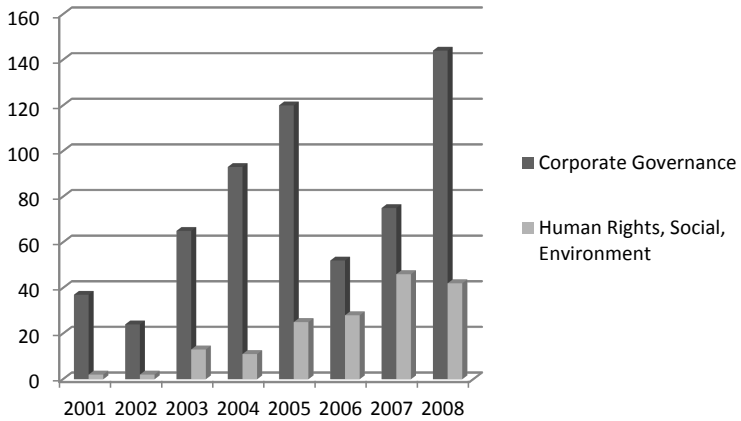
II. OVERVIEW OF THE PROPOSAL STRUCTURE

The shareholder proposal structure in corporate law provides equity holders with the ability to compel management to hold a shareholder vote on issues the proponent considers salient. Shareholder-commenced proposals are a novel implement in the overall corporate law tool shed, as they allow the investor to trigger activity and investor-to-firm dialogue, rather than passively absorbing the actions of management. The proposal mechanism is not meant to appropriate management's authority, but to "provide shareholders with the opportunity to express their views on issues affecting their corporation,"[19] and to allow them "to hold management accountable for its actions and to influence future business decisions by having a public forum in which to challenge management."[20] In terms of procedure, the firm is obligated to include a proposal in the management proxy circular materials.[21] Shareholders then consider the proposal before a vote at an annual or special meeting.

The company is excused from the requirement to circulate a proposal if a substantive ground for exclusion is present or if particular procedural requirements are not adhered to. The former situation might occur if the proposal is submitted primarily to advance a personal grievance against the firm or if the proposal provision is being misused in an effort to attract publicity. The latter situation might occur if the proposal is not submitted within the legally required timeframe or if the proponent has not held the prescribed number of shares for the required period of time.[22]

In 2001, the *Canada Business Corporations Act* underwent substantial revision. Of particular relevance is an amendment that altered when the firm can lawfully refuse to circulate a proposal on substantive grounds. Prior to 2001, the law allowed exclusion if the proposal was submitted "by the shareholder primarily for the purpose of . . . promoting general economic, political, racial, religious, social or similar causes."[23] Under the new test, exclusion is permitted where it "clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation."[24]

The post-amendment period has seen a marked increase in use of the proposal mechanism with respect to issues of corporate governance and human rights/environmental/social policy.[25] Taking the latter as an example, in 2001—the year of the amendments—just two social responsibility-related shareholder proposals were submitted to Canadian firms.[26] This was the case again in 2002.[27] However, from 2003–2006, the numbers increased to thirteen,[28] eleven,[29] twenty-five,[30] and twenty-eight.[31] In the 2007 and 2008 proxy seasons, there was a striking spike in the use of proposals as a means of advancing human rights issues. My analysis of data compiled by the Shareholder Association for Research and Education reveals that in these years investors submitted approximately forty-six and forty-two proposals, respectively, to Canadian firms. The general upward rise can be represented approximately as follows:



Human rights in Burma,[32] human rights in China,[33] aboriginal land claims,[34] gender diversity,[35] biodiversity protection,[36] climate change risk and related disclosure[37]—these are just some of the topical issues that have been broached in Canadian shareholder resolutions. Should this trend of using the corporation as an arena for political discourse be viewed in a positive or negative light?[38] The answer, of course, depends on the perspective from which we consider the issue. For economic theorists, the very existence of the proposal mechanism is a peculiarity. As Lee observes:

> [F]or many opponents of social shareholder proposals, the shareholder proposal mechanism itself (never mind proposals directed at social responsibility) seems anomalous. For one thing, the mechanism is in tension with the separation of ownership and control, which economic theorists of the corporation believe produces gains through the specialization of functions. Moreover, shareholders have no reason to vote on a shareholder proposal, or for that matter any other matter submitted to shareholders, since they rationally have no expectation that their vote will be pivotal. For both of these reasons, economic theorists of the corporation typically have difficulty accounting for the existence of a shareholder proposal mechanism.[39]

Beyond academic puzzlement, particular commentators view proposals as a tool used "chiefly by time-worn gadflies . . . unable to achieve their ends through legitimate political mechanisms"[40] that threaten to "lead management to be less inclined to pursue shareholder wealth maximization."[41] Correspondingly, some have called for the abolition of the mechanism.[42]

If, however, we view the proposal structure in light of social movement theory, we find a different set of considerations at play. While the study of social movement activity has typically been preoccupied with the public realm, scholars of late have turned their attention to the private realm, analyzing the relationship between social mobilization and corporate operations.[43]

In particular, the literature reveals an increasing interest in how strategically focused activism informs organizational development.[44] Den Hond and DeBakker note that reformative activist groups seeking to influence the levels and content of corporate social responsibility may prefer to rely on participatory modes of engage-

ment in attempting to gain leverage over targeted businesses.[45] In doing so, such groups must position their issues in a manner that clearly demonstrates their value and relevance to the firm in question. This may be accomplished through illustrating the potential for "material and symbolic gain"; in other words, through establishing pecuniary advantage or the possibility of enhanced reputational capital.[46] I will return to this idea in more detail below.

III. THE IMPACT OF SHAREHOLDER PROPOSALS

When considering the impact of shareholder proposals, it is important to note the dialogue that arises between investors and corporate management. The former's concerns are expressed to management via the proposal's submission. This should be viewed less as an adversarial expression and more as the initiation of a conversation on issues of mutual concern.

While arguably a "lower profile tactic,"[47] proposals have the potential to yield enormous gains for the proponent. There is accumulating evidence suggesting that "today's proposals may become tomorrow's corporate policy."[48] In other words, through the submission process, and the resulting dialogue between the investor and the firm, the formulation of corporate policy relating to human rights issues has been transformed.[49] In certain cases, investors have withdrawn proposals after conducting successful negotiations with management. I have previously canvassed several examples of this trend, which I have viewed in a positive light, such as proposals submitted to Enbridge Inc., McDonald's, IPSCO Inc., Petro Canada, the Bank of Montreal, Cott Corp., Encana Corp., Harry Winston Diamond Corp., Nortel Networks Corp., and Barrick Gold Corp.[50] The recent Goldcorp proposal,[51] however, serves as a useful example of serious difficulties that arise when employing proposals in the human rights sphere; as such, this case study merits particular exploration.

