Curing Canaries: Transnational Remedies for Peruvian Communities Impacted by Foreign Extractive Projects

This Note addresses the human rights, environmental, and social impacts that accompany foreign-backed extractive projects in Peru, and the ability of impacted communities to hold such companies accountable for harms caused. Given persistent roadblocks to local justice, this Note focuses on judicial and non-judicial remedies available in the home states of multinational extractive corporations operating in Peru. It first evaluates the extent of home states' obligations under international law to regulate their corporations' extraterritorial activities. It next applies this framework to foreign actors in Peru, particularly the United States and Canada, two of the largest investors in the Peruvian extractive sector. In the case of Canada, this Note considers the novel Canadian Ombudsperson for Responsible Enterprise (CORE), highlighting its institutional shortfalls and failure to remedy harmful impacts felt abroad. It then analyzes the recent Canadian Supreme Court case Nevsun v. Araya *(2020), which importantly recognized a Canadian cause of action for violations of customary international law.*

Shifting to the United States, this Note next examines the recent U.S. Supreme Court case, Nestlé USA, Inc. v. Doe *(2021), demonstrating the tenuous viability of the Alien Tort Statute (ATS) to provide for corporate accountability. Given uncertainty around the ATS as an anchor for judicial relief in U.S. courts, this Note argues that a state statute, the California Transparency in Supply Chains Act (CTSCA), may provide a case study for a more promising mechanism for accountability, if revised and adopted nationwide. By evaluating U.S. and Canadian corporate accountability models, this Note offers a current*

snapshot of recourses available to foreign victims aggrieved by extractive industries, therein contemplating the interplay of accountability mechanisms across jurisdictions, both in Peru and beyond.

INTRODUCTION

Peru has long been recognized as a country that is rich in natural resources.[1] Even throughout the ongoing COVID-19 pandemic and its related lockdowns, Peru has remained a frontrunner among mineral producers, both within Latin America[2] and globally.[3] This international standing is not all that surprising. Extractive industries (EI)[4] are undoubtedly vital to the Peruvian economy, constituting a significant portion of the country's gross domestic product (GDP) and its exports.[5] Many of these EI projects benefit from

1. *See, e.g.*, PEDRO HUGO TUMIALÁN DE LA CRUZ, *Capítulo 1: Historia de la Minería del Perú* [*Ch. 1: History of Peruvian Mining*], *in* COMPENDIO DE YACIMIENTOS MINERALES DEL PERÚ [COMPENDIUM OF MINERAL DEPOSITS IN PERU] 1, 1–19 (2003), https://repositorio.ingemmet.gob.pe/handle/20.500.12544/202 [https://perma.cc/48WF-CDPQ] (tracing the impressive development of the Peruvian mining sector from the pre-Incan period into the twenty-first century).

2. According to the Ministerio de Energía y Minas [Peru's Ministry of Energy and Mines], in 2020, Peru was the leading Latin American producer of the following resources: gold, zinc, lead, tin, diatomite, indium, andalusite (and related minerals), and selenium. MINISTERIO DE ENERGÍA Y MINAS, ANUARIO MINERO 2020 [MINISTRY OF ENERGY AND MINES, ANNUAL MINING REPORT 2020] at 50 (2020), https://cdn.www.gob.pe/uploads/document/file/1921117/Anuario%20Minero%202020.pdf.pdf [https://perma.cc/QD53-DRRS].

3. In 2020, despite various shutdowns stemming from the COVID-19 pandemic, Peru also ranked second in the world for copper and silver, and third for zinc production. *Id.* The United States Geological Survey (USGS) has corroborated these 2020 global rankings. *See* USGS, MINERAL COMMODITY SUMMARIES 2021 at 53 (2021), https://pubs.usgs.gov/periodicals/mcs2021/mcs2021.pdf [https://perma.cc/SD59-UBDJ] (denoting that Peru ranked second in global copper production, at 2,200 thousand metric tons, despite significant disruptions owing primarily to COVID-19 lockdowns); *id.* at 151 (second in global silver production, at 3,400 metric tons, even with decreased production due to the pandemic); and *id.* at 191 (third in global zinc production, at 1,200 thousand metric tons, despite reduced zinc mine production across South America).

4. *See* Claudine Sigam & Leonardo Garcia, United Nations Conference on Trade and Development, *Extractive Industries: Optimizing Value Retention in Host Countries*, at 3, U.N. Doc. UNCTAD/SUC/2012/1 (2012), https://unctad.org/system/files/official-document/suc2012d1_en.pdf [https://perma.cc/W2S2-P67V] (explaining how extractive industries involve the extraction of raw materials from the earth (e.g., oil, metals, minerals, and aggregates), as well as the processing and consumption of these materials, all within the host and home countries of operating companies, as well as within consuming markets). N.B.: This Note uses "extractive industries" (EI) and "mining" interchangeably.

5. *See, e.g.*, Agencia AFP, *Minería Puede Ser el Salvavidas para Economía Peruana en Recesión* [*Mining Can Be the Lifeline for a Peruvian Economy in Recession*], GESTIÓN (Aug. 20, 2020, 9:43 AM), https://gestion.pe/economia/mineria-puede-ser-el-salvavidas-para-economia-peruana-en-recesion-noticia/?ref=gesr [https://perma.cc/HLQ5-KSJZ] (noting that "the mining sector is responsible of 10% of [Peru's] GDP, 60% of its exports, 16% of private

foreign direct investment (FDI), which is inordinately concentrated in the mining sector.[6] Strikingly, a substantial portion of these investors are located in Western democracies, such as the United States and Canada.[7] In 2020, for instance, Canadian investors represented the principal source of FDI for 15.3% of mine construction projects in Peru, while U.S. investors contributed to 12.8% of the same.[8] These strong flows of Western investment allow foreign investors to share in the riches of Peru's subterranean wealth.

Buttressed by this foreign backing, the EI sector is generally perceived among Peruvians as benefiting the national economy, particularly in the wake of various setbacks imposed by the COVID-19 pandemic.[9] Even so, these foreign capital flows have not come

investment, and 19% of taxes paid by companies, according to the Sociedad Nacional de Minería, Petróleo y Energía [Peru's National Society of Mining, Petroleum, and Energy, or the SNMPE]") (translation by author). Following decreased mineral production and exports in 2020, the Peruvian mining industry began making a comeback in the first half of 2021. *See* Redacción Gestión, *SNMPE: Exportaciones Mineras Crecieron 71.9% en Primer Semestre del Año* [*SNMPE: Mineral Exports Grew by 71.9% in the First Half of the Year*], GESTIÓN (Aug. 9, 2021, 2:30 PM), https://gestion.pe/economia/snmpe-exportaciones-mineras-crecieron-719-en-primer-semestre-del-ano-nndc-noticia/?ref=signwall [https://perma.cc/Z95D-Z8S9].

6. More precisely, the mining sector is the industry that receives the most FDI by sector, commanding, as of June 2021, 25% of all FDI in Peru, according to the Agencia de Promoción de la Inversión Privada [Peru's Private Investment Promotion Agency]. Beatriz De la Vega & Juan Carlos Mejía, Presentation at ComexPerú's "Minería y Desarrollo Sostenible" [Sustainable Mining and Development] Symposium: Panorama de la Actividad Minera en el Perú [Panorama of Mining Activity in Peru], at 5 (Aug. 10, 2021), https://www.comexperu.org.pe/upload/seminars/foro/seminario_10082021/presentacion-beatriz-vega-juan-mejia.pdf [https://perma.cc/3MR4-WZZW]. The United Nations Conference on Trade and Development (UNCTAD) published similar findings in 2020. *See* UNCTAD, WORLD INVESTMENT REPORT 2020: INTERNATIONAL PRODUCTION BEYOND THE PANDEMIC 49 (2020), https://unctad.org/system/files/official-document/wir2020_en.pdf [https://perma.cc/C84M-CTEY] (observing that mining accounted for twenty to thirty percent of FDI stock in Peru, as well as in Chile, notwithstanding the COVID-19 pandemic).

7. MINISTERO MINISTERIO DE ENERGÍA Y MINAS, CARTERA DE PROYECTOS DE CONSTRUCCIÓN DE MINA [MINISTRY OF ENERGY AND MINES, PORTFOLIO OF MINE CONSTRUCTION PROJECTS] 12 fig.3 (2020), http://www.minem.gob.pe/minem/archivos/file/Mineria/INVERSION/2020/CPM2020.pdf [https://perma.cc/8KBH-7ZPH]. These two countries, which comprise the focus of this Note, were outpaced only by the United Kingdom (21.5%) and China (18.6%), both of which are beyond the ambit of the present discussion. *Id.*

8. *Id.*

9. *See, e.g.*, Bryan Quinde, *Un 83% de Peruanos Considera a la Minería como el Motor que Impulsará la Reactivación Económica* [*Eighty-Three Percent of Peruvians Consider Mining as the Motor that Will Drive Economic Recovery*], RUMBO MINERO (July 20, 2020), https://www rumbominero.com/noticias/mineria/un-83-de-peruanos-considera-a-la-mineria-

without a price. Local communities have alleged a number of social, environmental, human rights, and cultural harms stemming from extractive projects, including those associated with U.S. and Canadian multinational corporations (MNCs).[10] In making these claims, local communities may be serving as important "canaries" in Peru's physical and figurative "coal mines"[11] by expressing their discontent

como-el-motor-que-impulsara-la-reactivacion-economica [https://perma.cc/M92Q-66NX] (analyzing a 2020 study conducted by Ipsos Perú, which found that 83% of respondents, both urban and rural, considered the mining industry to be the "motor" that would jumpstart the national economy after various COVID-19-related setbacks). As SNMPE Executive Director Pablo de la Flor has posited, this widespread trust in the mining sector may derive from the fact that mining provides work opportunities for many other related industries, including construction, agriculture, business, and transportation. *Id.* Nevertheless, many impacted communities and social movements oppose such large-scale extraction as inherently exploitative and harmful. *See, e.g.*, Máxima Acuña, GOLDMAN ENV'T PRIZE, https://www.goldmanprize.org/
recipient/maxima-acuna/ [https://perma.cc/5EDR-G9QZ].

10. For a map of mining conflicts in Peru, see *Conflictos Mineros en Perú* [*Mining Conflicts in Peru*], CONFLICTOS MINEROS, https://mapa.conflictosmineros net/ocmal_db-v2/conflicto/lista/02034800 [https://perma.cc/UYH6-AJ97] (detailing local human rights, environmental, and social concerns, alongside the mining companies overseeing the relevant projects). A substantial portion of these mining companies are located in the United States and Canada. The U.S. companies include: (a) Newmont Mining Corp. (Yanacocha, Conga, and La Zanja Projects); (b) Southern Perú Copper Corp. (Los Chancas, Complejo de Ilo, Cuajone, and Toquepala Projects); (c) Southern Copper Corp. (Tía María Project); (d) Freeport McMoRan, Inc. (Cerro Verde Project); and (e) Phelps Dodge Corp. (Cerro Verde Project). *See id.* The Canadian companies include: (a) Manhattan Minerals Corp. (Tambogrande Project); (b) Candente Cooper Corp. (Cañariaco Norte Project); (c) Barrick Gold Corp. (Pierina Project); (d) Aquiline Resources, Inc. (Pico Machay Project); (e) Hubby Minerals, Inc. (Constancia Project); (f) Antares Minerals, Inc. (Rosa Rojo Project); and (g) Bear Creek Mining Corp. (Santa Ana Project). *See id.*; *see also* Liam Meisner, *Canadian Mining Companies Are Devastating the Global South*, PASSAGE (Jan. 21, 2021), https://readpassage.com/canadian-mining-companies-are-devastating-the-global-south/ [https://perma.cc/GJF8-W7CX] (describing the Santa Ana Project and subsequent local Peruvian protests against Canadian mining projects and calling for greater corporate accountability within Canada); discussion *infra* Part I (elaborating more fully on the persistent protests surrounding the U.S.-backed Tía María Project).

11. This idiom—quite fitting for the subject of this Note—refers to the historical practice of bringing canaries into coal mines to sense danger. Canaries are more sensitive to lethal gases than are humans, so the birds served as an early-warning system to miners. The logic went that, if a canary died in the mines, then the miners recognized that it was time to flee before the gas affected them, too. *See* Margaret Renkl, Opinion, *Three Billion Canaries in the Coal Mine*, N.Y. TIMES (Sept. 29, 2019), https://www nytimes.com/2019/09/29/opinion/three-billion-canaries-in-the-coal-mine.html [https://perma.cc/KW73-A2KM]. In colloquial speech, the phrase therefore refers to individuals who are able to perceive the early warning signs of danger. *See Canary in a/the Coal Mine*, FREE DICTIONARY, https://idioms. thefreedictionary.com/canary+in+a+coal+mine [https://perma.cc/A8UW-NKWZ]. While

with these harms before or as they are transpiring. Equipped with a native familiarity of neighboring regions, local groups may be the harbingers of human rights, environmental, and other disasters.[12] And yet, as prophetic as these communities might be, local concerns are repeatedly dismissed, leaving these actors relatively unsuccessful in accessing justice domestically.[13]

This Note accordingly reviews the availability of judicial and non-judicial remedies for these impacted "canaries," specifically within the home country jurisdictions of two major FDI players: the United States and Canada. Part I provides background on the Peruvian EI landscape, explaining the neoliberal policies that attract foreign investors and hinder local representation in some of their projects. Part II then considers whether home states have a legal duty to regulate the extraterritorial impacts of MNCs domiciled or doing business in the home state. This Part considers prescriptive and mandatory bases under international law for home states to hold their MNCs accountable for their violations abroad, particularly within the EI context in Latin America. Part III next addresses the United States and Canada as key investors within the Peruvian FDI scheme.[14] This Part evaluates current, recently-formulated, and potentially-serviceable mechanisms within Canada and the United States for impacted Peruvian communities to utilize in their quest for justice. These remedies include both judicial and non-judicial mechanisms and are presented alongside their practical shortcomings. By comparing models, this Note draws conclusions about the viability of these home state mechanisms before considering the interplay of accountability initiatives across legal systems. This Note thereby serves as a living tool for aggrieved Peruvian communities and others similarly affected by U.S. and Canadian corporations.

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this Note uses this idiom in the Peruvian EI context for the first time, U.S. Secretary John Kerry too employed the adage to refer to early indications of climate change. *See Idiom in the News: Canary in the Coal Mine*, SHARE AM. (Nov. 12, 2014), https://share.america.gov/english-idiom-canary-coal-mine/ [https://perma.cc/FNU5-2ZQ5].

12. In fact, some academics maintain that Indigenous and Local Knowledge (ILK) is essential to safeguard the biological and cultural diversity of our planet. *See, e.g.*, Álvaro Fernández-Llamazares et al., *Scientists' Warning to Humanity on Threats to Indigenous and Local Knowledge Systems*, 41 J. ETHNOBIOLOGY 144, 145–46 (2021).

13. For instance, while the Peruvian Ombudsperson advocates on behalf of these populations, the office still faces significant institutional limitations, as it is only a recommendatory body. *See* discussion *infra* Part I.

14. This Note discusses private companies based in the United States and Canada, rather than state-owned entities.

I. ROLE OF FDI IN THE PERUVIAN EXTRACTIVE SECTOR AND ROADBLOCKS TO COMMUNITY REPRESENTATION

Before exploring strategies for increasing corporate accountability in the United States and Canada, it is first essential to understand how these countries entered the Peruvian EI scene. The reasons are historical inasmuch as they are practical. Within the EI context, FDI[15] is considered particularly advantageous given the capital investments, technological advancements, industrial knowhow, and essential access to (international) supply chains and markets that are required to render the sector profitable.[16] For that reason, many low- and middle-income countries rely on FDI to extract, refine, and market their mineral resources.[17] These governments expect such projects to raise revenue that can later be reinvested in the countries' own human and infrastructure capital.[18] Operating at its best, FDI can therefore provide the necessary financial means for a developing country to harness its natural resources for the benefit of the country's citizens.[19]

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15. Foreign direct investment (FDI) refers to "a category of investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy (*direct investor*) in an enterprise (*direct investment enterprise*) that is resident in an economy other than that of the direct investor." OECD, OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT 234 (4th ed. 2008), https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf [https://perma.cc/MWZ7-N9L9]. FDI therefore differs from traditional portfolio investment because it is transnational by nature and directly invests in a defined enterprise, rather than focusing on the acquisition of a diverse array of assets.

16. *See* Lisa Sachs, *On Solid Ground: Toward Effective Resource-Based Development*, WORLD POL. REV. (Aug. 6, 2013), https://www.worldpoliticsreview.com/articles/13140/on-solid-ground-toward-effective-resource-based-development [https://perma.cc/LE3G-SRDR] (finding EI projects "capital intensive, with major infrastructure and supply chain needs").

17. *See* Lorenzo Formenti & Bruno Casella, *Mining for Tech Advances? The Impact of Mineral-Resource FDI in the Era of Global Value Chains*, LSE BLOGS (Sept. 18, 2019), https://blogs.lse.ac.uk/gild/2019/09/18/mining-for-tech-advances-the-impact-of-mineral-resource-fdi-in-the-era-of-global-value-chains/ [https://perma.cc/Z44S-AVM2] ("The spillovers of mining FDI—the diffusion and appropriation of foreign technology, know-how or skills that may not be available locally—are paramount for development in poor, resource-rich countries.").