As noted above, the specific proposal at issue focused on the Marlin mine. Operations at the mine have catalyzed a recent wave of international activity. In 2008, after conducting a fact-finding mission to Guatemala, sustainability research and analysis firm Jantzi-Sustainalytics recommended that Goldcorp "be considered ineligible for [socially responsible investment] portfolios."[52] In December 2009, a coalition of affected community groups from San Miguel Ixtahuacan, Guatemala, submitted a complaint to the Canadian National Contact Point under the OECD Guidelines for Multinational Enterprises,[53] alleging a range of human rights deprivations resulting from Montana Exploradora's operations, including violations of the right to free, prior, and informed consent; communal property rights; the right to health; the right to water; and the right to life and security of person.[54]

Also in 2009, the International Labour Organization considered the activities of Montana Exploradora and asked the Guatemalan government "to neither grant nor renew any licence for the exploration and exploitation of natural resources" without participation and consultation.[55] In May 2010, the Inter-American Commission on Human Rights (an independent body of the Organization of American States) granted precautionary measures under which it requested that Guatemala cease operations at the Marlin mine and take steps to prevent environmental harm

until the Commission makes a final determination on a petition brought by locally affected communities.[56]

That same month, a study published by Physicians for Human Rights found that a sample of residents living near the Marlin mine had higher levels of arsenic, copper, zinc, and mercury in their urine than a sample of individuals living further away. Various metals—including cobalt, aluminum, and manganese—were also present at higher levels in the sediment and water close to the mine. While the study found that causation between these results and significant human health risk is not clear, it recommended further investigation of this issue.[57]

In June 2010, the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People also recommended that activities at the Marlin mine be suspended until all negative impacts could be addressed.[58] Subsequently, the Guatemalan government announced that it would comply with the Inter-American Commission's precautionary measures and it begin the administrative process of suspending operations.[59] Goldcorp then released a strategy for implementing the recommendations of the human rights impact assessment. This strategy was severely criticized by civil society organizations as failing to remedy the most significant assessment findings.[60]

Returning to the shareholder proposal at issue, in 2008 the consortium of investors was successful in advancing its request and the proposal was withdrawn after Goldcorp agreed to commission the impact assessment.[61]

At one level, this might be heralded as a milestone in corporate accountability engagement as it is unprecedented for a Canadian corporation to undertake an impact assessment focusing on human rights.[62] This is particularly important in the context of the Canadian extractive industry. Canada has more mining firms listed on its stock exchanges than any other state.[63] Globally, Canadian exchanges represent "the world's largest source of equity capital for mining exploration and production both in Canada and abroad."[64] However, United Nations treaty monitoring bodies, academics, civil society groups, and parliamentarians[65] have all impugned the Canadian extractive sector for the deleterious human rights–related repercussions of its overseas operations.

Further, beyond the end result of the impact assessment itself, there is value to be derived from the process of contemplating and selecting an assessment methodology. After the proposal's withdrawal, the consortium worked in concert with Goldcorp to design a procedure.[66] The proposal's text also specifically referenced the assessment methodology created by Canadian organization Rights & Democracy.[67] Rights & Democracy's impact-assessment framework involves ten steps that include, for example, ascertaining the human rights context in the state that will host the proposed investment; seeking expert views on relevant human rights challenges; data collection, such as interviewing community members, government officials, corporate representatives, and workers; the formulation of a draft report to be commented on by all relevant parties; establishing a set of conclusions and suitable corrective measures; and monitoring/continuing assessment.[68] The process of appraising these sorts of methodologies and working through how they can best be integrated into business operations will undoubtedly be educative for corporate

management and will assist it in developing a fluency in human rights concepts and techniques.[69]

That being said, there is also cause for serious concern. After its inception, the consortium's proposal generated intense controversy. The controversy originated not from detractors of the shareholder proposal mechanism or the business community; rather, it stemmed from Canadian human rights players and from Guatemalan communities. An early critique was advanced by non-governmental organization Rights Action:

> While the original shareholder resolution may have been proposed with good intentions, we believe it will harm and undermine the clearly stated demands and positions of the Goldcorp-affected indigenous communities and may result in a whitewashing public relations exercise that only benefits Goldcorp and company shareholders and investors.[70]

MiningWatch Canada subsequently adopted and elaborated on the substance of these concerns. In a letter to the consortium and others, MiningWatch wrote:

> The shareholder proposal . . . reveals a lack [of] understanding of the ethical responsibility to assure that shareholder resolutions that directly impact on locally affected communities do not undermine the efforts these communities are engaged in to protect their own rights. In short, shareholder resolutions put forward in Canada that will directly impact on local communities should have the free prior and informed consent of locally affected communities.[71]

The lack of locally affected communities' approval was arguably present at two levels; first, the drafting of the shareholder proposal itself, and second, the drafting of the Memorandum of Understanding (MOU) entered into by the consortium and Goldcorp.[72] With respect to the latter, MiningWatch notes that the MOU did not permit a representative from communities on the ground to form part of the Steering Committee that supervised the impact-assessment process. As a result, unlike the foreign corporation and foreign investors, those whose rights were actually at stake and would be most impacted had "no direct role in setting the scope and the timelines of the assessment process, nor in selecting assessors and peer reviewers, nor in managing the assessment process."[73] Affected communities in San Miguel Ixtahuacan referred to this asymmetry as "an act of racism and discrimination."[74]

As use of the shareholder proposal mechanism by socially responsible investment organizations has increased in the post-CBCA amendment period, there has been a corresponding trend in affected communities viewing proposals submitted to Canadian extractive firms with apprehension. In addition to Goldcorp, other such instances include proposals submitted to Barrick Gold Corporation *vis-à-vis* its Pascua Lama mining project in Chile and to Alcan Inc. *vis-à-vis* its mining and refining project in Kashipur, India.[75] At the heart of these examples is a tension that arises from potentially competing interests. I return to the idea of "material and symbolic gain" discussed above. The strategy of shareholder engagement entails the proposing group positioning the issue of concern as a matter of financial and reputational gain for the firm and of risk mitigation for the investor. With respect to the latter, Engle notes:

> [C]orporations which violate human rights face higher insurance costs, lawsuits in tort and the risk of paying settlements or damages payments. Human rights abuse creates a riskier political climate which can cause rioting, leading to destruction of corporate property and the possible nationalization of business assets. Such risks are not just intolerable to individual investors; they also poison the capital market generally and discourage efficient capital formation. Companies which violate human rights laws risk investors' assets for questionable gains. They seek to externalize costs resulting in diseconomies to the detriment of the market.[76]

In fact, establishing a nexus between the subject matter of a human rights–related shareholder proposal and pecuniary advantage is not solely strategic but is arguably *required* in law. As discussed, the revised CBCA allows a shareholder proposal to be excluded where it "clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation."[77] In my view, there is actually little difference between the current and pre-amendment tests. While the former removes the previously enumerated categories for exclusion (i.e., "general economic, political, racial, religious, social, or similar causes"), the result, in essence, is the same. Previously, it had to be demonstrated that the proposal was not primarily for the purpose of promoting an enumerated cause; thus, by inference, that it was primarily submitted for a reason involving the business or affairs of the corporation. In other words, the amended formulation of the test would have to have been met under the previous test.