18. *See* Sachs, *supra* note 16 (explaining how FDI-backed EI projects offer sustainable pathways for host countries to reinvest in their national and local economies).

19. *See supra* notes 5 & 9 and accompanying text (signaling the Peruvian potential to do the same in the throes of the COVID-19 pandemic); *see also* THEODORE H. MORAN, HARNESSING FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: POLICIES FOR DEVELOPED AND DEVELOPING COUNTRIES 36 (2006) (underscoring how FDI can allow host countries to increase their efficiency, engage in new kinds of activities, and fortify their transnational

Such a transformation was vital when President Alberto Fujimori assumed power in 1990 and paved the way for subsequent initiatives to attract FDI to Peru.[20] Indeed, Fujimori inherited a Peruvian economy in shambles: The 1980s had witnessed an unprecedented recession[21] owing to unmanageable debt and hyper-inflation.[22] Joining a chorus of other Latin American countries, Fujimori's Peru implemented neoliberal policies to entice FDI as a means of development.[23] These policies comprised a larger "Fujishock" program to stabilize inflation and generate revenue for the Peruvian economy,[24] oftentimes to the disadvantage of local citizens.[25]

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business networks). At the same time, however, FDI can simultaneously entail various drawbacks to local communities. *See id.* (noting the potential instability and dislocation among host country communities, firms, and workers given FDI's effect on international economic output and patterns of production).

20. President Alberto Fujimori served as the President of Peru from 1990 to 2000 and favored FDI initiatives to expand the Peruvian economy. *See, e.g.*, *Commanding Heights: Peru*, PBS, https://www.pbs.org/wgbh/commandingheights/lo/countries/pe/pe_full html [https://perma.cc/Y32V-XCGT] (chronicling Fujimori's initial "court[ing] [of] foreign investment and privatization" from 1990–91 and describing Peru's "robust economic growth driven by foreign direct investment" between 1993 and 1995).

21. Even today, the 1980s are still known in Peru as *la Década Perdida* ["the Lost Decade"] or *la Crisis de los 80* ["the Crisis of the 80s"] because of the severity of the economic downturn. *See generally,* Luis Gonzalo Llosa & Ugo Panizza, *La Gran Depresión de la Economía Peruana: ¿Una Tormenta Perfecta?* [*The Great Depression of the Peruvian Economy: A Perfect Storm?*], 30 REV. ESTUDS. ECOS. 91, 91–117 (2015), https://www.bcrp.gob.pe/docs/Publicaciones/Revista-Estudios-Economicos/30/ree-30-llosa-panizza.pdf [https://perma.cc/F6NT-2H48] (concluding that the economic crisis of the 1980s was amplified by a fragmented political system and limited industrial capacity).

22. Carlos Alberto Gomez, *Peru's Debt Crisis and Subsequent Shock Economy*, UCLA INT'L INST. (Feb. 4, 2005), https://international.ucla.edu/institute/article/19898 [https://perma.cc/3PJQ-TRPR].

23. *See Latin America at the End of the 20th Century*, BRITANNICA, https://www.britannica.com/place/Latin-America/Latin-America-at-the-end-of-the-20th-century [https://perma.cc/VGG5-TMCL]. Many of these policies persist in the region in the present day. *See, e.g.*, *Now Is a Great Time to Invest in Latin American Mining*, LATAM INVESTOR (July 8, 2019), https://latam-investor.com/2019/07/latin-american-mining/ [https://perma.cc/398Z-U7RK] (encouraging English-speaking readers to invest in Latin American mining and noting renewed FDI opportunities in Argentina and Ecuador).

24. *See Peru: Impact of the "Fujishock" Program*, COUNTRY DATA, http://www.country-data.com/cgi-bin/query/r-10324 html [https://perma.cc/E5XH-JGFD] (last updated Sept. 1992).

25. *See, e.g.*, James Brooke, *Peru's Poor Feel Hardship of 'Fuji Shock' Austerity*, N.Y. TIMES (Aug. 12, 1990), https://www.nytimes.com/1990/08/12/world/peru-s-poor-feel-hardship-of-fuji-shock-austerity.html [https://perma.cc/69B3-57VW]. This is not to mention the various human rights abuses that Fujimori—recognized as a dictator by some—perpetrated

Within the EI sector, the Fujimori Administration advanced FDI policies which liberalized the rules permitting foreign investors to engage in extraction.[26] For example, a 1995 law provided (foreign) mining corporations with the right of unrestricted land use, on the sole condition that the companies compensated the original landowner.[27] The same law also lifted a ban on the sale of community lands, allowing these regions to be mined by foreign investors subject to communal agreement.[28] Among other mechanisms, a tax regime exempted mining corporations from royalty payments and a thirty percent profit tax until these companies had recovered their initial investments, thereby enabling foreign investors to take home more in profits.[29] Other reforms likewise rendered Peru an attractive country for FDI-backed extractive initiatives to set up shop.[30] Today, the

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before fleeing office in 2000. In fact, Fujimori was sentenced in 2009 to twenty-five years in prison for his role in extrajudicial killings, abductions, and enforced disappearances. In 2017, President Pedro Pablo Kuczynski granted Fujimori a humanitarian pardon, sparking outrage among various human rights defenders. *See Peru: Revoke Fujimori Pardon. Human Rights Watch Submits Brief to Rights Court*, HUM. RTS. WATCH (Feb. 1, 2018, 5:00 PM), https://www hrw.org/news/2018/02/01/peru-revoke-fujimori-pardon [https://perma.cc/UL4Q-BY4Z].

26. *See supra* note 20 and accompanying text; *see also* MORAN, *supra* note 19, at 30 (remarking that it is a common strategy among host countries to attract FDI by directly providing tax breaks and other subsidies to investors).

27. *See* LEY NO. 26505 [LAW NO. 26505], art. 7 (1995) (Peru) (providing that landowners will be compensated by the owners of the relevant mining or hydrocarbon activities taking place on their land) (translation by author).

28. *See id.* art. 11 (allowing communal lands to be disposed of, encumbered, leased, or otherwise acted upon with an affirmative vote of two-thirds of the relevant community members) (translation by author). At the same time, however, this provision thereby legalized the dispossession of indigenous peoples' lands. *See* Arthur Scarritt, *Undermining Indigenous Self-Determination and Land Access in Highland Peru*, OPEN DEM. (July 2, 2015), https://www.opendemocracy net/en/beyond-trafficking-and-slavery/undermining-indigenous-selfdetermination-and-land-access-in-highland-p/ [https://perma.cc/85KQ-KXVF].

29. Aldo F. Ponce & Cynthia McClintock, *The Explosive Combination of Inefficient Local Bureaucracies and Mining Production: Evidence from Localized Societal Protests in Peru*, 56 LAT. AM. POL. & SOC'Y 118, 121 (2014).

30. Of note are:

> the elimination of restrictions on remittances of profits and capital, the simplification of licensing procedures, the suppression of performance requirements for foreign investments, the adoption of new labor legislation that weakened the bargaining power of labor unions, changes to indigenous land tenure, the reduction of taxes, free capital mobility, and the privatization of state firms and concessions.

Id. Some of these policies have spawned negative human rights impacts, such as the government's endorsement of private security agreements between police forces and extractive companies. *See generally* EXECUTIVE SUMMARY REPORT: AGREEMENTS BETWEEN

Peruvian EI sector benefits from U.S. and Canadian corporate investments worth approximately $15.9 billion in U.S. dollars.[31] As a "host country"[32] to these companies, Peru continues to capitalize on FDI opportunities, with a clear focus on creating an attractive environment for foreign capital, technology, and trading partners.[33]

While beneficial, FDI-backed extractive projects can nonetheless engender certain human rights, environmental, and social impacts.[34] Such has been the case in Peru, where EI projects have

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THE NATIONAL POLICE AND THE EXTRACTIVE COMPANIES IN PERU, EARTH RIGHTS INT'L (2019), https://earthrights.org/wp-content/uploads/Executive-Summary-Agreements-between-Perus-National-Police-and-extractive-companies-2.pdf [https://perma.cc/LUV3-RLG3].

31. FDI within the Peruvian EI sector can be analyzed along several metrics. In terms of future development, of Peru's forty-eight planned mining projects, eleven can be traced to Canada (for an approximate investment of 8.5 billion USD), and four can be traced to the United States (a 7.2 billion USD investment). INT'L TRADE ADMIN., MINING EQUIPMENT AND MACHINERY, https://www.trade.gov/country-commercial-guides/peru-mining-equipment-and-machinery [https://perma.cc/TZ8V-A58F] (last updated Oct. 7, 2021); *see also supra* note 8 and accompanying text.

32. This term indicates the country into which investment is made. This Note is particularly interested in Peru's ability to "host" U.S. and Canadian corporations. In this schema, the United States and Canada serve as these corporations' "home countries."

33. FDI inflows in Peru increased from 6.5 billion USD to 8.9 billion USD between 2018 and 2019 (constituting an increase of 37.1%). *See* UNCTAD, *supra* note 6, at 46. Note, however, that FDI plummeted by 88% between 2019 and 2020 due to COVID-19-related shutdowns. *See* UNCTAD, WORLD INVESTMENT REPORT 2021: INVESTING IN SUSTAINABLE RECOVERY 59 (2021), https://unctad.org/system/files/official-document/wir2021_en.pdf [https://perma.cc/K74L-J6HE]. That said, "FDI is expected to partially rebound in 2021 and 2022, boosted by the recovery of commodity prices, the related economic recovery, the formation of a new government after the June [2021] elections, further fiscal support and a profitable currency appreciation." *Id.* at 59–60.

34. *See, e.g.*, Penelope Simons & J. Anthony VanDuzer, *Using International Investment Agreements to Address Access to Justice for Victims of Human Rights Violations Associated with Transnational Resource Extraction*, *in* CORPORATE CITIZEN: NEW PERSPECTIVES ON THE GLOBALIZED RULE OF LAW 279, 282–85 (Oonagh E. Fitzgerald ed., 2020) (enumerating a litany of human rights abuses at the hands of extractive MNCs, including forced displacement, gender-based violence, and inordinate impacts on indigenous communities); Luz Adriana Muñoz-Duque et al., *Despojo, Conflictos Socioambientales y Violación de Derechos Humanos. Implicaciones de la Gran Minería en América Latina* [*Spoliation, Socio-Environmental Conflicts, and Human Rights Violations. Implications of Large-Scale Mining in Latin America*], 23 REV. U.D.C.A. ACT. & DIV. CIENT. 1, 3 tbl.1 (2020) (noting the impact of large-scale mining on Latin American communities, economies, and their environment); Penelope Simons & Melisa Handl, *Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence Against Women in the Context of Resource Extraction*, 31 CAN. J. WOMEN & L. 113, 120–28 (2019) (scrutinizing the egregious impact of EI projects on host country women); DUE PROCESS L. FOUND. & OXFAM, EXECUTIVE SUMMARY. RIGHT TO FREE, PRIOR, AND INFORMED CONSULTATION AND CONSENT IN LATIN AMERICA: PROGRESS AND CHALLENGES IN BOLIVIA, BRAZIL, CHILE,

infringed local communities' land rights and diverted or polluted water and land resources, sparking conflict.[35] In a recent notorious instance, demonstrators blocked a coastal highway to impede the construction of the $1.4 billion Tía María copper mining project by Southern Copper Corporation, an American mining company.[36] Protesters expressed their ongoing frustrations with the project, which they believed would "pollute their fields and affect water supplies" within the southern region of Arequipa.[37] Controversy has surrounded this project for nearly a decade, with at least six protesters killed in police clashes in 2011 and 2015,[38] and an additional fatality in April 2021.[39]

This incident and its resultant backlash do not stand alone.[40] Indigenous farmers and laborers have habitually protested against EI projects, oftentimes using blockades to halt operations and demand renegotiation, so as to minimize the harmful effects of these initiatives.[41] Yet, these demonstrations are often met with "heavy-

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COLOMBIA, GUATEMALA, AND PERU at iii (2015), http://www.dplf.org/sites/default/files/executive_summary_consultation_2015_web_02-17-2016_c.pdf [https://perma.cc/86CA-SNDR] ("[I]mplementation of extractive projects has brought with it numerous social conflicts with peoples, communities, and local populations in general, whose rights and interests are adversely affected when their lands and the natural resources on those lands are not respected.").

35. *See supra* note 10 and accompanying text.

36. *See* Marco Aquino, *Protest Begins Against Billion-Dollar Southern Copper Mining Project in Peru*, REUTERS (July 15, 2019), https://www reuters.com/article/us-peru-southern-copper/protest-begins-against-billion-dollar-southern-copper-mining-project-in-peru-idUSKCN1UA2GO [https://perma.cc/J7YR-R56S].

37. *Id. But see* James Attwood, *Southern Copper Keeps Faith in Iconic Mine Spurned by Government*, BLOOMBERG (Aug. 20, 2021, 3:58 PM), https://www.bloomberg.com/news/articles/2021-08-20/southern-copper-keeps-faith-in-iconic-mine-spurned-by-government [https://perma.cc/MD6J-VZUP] (summarizing an August 2021 meeting between Peru's Minister of Energy and Mines and Southern Copper Corp. executives, in which the company clarified purportedly-incorrect assumptions about the project's ecological footprint and remained hopeful that the new Castillo Administration would approve the project).

38. Aquino, *supra* note 36.

39. *See How the Violence at Southern Copper's Tia Maria Mining Project Could Have Been Avoided*, MINING GLOBAL (Apr. 20, 2021), https://miningglobal.com/supply-chain-and-operations/how-violence-southern-coppers-tia-maria-mining-project-could-have-been-avoided [https://perma.cc/GME4-N39C] (describing Peru's state of emergency and deployment of the national police and armed forces to suppress months of protest against the project due to environmental and economic concerns).

40. *See, e.g.*, *supra* note 10 and accompanying text.

41. In 2019, anti-mining protests by local communities "held up hundreds of millions of dollars in copper exports and forced the Peruvian government into contentious negotiations over indigenous land rights and environmental concerns." Matthew C. DuPée, *As Anti-Mining*

handed" responses by police and military forces, particularly under President Martín Vizcarra (2018–2020).[42] Remarking on the legacy of Vizcarra's presidency, U.S. government analyst Matthew DuPée notes:

> Hitching economic growth plans to Peru's mineral wealth by enticing multinational mining firms to invest in new projects has always entailed environmental concerns and is at odds with the interests of local communities. But in facilitating large-scale mining operations, the Vizcarra [A]dministration appears willing to exceed what previous Peruvian governments tolerated when it comes to environmentally risky projects that threaten to damage waterways, agricultural lands and protected indigenous populations.[43]

In July 2021, Pedro Castillo was elected the President of Peru, prevailing over his right-wing opponent and Fujimori's daughter, Keiko Fujimori.[44] While it remains to be seen how the Castillo Administration will grapple with mining-related conflicts, President Castillo did campaign on the promise of maximizing mineral production.[45] This pledge may in fact herald a renewed commitment[46] to MNCs and their rights and interests, including privileged access to

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Protests Escalate, Peru's Vizcarra Sides With Mining Companies, WORLD POL. REV. (Dec. 11, 2019), https://www.worldpoliticsreview.com/articles/28403/as-anti-mining-protests-escalate-peru-s-vizcarra-sides-with-mining-companies [https://perma.cc/N5SE-J6ET].

42. *See id.* ("Under Vizcarra, the Peruvian government has taken a more heavy-handed approach to protect multinational mining activities at the expense of local communities.").

43. *Id.*

44. *See Pedro Castillo Declared President-Elect of Peru*, BBC NEWS (July 20, 2021), https://www.bbc.com/news/world-latin-america-57897402 [https://perma.cc/8GK3-SH6H].

45. *See Pedro Castillo: Habrá Minería «Donde la Naturaleza y la Población lo Permitan»* [*Pedro Castillo: There Will Be Mining "Wherever Nature and Residents Permit"*], ENERGIMINAS (Apr. 8, 2021), https://energiminas.com/pedro-castillo-habra-mineria-donde-la-naturaleza-y-la-poblacion-la-permitan/ [https://perma.cc/U3A5-GJXQ] (reporting Castillo's commitment to mineral extraction "wherever nature and residents permit" and his indication that mining-related matters would "also be debated in the Constitution") (translation by author).

46. *See* DuPée, *supra* note 41 (concluding that "the Peruvian government seems more interested in satisfying mining multinationals than appealing to popular grievances"); *see also* Muñoz-Duque et al., *supra* note 34, at 5 (observing the tendency for Latin American governments to favor the implementation of mining projects and "obviat[e] the particular needs of impacted communities") (translation by author).

investor-state dispute settlement.[47] In this context, the Peruvian government arguably remains focused on maximizing FDI returns, quelling protest, and ensuring that mining projects continue on schedule, rather than consulting with the (often indigenous) communities that would be impacted by such projects.[48]

When harms to local communities have occurred as a result of FDI, Peruvian communities have persistently struggled to access a meaningful remedy.[49] While the Peruvian legal system offers a potential avenue for redress, local communities litigating in this area have sometimes encountered procedural and extrajudicial hurdles, both inside and outside the courtroom.[50]

Fortunately, non-judicial grievance mechanisms present another option in the quest for justice. Yet, in following this tack, local communities have found their greatest support in government branches

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47. This dispute settlement process notably champions foreign investors. *See* Lise Johnson & Lisa Sachs, *Investment Treaties, Investor-State Dispute Settlement, and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities*, *in* INTERNATIONAL POLICY RULES AND INEQUALITY: IMPLICATIONS FOR GLOBAL ECONOMIC GOVERNANCE 112, 116 (José Antonio Ocampo ed., 2019) (noting the distortion of government incentives to favor the interests of (often multinational) companies, which could file costly suits, over those of local communities).

48. *See* TEHTENA MEBRATU-TSEGAYE & LEILA KAZEMI, FREE, PRIOR AND INFORMED CONSENT: ADDRESSING POLITICAL REALITIES TO IMPROVE IMPACT 16 (Oct. 2020), http://ccsi.columbia.edu/files/2019/04/Eng-Report-Free-prior-and-informed-consent-Addressing-political-realities-to-improve-impact.pdf [https://perma.cc/T586-E4TT] (describing some Peruvian ministries' view of meaningful consultation with impacted, often indigenous, communities as "an impediment to extractives projects and a 'mechanism to halt projects'").

49. *See, e.g.*, Lisa Viscidi & Jason Fargo, *Local Conflicts and Natural Resources: A Balancing Act for Latin American Governments* 3 (The Dialogue, Working Paper, May 2015), https://www.thedialogue.org/wp-content/uploads/2019/07/LocalConflictsandNaturalResources.pdf [https://perma.cc/M75E-RF5D] ("The uncertainty over commodities markets and investment makes it all the more important for Peru to find a solution to addressing local conflicts over resource investment."); Anthony J. Bebbington & Jeffrey T. Bury, *Institutional Challenges for Mining and Sustainability in Peru*, 106 PROC. NAT'L. ACAD. SCI. 17296, 17299 (2009) (pioneering studies analyzing FDI mining conflicts in Peru).

50. *See, e.g.*, Charis Kamphuis, *Litigating Indigenous Dispossession in the Global Economy: Law's Promises and Pitfalls*, 14 BRAZ. J. INT'L L. 165, 200 (2017) (describing the Indigenous Negritos Community's litigation against land dispossession by the foreign-owned Yanacocha Mine and concluding that these plaintiffs encountered the risk of corruption and bias in the judiciary, a lack of access to trained and funded legal counsel, and a formalist application of procedural rules to justify dismissing the case "on the basis of a concept of consent and subjectivity that is arguably discriminatory"). As this Note examines U.S. and Canadian remedies for Peruvian communities, the present discussion does not examine how these communities engage with local Peruvian courts.

"that are under-resourced and often side-lined in decision making processes."[51] Among Peruvian communities' limited advocates is the Ombudsperson (*la Defensoría del Pueblo*),[52] which has endeavored to protect human rights and promote governmental accountability since 1993.[53] This office is tasked with defending and promoting the rights of all individuals.[54] It may intervene in constitutional actions;[55] develop reports on topics of special importance; investigate human rights abuses; present legislative initiatives to Congress; promote the signing, ratification, compliance, and spread of international human rights law treaties; and galvanize administrative action.[56] The Ombudsperson often deploys these powers to intervene in socio-environmental conflicts, a majority of which are EI-related.[57]

In practical terms, however, the Ombudsperson's power is limited insofar as it can only recommend practices to other

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51. *See* Mebratu-Tsegaye & Kazemi, *supra* note 48, at 5 (concluding that governmental bodies that favor minimal consultation often prevail in the decision-making process).

52. Translation by author. For the Ombudsperson's homepage, visit: https://www.defensoria.gob.pe [https://perma.cc/79ZR-9DLC].

53. *See Nuestra Institución: Misión de la Defensoría del Pueblo* [*Our Institution: Ombudsperson's Mission Statement*], DEFENSORÍA DEL PUEBLO, https://www.defensoria.gob.pe/quienes-somos/ [https://perma.cc/G3Q3-ZEEE] [hereinafter *Peruvian Ombudsperson's Mission Statement*] (describing the Ombudsperson's founding and mission).

54. The Ombudsperson defines its mission as: "[d]efend[ing] and promot[ing] individual and community rights, acting with autonomy and an emphasis on vulnerable populations, by monitoring compliance with state obligations." *Id.* (translation by author).

55. With regard to constitutional actions:

> The [Ombudsperson] is authorized to intervene in constitutional cases involving the protection of the law, habeas corpus, habeas data, unconstitutional actions, popular actions, and enforcement actions . . . . In this way, it can initiate constitutional cases, intervene in ongoing cases as a co-party or present briefs as an amicus curiae, and can present reports or opinions at the request of the parties or the Constitutional Court.

Id. (translation by author).

56. *Id.*

57. *See Reporte de Conflictos Sociales No. 214 (Diciembre 2021)* [*Social Conflicts Report No. 214 (December 2021)*] at 18, 20, DEFENSORÍA DEL PUEBLO (Jan. 10, 2022), https://www.defensoria.gob.pe/wp-content/uploads/2022/01/Reporte-Mensual-de-Conflictos-Sociales-n.°-214-–-diciembre-2021.pdf [https://perma.cc/J9PL-5WVH] (indicating that 63.9% of social conflicts in December 2021 were socio-environmental in nature, and of those, 66.7% of such cases involved mining); *see also id.* at 22 tbl.15 (presenting the Ombudsperson's monthly involvement in active mining cases between December 2020 and December 2021); Bebbington, *supra* note 49, at 17299 (noting that the Ombudsperson has been the "most effective mediator" in these conflicts, possessing, despite criticism, "greater legitimacy with the different parties" than other potential bodies).

governmental bodies and not implement them directly.[58] Critics have underscored these institutional barriers.[59] Even so, the Ombudsperson remains dedicated to its advocacy[60] and specifically envisions a mining industry that respects human rights.[61]

Accordingly, these political dynamics have created a latent mismatch between local community interests and the FDI-driven interests embodied in Peruvian law and policy.[62] This Note argues that

58. The Ombudsperson recognizes its capacity to "[p]repare reports with recommendations or demands to the authorities, the fulfillment of which finds support in [the Ombudsperson]'s power of persuasion and in the strength of [its] technical, ethical, and legal arguments." *Peruvian Ombudsperson's Mission Statement*, *supra* note 53 (translation by author).

59. *See* Ponce & McClintock, *supra* note 29, at 133–34 (suggesting that political protests arising from the presence of foreign-owned mining corporations may also result from Peruvian bureaucratic and institutional failures at the local level, not solely from FDI and mining).

60. *See, e.g.*, *Defensoría del Pueblo Hace Balance de la Situación de los Derechos Humanos en el Perú* [*Peruvian Ombudsperson Takes Stock of the Human Rights Situation in Peru*], Press Note No. 1528/OCII/DP/2020, DEFENSORÍA DEL PUEBLO (Dec. 10, 2020), https://www.defensoria.gob.pe/wp-content/uploads/2020/12/NP-1528-2020.pdf [https://perma.cc/XU7P-6AWM] (underscoring the Ombudsperson's commitment to defending human rights on International Human Rights Day); *Peruvian Ombudsperson's Mission Statement*, *supra* note 53 ("In view of its legitimacy, it is vital that citizens perceive and sense the Ombudsperson as an institution that is not only close, but also [one] deeply committed to solving their problems.") (translation by author).

61. *See, e.g.*, *Defensorías del Pueblo Se Reúnen para Promover una Minería que Respete los DD.HH.* [*Ombudsperson Representatives Meet to Promote a Mining Industry That Respects Human Rights*], DEFENSORÍA DEL PUEBLO (Aug. 17, 2018, 10:54 AM), https://www.defensoria.gob.pe/defensorias-del-pueblo-de-iberoamerica-se-reunen-en-chile-para-promover-una-mineria-que-respete-los-derechos-humanos [https://perma.cc/4XG3-CLNA]; *"El País Necesita un Pacto para el Desarrollo con el Impulso de la Nueva Minería para Hacer Efectivos los Derechos Humanos"* [*"The Country Needs a Development Agreement Incorporating the Momentum of the New Mining Industry to Make Human Rights Effective"*], DEFENSORÍA DEL PUEBLO (Sept. 22, 2017, 1:07 PM), https://www.defensoria.gob.pe/el-pais-necesita-un-pacto-para-el-desarrollo-con-el-impulso-de-la-nueva-mineria-para-hacer-efectivos-los-derechos-humanos [https://perma.cc/82FA-Q28K].

62. *See* Viscidi & Fargo, *supra* note 49, at 3 ("Peru has long faced tensions between its governments [sic] looking to monetize the nation's mineral and hydrocarbons resources and local communities concerned about environmental and social degradation on their lands."); Fiorella Triscritti, *Mining, Development and Corporate-Community Conflicts in Peru*, 48 CMTY. DEV. J. 437, 448 (2013) (asserting that "dynamic corporate-community relations might be a necessary condition to prevent conflict and ensure sustainable mining," but deeming such relations insufficient if the Peruvian government, civil society, and the private sector do not also negotiate the management of mining projects and revenues as equal partners); *see also generally* Roger Merino, *Re-politicizing Participation or Reframing Environmental Governance? Beyond Indigenous' Prior Consultation and Citizen Participation*, 111 WORLD

the present impasse might benefit from access to additional fora or other mechanisms located outside of Peru, such as those situated in home states.

II. IDENTIFYING AND INTERROGATING HOME STATE "OBLIGATIONS" TO REDRESS EXTRATERRITORIAL CORPORATE IMPACTS

Given the consistent struggle of impacted communities to access justice within Peru, this Part explores the accountability of foreign states whose corporations give rise to these tensions. This Part suggests that these home states are encouraged—if not required—under international law to hold their corporations accountable for impacting local communities within host states like Peru.[63]

Academic debate in this area has splintered because MNCs' cross-border operations present thorny questions of home state duties in extraterritorial contexts. A state's "exclusive right to decide what acts shall take place in its territory" has long been recognized as a hallmark of state sovereignty and allows the state to adjudicate cases arising within the state's borders.[64] However, MNCs defy these territorial boundaries by situating a parent corporation in one state and its subsidiaries in another.[65] This transplanting poses the question of whether the states which house the parent corporation (the "home states") have the legal authority and/or obligation to regulate the activities of subsidiaries located in other territories and jurisdictions (the "host states"). This question becomes particularly significant when these subsidiaries are linked to human rights, environmental, and other social abuses in countries like Peru.

By identifying and interrogating home state obligations as a matter of legal doctrine, Section II.A presents international human rights treaties which implore—and may even require—home states to

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DEV. 75 (2018) (underscoring the Peruvian government's refusal to incorporate indigenous concerns into public policies beyond participatory processes).

63. This proposal rests upon the assumption that home state accountability offers a viable pathway towards redress. This pathway is only viable to the extent that extractive corporations in Peru are foreign-owned and foreign-affiliated. Fortunately for the purposes of the present discussion, a substantial portion are. *See* discussion *supra* Introduction.

64. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 237 (2005). For a complete discussion of a state's control over its territory, see *id.* at 224–302 (tracing the historical debate regarding this sovereign right).

65. *See* Julian Birkinshaw, *Entrepreneurship in Multinational Corporations: The Characteristics of Subsidiary Initiatives*, 18 STRATEGIC MGMT. J. 207, 207 (1997).

regulate and redress extraterritorial abuses. After describing the slippery nature of these agreements, Section II.B reviews academic literature assessing the binding effect of these home state "obligations." This Section presents arguments that these "obligations" are explicit and exacting, alongside dissenting views that home state intervention in corporate misconduct is, at most, only recommended. Section II.C applies this framework to the extractive industry, particularly within the Latin American context, to consider governance and implementational challenges alongside some potential glimmers of reform.

A. Laying the Groundwork for Home State Intervention in Extraterritorial Misconduct

No human rights treaty explicitly obliges home states to redress the extraterritorial impacts of their MNCs.[66] In 2011, the United Nations added a gloss to the international legal landscape by endorsing the "Guiding Principles on Business and Human Rights" (the "UNGPs" or the "Principles").[67] The UNGPs uphold states' extant

66. In 2014, however, the U.N. Human Rights Council (UNHRC) created an open-ended intergovernmental working group (OEIGWG) to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." UNHRC, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, at 2, U.N. Doc. A/HRC/26/9 (July 14, 2014). This draft treaty was most recently revised for a third time in August 2021. *See Legally Binding Instrument to Regulation, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (OEIGWG Chairmanship, 3d Revised Draft, Aug. 17, 2021), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rd DRAFT.pdf [https://perma.cc/U9A6-SG5D].

67. The UNGPs were developed by the Special Representative of the Security-General John Ruggie to provide the first global standard for addressing human rights impacts by MNCs and other business enterprises. *See* Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter the "UNGPs" or the "Principles"]. The Principles incorporate the human rights contained in the International Bill of Human Rights, which consists of the: (1) the Universal Declaration of Human Rights (UDHR) (Dec. 10, 1948, G.A. Res. 217 A (III)); (2) the International Covenant on Economic, Social, and Cultural Rights (ICESCR) (Dec. 16, 1966, 993 U.N.T.S. 3); and (3) the International Covenant on Civil and Political Rights (ICCPR) (Dec. 16, 1966, 999 U.N.T.S. 171). The UNGPs advance three central pillars outlining state and business responsibilities: (1) the state duty to protect human rights; (2) the corporate duty to respect human rights; and (3) access to remedy for victims of business-related abuses. The UNHRC endorsed the UNGPs on June 16, 2011. *See* Human Rights

obligations to protect human rights,[68] but these provisions significantly do not create any "new international law obligations."[69]

Nevertheless, the Principles still address home states' ties to their corporations' extraterritorial affairs. First, the UNGPs call on business enterprises, including MNCs, to comply with their home states' human rights laws,[70] importantly linking home state laws to the activities of their MNCs.[71] Second and more explicitly, the Principles urge states to protect against human rights abuses "within their territory and/or jurisdiction by third parties, including business enterprises."[72] This state protection against MNC abuses is recognized as a "standard of conduct," rather than a binding obligation on states to answer for human rights violations perpetrated by their private actors.[73] While states are expected to signal to businesses domiciled in their territory and/or jurisdiction to respect human rights, states are "not generally required . . . to regulate the extraterritorial activities" of these businesses; rather, they are permitted to do so consonant with their recognized jurisdiction, which may constructively reach beyond

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Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/Res. 17/4 (June 16, 2011) (endorsing the UNGPs).

68. *See* UNGPs, *supra* note 67, at 6 (General Princ. (a)) (grounding the UNGPs in "[s]tates' existing obligations to respect, protect and fulfill human rights and fundamental freedoms").

69. *Id.* (General Princ. (b)). This clause has been identified by scholars as a particularly damning indication that home states have no binding obligation under international law to regulate the impacts of MNCs, even under the UNGPs. *See* discussion *infra* Section II.B. At the same time, the Principles also importantly do not abridge human rights obligations that already exist.

70. *See* UNGPs, *supra* note 67 (General Princ. (b)) (recognizing business enterprises as "specialized organs of society . . . required to comply with all applicable laws and to respect human rights").

71. *See id.* ("These Guiding Principles apply to all [s]tates and to all business enterprises, both *transnational* and others, regardless of their size, sector, location, ownership and structure.") (emphasis added).

72. *Id.* (Guiding Princ. 1). Within the present discussion of the Peruvian EI context, it is incumbent upon Canada and the United States as home states to protect against human rights abuses within their jurisdiction. See discussion *infra* Part III for an analysis of viable home state accountability mechanisms within these two countries. It is likewise incumbent upon Peru as the host state to protect against these abuses, which occur within its physical territory. See *supra* Part I for a discussion of the Peruvian Ombudsperson and the institutional shortcomings that thwart the successful representation of Peruvian community interests.

73. *See* UNGPs, *supra* note 67, at 7 (Guiding Princ. 1). The UNGPs identify a state's breach of international law obligations "where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse." *Id.*

their own borders.[74] To that end, the Principles recommend that home states "take steps to prevent abuse abroad by business enterprises within their jurisdiction," yet this advice is at best hortatory.[75] While the UNGPs suggest that home states attempt to counteract their MNCs' misconduct abroad, the Principles represent a modest interpretation of extraterritorial obligations under international law.[76]

Even if they are not positively binding, the UNGPs make some strides in encouraging home state remedies for communities impacted by corporate misconduct.[77] It is, however, incumbent upon states to take appropriate steps—whether through judicial, administrative, legislative or other means—to create pathways towards redress when abuses occur within their territory and/or jurisdiction.[78] The Principles recognize that a state's duty to protect "can be rendered weak or even meaningless" if the state lacks a means of investigating, punishing, and redressing business-related human rights abuses.[79] According to the UNGPs, judicial and non-judicial grievance mechanisms must exist to allow affected communities, or their representatives, to come forward and seek justice for the harms caused by corporate misconduct.[80] The Principles also promote international collaboration between these mechanisms to ensure that justice is served.[81]

Under these guidelines, state-based judicial mechanisms should consider ways to reduce legal, practical, and other barriers that impede access to remedy.[82] The UNGPs recognize that the

74. *Id.* at 7 (Guiding Princ. 2).

75. *Id.* By "hortatory," this Note refers to the lack of explicitly binding language throughout the UNGPs.

76. *See* discussion *infra* Section II.B (reviewing the academic literature surveying the extent of this duty).

77. *See* UNGPs, *supra* note 67, at 22–27 (Guiding Princs. 25–31).

78. *See id.* at 22 (Guiding Princ. 25).