By way of illustration, in 2008 Goldcorp management relied on the "does not relate in a significant way to the business or affairs of the corporation" provision in refusing to circulate a proposal from a retail investor which asked the corporation to suspend any further mine expansion in the Guatemalan municipalities of San Miguel Ixtahuacan and Sipakapa without first obtaining the informed consent of local communities.[78] Unlike the consortium's proposal, which specifically referenced "serious risks to shareholder value,"[79] the retail investor's proposal made no mention of potential financial impact.[80]

On its face, this may not seem problematic; it is logical that investors would want to assess and manage human rights–related financial risk and that a proposal to the corporation should be cast in those terms. However, when the subject of the proposal actually affects local communities (for example, it does not resonate with the agenda they are pursuing or it presents obstacles to their advocacy),[81] the situation becomes more complex and two sets of conflicting interests emerge. This tension is eloquently articulated by the San Miguel Ixtahuacan communities:

> [T]he . . . proposal does not reflect the reality of life in our communities. The investors' concern for protection of our human rights remains solely at the level of concern. In the end, the . . . proposal allows for the sacking and destruction of our resources to continue without any regard for our health, life and territory or for any other aspects of the human rights of these ancient indigenous peoples. . . .
>
> [H]uman rights have nothing to do with optimizing the profits of a transnational company that is sacking and destroying the resources of an ancient people.[82]

In negotiating this incongruity, it is important to remain mindful of the fact that socially responsible investment organizations utilizing the proposal mechanism must strive to make their proposals palatable to the receiving company on one hand and to their clients on the other.[83] The former is especially important if the organization wishes to advance its cause via the dialogue process discussed above. This is presumably the case given that social/ human rights–related proposals have a slim chance of adoption if put to a vote at a shareholder meeting. In fact, even if they receive a majority vote, the corporation is under no legal obligation to implement the recommendations of such a proposal.[84]

While addressing potential corporate involvement in human rights–violating activities is a goal of socially conscious shareholder proposals, this goal is pursued only under the overarching umbrella of financial risk reduction. As discussed, the governing legislative provisions arguably require the establishment of a financial connection. While I, of course, appreciate the two goals may very well exist in harmony, the fact that the interests of affected communities may conflict with those of proposing investors cannot be ignored. In the Goldcorp scenario, there is a clear divergence in interests; investor risk mitigation on one hand, juxtaposed against Guatemalan communities' desire to end the firm's subsidiary operations altogether.[85] The previous investor representative on the impact-assessment Steering Committee was dismissive of the latter ambition and startlingly paternalistic:

> [The] Marlin mine is a reality that is not going to go away. It is extremely unlikely the Guatemalan government will revoke the mining license and, most certainly, Goldcorp Inc. will not voluntarily close up shop and vacate the premises. Given that reality, the matter of determining and resolving the current social and environmental impacts on the population remains unaddressed and unresolved. *In the judgement of the responsible investor group . . . the most appropriate means to address those impacts—the real issues the people and communities are experiencing every day—is a human rights impact assessment*.[86]

IV. SITUATING THE ISSUE WITHIN TWAIL DISCOURSE

In a situation of direct conflict, the interests of locally affected communities must be respected. In that regard, while I have noted that the investor-firm dialogue process may prove educational for management in terms of the human rights–related impacts of business operations, there is also much to be learned by socially responsible investment organizations as they continue to employ the proposal mechanism in the post-CBCA amendment period. In particular, as they journey further into human rights terrain, they must familiarize themselves with relevant human rights discourses.

Despite its lack of acknowledgement in more conventional, prevailing literature,[87] TWAIL provides both theoretical and methodological tools for dissecting transnational dynamics.[88] As an intellectual movement, it has been described as "a broad dialectic (or large umbrella) of opposition to the generally unequal, unfair, and unjust character of an international legal regime that . . . helps subject the Third World to domination, subordination, and serious disadvantage."[89]

In many respects, TWAIL can be seen as a transnational analogue of domestic Critical Race Theory (CRT). While it is true that both approaches exist in different socio-political spaces,[90] they also exhibit fundamental similarities; most notably, a mutual emphasis on "the use of law and the exercise of power as tools of domination and exclusion."[91] Racial hierarchies influence "both the national and international legal orders" and CRT scholars have "identified national parallels that are . . . a microcosm of the international [system]."[92] In that respect, it should be noted that TWAIL scholars have much to gain in examining CRT-related forms of analysis: "TWAIL would be well served to study the CRT method to inform its own struggle. . . . CRT and TWAIL must hatch deliberate conspiracies and cross-fertilize in their struggles against entrenched Eurocentric power structures both at the national and the international levels."[93]

As alluded to, TWAIL scholarship is still evolving and, correspondingly, various substantive areas remain unexplored.[94] To date, the intersections of TWAIL-related concerns and corporate law have not formed the subject of scholarly inquiry. Similar to areas such as taxation, this is understandable when considering that corporate law and policy is often deliberated at the domestic—rather than the transnational—level. However, as discussed above, the effects of a Western state's corporate law provisions may be experienced far beyond the domestic realm and thus have the potential to assume a transnational character insofar as they impact on citizens of the Third World.[95] In that respect, the relationship between the shareholder proposal mechanism and human rights abroad engages a fundamental organizing question posed by Anghie: "How does a particular rule or legal regime empower or disempower people in the Third World?"[96]

Mutua argues that contemporary human rights advocacy and discourse is characterized by a "damning metaphor" consisting of savages, victims, and saviors.[97] He asks human rights actors to engage in a process of critical self-reflection,[98] and cautions against perpetuating the image of agency-lacking victims[99] who are rescued by Western saviors operating upon the tenants of liberalism.[100] Despite good intentions, there is a real danger of replicating the dominant/submissive binary of the colonial encounter.[101]

The act of Western, human rights–concerned shareholders submitting a proposal that may affect local communities in the Third World country of business operations, followed by an investor-corporation MOU that does not contemplate representation from affected communities on the body overseeing an impact-assessment process, falls squarely within the metaphor that Mutua impugns. The Goldcorp situation arguably has the potential to perpetuate power differentials, fortify race hierarchies[102] and undermine the goals of autonomy and self-determination. Further, for those of us who identify with communitarian or so-called "progressive corporate law" scholarship, it runs the risk of qualifying the possible contribution of corporate law to the overall human rights project and of replicating the failures of other seemingly well-intentioned discourses, such as development.[103]

TWAIL-centered approaches focus on "global processes of marginalization and domination that impact on the lives and struggles of third world peoples."[104] An investment activism strategy that is informed by TWAIL discourse would take great pains not to hinder the advocacy efforts of locally affected communities.[105]

To be clear, I do not mean to suggest that overarching investor concerns of risk mitigation will necessarily run counter to these advocacy efforts; rather, that the potential for dissonance exists. In order to avoid such conflict, Western shareholders of transnational corporations must engage in a process of critical internal analysis in an effort to formulate an investment blueprint that is mindful of its own constraints, does not exploit power dynamics, and is credible and inclusive from the perspective of those who will be directly affected by it.[106] Such an approach would not consist of "an uncritical privileging of stories of essentialised Third World peoples," but would involve a significant, mindful examination of how the shareholder proposal contemplated "relates to human suffering in particular places."[107]