79. *Id.* This acknowledgement applies to host and home states alike. *See* discussion *supra* Part I (explaining the Peruvian Ombudsperson's shortfalls as a host state mechanism) & *infra* Section III.A.1 (describing the CORE's pitfalls as a home state mechanism).

80. *See* UNGPs, *supra* note 67, at 22 (Guiding Princ. 25). The Principles define "grievance mechanism" as "any routinized, [s]tate-based or non-[s]tate-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought." *Id.* Ombudsperson offices are explicitly identified as an example of such a mechanism. *See id.*

81. *See id.* ("State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms.").

82. *See id.* at 23 (Guiding Princ. 26). Acknowledging the viability of home state judicial mechanisms concretizes previous calls to prosecute egregious MNCs in their national courts. *See, e.g.*, Halina Ward, *Securing Transnational Corporate Accountability Through National*

effectiveness of these mechanisms relies on their "impartiality, integrity and ability to accord due process."[83] The Principles also call upon states to consider ways to reduce legal barriers, such as limited recourse opportunities in a host state and the inaccessibility of home state courts.[84] States are likewise instructed to dismantle political barriers—such as the exclusion of vulnerable groups, like indigenous and migrant communities—that impede community access to these redress mechanisms.[85]

Furthermore, the UNGPs prescribe effective and appropriate non-judicial grievance mechanisms, recommending that they be combined with judicial mechanisms "as part of a comprehensive [s]tate-based system."[86] The Principles acknowledge that non-judicial mechanisms may be more appropriate in some instances and should serve to fill gaps in the judicial process.[87] To thwart power imbalances, non-judicial grievance mechanisms should therefore be "legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue."[88]

In conclusion, the UNGPs advance significant recommendations to encourage home states to regulate overseas corporate activity and to respond to extraterritorial corporate impacts. In that respect, the Principles invite, but do not require, extraterritorial regulation and related judicial and non-judicial remedies. These recommendations are frustratingly prescriptive at best.

Fortunately, other human rights treaty bodies have gone even further to positively establish related obligations for states that have signed and ratified the respective treaties. As legal scholar and former U.N. Special Rapporteur Olivier De Schutter observes, "[the]

Courts: Implications and Policy Options, 24 HASTINGS INT'L & COMP. L. REV. 451, 468 (2001) (calling on home state courts to intervene and define the "boundaries of corporate accountability").

83. UNGPs, *supra* note 67, at 23 (Guiding Princ. 26).

84. *See id.*

85. *See id.* The consideration of indigenous communities is particularly relevant in the Peruvian context. *See* discussion *supra* Part I. The Principles also identify a series of other practical and procedural barriers to accessing judicial remedy.

86. UNGPs, *supra* note 67, at 24 (Guiding Princ. 27).

87. *See id.* (identifying non-judicial mechanisms' "essential role in complementing and supplementing judicial mechanisms").

88. *Id.* at 26–27 (Guiding Princ. 26). This paragraph enumerates effectiveness criteria for non-judicial grievance mechanisms. The final criterion concerning engagement and dialogue with stakeholder groups is relevant to the Peruvian government's failure to meaningfully consult with communities impacted by EI projects. *See* discussion *supra* Part I.

Principles set the bar clearly below the current state of international human rights law."[89] Various bodies, including the U.N. Committee on Economic, Social and Cultural Rights (CESCR), demand more from signatory states by way of General Comments to these treaties.[90] It is commonly acknowledged, however, that these Comments are not themselves legally binding and only serve as interpretive aids.[91] As an example, the CESCR expects signatories to ensure that critical human rights are protected from third-party misconduct,[92] even "in other countries, if they are able to influence these third parties by way of legal or political means."[93] The CESCR has further identified the need to regulate MNC extraterritorial activity, calling on states to prevent

89. *See* Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. & HUM. RTS. J. 41, 45 (2016) (explicating the deficiency regarding "the extraterritorial human rights obligations of states, including, in particular, the duty of states to control the corporations they are in a position to influence, *wherever such corporations operate*") (emphasis added).

90. *See* discussion *infra*. In the case of the ICESCR, the United States has only signed, but not ratified, the treaty. *See International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en [https://perma.cc/EP9F-BPL4]. This Convention and its General Comments are technically not binding authority on the United States.

91. *See* Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, *in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 116, 129 (Helen Keller & Geir Ulfstein eds., 2012) (identifying General Comments as "secondary soft law instruments" that "interpret and add detail to the rights and obligations contained in the[ir] respective human rights treaties").

92. *See, e.g.*, Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, ¶¶ 30–35, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017). This Comment positively identifies an extraterritorial obligation to protect by way of the ICESCR, calling on states to "prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control." *Id.* ¶ 30. This concern is particularly relevant "in cases where the remedies available to victims before the domestic courts of the state where the harm occurs are unavailable or ineffective." *Id.*; *see also Submission on the Draft General Comment on "State Obligations Under the ICESCR in the Context of Business Activities,"* COLUM. CTR. ON SUSTAINABLE INV. (2017), https://ccsi.columbia.edu/sites/default/files/content/docs/publications/CCSI_Submission-for-DGD-Jan.-2017.pdf [https://perma.cc/TU4J-W5BK] (remarking on the draft Comment's discussion of: (1) host and home states' obligations as they relate to international investment agreements (IIAs), (2) extraterritorial obligations in the context of outward investment, and (3) obligations related to corruption issues).

93. CESCR, *General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 39, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); *see also* De Schutter, *supra* note 89, at 45 n.21.

human rights contraventions abroad, provided that remedial measures do not "infring[e] the sovereignty or diminish[] the obligations of host [s]tates under the Covenant."[94] The U.N. Committee on the Rights of the Child has issued similar statements.[95]

Unfortunately, while Canada is a state party to both the ICESCR and the Convention on the Rights of the Child (CRC), the United States has signed—but not ratified—both instruments.[96] The treaties are therefore not binding on the United States and are at best persuasive.[97] While Canada may be subject to greater international human rights obligations under these agreements, the United States may still lack a positive duty to regulate and redress extraterritorial corporate impacts, given the suggestive nature of the UNGPs.[98]

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94. CESCR, *Statement on the Obligations of State Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, ¶ 5, U.N. Doc. E/C.12/2011/1 (July 12, 2011). For a more recent articulation of this positive duty, see *supra* note 92 and accompanying text; *see also* MARKUS KALTENBORN, SOCIAL RIGHTS AND INTERNATIONAL DEVELOPMENT: GLOBAL LEGAL STANDARDS FOR THE POST-2015 DEVELOPMENT AGENDA 6–8 (2015) (examining the human rights obligations under the ICESCR and its implementation mechanisms at the international level).

95. *See, e.g.*, Committee on the Rights of the Child, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, ¶ 43, U.N. Doc. CRC/C/GC/16 (Apr. 17, 2013) (maintaining that home states have obligations to respect *children*'s rights in the context of businesses' extraterritorial activities, provided that there is a reasonable link between the state and the conduct concerned). One might impute the home state duty to protect children's rights to a duty to protect human rights more broadly. *See* Kaltenborn, *supra* note 94, at 9–10 (surveying social rights obligations in special human rights treaties, including the CRC).

96. *See supra* note 90 and accompanying text; *see also Convention on the Rights of the Child*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en [https://perma.cc/XU88-2BDV]; Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US*, ACLU (Nov. 20, 2015, 1:30 PM), https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens [https://perma.cc/R2C4-JZKW].

97. Under the Vienna Convention on the Law of Treaties (VCLT), a state that has signed, but not ratified, a treaty still has an obligation to "refrain from acts which would defeat the object and purpose of [the] treaty." Vienna Convention on the Law of Treaties art.18, May 23, 1969, 1155 U.N.T.S. 331.

98. *But see* ICCPR, *supra* note 67, art. 2.1 (obligating states parties, including the United States, to respect and ensure human rights to all individuals "within [their] territory and subject to [their] jurisdiction"). These two elements are explored *infra* in Section II.B.

B. Mining for a Legal Basis—Jackpot or Fool's Gold?

Left with this complex web of international instruments, academic debate has centered around two potential avenues towards establishing an affirmative home state duty to redress abuses committed overseas: (1) triggering home state jurisdiction where noncompliant companies are domiciled, headquartered, and/or conduct substantial business activity in the home state; and (2) enforcing home states' human rights commitments under extant treaties.[99] These two avenues often converge and may chart a serviceable pathway towards holding MNCs accountable in their home states.

The crux of this debate hinges on the scope of a state's "jurisdiction" as it pertains to the state's human rights obligations. Some scholars have doubted whether extraterritorial corporate activity is sufficient to trigger home state jurisdiction and international duties in the first place.[100] This approach, however, may mistakenly conflate territory and jurisdiction: Only one of these elements must be present to activate home state duties.[101] Even before the development of the UNGPs, jurisdiction had traditionally been analyzed as a hook for mandatory home state intervention.[102]

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99. *See generally* Doug Cassel, *State Jurisdiction Over Transnational Business Activity Affecting Human Rights*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 198 (Surya Deva & David Birchall eds., 2020).

100. *See, e.g.*, Claire Methven O'Brien, *The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal*, 3 BUS. & HUM. RTS. J. 47, 65 (2018) (taking issue with jurisdiction as the *sine qua non* of human rights obligations and underscoring the "unlikelihood that the home state–TNC [transnational corporation] relationship is capable of triggering extraterritorial jurisdiction"); *see also* discussion *infra* Section III.B.1 (evaluating this question in the U.S. Supreme Court's *Nestlé* decision).

101. *See* Sigrun Skogly, *Regulatory Obligations in a Complex World: States' Extraterritorial Obligations Related to Business and Human Rights*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS 318, 329–33 (Surya Deva & David Bilchitz eds., 2017) (parsing the jurisdictional question).

102. *See, e.g.*, Sara L. Seck, *Conceptualizing the Home State Duty to Protect Human Rights*, *in* CORPORATE SOCIAL AND HUMAN RIGHTS RESPONSIBILITIES 25, 28–32 (Karin Buhmann et al. eds., 2011) [hereinafter Seck, *Conceptualizing the Home State Duty*] (charting the juridical pathway towards establishing home state jurisdiction without infringing upon host state sovereignty); Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RTS. & DEV. L.J. 177, 195, 195 n.101 (2008) [hereinafter Seck, *Global Mining*] (emphasizing a balance of state interests in establishing this concurrent jurisdiction, including "consideration of links to the territory of the regulating state, and the importance of the regulation to the international system"). For an earlier articulation of establishing home state obligations, see generally Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

Other academics maintain that home state jurisdiction is triggered in extraterritorial contexts where a state aids and abets corporate activity constituting an internationally-wrongful act.[103] Under this logic, a state's failure to prevent and mitigate risk via legislation would violate a duty to comply with human rights obligations.[104] Some jurists have gone so far as to suggest that encouraging bilateral investment treaties (BITs)—which may discourage or punish rights-compliant measures by host states—can itself constitute a violation of home states' human rights obligations.[105]

Most significantly, certain scholars argue that the UNGPs, despite their generally-prescriptive nature, impose an affirmative legal duty on home states to redress the extraterritorial impacts of their MNCs.[106] As law professors Daniel Augenstein and David Kinley contend, states have both direct (vertical) obligations to prevent human rights abuses with their own actions and indirect (horizontal) obligations to protect individuals "within their jurisdiction, both inside and outside their territory, against corporate violations."[107] These obligations extend to the extraterritorial regulation and control of corporate actors.[108]

Other researchers, however, still deny the existence of any affirmative obligation to remedy human rights violations in extraterritorial contexts[109] or to regulate MNCs abroad to prevent these

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103. *See* Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MOD. L.R. 598, 611–15 (2007); *see also* discussion *infra* Section III.B.1 (considering extraterritorial aiding and abetting in the U.S. Supreme Court's *Nestlé* decision).

104. *See* McCorquodale & Simons, *supra* note 103, at 619–21 (identifying this oversight as a breach of the international obligation to exercise due diligence).

105. *See id.* at 621–23 (discussing the unfair balance of these arrangements, which are designed to shift responsibility from home states to host states with inferior bargaining power); *see also* Simons & VanDuzer, *supra* note 34, at 291–308 (considering the implications of international investment law regarding access to an effective remedy for victims of extractive-related violations). The general point is that the violation still occurs with the involvement of the home state, which should remain to some extent responsible for the adverse impact. *See supra* note 47 and accompanying text (discussing the home state's preferable position and attendant rights as stipulated in IIAs).

106. *See, e.g.*, Daniel Augenstein & David Kinley, *When Human Rights 'Responsibilities' Become 'Duties': The Extra-Territorial Obligations of States That Bind Corporations*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 271, 272–75 (Surya Deva & David Bilchitz eds., 2013).

107. *Id.* at 275.

108. *See id.*

109. *See, e.g.*, Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on*

impacts.[110] At most, these experts maintain that states are not prohibited from regulating their MNCs' activities.[111] At the very least, however, home states should answer for corporate decisions made within the state's territory and which produce later extraterritorial effects.[112]

This jurisdictional debate is clearly complex and remains ongoing.[113] Nonetheless, one can safely conclude that home states are *permitted* and even *encouraged* under the UNGPs to assert jurisdiction over the transnational activities and impacts of their MNCs.[114] These Principles have therefore imagined judicial and non-judicial remedies such as those adopted by home states like the United States and Canada.[115] What is more, certain treaties, such as the ICESCR and the CRC, go a step further to *mandate* that states parties exercise their jurisdiction over aspects of transnational business activity.[116] Ultimately, however, the issue remains that countries like the United States are not bound by such treaties, presenting a currently-

Economic, Social and Cultural Rights, 11 HUM. RTS. L. REV. 1, 31 (2011) (finding "no explicit extraterritorial obligation to protect laid down by international human rights law" but "strong arguments for an implicit legal basis for such obligations"). While Coomans argues that there is no such explicit duty in the ICESCR, he does acknowledge that a home state's failure to prevent an MNC from committing human rights abuses in another state "would be contrary to the obligation of international cooperation as laid down in Article 2(1) of the ICESCR." *Id.*

110. *See* Methven O'Brien, *supra* note 100, at 69–70 (arguing that positive obligations do not equal a "duty to regulate"). Methven O'Brien may miss the conceptual mark with this assertion; how is one expected to fulfill an affirmative duty if they do not regulate the key players who might breach that duty? A duty based on an outcome-determination (breach or no breach) may logically implicate a duty to control the process anticipating that outcome.

111. *See, e.g.*, Nadia Bernaz, *Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?*, 117 J. BUS. ETHICS 493, 508 (2013) (finding no conclusive treaty on states' obligation to prevent and punish extraterritorial human rights violations and concluding that international law merely does not prohibit states from acting in this area); *see also generally* Sara L. Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?*, 46 OSGOODE HALL L.J. 565 (2008) (finding responsibility but exploring the imperialistic dynamics of home state intervention).

112. *But see* discussion *infra* Section III.B.1 (noting the challenge to this truism within the U.S. Supreme Court's *Nestlé* decision).

113. *See* Cassel, *supra* note 99, at 198 ("The only way to close this regulatory and remedial gap (short of some new or improved international mechanism) is for states to exercise jurisdiction over transnational business activities."). Hopefully, the U.N. Human Rights Council can rectify this legal morass by way of its draft business and human rights treaty. *See supra* note 66 and accompanying text.

114. *See* Cassel, *supra* note 99, at 198.

115. *See* discussion *infra* Part III.

116. *See supra* note 98 and accompanying text.

insurmountable hurdle to mandating redress which may be best solved by political pressure to ratify such agreements.[117]

C. Golden Glimmers in the Latin American Extractive Sector

Having evaluated the soft recommendations and harder requirements for home states to redress extraterritorial corporate impacts, it bears briefly mentioning how this involvement has played out within the extractive sector in Latin America more generally. Underpinning this legal quagmire lies a "governance gap"[118] which prevents home states from effectively supervising their MNCs' transnational business around the world. Speaking more generally, Canadian legal scholar Audrey Macklin argues that this gap is further exacerbated by MNCs' failure to voluntarily self-regulate.[119] She proposes two theories for this practical and legal failure: Home and host states, as well as regional and international legal orders, are either (1) unable or (2) unwilling to assert effective governance over MNCs in relation to these activities.[120] In terms of the first theory, Macklin astutely pins this "inability" to govern MNC activity on existing legal

117. In the field of international human rights treaties, the United States has signed—but importantly, not ratified—at least three agreements that would otherwise mandate jurisdiction for extraterritorial impacts: (1) the ICESCR (see *supra* note 90 and accompanying text); (2) the CRC (see *supra* note 96 and accompanying text); and (3) the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (July 17, 1980, 1249 U.N.T.S. 13, but never entered into force). This final agreement—the CEDAW—obligates states parties "both within and outside their territories to ensure the full implementation of the Convention" concerning gender equality. Committee on the Elimination of Discrimination against Women, *General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, ¶ 43, U.N. Doc. CEDAW/C/GC/37 (Feb. 7, 2018). Various legal scholars and advocates have pushed for the United States to ratify such agreements, which would dramatically increase U.S. obligations under international law. *See generally, e.g.*, Rangita de Silva de Alwis & Melanne Verveer, *"Time Is A-Wasting": Making the Case for CEDAW Ratification by the United States*, 60 COLUM. J. TRANSNAT'L L. 1 (2021).