In undertaking their own reflexive "assessment process" going forward, shareholders must give specific consideration to whether the proposal contemplated has the potential to impact local communities and to frustrate their stated political objectives. At a minimum, this would include consulting with these communities in the design of a shareholder proposal, ensuring community representation on bodies overseeing any impact-assessment initiatives and ensuring free, prior, and informed consent. Ideally, the gradual establishment of meaningful connections with these groups and their allies will facilitate identification and consultation. Anything less threatens the legitimacy of the proposal/ impact-assessment process[108] and serves to perpetuate the "civilizing mission."[109] Indeed, the response of the impact-assessment Steering Committee's former investor representative to concerns regarding the assessment process is replete with "civilizing" discourse, presuming that externally-based "judgement" can best identify "the most appropriate means to address . . . the real issues the people and communities are experiencing every day."[110]

A TWAIL-versed plan of action would recognize and respect enduring community struggles that are undertaken with great peril.[111] It would entail establishing continuing linkages with local civil society groups and not only conducting on-the-ground consultations with stakeholders (as done by the consortium),[112] but ensuring that investment initiatives concerning local communities (and necessitating their involvement) have widespread community support and a role for long-term community oversight. In addition to confirming local legitimacy, such efforts will prevent transnational firms from agreeing to the course of action suggested in a shareholder proposal merely in order to temporarily ease the pressures of human rights–related advocacy and to simultaneously reap the benefits of positive publicity.[113]

I am not arguing that shareholder proposals must always actively advance community desires. For example, it is legitimate for a proposal to seek a report from the company investigating and articulating potential human rights–related risks associated with Third World operations. Such a proposal does not call on the firm to cease operations altogether and, as such, may not reflect the demands of local stakeholders. However, unlike the consortium's proposal, it does not thwart the advancement of those demands, require local community participation or exclude local communities from supervising processes that directly impact them. In other words, it is a proposal that meets the simple, but essential test of "do[ing] no harm."[114]

On this point, I appreciate and agree with MiningWatch's concern that proposals that are seemingly innocuous can actually have detrimental repercussions. However,

I see this example as different from the ones it references (e.g., commissioning reports measuring project backing, enhancing methods of local consultation, etc.), which are more conducive to allowing target corporations to simply bask in the light of reputational advancement.[115] Most importantly, as a general rule, if a particular project has garnered noteworthy levels of community resistance, rights-concerned investors should be reticent to submit a proposal which may run antithetical to communities' stated goals.[116]

To elaborate on this last point, I have argued that in a situation of direct conflict between the goals of a shareholder proposal and the interests of local actors, the latter must be respected. I do not mean to suggest that affected communities are a single-minded monolith; indeed, in ascertaining the views of affected stakeholders, it is likely that proposing shareholders will face a more complex reality of differing, conflicting views. One constituency, focusing on human rights and environmental repercussions, may oppose a mining project. Another, focusing on job creation and poverty reduction, may support the same project.

It may be argued that this makes it impossible for shareholders to actually ascertain the desires of affected communities on the whole and thus that a requirement of securing free, prior and informed consent is impracticable.

While I certainly concede that well-intentioned shareholders must navigate complex terrain, and that a consensus view may not exist, I do not accept that divisions on the ground can be used as a rationale for advancing a proposal that is adverse in interest to the stated objectives of a significant portion of local players. In this case, I have highlighted the specific objections of particular locally affected communities to the shareholder proposal at issue. But beyond this, it is well known that indigenous opposition to the Marlin mine has been far from negligible. Most notably, a 2004 poll of residents of the thirteen villages in the Sipacapa municipality indicated that 95 percent of persons surveyed opposed the mine because of their concerns regarding its potential environmental repercussions. This was followed by a local declaration which emphatically stated: "We publicly declare at the national and international level, that the granting of the licence for open pit metal mining violates the collective rights of the [I]ndigenous peoples who inhabit our territories."[117]

V. CONCLUDING REMARKS

The aftermath of the consortium's proposal reflects many of the problems identified above. Guatemala's Catholic Church began a rival impact-assessment process, viewed as more inclusive and independent. Noted human rights scholar Douglas Cassel collaborated with the Church after refusing to participate in the consortium/Goldcorp process because of concerns relating to its independence.[118] Further, the Public Service Alliance of Canada Staff Pension Fund, an original consortium member, withdrew from the process citing, *inter alia*, the absence of informed consent on the part of local indigenous peoples.[119]

In some respects, the removal of the previously enumerated CBCA restrictions, and the increased use of the proposal mechanism in the post amendment period, can be seen as part of a broader movement toward a reflexive, "new governance"

approach. Given the constraints of traditional regulatory models and conventional legal frameworks, the new governance project seeks, in part, to transcend traditional punitive/deterrence-based measures,[120] and to focus instead on norm generation and the enhancement of "internal self-regulatory capacities."[121] While this may not involve the direct regulation of corporate conduct with societal implications,[122] part of the goal is to empower non-governmental actors (such as shareholders). In that respect, the approach is participatory and democratic, involving an important role for multiple societal segments.[123]

While these are laudable objectives, I return to the Polanyi-inspired embeddedness discussion that begins this paper. Resituating the market within the "moral fabric of society" requires responsive state intervention. It is only with this intervention that our metaphorical rubber band will retract and the market will return to an embedded state. In that regard, I am uneasy with some of the new governance literature that seems to celebrate the notion of the decentred state.[124] Seck cautions that when the state puts itself on the same footing as other interested parties, there is a risk that it will abdicate its governmental responsibilities.[125] This concern is especially consequential when dealing with situations where there is an imbalance of power among stakeholders. There is the danger, for example, that global corporations (or, in this case, corporations acting in concert with investors) will usurp processes and unduly influence corporate accountability discourse.[126]

Along these lines, there could be an important role for the state to play in overseeing the proposal process and ensuring its equity (and thus, from a Polanyian perspective, reanchoring market activity).[127] While I appreciate that an essential component of the TWAIL project is unpacking the traditional centrality of the state, I also note that the state "is not dismissed"[128] and that TWAIL literature does not abandon the idea of statehood in its entirety.[129] As argued by Chimni, "there is the lack of a 'public' voice in the emergence of corporate law without a State."[130] Elsewhere, I have argued in favour of the establishment of an ad-hoc review panel.[131] While there appears to be little political will for such a panel, I also see a possible role for the "Office of the Extractive Sector CSR Counsellor" recently created by the Canadian government—though I acknowledge that various civil society groups and parliamentarians view this Office as largely impotent given, for example, the voluntary nature of its dispute resolution process.[132]

Moving away from the state for a moment, it should be noted that in his 2008 report to the Human Rights Council, John Ruggie, Special Representative of the United Nations Secretary General on Human Rights and Transnational Corporations, established an analytical framework for the business and human rights conundrum. The second pillar of the "protect, respect and remedy" framework is the responsibility of corporations to respect the spectrum of internationally recognized human rights.[133] A key element of this responsibility is a corporate due-diligence process that allows firms to identify, thwart, and deal with any negative human rights impacts that result from business operations.[134] Such a process may, for example, be carried out through a human rights impact-assessment process.[135]

In the case at hand, Goldcorp, in response to shareholder pressure, arguably met its responsibility under the Ruggie framework. However, given the issues discussed

above, this is a problematic conclusion. Upon deeper consideration, it is clear that the *quality* of the due-diligence process is a key issue. In other words, not all processes are created equal, and as firms and their stakeholders move forward in implementing the Ruggie framework, simply conducting due diligence is insufficient. The diligence process must be done in a way that is credible and legitimate.