118. *See* Audrey Macklin, *Extractive Industries, Human Rights and the Home State Advantage*, *in* THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS, AND THE HOME STATE ADVANTAGE 272, 272 (Penelope Simons & Audrey Macklin eds., 1st ed. 2014); *see also* Tebello Thabane, *Weak Extraterritorial Remedies: The Achilles Heel of Ruggie's 'Protect, Respect and Remedy' Framework and Guiding Principles*, 14 AFR. HUM. RTS. L.J. 43, 57 (2014) (criticizing the UNGPs for failing to elaborate on the "'governance gaps' to assist home states to implement governance mechanisms to ensure that their corporations do not violate human rights abroad").

119. Macklin, *supra* note 118, at 272.

120. *Id.*

or practical constraints.[121] More relevant to present purposes is the "unwillingness" theory, which derives from a "lack of political initiative to use reasonable and feasible means to address those legal and practical constraints that are alterable."[122] Within home states such as Canada and the United States, this unwillingness may explain the persistent failure to curtail adverse impacts generated by MNCs in countries like Peru.[123]

However, there may be hope on this front, with states beginning to recognize their legal duty to change these dynamics, particularly within the Latin American EI context. There has been a push for host countries in the region to begin recognizing their own duties to mitigate human rights abuses occurring within their territory.[124] Home countries, including Canada and the United States, have also borne witness to civil society and business leaders, community advocates, and academics alike calling for reform and sparking broader conversations for change.[125] In the Canadian context in particular, these advocacy and legal strategies have even manifested in an ombudsperson that is specifically committed to holding MNCs accountable for their EI abuses around the globe.[126]

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121. *Id.* This inability to assert effective governance includes, for example, the legal restraint on the Peruvian Ombudsperson to directly intervene. *See supra* note 58 and accompanying text; *see also* discussion *infra* Section III.A.1 (outlining limitations on the CORE's investigatory powers).

122. Macklin, *supra* note 118, at 272–73.

123. On this point, Macklin argues for a home state governance regime that "expends the bulk of its regulatory energy on *ex ante* prevention through mandatory mechanisms of assessment, monitoring and disclosure." *Id.* at 273; *see also* discussion *infra* Section III.B.2 (evaluating the capacity of the CTSCA to do the very same).

124. *See* Alberto do Amaral Jr. & Viviana Palacio Revello, *Human Rights and Extractive Industries in Latin America: What Responsibility of Corporations and Their States of Origin for Human Rights Violations in the Inter-American Human Rights System?*, 15 BRAZ. J. INT'L L. 242, 249 (2018) (noting states' obligations under the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man to "take positive measures to ensure human rights, including in relation to their actual or potential violation by private parties").

125. *See* discussion *infra* Sections III.A & III.B. Generally speaking, the push for greater corporate accountability in the Peruvian EI sector seems to be stronger in Canada than in the United States.

126. For a review of the advocacy efforts and legal strategies that underpinned Canadian civil society's proposal for an ombudsperson's office, see generally Charis Kamphuis, *Building the Case for a Home-State Grievance Mechanism: Law Reform Strategies in the Canadian Resource Justice Movement*, *in* HUMAN RIGHTS IN THE EXTRACTIVE INDUSTRIES: TRANSPARENCY, PARTICIPATION, RESISTANCE 455 (Isabel Feichtner et al. eds., 2019); *see also* discussion *infra* Section III.A.1.

Having scrutinized the home state accountability question, this Note will now evaluate the redress mechanisms in Canada and the United States that are available to Peruvian communities affected by the adverse impacts of Canadian and U.S. MNCs operating in the Peruvian extractive sector.

III. CANADIAN AND U.S. HOME STATE MECHANISMS AND PATHWAYS TOWARDS REDRESS

As the home states of several extractive corporations operating in Peru, both Canada and the United States present potential venues for Peruvian communities to seek justice for attendant harms.[127] Yet, even where jurisdiction has been established, foreign claimants may still encounter hurdles barring easy access to home state remedies.[128] This Part gauges the viability of these judicial and non-judicial pathways. Canada offers an oft-rebuked non-judicial grievance mechanism known as the "CORE,"[129] as well as a landmark Supreme Court case, *Nevsun v. Araya* (2020), an important judicial precedent in this area.[130] While Canadian case law may hereinafter shore up accountability protections,[131] U.S. jurisprudence remains less clear after the U.S. Supreme Court's recent decision in *Nestlé USA, Inc. v. Doe* (2021).[132] However, a state statute, the California Transparency in Supply Chains Act, may provide a serviceable supplement by offering a legislative means for extraterritorial redress.[133] Drawing conclusions about the options available in these two countries, this Part

127. *See* Simons & VanDuzer, *supra* note 34, at 283–84 (noting that extractive MNCs have "consistently been the subject of a considerable proportion of the allegations of wrongdoing made against business actors and of claims in both non-judicial mechanisms and domestic courts").

128. *See id.* at 288–91 (describing financial, jurisdictional, and juridical hurdles to accessing home state remedies); Amnesty Int'l & Bus. & Hum. Rts. Res. Ctr., *Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse*, AI Index POL 30/7037/2017, 11–13 (2017) (parsing *forum non conveniens* issues); *see also generally* JENNIFER ZERK, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES: TOWARDS A FAIRER AND MORE EFFECTIVE SYSTEM OF DOMESTIC LAW REMEDIES (2014), https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf [https://perma.cc/T2RC-QVN7] (disparaging home state legal hurdles).

129. *See* discussion *infra* Section III.A.1.

130. *See* discussion *infra* Section III.A.2.

131. *See* discussion *infra* Section III.A.3.

132. *See* discussion *infra* Section III.B.1.

133. *See* discussion *infra* Section III.B.2.

finally applies these possibilities to Peruvian communities impacted by foreign extractive abuses.[134]

A. Canada

In recent years, Canadian companies have been harshly criticized for perpetrating human rights impacts, both at home and abroad, and particularly within the extractive sector. In fact, the United Nations,[135] legal scholars,[136] journalists,[137] Canadian civil society,[138] and impacted Peruvian communities[139] have all called for improved corporate accountability mechanisms to counteract these shortfalls. This Section compares two such pathways. Section III.A.1 first assesses the efficacy of the Canadian Ombudsperson for Responsible Enterprise (CORE), a non-judicial grievance mechanism. Section III.A.2 then examines the recent Supreme Court decision, *Nevsun v. Araya* (2020), which may offer a judicial mechanism by way

134. *See* discussion *infra* Section III.C.

135. *See, e.g.*, *UN Experts Urge Canada to Take Tougher Line on Business-Related Rights Abuses*, U.N. HUM. RTS. OFF. HIGH COMM'R (June 1, 2017), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21683&LangID=E [https://perma.cc/92RR-MVAG] (stressing need for Canadian government to address business-related human rights abuses concerning natural resource projects, in Canada and abroad).

136. *See, e.g.*, Penelope Simons, *Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses*, 56 CAN. BUS. L.J. 167, 168–73 (2015) (surveying Canada's response to prior demands for corporate social responsibility).

137. *See, e.g.*, Meisner, *supra* note 10 (calling for additional Canadian accountability measures for adverse EI-related impacts in the "Global South"); Mike Blanchfield, *Ottawa Clashes with UN Human Rights Panel Over Mining Complaints*, GLOBE & MAIL (July 8, 2015), https://www.theglobeandmail.com/news/politics/ottawa-sidesteps-questions-from-un-panel-on-human-rights-complaints-in-canadian-mining-industry/article25349401/ [https://perma.cc/FHA2-ALPG] (documenting U.N. concerns about Canadian extraterritorial abuses).

138. *See generally, e.g.*, Shin Imai et al., *The "Canada Brand": Violence and Canadian Mining Companies in Latin America* (Osgoode Legal Stud., Research Paper No. 17/2017 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886584 [https://perma.cc/3YRT-Y4D2] (categorizing the Justice and Corporate Accountability Project's research into specific forms of violence and criminalization associated with Canadian mining projects in Latin America between 2000 and 2015).

139. *See, e.g.*, *Deadly Clash at Peru Protest Over Barrick Gold Mine*, BBC NEWS (Sept. 20, 2012), https://www.bbc.com/news/world-latin-america-19669760 [https://perma.cc/A3FM-UKRF] (reporting on a violent protest against Canadian firm Barrick Gold's Pierina Mining Project following impacted communities' demands for water); *see also supra* note 10 and accompanying text.

of precedent. Finally, Section III.A.3 draws conclusions about aggrieved communities seeking justice in Canada.

1. A Coreless CORE: The Shortcomings of the Non-Judicial CORE Mechanism

In January 2018, the Canadian government announced the creation of an Ombudsperson to investigate business misconduct committed abroad.[140] In principle, the Ombudsperson was designed to monitor extraterritorial Canadian corporate activity, with an eye towards the home state human rights measures that are prescribed by the UNGPs.[141] The new office sought to facilitate the resolution of disputes between host communities and Canadian companies, in addition to recommending and supervising the implementation of remedies.[142] In particular, the Ombudsperson was poised to regulate the mining, oil and gas, and garment sectors.[143]

Over a year later—and not without intervening complaints[144]—the Ministry of International Trade Diversification (ITD) announced the appointment of Sheri Meyerhoffer as the

140. News Release, GLOB. AFFS. CAN., *Minister Carr Announces Appointment of First Canadian Ombudsperson for Responsible Enterprise*, GOV'T CAN. (Apr. 8, 2019), https://www.canada.ca/en/global-affairs/news/2019/04/minister-carr-announces-appointment-of-first-canadian-ombudsperson-for-responsible-enterprise html?fbclid=IwAR3ekyU8D0DvM78-7Z_Z5dSesUA9\JK1sqMlUcHj97KGUqmVmLtAxSnQ65XM [https://perma.cc/H5HQ-2EEX]. Rather than adopting parliamentary legislation, the government chose to create the Ombudsperson through an order-in-council, a legal instrument developed by cabinet. *See* Karyn Keenan, *Canada's New Corporate Responsibility Ombudsperson Falls Far Short of its Promise*, 5 BUS. & HUM. RTS. J 137, 140 (2020).

141. GLOB. AFFS. CAN., *supra* note 140. The Ombudsperson is also tasked with managing the OECD Guidelines for Multinational Enterprises, a similar set of recommendations for responsible business in a global context. *Id.*; *see also generally* OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), https://www.oecd.org/daf/inv/mne/48004323.pdf [https://perma.cc/Y82X-RRGS].

142. Olabisi D. Akinkugbe et al., *2018 Developments in Home State Foreign Direct Investment Policies*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2019, at 41, 43–44 (Lisa E. Sachs et al. eds., 2019).

143. *Id.* at 44. The Ombudsperson replaced the Extractive Sector Corporate Social Responsibility (CSR) Counsellor.

144. *See, e.g.*, *Mining Affected Communities Ask: Where Is Canada's Ombudsperson for Responsible Enterprise?*, MININGWATCH CAN. (Nov. 28, 2018, 12:05 PM), https://miningwatch.ca/news/2018/11/28/mining-affected-communities-ask-where-canadas-ombudsperson-responsible-enterprise [https://perma.cc/TLZ3-FLY7].

inaugural CORE.[145] Heralded as the first such mechanism of its kind worldwide,[146] the CORE has endeavored to recognize Canada's commitment to responsible business globally, while also advancing Canada's trade diversification strategy.[147] Notably, Canadian corporations that fail to comply with the CORE's recommendations "could face trade measures, including the withdrawal of trade advocacy services and future Export Development Canada support."[148] The "stick" in this paradigm is therefore the threat of losing international business competitiveness if a company fails to conduct its overseas activities in a responsible manner.

Despite this sanction, critics continue to doubt the CORE's effectiveness, as the office can review purported abuses, but it crucially cannot compel the production of any documents necessary to take the complaint further. This lack of investigatory powers renders the CORE unable to access necessary evidence or to order effective remedies.[149] As a result, many advocates view the role as ineffective and fear that the office will be unable to uphold Canada's human rights duties under international law.[150] Likewise concerned that the office

145. GLOB. AFFS. CAN., *supra* note 140. For more information on the CORE, see *Office of the Canadian Ombudsperson for Responsible Enterprise*, GOV'T CAN., https://core-ombuds.canada.ca/index.aspx?lang=eng [https://perma.cc/8PWV-6P6Q].

146. There is accordingly no U.S. analogue to which this Note might compare this non-judicial mechanism. Even so, there may still be comparable models in other jurisdictions beyond the scope of this Note.

147. *See* GLOB. AFFS. CAN., *supra* note 140.

148. *Id.* The loss of Export Development Canada (EDC) support can be significant, as this Crown corporation provides multinational Canadian companies with access to working capital and financing, risk mitigation services, trade knowledge expertise, and various other global connections. *See About Us*, EDC, https://www.edc.ca/en/about-us html [https://perma.cc/4H5F-PKUL].

149. Tellingly, the CSR—the precursor to the CORE (see *supra* note 143 and accompanying text)—had the power to subpoena witnesses and compel documents as part of its Review and Mediation Process. *See* GLOB. AFFS. CAN., *Reviewing Corporate Social Responsibility Practices*, GOV'T CAN., https://www.international.gc.ca/csr_counsellor-conseiller_rse/Reviewing_CSR_Practices-Examen_Pratiques_RSE.aspx?lang=eng [https://perma.cc/D2PD-NK8H] (last updated Mar. 31, 2017). The CORE seems to be missing this investigatory process and its attendant powers.

150. *See, e.g.*, Charis Kamphuis & Leah Gardner, *Effectiveness Framework for Home-State Non-Judicial Grievance Mechanisms*, *in* EXTRACTIVE INDUSTRIES AND HUMAN RIGHTS IN AN ERA OF GLOBAL JUSTICE: NEW WAYS OF RESOLVING AND PREVENTING CONFLICTS 75, 92–100 (Amissi Manirabona & Yenny Vega Cárdenas eds., 2019) (developing an "effectiveness framework" under the UNGPs and other international standards and expressing concern about the then-prospective CORE's ability to: (1) order and enforce remedies; (2) be independent from parties and the government; and (3) promote transparency and public reporting).

will only reinforce the status quo, Emily Dwyer of the Canadian Network on Corporate Accountability (CNCA) even dubbed the CORE an "advisory post" and "little different from what has already existed for years."[151]

Moreover, the institutional ambiguities surrounding the CORE and its investigatory powers leave the position open to interference by corporations, which could lobby to ensure that the office remains ineffective by design.[152] In other words, corporate lobbyists might take advantage of the present weaknesses of the CORE to suppress any future ability for the office to meaningfully curtail abuses engendered by Canadian companies overseas.[153] In fact, various reversals concerning the CORE's powers may indicate that this corporate capture is already under-way.[154] First, the legislation establishing the CORE initially included companies as potential complainants,[155] potentially muffling local community demands and "hinder[ing] [the] ability to address the power imbalance that was the impetus for the

151. *Canadian Government Reneges on Promise to Create Independent Corporate Human Rights Watchdog*, CAN. NETWORK ON CORP. ACCOUNTABILITY (Apr. 8, 2019), https://cnca-rcrce.ca/2019/04/08/canadian-government-reneges-on-promise-to-create-independent-corporate-human-rights-watchdog/ [https://perma.cc/BNC6-SGPS] [hereinafter CNCA, *Canadian Government Reneges*].

152. *See* Daniela Chimisso dos Santos, *Corporate Capture and Institutional Work: Lessons for the Canadian Ombudsperson for Responsible Enterprise*, *in* CORPORATE CITIZEN: NEW PERSPECTIVES ON THE GLOBALIZED RULE OF LAW 173, 187–90 (Oonagh E. Fitzgerald ed., 2020) (examining the CORE's institutional uncertainty and ambiguities—including those surrounding its investigatory powers—and concluding that this institutional gap "can create an environment that will allow for corporate actors to take action and engage in corporate capture" of the office).

153. *See id.*; *see also* CNCA, *Canadian Government Reneges*, *supra* note 151 (calling the CORE an ombudsperson "in name only" and criticizing its subservience to the Ministry of ITD as an intentional means of hamstringing the power of the office).

154. *See* Charis Kamphuis, *Why Does Justin Trudeau Succumb to Corporate Pressure?*, CONVERSATION (May 5, 2019), https://theconversation.com/why-does-justin-trudeau-succumb-to-corporate-pressure-116134 [https://perma.cc/D332-WHRT] (suggesting that even Prime Minister Justin Trudeau has encountered corporate pressure to limit the power of the CORE).

155. Under the CORE's original mandate, the office was tasked with reviewing complaints submitted by "organizations," in addition to the individuals and communities that it was intended to serve. *See Order in Council No. 2019-1323*, § 4(c) (Sept. 6, 2019), https://orders-in-council.canada.ca/attachment.php?attach=38652&lang=en [https://perma.cc/V8QK-A4BQ]. Questioning why Canadian companies would even need this recourse in the first place, critics also expressed concern that these companies would abuse the system to file complaints for "unfounded human rights abuse allegations" in order to intimidate their opponents. *See* Kamphuis, *supra* note 154 (noting that "there's nothing in place to prevent companies from seeking compensation from human rights organizations or individuals on this basis").

office."[156] Although this provision was later removed, many disparaged this response as "too little, too late."[157] Second, ITD Minister Jim Carr, who oversees the CORE, has waffled on the question of granting investigatory powers to the office.[158] According to a recently-leaked advisory report that he himself commissioned, Carr ironically seems to have ignored expert advice to bestow the CORE with these powers.[159] Even when he expressed some interest in taking this next step, Carr's decision came upon on the eve of a federal election—too late to adopt new legislation and over two years after initial discussions of creating the ombudsperson office.[160]

As of late 2021, the CORE still lacks the critical power to "investigate abuses and redress the harms caused by Canadian companies operating abroad."[161] Accordingly, scholars remain doubtful that aggrieved communities can access meaningful redress through the CORE as it stands.[162] By impeding evenhanded access to justice, the CORE likely does not fulfill Canada's duty under the

156. Keenan, *supra* note 140, at 141.

157. *Id.* at 142.