Shareholder proposals provide a useful lens through which to view the embeddedness of economic behaviour in social relations. As socially responsible investment organizations move forward with their advocacy, they must develop fluency in relevant human rights discourses such as TWAIL and must ensure that the processes they advocate are legitimate and inclusive *vis-à-vis* locally affected communities and do not undermine their stated political goals.

NOTES

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1. For a discussion of corporate social responsibility developments within the context of Polanyi's work, see Peter Utting, *Rethinking Business Regulation: From Self-Regulation to Social Control* (United Nations Research Institute for Social Development, Technology, Business and Society Programme Paper No. 15; Sept. 2005), 13ff, *available at* http://www.unrisd.org/80256B3C005BCCF9/%28httpAuxPages%29/F02AC3DB0ED406E0C12570A10029BEC8/$file/utting.pdf.

2. See KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 68 (1944) ("never before our own time were markets more than accessories of economic life. As a rule the economic system was absorbed in the social system"). See also Bernard Barber, *All Economies are "Embedded": The Career of a Concept, and Beyond*, 62 SOCIAL RESEARCH 387, 401 (1995); and Fred Block, *Karl Polanyi and the Writing of The Great Transformation*, 32 THEORY AND SOCIETY 275, 276 (2003).

3. Mark Banks, *Karl Polanyi*, *The Rubberband Man* (December 12 2008), *available at* http://www.open2.net/blogs/society/index.php/2008/12/12/karl-polanyi-the-rubberband-man?blog=10.

4. Block, *supra* note 2, at 297.

5. Polanyi, *supra* note 2, at 76 ("While on the one hand markets spread all over the face of the globe . . . on the other hand a network of measures and policies was integrated into powerful institutions designed to check the action of the market. . . . Society protected itself against the perils inherent in a self-regulating market system").

6. Fred Block, *Introduction*, in KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME xxv (2nd ed., 2001).

7. Jens Beckert, *The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology* (MPIfG Discussion Paper 07/1; 2007), 8, *available at* http://www.mpifg.de/pu/mpifg_dp/dp07-1.pdf.

8. See, for example, Bill C-300, Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act, 2nd Session, 40th Parliament, 57-58 Elizabeth II (2009), *available at* http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3658424&Language=e&Mode=1&File=24#1.

9. I should note that this is my own description and that shareholders who engage with social policy and human rights issues may not describe their activities in this manner. There are a range of interests, aims, and strategies at play and these shareholders form a diverse group.

10. The use of the term "Third World" in this context is meant to include "the group of states and peoples who 'self-identify' as such." See O. C. Okafor, *Marxian Embraces and De-couplings in Upendra Baxi's*

Human Rights Scholarship: A Case Study, in INTERNATIONAL LAW ON THE LEFT 253, n. 4 (S. Marks ed., 2008). That said, there are of course complexities associated with this term. As Alvarez notes, the term has "historical baggage" and no longer exists "as an identifiable geographic space on which all agree." *See* J. E. Alvarez, *My Summer Vacation (Part III): Revisiting TWAIL in Paris* (Sept. 28, 2010), *available at* http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/. Others, however, have argued that "although the concept may no longer have much coherence in a strict geographic sense, it may have significant use in conceptualizing an anti-subordination politics" and that "it allows us to critique the strictly hierarchical ordering of the global community on both state and, importantly, non-state levels . . . [and] also locates the origins of this hierarchical ordering of states and regions in the direct experience of subordination occurring under colonialism and imperialism." *See* Keith Aoki, *Space Invaders: Critical Geography, The 'Third World' in International Law and Critical Race Theory*, 45 VILLANOVA LAW REVIEW 913, 924, and 926 (2000) (citations omitted).

11. Polanyi, *supra* note 2, at 159. For more on this point, see M. Fakhri, *Law as the Interplay of Ideas, Institutions, and Interests: Using Polyani (and Foucault) to ask TWAIL Questions*, 10 INTERNATIONAL COMMUNITY LAW REVIEW 455, 460–61 (2008).

12. Aaron A. Dhir, *Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability*, 43 AMERICAN BUSINESS LAW JOURNAL 365 (2006) (Dhir, "Realigning"); Aaron A. Dhir, *The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice and Human Rights*, 47 OSGOODE HALL LAW JOURNAL 47 (2009) (Dhir, "The Politics"). For a recent sample of this burgeoning literature that has appeared in this particular journal, see D. Arnold, *Transnational Corporations and the Duty to Respect Basic Human Rights,* 20 BUSINESS ETHICS QUARTERLY 371 (2010); S. Kobrin, *Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights*, 19 BUSINESS ETHICS QUARTERLY 349 (2009); and N. Hsieh, *Does Global Business Have a Responsibility to Promote Just Institutions?,* 19 BUSINESS ETHICS QUARTERLY 251 (2009).

13. The Public Service Alliance of Canada Staff Pension Fund, the Ethical Funds Company, the First Swedish National Pension Fund and the Fourth Swedish National Pension Fund.

14. Shareholder Association for Research and Education, *Shareholder Resolution Database*, *available at* http://www.share.ca/en/node/1461 (SHARE, "Database").

15. See, for example, Rights Action, *Investing in Conflict: Public Money, Private Gain—Goldcorp in the Americas* (2008), *available at* http://www.rightsaction.org/Reports/research.pdf; and Shin Imai, Ladan Mehranvar & Jennifer Sander, *Breaching Indigenous Law: Canadian Mining in Guatemala*, 6 INDIGENOUS LAW JOURNAL 101 (2007) (Imai, "Breaching Indigenous Law").

16. For recent accounts of local resistance to Goldcorp's operations in Guatemala, see Andy Hoffman, *Goldcorp Bested by Mayan Mother*, THE GLOBE AND MAIL, July 10, 2008, at B1; and Dawn Paley, *Goldcorp: Occupation and Resistance in Guatemala (and Beyond)*, THE DOMINION, June 21, 2008, *available at* http://www.dominionpaper.ca/weblogs/dawn/1887.

17. International Finance Corporation, *Guide to Human Rights Impact Assessment and Management—Executive Overview* (2007) at 5, *available at* http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/ref_SocialResponsibility_HRIA_ExecutiveOverview/$FILE/HRIAexecsummary.pdf.

18. On Common Ground Consultants Inc., *Human Rights Assessment of Goldcorp's Marlin Mine* (May 2010), 133, 212, *available at* http://hria-guatemala.com/en/MarlinHumanRights.htm.

19. Thomas A. DeCapo, Note, *Challenging Objectionable Animal Treatment with the Shareholder Proxy Proposal Rule,* 1988 UNIVERSITY OF ILLINOIS LAW REVIEW 119, 138 (1988).

20. *Id*. at 138–39. The proposal mechanism is an alternative to simply raising an issue from the meeting floor, which "often gets a nonresponsive reply . . . [and] [e]ven if [the shareholder's] question is answered . . . his efforts will generate as much noise as a tree falling in an uninhabited forest." See Donald E. Schwartz & Elliott J. Weiss, *An Assessment of the SEC Shareholder Proposal Rule,* 65 GEORGETOWN LAW JOURNAL 635, 641 (1977).

21. *Canada Business Corporations Act*, R.S., c. C-44, §137(2) (1985) (Can.) (CBCA).

22. *Id.*, §137(5)(b), (e), (a); §137(1.1)(a).

23. *Id.* (prior to the 2001 amendments).

24. *Id.*, §137(5)(b.1).

25. This trend has occurred in other jurisdictions as well. See T. Guay, J. Doh & G. Sinclair, *Non-Governmental Organizations, Shareholder Activism, and Socially Responsible Investments: Ethical, Strategic, and Governance Implications*, 52 JOURNAL OF BUSINESS ETHICS 125 (2004).

26. Benjamin J. Richardson, *Financing Environmental Change: A New Role for Canadian Environmental Law*, 49 MCGILL LAW JOURNAL 145, 183 (2004).

27. Social Investment Organization, *Canadian Social and Environmental Resolutions Reach 13 This Year, Up from Two in 2002*, *available at* http://www.socialinvestment.ca/News&Archives/news-803-Canadian.htm.

28. *Id*.

29. Social Investment Organization, *Socially Responsible Shareholder Proposals Double in 2005; Climate Change, Human Rights Leading Issues*, *available at* www.socialinvestment.ca/News&Archives/news-305-ShareholderProposals.htm.

30. *Id.*

31. Social Investment Organization, *Canadian SRI Investors File 28 Social and Environmental Shareholder Proposals with Canadian Firms*, *available at* www.socialinvestment.ca/News&Archives/news-0306-Shareholderproposals.htm.

32. SHARE, "Database," *supra* note 14, at http://www.share.ca/en/node/1368.

33. *Id.* at http://share.ca/en/node/888.

34. *Id.* at http://www.share.ca/en/node/587.

35. *Id.* at http://share.ca/en/node/483.

36. *Id.* at http://share.ca/en/node/868.

37. *Id.* at http://www.share.ca/en/node/1320, http://www.share.ca/en/node/1322, http://www.share.ca/en/node/1324, http://www.share.ca/en/node/1384, http://www.share.ca/en/node/1386, and http://www.share.ca/en/node/1389.

38. As previously alluded to, the shareholder groups at issue may not see themselves as using the firm as a venue for political discourse; this is my own characterization of their activities. See note 9 above. In that regard, I view the Goldcorp proposal as having a two-fold purpose. First, the language of the proposal itself references mitigating risk to shareholder value. See SHARE, "Database," *supra* note 14. Second, when considering public statements made by consortium members, it is clear there is also a political/human rights agenda at play. See *infra* note 62 ("We laud Goldcorp for embracing this tool as a foundation for protecting human rights and addressing community concerns in Guatemala").

39. Ian Lee, *Corporate Law, Profit Maximization and the 'Responsible' Shareholder*, 10 STANFORD JOURNAL OF LAW, BUSINESS & FINANCE 31, 63–64 (2005) (citations omitted). For my own views on (and disagreement with) the traditional economics-based reaction to shareholder proposals, see Dhir, "Realigning," *supra* note 12 at 397–98.

40. George W. Dent, Jr., *Proxy Regulation in Search of a Purpose: A Reply to Professor Ryan*, 23 GEORGIA LAW REVIEW 815, 820 (1989). See also DAVID VOGEL, LOBBYING THE CORPORATION: CITIZEN CHALLENGES TO BUSINESS AUTHORITY 208ff. (1978).

41. Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALABAMA LAW REVIEW 879, 899 (1993). See also Roberta Romano, *Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE JOURNAL ON REGULATION 174, 186, n. 30 (2001) ("Social responsibility proposals are not a focus of this article because they are not advanced in order to improve corporate performance and are consequently, not compatible with the objective of U.S. corporate law, which is to maximize share value"); and Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STANFORD LAW REVIEW 481 (1972).

42. Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GEORGIA LAW REVIEW 425, 426–27 (1984) ("[b]ecause it is an unwise and unwarranted intrusion into private transactions, private markets, and state corporation law, the rule should be rescinded").

43. Erin Marie Reid & Michael W. Toffel, *Responding to Public and Private Politics: Corporate Disclosure of Climate Change Strategies* (Aug. 18, 2008), 8, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1237982 (citations omitted).

44. *Id*. at 9 (citations omitted).

45. Frank Den Hond & Frank G. A. DeBakker, *Ideologically Motivated Activism: How Activist Groups Influence Corporate Social Change Activities*, 32:3 ACADEMY OF MANAGEMENT REVIEW 901, 911 (2007).

46. *Id*. at 915.

47. K. Rehbein, S. Waddock & S.B. Graves, *Understanding Shareholder Activism: Which Corporations are Targeted?*, 43 BUSINESS AND SOCIETY 239, 240 (2004).

48. Janis Sarra, *Shareholders as Winners and Losers under the Amended Canada Business Corporations Act*, 39 CANADIAN BUSINESS LAW JOURNAL 52, 74–75 (2003).

49. See J. M. Logsdon & H. J. Van Buren III, *Beyond the Proxy Vote: Dialogues between Shareholder Activists and Corporations*, 87 JOURNAL OF BUSINESS ETHICS 353, 353 (2009) ("The phenomenon of Dialogue between a corporation and dissident shareholders has not been analyzed in the academic literature . . . because it occurs behind the scenes. . . . Yet this is where a great deal of social change initiated by shareholder activists is negotiated").

50. Dhir, "Realigning," *supra* note 12 at 405–07; and Dhir, "The Politics," *supra* note 12 at 75.

51. I have also considered this proposal favorably. Dhir, "The Politics," *supra* note 12 at 73–75.

52. Jantzi-Sustainalytics, *Jantzi Research Recommends Goldcorp As Ineligible for SRI Portfolios* (2008), *available at* http://www.jantziresearch.com/jantzi-research-recommends-goldcorp-ineligible-sri-portfolios.

53. OECD Watch, *FREDEMI Coalition vs. Goldcorp* (Dec. 9, 2009), *available at* http://oecdwatch.org/cases/Case_172.

54. Frente de Defensa San Miguelense, *Specific Instance Complaint Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises Concerning the Operations of Goldcorp Inc. at the Marlin Mine in the Indigenous Community of San Miguel Ixtahuacán, Guatemala* (Dec. 9, 2009), *available at* http://oecdwatch.org/cases/Case_172/824/at_download/file.