158. *See id.* (noting how the Canadian government could give the CORE the power to investigate and compel witnesses and testimony under the Inquiries Act). This concern has been more recently echoed at the municipal level. *See* Can. Press, *Liberal MP Confronts Minister Over New Watchdog to Oversee Canadian Companies Abroad*, CBC (Mar. 24, 2021), https://www.cbc.ca/news/politics/mckay-ng-ombudsperson-responsible-enterprise-1.5961607 [https://perma.cc/HV42-RK4V].

159. *See* CNCA, *Government Conceals and Ignores Expert Advice on CORE, Report Leaked by Civil Society* (Feb. 25, 2021), https://cnca-rcrce.ca/2021/02/25/government-conceals-and-ignores-expert-advice-on-core-report-leaked-by-civil-society/ [https://perma.cc/K9EV-4BZD] (revealing that the leaked "McIsaac Report" warned Minister Carr as early as 2019 that, "without a way to compel the cooperation of the entities against which a complaint is made or others who may hold relevant information, the CORE's effectiveness may be compromised").

160. *See* Keenan, *supra* note 140, at 142.

161. *See* CNCA, *An Ombudsperson With Teeth*, https://cnca-rcrce.ca/campaigns/ombuds-power2investigate/ [https://perma.cc/UN44-FLRP] (campaigning for the CORE to acquire investigatory powers); *see also* CNCA, *Can Money Replace Powers? CORE Gets Budget Boost But Remains Powerless* (Apr. 19, 2021), https://cnca-rcrce.ca/2021/04/19/can-money-replace-powers-core-gets-budget-boost-but-remains-powerless/ [https://perma.cc/VR2W-P3ZD] (expressing dissatisfaction with a nominal budget increase to the CORE's services).

162. *See, e.g.*, Jolson Lim, *Ombudsperson's Success 'May Be Compromised' Without Powers to Compel Info: Legal Review*, IPOLITICS (Mar. 2, 2021, 5:42 PM), https://ipolitics.ca/2021/03/02/ombudspersons-success-may-be-compromised-without-powers-to-compel-info-legal-review [https://perma.cc/7XPT-6NX9]; Keenan, *supra* note 140, at 142 ("Communities and individuals impacted by Canadian companies look to an office such as [the CORE] to impartially determine and report the truth. Without independence and the power to get at the facts, the new ombudsperson has little to offer these constituencies.").

UNGPs' Third Pillar ("Access to Remedy") to provide an appropriate non-judicial grievance mechanism.[163]

2. A Recent Remedy: Surveying *Nevsun v. Araya* as a Jurisprudential Mother Lode

Perhaps a more promising avenue for host state communities to access redress lies in the traditional Canadian court system. On February 28, 2020, the Supreme Court of Canada handed down a landmark decision—*Nevsun v. Araya*[164]—acknowledging that corporations may be liable for violations of customary international law. By recognizing these breaches,[165] this decision may broaden the justiciability of aggrieved communities' claims moving forward.

By way of background, the *Nevsun* case concerned three Eritrean nationals who claimed refugee status in Canada following a period of harsh labor in their home country.[166] While all Eritreans must complete military training or public service at the age of eighteen,[167] the three representative plaintiffs were indefinitely conscripted into working under cruel conditions at the Bisha Mine.[168] This mine produced gold, copper, and zinc and represented one of the largest sources of revenue for the Eritrean economy.[169] The mine was owned and operated by an Eritrean corporation, the Bisha Mining

163. *See supra* note 150 and accompanying text. For information on the UNGPs' Third Pillar, see also *supra* notes 86–88 and accompanying text.

164. Nevsun Res. Ltd. v. Araya, 2020 SCC 5 (Can.), https://scc-csc.lexum.com/scc-csc/scc-csc/en/18169/1/document.do [https://perma.cc/BZG2-WY7H].

165. The majority opinion vividly champions modern international human rights law as "the phoenix that rose from the ashes of World War II and declared global war on human rights abuses." *Id.* ¶ 1. The international norms which emerged from the aftermath "were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities." *Id.* In this introduction, Justice Abella immediately sets the tone for the majority opinion, emphasizing that customary international law is more than "soft law"; rather, it encompasses claims which have always been intended to be remediable. *Id.*

166. *Id.* ¶ 3.

167. *See id.* ¶ 9 (describing the requirements of the Eritrean National Service Program, which involves direct military service and/or "assist[ing] in the construction of public projects that are in the national interest").

168. *See* Nevsun Res. Ltd. v. Araya, 2020 SCC 5, ¶¶ 11, 13–15 (Can.) (tracing these individuals' indefinite conscription at the mine). The workers claimed that they were forced to provide labor in harsh and dangerous conditions for years. *Id.* ¶ 11. The mine operators threatened a variety of physical punishments to the workers and their families if any of the workers failed to cooperate. *Id.* ¶¶ 11–12. The conscripts toiled from sunrise to sunset for less than 1 USD per day. *See id.* ¶ 12 (reporting less than 30 USD per month).

169. *Id.* ¶ 7.

Share Company.[170] Sixty-percent of this company was, in turn, owned by Nevsun, a publicly-held Canadian company incorporated in British Columbia.[171]

This Canadian shareholder scheme, whereby a Canadian corporation controlled a majority of the Bisha board of directors, created a jurisdictional pathway for the three Eritrean plaintiffs to seek justice in Canadian courts.[172] The plaintiffs first filed suit in British Columbia as a class action against Nevsun on behalf of more than 1,000 individuals who claimed to have been compelled to work at the Bisha Mine.[173] The Eritrean workers asserted two sets of claims: (1) damages for breaches of domestic torts, including conversion, battery, "unlawful confinement" (false imprisonment), conspiracy, and negligence; and (2) damages for breaches of customary law prohibitions against "forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity."[174] In response, Nevsun filed a motion to strike, citing the "act of state doctrine," a principle which "precludes domestic courts from assessing the sovereign acts of a foreign government."[175] Nevsun also argued that the plaintiffs' customary international law claims should be struck because they "ha[d] no reasonable prospect of success."[176] Both the Chambers Judge and the British Columbia Court of Appeal denied Nevsun's motions to strike.[177] The Supreme Court of Canada affirmed these decisions by considering the threshold justiciability of the act of

170. *Id.* ¶ 7.

171. *Id.*

172. Jurisdiction was cognizable in British Columbia because Nevsun, a Canadian corporation, controlled a majority of the Board of the Bisha Company, and Nevsun's CEO was its Chair. Nevsun was said to exercise "effective control" over the Bisha Company by way of these contacts. The Chambers Judge also observed that Nevsun had "operational control" through its involvement in "all aspects of Bisha operations, including exploration, development, extraction, processing and reclamation." *Id.* ¶ 17; *see also* discussion *supra* Part II (surveying pathways to establishing home state jurisdiction).

173. *See* Nevsun Res. Ltd. v. Araya, 2020 SCC 5, ¶ 4 (Can.) (limiting class plaintiffs to individuals who had labored between 2008 and 2012).

174. *Id.*

175. *Id.* ¶ 5. The validity of this claim therefore hinged on whether the Bisha labor regime was sufficiently attributable to the Eritrean government so as to bar Canadian courts from interfering with Eritrean sovereignty by adjudicating the case. *See supra* note 102 and accompanying text (discussing the interplay between home state jurisdiction and the requisite respect for host state sovereignty).

176. Nevsun Res. Ltd. v. Araya, 2020 SCC 5, ¶ 5 (Can.). Under British Columbia's Supreme Court Civil Rules, pleadings can be struck if they "disclose no reasonable claim (rule 9-5(1)(a)), or are unnecessary (rule 9-5(1)(b))." *Id.* ¶ 63.

177. *Id.* ¶ 6.

state doctrine and the plaintiffs' customary international law claims.[178] Notably, however, the case settled before a trial court could adjudicate the merits of the claims on remand, so the later-stage legal issues remain unexplored.[179]

Regarding the act of state doctrine, the Supreme Court observed that British courts recognize the duty to: (1) consider the potential conflict between home and host state laws; and (2) exercise judicial restraint from "adjudicating the transactions of foreign states."[180] The Court determined that Canadian jurisprudence had already subsumed these tenets, such that Canada does not recognize an "all-encompassing 'act of state doctrine.'"[181] As such, this doctrine did not bar the workers' claims.[182]

The Court's discussion of the customary international law claims[183] proved more fruitful. The majority foregrounded the responsibility of Canadian courts to assist in the development of customary international law.[184] Underscoring its commitment to this global jurisprudence, the Court determined that if the plaintiffs' claims were cognizable under customary international law, then they were also cognizable under Canadian law, which adopts these principles.[185]

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178. *See id.* ¶¶ 6, 26 (bifurcating the analysis as: "(1) Does the act of state doctrine form part of Canadian common law?"; and "(2) Can the customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity ground a claim for damages under Canadian law?").

179. *See* Anne Bucher, *Landmark Settlement Reached in Slavery Lawsuit Against Nevsun*, TOP CLASS ACTIONS (Oct. 26, 2020), https://ca.topclassactions.com/lawsuit-settlements/lawsuit-news/landmark-settlement-reached-in-slavery-lawsuit-against-nevsun [https://perma.cc/ADD3-N6DT].

180. Nevsun Res. Ltd. v. Araya, 2020 SCC 5, ¶ 35 (Can.) (analyzing Lord Wilberforce's discussion of the act of state doctrine in the English case, Buttes Gas & Oil Co. v. Hammer (No. 3), [1982] A.C. 88 (H.L.)). The Canadian judicial system was based on the English model and is to some extent still wedded to this tradition as a member of the British Commonwealth. Accordingly, the British interpretation of the act of state doctrine has some influence on Canada's interpretation of the same.

181. *Id.* ¶¶ 44, 57. The Court hesitated to import the English act of state doctrine and jurisprudence into Canadian law, which already contains the aforementioned constitutive principles.

182. *Id.* ¶ 59.

183. *See supra* note 164 and accompanying text.

184. *See* Nevsun Res. Ltd. v. Araya, 2020 SCC 5, ¶ 72 (Can.) ("Understanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute, as we already assertively have, to the 'choir' of domestic court judgments around the world shaping the 'substance of international law.'").

185. *Id.* ¶ 73; *see also id.* ¶ 75 (recapitulating the Canadian duty to protect human rights after the brutality of World War II).

As a first step, the Court concluded that the plaintiffs' claims satisfied the two requirements for a justiciable norm of customary international law: (1) general, but not necessarily universal, practice; and (2) *opinio juris*—namely, the belief that such practice amounts to a legal obligation.[186] Because Canada has "automatically incorporat[ed] customary international law into domestic law via the doctrine of adoption," these claims could be remedied under the common law of Canada because no conflicting legislation barred the remedy.[187] In this case, traditional domestic tort remedies were deemed insufficient given the gravity of the plaintiffs' claims.[188]

The Court therefore found it necessary to develop a new remedy for the breach of customary international law norms.[189] While it deferred to the Chambers Judge to specify this remedy,[190] the Court concluded that it was not "'plain and obvious'[191] that Canadian courts cannot develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law."[192] By allowing the Eritrean plaintiffs' case to proceed,[193] the Supreme Court importantly recognized that corporations, as private actors, cannot enjoy a "blanket exclusion" from customary international law norms.[194] Rather, Canadian corporations may be held liable for

186. *Id.* ¶ 77. The Court lifted these requirements from the U.N.'s International Law Commission. *See* International Law Commission, *Report of the International Law Commission*, U.N. Doc. A/73/10, at 124 (2018). In fact, the claims were so egregious that they likely constituted a non-derogable peremptory norm. *See* Nevsun Res. Ltd. v. Araya, 2020 SCC 5, ¶¶ 83–84 (Can.) (recognizing the subset of norms known as *jus cogens* which cannot be abridged per the Vienna Convention on the Law of Treaties, Can. T.S. 1980 No. 37 (entered into force Jan. 27, 1980), art. 53).

187. *See Nevsun*, 2020 SCC 5, ¶ 90 (concluding that Canada automatically incorporates customary international law into its domestic law unless Parliament says otherwise). *But see id.* ¶¶ 177–84 (Brown, J., dissenting) (challenging this theory of automatic adoption and offering a different procedure for recognizing customary international law).

188. *See id.* ¶ 129 (arguing that remedying these violations "requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches").

189. *Id.* ¶ 118; *see also id.* ¶ 119 (citing Canada's obligation to ensure an effective remedy to victims under ICCPR, art. 2); International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 99 U.N.T.S. 171.

190. *Nevsun*, 2020 SCC 5, ¶ 131.

191. This phrase represents the standard on a motion to strike in Canadian courts. *See, e.g.*, Hunt v. Carey Can. Inc., 1990 SCC 959, ¶ 33.

192. Nevsun Res. Ltd. v. Araya, 2020 SCC 5, ¶ 122 (Can.).

193. *See id.* ¶ 132.

194. *Id.* ¶ 113.

violating these international norms when they involve transnational activity.[195]

3. Gauging the Common Law's Redemptive Power

If the CORE's institutional mandate is afflicted by investigatory weaknesses and the risk of corporate capture, perhaps Canadian common law can now bridge the gap.[196] Though it leaves the remedial scheme to be developed by lower courts, the *Nevsun* decision is groundbreaking in its assertion that victims of customary international law violations can seek a remedy under Canadian common law. Depending on how lower courts particularize the domestic remedy, the decision may offer greater access to justice for aggrieved communities across the globe. For the first time, these communities may seek such remedies, provided that the parties can access Canadian courts and the injury satisfies the more exacting bar of constituting a customary international law violation.[197] Furthermore, this case may put companies on notice as to potential liability for perceived human rights violations and other abuses committed abroad. Perhaps this increased judicial role will encourage Canadian MNCs to comply with business and human rights guidelines, knowing that violations of customary international law can now be adjudicated in Canadian courts.

So as not to be overly optimistic, it is also essential to highlight that the *Nevsun* decision may be of limited value to most plaintiffs, who will still have to overcome the hurdles of establishing Canadian jurisdiction and demonstrating that Canadian courts present the most sensible forum for settling the dispute (*forum non conveniens*, or

195. *Compare id.* ¶ 105 *with* discussion *infra* Section III.B.1 (describing the more complex U.S. approach to extraterritorial corporate liability).

196. The majority opinion interestingly cites the creation of the CORE as evidence of the Canadian government's adoption of policies "to ensure that Canadian companies operating abroad *respect* these [customary international law] norms." *Nevsun*, 2020 SCC 5, ¶ 115. However, the CORE's effectiveness still remains suspect. *See* discussion *supra* Section III.A.1.

197. While this case represents a victory for aggrieved parties, this Note does not intend to exaggerate the significance of this decision for Peruvian communities seeking redress. In terms of human rights, environmental, and social impacts caused by Canadian corporations within Peru, only a subset of these shortfalls will likely violate customary international law and therefore constitute a cognizable claim in Canadian courts. For example, polluting a remote water source, though harmful, may not amount to a more serious customary international law violation. See *supra* note 186 and accompanying text for the two elements required for a cognizable norm of customary international law.

"FNC").[198] Regarding the FNC question, there was uniquely no competition for an appropriate venue in the *Nevsun* case. In fact, the Chambers Judge determined early on that Eritrea would not represent a more convenient forum because the plaintiffs were Eritrean refugees who could not return to the country, where "there was a real risk of an unfair trial occurring."[199] While plaintiffs may not always be so fortunate, in at least one case where there was a debatable question as to the appropriate forum (*Garcia v. Tahoe Resources*), plaintiffs were nevertheless able to overcome this hurdle.[200] Though they still must pay Canadian court costs and assemble evidence from across jurisdictions,[201] similarly-situated plaintiffs can hopefully now capture the advantages of the *Nevsun* decision in Canadian courts.

B. United States

This Section offers a similar analysis for the U.S. context.[202] Section III.B.1 begins by evaluating the current status of a cause of action under the Alien Tort Statute. Section III.B.2 then suggests a state alternative, the California Transparency in Supply Chains Act, to replace or supplement this federal statute. In Section III.C, this Note finally takes stock of current U.S. options and weighs them alongside their Canadian counterparts.

198. *See supra* note 128 and accompanying text.

199. Nevsun Res. Ltd. v. Araya, 2020 SCC 5, ¶ 18 (Can.).

200. *See* Garcia v. Tahoe Res. Inc., 2017 BCCA 39, 126 (reversing the trial court's FNC determination and concluding that Canada presented the more appropriate forum to hear claims surrounding activities at defendant's El Escobal mine in Guatemala, due to "evidence of weakness and lack of independence in the Guatemalan justice system").

201. *See supra* note 128 and accompanying text.

202. There is some sentiment within the United States that corporations must exercise social responsibility with respect to human rights. Many companies frame this responsibility as a duty "owed" to their customers and other stakeholders. *See, e.g.*, BUS. ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION (Oct. 2020), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf [https://perma.cc/6T5Q-NQ98] (expressing the commitment of dozens of major corporations to upholding human rights). The question remains as to whether this commitment is sincere or merely an effort to brand these corporations as "socially responsible" in name only. *See* Amiram Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT'L L. 452, 459–63 (2008) (discussing the "de-radicalization" of the corporate social responsibility movement and noting that some corporations claim to be socially responsible and forward-thinking solely to enhance their brand to consumers).