55. *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference (98th Session, 2009), 680, *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_103484.pdf.

56. Inter-American Commission on Human Rights, *Precautionary Measures Granted by the Commission During 2010* (May 2010), *available at* http://www.cidh.oas.org/medidas/2010.eng.htm.

57. Physicians for Human Rights, *Toxic Metals and Indigenous Peoples Near the Marlin Mine in Western Guatemala: Potential Exposures and Impacts on Health* (May 2010), 3, *available at* http://physiciansforhumanrights.org/library/documents/reports/guatemala-toxic-metals.pdf.

58. Office of the United Nations High Commissioner for Human Rights, *Observaciones Preliminares Del Relator Especial De Naciones Unidas Sobre La Situación De Los Derechos Humanos Y Las Libertades Fundamentales De Los Indígenas, S. James Anaya, Sobre Su Visita A Guatemala* (13 a 18 de junio de 2010), *available at* www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10173&LangID=S.

59. *The Government of Guatemala's Position Regarding the Request for Precautionary Measures Submitted by Inter-American Commission on Human Rights of the OAS* (June 23, 2010), *available at* http://www.ciel.org/Lac/Guatemala/Guatemala_23Jun10_English.pdf.

60. *Human Rights Advocates Denounce Goldcorp's New Plan to Improve Situation in Guatemala* (July 1, 2010), *available at* http://int.piplinks.org/Center+for+International+Environmental+Law.

61. SHARE, "Database," *supra* note 14.

62. *Investors Spur Goldcorp to Address Human Rights In Guatemala* (Apr. 24, 2008), *available at* www.newswire.ca/fr/releases/archive/April2008/24/c9323.html?view=print.

63. National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries, *Advisory Group Report* (Mar. 29, 2007), 3, *available at* http://www.mining.ca/www/media_lib/MAC_Documents/Publications/CSRENG.pdf.

64. *Id*. For a discussion of the increased presence of Canadian mining firms in Latin America generally, see G. J. Munarriz, *Rhetoric and Reality: The World Bank Development Policies, Mining Corporations, and Indigenous Communities in Latin America*, 10 INTERNATIONAL COMMUNITY LAW REVIEW 431, 440 (2008) (citations omitted).

65. Dhir, "The Politics," *supra* note 12 at 52–53 (citations omitted).

66. Shareholder Association for Research and Education, *Shareholder Engagement Activity Report* (Q1/08), 6, *available at* http://www.share.ca/files/2008_Q1_Engagement_Report_WEB.pdf.

67. SHARE, "Database," *supra* note 14.

68. Rights & Democracy, Human Rights Impact Assessments for Foreign Investment Projects (2007), 18–19, *available at* www.dd-rd.ca/site/_PDF/publications/globalization/hria/full%20report_may_2007.pdf.

69. As noted above, the parties eventually chose On Common Ground Consultants to perform the impact assessment and International Alert to provide peer review. See CSRWire, *Human Rights Impact Assess-*

ment Contractors Selected and Website Established (Oct. 7, 2008), *available at* http://www.csrwire.com/News/13376.html.

70. Rights Action, *Open Letter from Rights Action to Goldcorp Inc. and Shareholders* (May 1, 2008), *available at* www.rightsaction.org/articles/Goldcorp_Open%20Letter_050108.html.

71. Correspondence from Catherine Coumans, MiningWatch Canada to the consortium *et al.* (Dec. 4, 2008), 1, *available at* http://www.miningwatch.ca/updir/Shareholder_ltr_2008-12-04.pdf ("Coumans").

72. *Id*. at 1–2.

73. *Id*. at 2.

74. Correspondence from ADISMI, Parroquía de San Miguel Ixtahuacán, the Alcaldía del Pueblo and the Mam Maya communities in resistance (Ágel, San José Ixcaniche, Salitre) to the consortium *et al.* (Sept. 4, 2008), *available at* http://groups.google.com/group/GuatemalaStoveProject/browse_thread/thread/12018bd4b10f97b4 ("ADISMI *et al*.").

75. Coumans, *supra* note 71, at 2.

76. Eric Engle, *What You Don't Know Can Hurt You: Human Rights, Shareholder Activism and SEC Reporting Requirements*, 57 SYRACUSE LAW. REVIEW. 63, 66 (2006).

77. *CBCA, supra* note 21, §137(5)(b.1).

78. See SHARE, "Database," *supra* note 14, at http://www.share.ca/en/node/1432 and Fredericton Peace Coalition, *Maritime Human Rights Group Seeks Answers from Goldcorp* (May 16, 2008), *available at* http://frederictonpeace.org/?p=1218.

79. SHARE, "Database," *supra* note 14.

80. I, of course, acknowledge that this example does not provide conclusive proof of the argument. There may be other reasons why Goldcorp circulated the impact-assessment proposal, but not the informed consent proposal. But it is certainly plausible that the firm's acceptance of one over the other was at least partially rooted in its interpretation of the legislation and the notable difference in the language of the two proposals. A similar proposal was submitted to Goldcorp in 2010. While the firm did not exclude it, it failed to provide the full text in its management proxy circular and recommended that shareholders vote against the proposal. See SHARE, "Database," *supra* note 14, at http://www.share.ca/en/node/2201 and Goldcorp, *Notice of Annual Meeting of Shareholders and Management Information Circular* (Mar. 26, 2010), Schedule B, *available at* http://www.goldcorp.com/_resources/Management-Information-Circular_2010.pdf.

81. Coumans, *supra* note 71, at 2.

82. ADISMI *et al.*, *supra* note 74. Mayan Mam community leader Javier de Leon recently highlighted this tension in response to my request for an evaluation of the Goldcorp proposal. See Nathanson Centre on Transnational Human Rights, Crime and Security, *Press Conference: Goldcorp Operations in Central America* (May 18, 2010), video *available at* http://nathanson.osgoode.yorku.ca/events/goldcorp-press-conf/.

83. Coumans, *supra* note 71, at 2.

84. *Supra* note 12, at 406, 402 (citations omitted).

85. ADISMI *et al*., *supra* note 74 ("We will demand that the company be closed down and not be given the opportunity to continue polluting and destroying the lands of this ancient people").

86. *A Summary of Issues Relevant to the Human Rights Impact Assessment (HRIA) of Marlin Mine, Guatemala* (Feb. 2009), 6, *available at* http://cule.ca/wp-content/uploads/2009/02/hitting-back-feb-09-revised-pdf.pdf(emphasis added). I understand this statement was not reviewed or approved by the entire investor consortium, which is heartening. Assuming the statement does not reflect the views of other consortium members, it is hoped they will take the opportunity to publicly distance themselves from its substance.

87. A. F. Sunter, *TWAIL as Naturalized Epistemological Inquiry*, 20 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 475, 476 (2007) ("There is almost no recognition of TWAIL in mainstream scholarship").

88. O. C. Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?* 10 INTERNATIONAL COMMUNITY LAW REVIEW 371 (2008) (Okafor, "Critical").