1. Fossilizing the Alien Tort Statute: *Nestlé v. Doe*

A significant statute has been on the books in the United States since 1789.[203] Today recognized as the "Alien Tort Statute" (ATS), the law declares that U.S. District Courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[204] By its own terms, the ATS is purely jurisdictional and requires a separate federal cause of action to be deployed in federal courts.[205] While the statute is useful on paper for redressing extraterritorial harms, the law was not so invoked until two centuries after its initial enactment.[206] In 1980, the Second Circuit in *Filártiga v. Peña-Irala* took an initial stab at demarcating the outer bounds of the ATS, reasoning that U.S. federal courts have jurisdiction to hear cases alleging violations of the law of nations, such as torture, because "the law of nations . . . has always been part of the federal common law."[207] However, the subsequent stream of U.S. Supreme Court decisions involving the ATS has gradually chipped away at the applicability of the statute for extraterritorial corporate wrongdoing.[208]

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203. The Alien Tort Statute was originally passed as part of the Judiciary Act of 1789. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE (ATS): A PRIMER at ii (June 1, 2018), https://sgp.fas.org/crs/misc/R44947.pdf [https://perma.cc/JD4E-6762].

204. 28 U.S.C. § 1350 [hereinafter ATS].

205. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 610 (2015) (noting that the ATS "creates no cause of action itself" and concluding that "federal courts have limited power to recognize a small handful of federal common law causes of action when exercising this jurisdiction").

206. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 588 (2002) ("The obscurity of the Alien Tort Statute ended in 1980, with the Second Circuit's decision in *Filartiga v. Pena-Irala*.").

207. *See* Filártiga v. Peña-Irala, 630 F.2d 876, 885–86, 890 (2d Cir. 1980) (construing the ATS to allow two Paraguayan citizens to bring a civil action against a Paraguayan police officer who had tortured and killed their son).

208. Over the past two decades, the U.S. Supreme Court has repeatedly curtailed the ATS in this respect, perhaps making the United States a less attractive jurisdiction of choice for plaintiffs suing U.S. corporations for extraterritorial human rights violations. *See* Jesner v. Arab Bank, Plc, 138 S.Ct. 1386, 1389 (2018) (plurality) (finding that foreign corporations may not be defendants in ATS suits, but leaving the question of U.S. corporate defendants unresolved); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) (holding that a defendant's conduct must "touch and concern" the United States to such a degree so as to overcome the presumption against extraterritorial application of the ATS); Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) (limiting cognizable causes of action under the ATS to international law offenses as widely recognized as the three historical "law of nations"

In keeping with this pattern of statutory ossification, the Court recently revisited its interpretation of the ATS in *Nestlé USA, Inc. v. Doe*, decided in June 2021.[209] This matter consolidated two cases brought by Malian plaintiffs against Nestlé USA, Inc. and Cargill, Inc., both U.S. corporations that operate in the cocoa industry in the Ivory Coast.[210] The plaintiffs alleged that they had been trafficked as children and enslaved to work on cocoa farms from which the U.S. defendants purchased cocoa.[211] The plaintiffs also claimed that these U.S. companies "provided those farms with technical and financial resources—such as training, fertilizer, tools, and cash—in exchange for the exclusive right to purchase cocoa."[212] The plaintiffs brought suit under the ATS, alleging that the defendants had aided and abetted violations of international law from which the plaintiffs themselves had suffered—specifically, child slavery and forced labor.[213] Granting certiorari to hear the case, the U.S. Supreme Court was slated to decide whether the ATS can be deployed to impose liability on domestic corporations for aiding and abetting extraterritorial human rights abuses.[214]

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offenses contemporaneously accepted during the statute's enactment in 1789: (1) violation of safe conducts, (2) infringement of the rights of ambassadors, and (3) piracy). Even so, legal scholars still challenge this interpretive austerity, arguing that U.S. corporations can and should be held accountable for their extraterritorial human rights impacts. *See, e.g.*, Tyler Becker, Note, *The Liability of Corporate Directors, Officers, and Employees Under the Alien Tort Statute After* Jesner v. Arab Bank, Plc, 120 COLUM. L. REV. 91, 91–94 (2020); Erin Downey, Comment, *Modern-Day Pirates: Why Domestic Parent Corporations Should Be Liable Under the Alien Tort Statute for Violations of Workers' Rights Within Global Supply Chains*, 68 AM. U. L. REV. 1933, 1966 (2019).

209. *See* Nestlé USA, Inc. v. Doe et al., 141 S.Ct. 1931 (2021) [hereinafter *Nestlé*]. In this fractured opinion, Justice Thomas wrote for the majority (all Justices except Justice Alito) in Parts I and II, both of which are binding. *See id.* at 1935–37 (majority opinion). Justice Thomas also offered a non-binding plurality opinion in Part III, in which he was joined by Justices Gorsuch and Kavanaugh. *See id.* at 1937–40 (majority opinion). In addition, Justice Gorsuch penned a separate concurring opinion, joined in part by Justice Alito (Part I) and in part by Justice Kavanaugh (Part II). *See id.* at 1940–43 (Gorsuch, J., concurring). Justice Sotomayor, joined by Justices Breyer and Kagan, also wrote separately, partially concurring in the opinion and concurring in the judgment. *See id.* at 1943–50 (Sotomayor, J., concurring). Finally, Justice Alito was the lone dissenter. *See id.* at 1950–51 (Alito, J., dissenting).

210. *Id.* at 1935 (majority opinion).

211. *See id.*

212. *Id.*

213. *See id.* (discussing plaintiffs' aiding and abetting allegations more fully).

214. The case's petition for certiorari presented two central questions:

> 1. Whether an aiding and abetting claim against a domestic corporation brought under the Alien Tort Statute, 28 U.S.C. § 1350, may overcome the extraterritoriality bar where the claim is based on allegations of general corporate activity in the United States and where plaintiffs cannot trace the alleged harms,

Shirking these issues, the Court generally eschewed the question of domestic corporate liability[215] and aiding and abetting liability,[216] instead focusing on the issue of extraterritoriality and separation of powers concerns surrounding the judicial fashioning of new causes of action.[217] Yet, the Court still left both of these areas unresolved.[218] Less helpfully, the Court articulated what the law is *not*, rather than positively and specifically declaring what the law *is*.

On the extraterritoriality question, for instance, the Court issued a very narrow ruling that will likely not be useful to future plaintiffs who are interested in ascertaining the jurisdictional scope of the statute. In his terse majority opinion, Justice Thomas concluded that "[t]o plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity."[219] Noting that many domestic corporations make "operational decisions" in the United States that might have extraterritorial repercussions, the majority required a greater connection between the cause of action and domestic conduct to rebut

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which occurred abroad at the hands of unidentified foreign actors, to that activity.
2. Whether the Judiciary has the authority under the Alien Tort Statute to impose liability on domestic corporations.

Petition for Writ of Certiorari, Nestlé USA, Inc. v. Doe I, 141 S.Ct. 1931 (2021) (No. 19-416). These questions directly implicate the earlier point about home state obligations potentially extending to decisions made on home state soil. *See supra* note 112 and accompanying text.

215. *Nestlé* may represent something of a victory on this point, as Justices Gorsuch, Sotomayor, Breyer, Kagan, and Alito implicitly recognized that U.S. corporations can be sued under the ATS. *See Nestlé*, 141 S.Ct. at 1940–43 (Gorsuch, J., concurring); *id.* at 1943–50 (Sotomayor, J., concurring (joined by Breyer & Kagan, JJ.)); and *id.* at 1950–51 (Alito, J., dissenting). While this stance on domestic corporate liability is not a formal holding, lower courts may later infer this unofficial majority agreement and apply it to future cases. *See* Corporate Accountability Lab, *Supreme Court Debrief:* Nestle v. Doe *Decision*, YOUTUBE, at 17:54 (June 24, 2021), https://www.youtube.com/watch?v=cuWt2f992lU [https://perma.cc/HY7X-ATCC].

216. *See* Corporate Accountability Lab, *supra* note 215, at 19:10 (explaining how the only entity that argued against aiding and abetting liability was the Solicitor General's Office during the Trump Administration, a position that gained no traction with the Supreme Court).

217. *See* discussion *infra*.

218. Before this decision, the U.S. Supreme Court had found in *Kiobel* that the presumption against extraterritoriality applies to the ATS and could only be overcome where the underlying conduct "touched and concerned" the United States. *See supra* note 208 and accompanying text. Regarding cognizable causes of action, the Court had previously articulated in *Sosa* various separation of powers concerns surrounding the judicial creation of new causes of action to anchor ATS claims. *See id.*

219. *Nestlé*, 141 S.Ct. at 1937. Equally unhelpful, Justice Thomas admonished that "allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS." *Id.*

the ATS's presumption against extraterritoriality.[220] Even so, the Justices never identified what misconduct in the United States would be sufficient to overcome this bar.[221] Instead, the Court remanded the case and allowed the plaintiffs to amend their complaint to hopefully clarify the connection for the lower court.[222] Yet, by failing to elucidate what conduct is needed to overcome the presumption against extraterritoriality, the Court left the Malian plaintiffs without any guidance to amend their complaint effectively.[223]

Equally frustrating was the Court's inability to direct plaintiffs as to what causes of action they can use to anchor federal jurisdiction under the ATS. The Justices largely disagreed on what international law violations are immediately cognizable, versus what causes of action would have to be legislatively enacted by Congress before the Court could recognize them. Justices Thomas, Gorsuch, and Kavanaugh essentially limited potential causes to the "historical

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220. *See id.*

221. The Court interestingly departed from the "touch and concern" test employed in *Sosa*. *See supra* note 208 and accompanying text. Muddying the jurisprudential waters, the majority instead drew upon the two-step "focus" test articulated in *RJR Nabisco*. *See Nestlé*, 141 S.Ct. at 1936 (finding that the "focus" of the defendants' actions occurred in the Ivory Coast, not in the United States); RJR Nabisco, Inc. v. Euro. Cmty., 579 U.S. 325, 337 (2016) (holding that courts, when analyzing extraterritoriality issues, should: (1) ask "whether the statute gives a clear affirmative indication" that rebuts the presumption against extraterritoriality; and (2) where the statute does not apply extraterritorially, require that plaintiffs establish that "the conduct relevant to the statute's focus occurred in the United States").

222. *See Nestlé*, 141 S.Ct. at 1940; *see also* Allie Brudney & Avery Kelly, *Supreme Court Upholds Intolerable Status Quo in* Nestlé USA v. Doe, *Rejecting Claims of Trafficked Children*, CORP. ACCOUNTABILITY LAB (June 18, 2021), https://corpaccountabilitylab.org/calblog/2021/6/18/supreme-court-upholds-intolerable-status-quo-in-nestl-usa-v-doe-rejecting-claims-of-trafficked-children [https://perma.cc/LR5V-N33D] ("While the plaintiffs will now seek to amend their complaint to clarify the connection to the United States and continue the case, this decision demonstrates just how difficult and lengthy it often is for victims of corporate abuse to access remedy.").

223. Katherine Gallagher (Center for Constitutional Rights Senior Staff Attorney and amicus brief counsel for plaintiffs) said of the decision:

> Today the Supreme Court continued its recent and worrying trend of limiting the ability of victims of serious human or civil rights violations to seek justice and accountability in U.S. courts . . . . [T]he United States should be joining the growing global trend to make it easier to hold corporations accountable for serious human rights violations.

In Nestlé/Cargill Cases, Supreme Court Limits Corporate Accountability for Human Rights Violations, CTR. FOR CONST. RTS. (June 17, 2021), https://ccrjustice.org/home/press-center/press-releases/nestl-cargill-cases-supreme-court-limits-corporate-accountability [https://perma.cc/ZV3X-96VM].

three,"[224] arguing that the judicial creation of a cause of action under the ATS would be unprecedented, pose foreign policy concerns, and run afoul of the Constitution's separation of powers.[225] Conversely, Justices Sotomayor, Breyer, and Kagan refused to cabin cognizable torts to the historical three, instead drawing upon *Sosa*[226] and the text and history of the ATS to promote a more dynamic reading of the statute.[227] Once again, the Court failed to offer guidance that could assist foreign stakeholders who might be interested in using the ATS to access U.S. courts. While *Nestlé* did not definitively foreclose such a possibility, the decision did continue to hamstring the statute's utility and render it a historical artifact, rather than dust it off for modern-day use.

2. Refining a Nationalized California Transparency in Supply Chains Act

Given the indeterminacy surrounding the ATS, it may be prudent to locate another statute as a potential replacement or supplement. Previous scholarship has focused on extant federal statutes which may confer a remedy to aggrieved communities worldwide.[228] However, state legislation may hold an overlooked key

224. *See supra* note 208 and accompanying text (noting *Sosa*'s identification of the three torts contemporaneously recognized in 1789: (1) violation of safe conducts, (2) infringement of the rights of ambassadors, and (3) piracy).

225. *See Nestlé*, 141 S.Ct. at 1939 (Thomas, J., plurality) ("Our decisions since *Sosa*, as well as congressional activity, compel the conclusion that federal courts should not recognize private rights of action for violations of international law beyond the three historical torts identified in *Sosa*."); *id.* at 1 (Gorsuch, J., concurring) ("[T]he time has come to jettison the misguided notion that courts have discretion to create new causes of action under the ATS . . . .").

226. Sosa v. Alvarez-Machain established a two-step framework for resolving issues concerning the breadth of ATS liability. 542 U.S. 692 (2004). First, courts must decide whether the claim is based on a violation of an international law norm that is as "specific, universal, and obligatory" as the historical three torts were in 1789. *Id.* at 732. Second, if the first step is satisfied, the court should evaluate whether allowing the case to proceed represents an "appropriate" exercise of judicial discretion. *See id.* at 738.

227. *See generally Nestlé*, 141 S.Ct. at 1938–39 (Sotomayor, J., concurring) (espousing a flexibility to the ATS based on its text and history, criticizing Justice Thomas' "extraordinarily strict" reading of *Sosa*, as well as concluding that his reasons for curtailing the possibility of new causes of action are unpersuasive). Most vibrantly, Justice Sotomayor alleges that Justice Thomas's decision "would overrule [*Sosa*] in all but name." *Id.* at 1944.

228. *See generally, e.g.*, Hamzah Khan, *TVPA Holds Steady as ATS Shrinks for Redressing Torture Abroad in* Warfaa v. Ali, 25 TUL. J. INT'L & COMP. L. 291 (2016).

to a national remedy.[229] In particular, little ink has been spilled over the California Transparency in Supply Chains Act (CTSCA).[230] This statute, if modified, may present a compelling contender for national adoption, particularly now that one of the Act's greatest supporters, Kamala Harris, is the U.S. Vice President.[231] Indeed, the statute provides a helpful building block for establishing responsibility at the national level, but only if it is expanded and outfitted with an affirmative duty.[232]

This Section begins by parsing the terms of the CTSCA as they currently exist. It bears highlighting that this Act is not immediately useful to aggrieved Peruvian communities, as the statute, among other things, requires the sale of goods in the United States to address specific—but perhaps inapposite—shortfalls within the product's supply chain. This Section next considers the CTSCA's advantages and shortcomings, incorporating contemporary responses and regulatory theory. Finally, this Section concludes by envisioning a nationalized form of the CTSCA, which may ground a more durable remedy for victims of extraterritorial abuse.

Since January 1, 2012, the CTSCA has required all retail sellers and manufacturers doing business in California and having annual worldwide gross receipts totaling over $100 million to disclose their "efforts to eradicate slavery and human trafficking from [their] direct

229. Long recognized as the "laboratories of democracy," individual states often experiment with law before these policies are adopted at the national level. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous [s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

230. Cal. Civ. Code § 1714.43 (2010) [hereinafter CTSCA]. The CTSCA was originally introduced in 2009 as Section 3 of Cal. Senate Bill 657, which serves to contextualize the purpose and policy behind the Act. *See* Cal. Senate Bill No. 657 (Cal. 2010), https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersafety/sb_657_bill_ch556.pdf [https://perma.cc/L387-JD48] [hereinafter SB 657].

231. While this Note considers the advantages for national adoption below, it bears immediate mention that the CTSCA took effect during Vice President Kamala Harris' tenure as the Attorney General of California (2011–2017). Harris' recent election to be U.S. Vice President may induce a groundswell of Congressional support for national adoption. Harris has been an advocate for the CTSCA and even authored a resource guide to help qualifying corporations fulfill the disclosure requirements. *See generally* Kamala D. Harris (Att'y Gen., Cal. Dep't of Just.), *The California Transparency in Supply Chains Act: A Resource Guide* (2015), https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf [https://perma.cc/G8NZ-2WCK].

232. While one might question whether this Note imagines a new statute altogether, the CTSCA provides a solid foundation upon which Congress can implement necessary changes to give the state statute greater bite.

supply chain[s] for tangible goods offered for sale."[233] The CTSCA only requires disclosure and does not establish a new form of liability.[234] Qualifying corporations must disclose specific information on their websites in a "conspicuous and easily understood" manner.[235] At a minimum, corporations must report the extent to which they engage in: (1) supply chain verification;[236] (2) compliance audits;[237] (3) supplier certifications;[238] (4) internal accountability standards and procedures;[239] and (5) training initiatives for employees and management.[240] Violators are subject to an action for injunctive relief brought by the Attorney General of California, to whom the Franchise Tax Board is annually required to submit a list of qualifying retail sellers and manufacturers.[241]

This disclosure system emerged from the growing recognition that slavery and human trafficking[242] persist in the modern day, despite being crimes under state, federal, and international law.[243] In fact, U.S. corporations may even turn a "blind eye" to human rights impacts

233. CTSCA, *supra* note 230, subdivs. (a)(1) & (e); *see also id.* subdiv. (a)(2) for key definitions. In the Peruvian context, most shortfalls fortunately do not rise to the level of "slavery and human trafficking." *See* discussion *supra* Part I. Therefore, in order to be most effective, the Act should be expanded to include other relevant harms facing impacted communities globally. *See* discussion *infra*.

234. The CTSCA is unique in this respect, as it "does not regulate a company's labor practices, nor does it require companies to reveal confidential, proprietary and/or trade secret information." Harris, *supra* note 231, at 3.

235. CTSCA, *supra* note 230, subdiv. (b).

236. *See id.* subdiv. (c)(1).

237. *See id.* subdiv. (c)(2).

238. *See id.* subdiv. (c)(3).

239. *See id.* subdiv. (c)(4).

240. *See id.* subdiv. (c)(5).

241. *See id.* subdiv. (d) (setting the exclusive remedy as injunctive relief but specifying that this provision does not "limit remedies available for a violation of any other state or federal law"); *see also* SB 657, *supra* note 230, § 4 (amending REVENUE & TAX'N CODE § 19547.5).

242. These two crimes are specifically contemplated within the CTSCA itself. However, they are obviously not the only human rights impacts occurring worldwide. A nationalized CTSCA should be more expansive to trigger other forms of extraterritorial abuse. *See* discussion *infra*.

243. *See* SB 657, *supra* note 230, § 2 (remarking that these practices are often "hidden from view" and that transparency, disclosure, and consumer education can "improve the lives of victims of slavery and human trafficking"); *see also* Harris, *supra* note 231, at i (citing an estimated 21 million people as victims of forced labor around the globe and noting California's responsibility to address this issue).

within their supply chains, shifting any responsibility downstream.[244] Yet, the CTSCA's insistence on retail sellers and manufacturers disclosing their relevant practices offers an efficient and inexpensive means of ensuring corporate self-policing. With access to this information, consumers may be willing to pay more for ethically-produced products[245] and are even empowered to pressure and shame corporations that are connected to harmful practices.[246] Market forces also encourage socially-responsible activity through threats of marketplace activism, internal self-regulation, and shareholder activism if corporations are observed behaving illicitly.[247] By providing consumers with material for a potential "name and shame" campaign, the CTSCA capitalizes on these "societal pressures and market incentives to encourage good corporate citizenship and best practices."[248] According to then-Attorney General Harris, the statute endeavors to balance human rights concerns alongside legitimate corporate interests in protecting confidential, proprietary, and trade secret information.[249]

Nevertheless, critics have questioned this indirect approach and lack of meaningful remedy.[250] While overburdened governments generally prefer corporate self-policing over direct governmental intervention on efficiency grounds, self-regulation may prove

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244. *See* Sarah C. Pierce, Note, *Turning a Blind Eye: U.S. Corporate Involvement in Modern Day Slavery*, 14 J. GENDER, RACE & JUST. 577, 596–600 (2011) (observing American corporations' ability to shirk significant liability for the actions of their suppliers).

245. *See* Harris, *supra* note 231, at i (citing Michael J. Hiscox & Nicholas F. B. Smyth, *Is There Consumer Demand for Improved Labor Standards? Evidence from Field Experiments in Social Product Labeling* 2 (Harv. Univ, Working Paper, 2011)).

246. *See* Benjamin Thomas Greer & Jeffrey G. Purvis, *Corporate Supply Chain Transparency: California's Seminal Attempt to Discourage Forced Labour*, 20 INT'L J. HUM. RTS. 55, 60 (2016) (praising consumers' ability to dispel corporate abuses and effectuate social change if given the power and information); *see also supra* note 202 and accompanying text.

247. *See* Greer & Purvis, *supra* note 246, at 58 (describing the tempering effect of these market dynamics); *see also* Justine Nolan, *Hardening* Soft Law*: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?*, 15 BRAZ. J. INT'L L. 65, 69 (2018) (tracing the shift of regulatory responsibility from the state to investors, consumers, and other non-state actors).

248. *See* Greer & Purvis, *supra* note 246, at 60 (predicting a "strong likelihood that companies will enhance clauses in supply chain contracts and those lagging may find themselves losing competitiveness, consumer favour and market share").

249. Harris, *supra* note 231, at ii.

250. *See, e.g.*, Emma Cusumano & Charity Ryerson, *Is the California Transparency in Supply Chains Act Doing More Harm Than Good?*, CORP. ACCOUNTABILITY LAB (July 25, 2017), https://corpaccountabilitylab.org/calblog/2017/7/25/is-the-california-transparency-in-supply-chains-act-doing-more-harm-than-good?rq=ctsca [https://perma.cc/GRJ6-6FVR].

insufficient if the state cannot legitimately or practically take action to enforce the statute's requirements.[251] With its remedy limited to injunctive relief—most probably, an order to disclose the required information alongside a fine—the CTSCA may be toothless in practice.[252] The statute is also constrained by practical concerns, including the lack of a central repository for corporate disclosures and the inability to compare reports taking different forms.[253]

These transparency initiatives would have greater bite if they were first adopted on a national scale. Indeed, placing the statute in Congressional hands would immediately remedy constitutional concerns surrounding California's current involvement in interstate commerce.[254] Federal control would also help to homogenize disclosure requirements and to ensure broader recognition and enforcement.

There are certainly several changes to be made if this federal act is to prove useful to impacted Peruvian communities and others similarly situated. Most significantly, a nationalized CTSCA should provide a statutory basis for impacted global communities to petition for meaningful relief in U.S. courts. This change would involve establishing an affirmative responsibility for corporate wrongdoing alongside greater penalties for violation.[255] In its current form, the statute only requires corporate disclosure and enforces this obligation by threatening uncooperative companies with a fine collected by the enforcing state.[256] Foreign stakeholders, like the Peruvian "canaries,"

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251. *See* Ian Ayres & John Braithwaite, *Enforced Self-Regulation*, *in* RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 101, 103 (1992) (contemplating the need to supplement self-regulation with external governmental enforcement).

252. *See* Greer & Purvis, *supra* note 246, at 62–64 (pondering the limits of injunctive relief if all this means in practice is publishing the requested information). That said, disclosure alone might entail greater ramifications if the violation were more egregious, such as human trafficking, for instance.

253. *See* Nolan, *supra* note 247, at 69–70 (questioning the practical efficacy of the disclosure requirements).

254. *See* Greer & Purvis, *supra* note 246, at 65–69 (analyzing Dormant Commerce Clause concerns but failing to suggest that federal adoption of the CTSCA would *per se* resolve these). Here, this Note refers to the fact that California has sought to regulate corporations that merely "do business" in California. *See supra* note 233 and accompanying text. Said corporations may be incorporated or have their principal place of business in another state, thereby implicating interstate commerce—an area that only Congress is authorized to regulate. *See* U.S. CONST. art. I, § 8, cl. 3.

255. *See* Nolan, *supra* note 247, at 73–76 (imagining more substantive compliance with human rights obligations via transparency and due diligence requirements backed by accountability measures and penalties).

256. *See supra* note 241 and accompanying text.

are therefore not involved and do not benefit from this collected fee. While the CTSCA importantly recognizes extraterritorial abuses, it fails to provide an affirmative duty that such stakeholders may enforce to access justice. Despite this shortcoming, the statute nonetheless wields important advantages in its forward-thinking consideration of overseas harms and its attendant ability to render visible the impacts that MNCs have abroad. The CTSCA must still be fundamentally reworked to provide a grievance mechanism for impacted parties. For instance, a revised version of the statute might also grant victims with individual causes of action against culpable company directors.

Aside from incorporating an enforceable duty, Congress should also implement a few practical considerations to maximize the statute's usefulness for aggrieved communities worldwide. Some of these revisions would, in fact, mirror model legislation in Canada with similar aims, creating important cross-border consistency between the neighboring nations and co-investors in the Peruvian EI sector.[257] Europe has compellingly witnessed a similar push to enact mandatory human rights and environmental due diligence legislation to statutorily require additional transparency.[258] The United States should therefore take note of these initiatives and contribute to this now-global effort to enact statutory guidelines. First, Congress should broaden the scope of the Act to implicate any corporation operating in the United States, not just California. Second, Congress might also consider lowering the qualifying monetary threshold[259] to a more common—yet still practically-realistic—amount.[260] Third, Congress should mandate

257. On May 31, 2021, the CNCA published a model "Corporate Respect for Human Rights and the Environment Abroad Act" to "provide lawmakers with a blueprint for a new international corporate accountability law in Canada." CNCA, *Human Rights and Environmental Due Diligence Legislation in Canada*, https://cnca-rcrce.ca/campaigns/business-human-rights-legislation-hrdd/ [https://perma.cc/VZ8Y-HAP5]. If adopted, this model act would: (1) "[e]stablish a corporate duty on companies linked to Canada to prevent human rights abuses and environmental harms"; (2) "[r]equire companies to conduct due diligence and publicly report on the steps taken to prevent human rights and environmental harms"; and (3) "[i]nclude significant consequences for companies that cause harm and/or fail to conduct due diligence." *Id.*

258. *See, e.g.*, *National & Regional Movements for Mandatory Human Rights and Environmental Due Diligence in Europe*, BUS. & HUM. RTS. RES. CTR. (May 22, 2019), https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/ [https://perma.cc/RXD4-MZ4F] (last updated June 25, 2021) (summarizing country-specific and E.U.-wide initiatives for mandatory human rights and environmental due diligence in Europe).

259. *See supra* note 233 and accompanying text.

260. When first introduced by Sen. Pres. Pro Tem Darrell Steinberg in Feb. 2009, SB 657 set the annual threshold at $2 million. *See SB–657 Human Trafficking, Compare Versions*, CAL. LEG. INFO. https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient xhtml?

disclosure of additional human rights impacts to properly operationalize U.S. obligations under various international human rights law treaties, as well as customary international law.[261] In other words, the scope of justiciable harms should be expanded beyond slavery and human trafficking.[262] Finally, Congress should amend the specified remedy to include legal damages, both compensatory and punitive.[263] Doing so would set the stage for aggrieved communities across the globe to demand relief for the human rights abuses that U.S. corporate activity has left in its wake.[264] The threat of paying damages would also further pressure businesses to behave responsibly in cases where indirect market forces may prove insufficient.[265]

C. Exporting Available Remedies for Peruvian Communities (and Beyond)

As indicated in the above Sections, judicial and non-judicial pathways towards redress in both Canada and the United States do not come without significant caveats. In the case of Canada, the recently-created CORE does offer a glimmer of hope, but it suffers from deficient investigatory powers and limited opportunities to provide a meaningful remedy.[266] While ostensibly committed to its mission, the CORE may also prove nominal in practical terms, given its vulnerability to corporate capture.[267] However, the recent decision in

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bill_id=200920100SB657&cversion=20090SB65799INT [https://perma.cc/Q7LC-JWQF]. This amount was ultimately raised to $100 million in the enacted version. *See* CTSCA, *supra* note 230, subdiv. (a)(1). If adopted by Congress, a $2 million threshold may overwhelm federal resources, but an intermediate amount (e.g., $50 million) may strike the sweet spot between promoting human rights and preserving federal regulatory bandwidth.

261. *See, e.g.*, ICCPR, *supra* note 67, art. 2 (committing states parties, including the United States, to providing an effective remedy to victims).

262. *See supra* notes 233 & 242 and accompanying text.

263. This change is statutorily possible given the present status of CTSCA. *See* CTSCA, *supra* note 230, subdiv. (d) ("Nothing in this section shall limit remedies available for a violation of any other state or federal law."). Although it would share conceptual underpinnings with its state model, a nationalized version of the CTSCA would constitute a separate federal law with an independent remedy.

264. As already mentioned, the Act does not currently provide any actual grievance mechanism and must be revamped to provide an affirmative duty owed to impacted communities around the world.

265. It is worth highlighting, however, that this possible sanction may also merely encourage careful reporting.

266. *See* discussion *supra* Section III.A.1.

267. *See id.*

Nevsun v. Araya represents a landmark victory for extraterritorial plaintiffs. By holding that victims of customary international law violations now have a cause of action in Canadian courts, the Supreme Court has at least acknowledged international parties' right to redress, putting private entities on notice that they are bound by at least some customary international law obligations.[268] As this relief is particularized in future decisions, aggrieved parties around the world may acquire a better sense of the remedies that might be available to them. Peruvian parties who are impacted by cognizable human rights violations caused by Canadian extractive corporations may meet these criteria.[269]

In comparative terms, the prospects of achieving meaningful justice may appear more viable in Canada than in the United States.[270] In the latter country, the ATS has been repeatedly curtailed, with the U.S. Supreme Court failing to offer practical guidance as to its potential use by foreign tort victims.[271] Even so, not all hope is lost. The United States can begin offering similar remedies by building on initiatives embodied in other statutes, including the CTSCA. This state statute offers an innovative mechanism for deploying market forces to encourage corporations to self-regulate.[272] Given present regulatory hurdles, a unique path forwards might involve incorporating an enforceable affirmative duty owed to foreign victims. If this statute, *mutatis mutandis*, were to garner national traction in the coming years,[273] perhaps aggrieved communities in Peru could enjoy a clearer pathway towards redress.[274] In fact, if Congress were to pass a federalized version of the CTSCA, this measure could even assuage

268. *See* discussion *supra* Section III.A.2.

269. *But see supra* notes 197–201 and accompanying text (describing jurisdictional and procedural hurdles to accessing Canadian courts).

270. For a discussion comparing accountability models between a post-*Nevsun* Canada and a pre-*Nestlé* United States, see Kaitlyn Filip et al., *Landmark* Nevsun *Ruling Will Pave Way Forward for Other Victims of Corporate Abuse*, CORP. ACCOUNTABILITY LAB (Mar. 5, 2020), https://corpaccountabilitylab.org/calblog/2020/3/5/supreme-court-of-canadas-landmark-nevsun-ruling-will-pave-way-for-other-victims-of-corporate-abuse [https://perma.cc/6DXY-K9R5].

271. *See* discussion *supra* Section III.B.1.

272. *See* discussion *supra* Section III.B.2.

273. This possibility may not be a pipe dream with Kamala Harris, the principal advocate of the CTSCA, as the Vice President of the United States. *See supra* note 231 and accompanying text.

274. *See supra* note 269 and accompanying text. In the U.S. context, an affirmative duty backed by sanctions, in addition to common market forces, may do the operative work where a cause of action is not presently available for violations of customary international law.

the U.S. Supreme Court's justiciability concerns grounded in the separation of powers doctrine.[275] In other words, the statute would provide a legislative solution for victims seeking to use the ATS and the traditional court process to access justice. Ultimately—though perhaps idealistically—a legislative solution codifying a federal cause of action would help to clarify a nebulous area where the Court has repeatedly passed the buck.

CONCLUSION

This Note serves both practical and theoretical ends. It pragmatically endeavors to call attention to Peruvian community grievances, which may be warning signs of more pernicious threats in the country, as well as in other EI-dependent nations. Recognizing the power of these local actors, this Note presents these communities with semi-viable mechanisms, both within home states such as Canada and the United States, and within Peru itself. It also understands these avenues within their cultural contexts, bringing to the fore the most novel elements within each. It appreciates non-judicial options, such as Canada's CORE and Peru's Ombudsperson positions, provided that these entities possess the requisite investigatory and interventionist powers to bolster community claims.[276] It likewise recognizes that the legal field is still in flux, with Canada only beginning to offer judicial remedies to globally-impacted stakeholders,[277] and the United States still hesitating to follow suit.[278]

On a theoretical front, this Note also interrogates why these harms persist. The extractive sector is a viable means of redirecting foreign investments into local economies. However, these inflows can pose costs when they simultaneously entail harm to local communities. Justice is far from substantive where some groups enjoy positive benefits, while others bear the brunt of extractive impacts. While home states and their MNCs are encouraged to regulate and remedy overseas corporate shortfalls, true compensatory justice has been largely illusory.[279] In theory, community harms should be mitigated and redressed when they cannot be avoided. In practice, this web of

275. *See* discussion *supra* Section III.B.1.

276. *See* discussion *supra* Part I & Section III.A.1.

277. *See* discussion *supra* Section III.A.2.

278. *See* discussion *supra* Section III.B.1.

279. *See* discussion *supra* Parts I & II.

cross-jurisdictional mechanisms is ultimately futile if corporations can scuttle responsibility by setting up shop in a different country.

It is high time that corporate accountability becomes a transnational, cooperative endeavor in honor of the countless victims who go unnamed and whose wounds are never cured. Today's "canaries in the coal mine" deserve justice for having to endure such long-standing harms. Corporate home states must offer recourse to these parties while still respecting their agency as credible local actors. And for the sake of our collective future—threatened with climate change and democratic backsliding—the world ought to listen to their warning signs before it is too late.[280]

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280. *See supra* note 12 and accompanying text.

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