89. O. C. Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOODE HALL LAW JOURNAL 171, 176 (2005) (citation omitted). It is beyond the scope of this paper to provide a complete picture of TWAIL-related scholarship. For a very limited sample, see MAKAU W. MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002); Makau Mutua, *What Is TWAIL?*, 94 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 31 (2000) (Mutua, "What Is TWAIL?"); James Thuo Gathii, *Rejoinder: TWAILing International Law*, 98 MICHIGAN LAW REVIEW 2066 (2000), ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004); B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INTERNATIONAL COMMUNITY

LAW REVIEW 3 (2006); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003).

90. Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILLANOVA LAW REVIEW 841–43 (2000).

91. Mutua, "What Is TWAIL?," *supra* note 89, at 38.

92. *Id*.

93. *Id*. See also Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILLANOVA LAW REVIEW 827, 840 (2000) ("As scholars of international law, it is hoped that aspects of Critical Race Theory might help us articulate a different future, where a voice is given to those who are now voiceless and where those who seek to challenge the prevailing hierarchy might find a theoretical framework that will help mount this challenge.") For more on the relevance of CRT to international law analysis, see Penelope E. Andrews, *Making Room For Critical Race Theory In International Law: Some Practical Pointers*, 45 VILLANOVA LAW REVIEW 855 (2000).

94. See J. Kangave, *'Taxing' TWAIL: A Preliminary Inquiry into TWAIL's Application to the Taxation of Foreign Direct Investment*, 10 INTERNATIONAL COMMUNITY LAW REVIEW 389, 391 (2008) ("there is hardly any TWAIL literature exploring the relationship between the Westphalian civilising mission and taxation"); and I. T. Odumosu, *Challenges for the (Present/) Future of Third World Approaches to International Law*, 10 INTERNATIONAL COMMUNITY LAW REVIEW 467, 476–77 (2008).

95. Kangave, *id*., at 391, 392 (citations omitted).

96. A. Anghie, *TWAIL: Past and Future*, 10 INTERNATIONAL COMMUNITY LAW REVIEW 479, 480 (2008).

97. Makau W. Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARVARD INTERNATIONAL LAW JOURNAL 201, 201 (2001).

98. *Id*. at 202.

99. *Id*. at 203.

100. *Id*. at 204.

101. *Id*.

102. *Id*. at 207.

103. R. Buchanan, *Writing Resistance Into International Law*, 10 INTERNATIONAL COMMUNITY LAW REVIEW 445, 447 (2008).

104. *TWAIL Vision Statement*, as quoted in Karin Mickelson, *Taking Stock of TWAIL Histories*, 10 INTERNATIONAL COMMUNITY LAW REVIEW 355, 357 (2008).

105. I, of course, do not mean to suggest that TWAIL voices are a monolith. Rather, they are varied and address a range of interests, but are also connected by a "unifying core." Okafor, "Critical," *supra* note 88, at 375–76.

106. Anghie notes that such a self-reflective process is essential for the TWAIL movement itself: "TWAIL scholarship . . . needs to be self-critical, aware of the limitations of its own analytic framework, and the voices it has excluded and suppressed." A. Anghie, *What Is TWAIL: Comment*, 94 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 39 (2000).

107. Pooja Parmar, *TWAIL: An Epistemological Inquiry*, 10 INTERNATIONAL COMMUNITY LAW REVIEW 363, 365 (2008) (citation omitted).

108. For a similar point, in the context of unilateral home state regulation of corporate activity, see S. L. Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?*, 46 OSGOODE HALL LAW JOURNAL 565, 601 (2008) ("the legitimacy of unilateral home state regulation is likely to be greater if the structure of the regulation gives voice to [subaltern] communities").

109. This term is employed by numerous academics writing from a TWAIL perspective to "refer to the different methods employed by the West to justify intervention in the affairs of Non-western societies/'the Other.'" See Kangave, *supra* note 94, at 390, n. 6 (citation omitted).

110. *Supra* note 86.

111. Coumans, *supra* note 71, at 2.

112. *Supra* note 62.

113. Coumans, *supra* note 71, at 2.

114. *Id*. at 3.

115. *Id*.

116. *Id*.

117. Imai, "Breaching Indigenous Law," *supra* note 15, at 110 (citations omitted).

118. Correspondence from Catherine Coumans, MiningWatch Canada to the consortium *et al.* (March 16, 2009), 1, *available at* http://www.rightsaction.org/articles/Goldcorp_ongiong_concern_32409.html.

119. Bill Law, *Canada Goldmine Worries Grow*, BBC NEWS, Mar. 30, 2009, *available at* http://news.bbc.co.uk/2/hi/americas/7968888.stm.

120. David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Stakeholder Accountability through Transparency*, 17:3 BUSINESS ETHICS QUARTERLY 453, 453 (2007) (Hess, "New Governance Regulation").

121. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINNESOTA LAW REVIEW 342, 365 (2004). See also Bradley C. Karkkainen, *"New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINNESOTA LAW REVIEW 471, 473 (2004) ("This scholarship endeavors simultaneously to chronicle, interpret, analyze, theorize, and advocate a seismic reorientation in both the public policymaking process and the tools employed in policy implementation. The valence of this reorientation . . . is generally away from the familiar model of command-style, fixed-rule regulation by administrative fiat, and toward a new model of collaborative, multi-party, multi-level, adaptive, problem-solving New Governance").

122. David Hess, *Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development*, 2 VIRGINIA LAW AND BUSINESS REVIEW 221, 234 (2007).

123. Hess, "New Governance Regulation," *supra* note 120, at 455.

124. Adam Crawford, *Networked Governance and the Post-Regulatory State?*, 10:4 THEORETICAL CRIMINOLOGY 449, 458 (2006) ("I believe it would be foolish to 'throw out the state' with the governance or governmentality bath water. . . . [W]e should not get carried away with 'a giddy sense at the moment among many intellectuals that the state is passé'") (citations omitted).

125. S. L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUMAN RIGHTS & DEVELOPMENT LAW JOURNAL 177, 184, n. 35 (2008) (citations omitted).

126. John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 JOURNAL OF CORPORATION LAW 1, 36 (2005) (citation omitted).

127. "[T]he construction of competitive markets requires ongoing state action." Block, *supra* note 2, at 296.

128. Buchanan, *supra* note 103, at 447.

129. Kangave, *supra* note 94, at 397 (citation omitted).

130. Chimni, *supra* note 89, at 13.

131. *Supra* note 12, at 401–02.

132. Government of Canada, Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector (March 2009), 10–11, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/CSR-March2009.pdf; Carl Meyer, *CSR Counsellor's Dispute Resolution Plan Panned*, EMBASSY, June 16, 2010, *available at* http://www.embassymag.ca/page/view/csr-06-16-2010.

133. The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, "Protect, Respect, and Remedy: A Framework for Business and Human Rights," UN Doc. A/HRC/8/5 (Apr. 7, 2008).

134. *Id*. at 17.

135. *Id*. at 18.