

# ADJUSTING THE NORTH-SOUTH BALANCE: SOUTHERN JUDICIAL BOLDNESS AND ITS IMPLICATIONS FOR THE REGULATION OF GLOBAL SUPPLY CHAINS

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*Modern regulators have long grappled with the challenges of regulating multinational corporations and their cross-border supply chains. There is a tendency, in this context, to view the problem as one where the most serious or common abuses are to be found in the Global South, but the effective remedies mostly need to be found in the Global North. This article discusses recent examples of expansive, creative judicial activity from India, Colombia and the African regional judicial system to challenge this assumption. Some of today's Southern judicial activity can break the stereotype in interesting and important ways, and our thinking about regulation in this context needs adjustment accordingly.*

## I INTRODUCTION

There is widespread recognition that multinational corporate abuses (hereafter MNC abuses) require a multi-pronged response. This is nowhere truer than in the regulation of corporate supply chains. But there is a tendency, nearly as widespread, to frame problems such as the regulation of supply chains as problems where the most serious or common abuses are to be found in the Global South, and the effective remedies mostly need to be found in the Global North. There is, I should emphasise at the outset, much that is realistic about this view, and my aim is certainly not to try to prove that it is false. But we do need to adjust it, for it is a view that is somewhat out of step with the times. Developments in some Global South jurisdictions offer much more

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powerful tools against MNC abuses than is often appreciated, and do so in ways that should affect our strategic and scholarly calculations about how we should construct responses to global supply chain abuses and related problems of MNC regulation. This article aims to illustrate this point, using some select examples.

To emphasise again: the claim of this article is by no means that the need for North-based approaches will go away any time soon. It remains a reliable generalisation that, compared to their Southern equivalents, Northern institutions are stronger, Northern law firms and NGOs have greater resources, and Northern consumers have more market power.

But two things are weakening this generalisation. The first is simply that the North/South gap is an increasingly dubious category. In some of its interpretations — for example, as the divide between the place where rich people live and the place where poor people live — the gap has not existed for fifty years.<sup>1</sup> In other interpretations — for example as a divide marking different degrees of economic development more broadly — the gap is closing. This is reflected in the way the very categories ‘Global North’ and ‘Global South’ are becoming less and less useful. I use them here only because of the need for some convenient shorthand to speak to the generalisations just made, and because the other options (such as ‘developed’ and ‘developing’ are worse still).<sup>2</sup> I will say little about this general narrowing of the gap because its effects are obvious enough: insofar as it is a trend towards the South just becoming more like the North, we have no real difficulty understanding the trend, because it is about familiar things. We may, however, need to update ourselves about just where and how the gap is narrowing, and the African regional developments discussed in this article, particularly, are an example of that.

The second factor weakening the generalisation requires more analysis. Some Southern developments are not just about ‘catching up’ in doing what the North does, but are distinctive. Judicial behaviour is an example. In some Southern countries, the weakness of other local institutions has propelled the

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<sup>1</sup> The (justified) hobby-horse of the late Hans Rosling, who will be missed. See Hans Rosling with Ola Rosling and Anna Rosling Rönnlund, *Factfulness: Ten Reasons We're Wrong about the World – And Why Things Are Better than You Think* (Flatiron Books, 2018).

<sup>2</sup> On the terminology and its troubles, see, eg, John Comaroff and Lisa E Claudio, ‘Thoughts on Theorizing from the South: An Interview with John Comaroff’ (2015) 3(1) *Social Transformations: Journal of the Global South* 3. For scepticism of the category of ‘Global South constitutionalism’ as something with unique features not found in the North, see Michaela Hailbronner, ‘Transformative Constitutionalism: Not Only in the Global South’ (2017) 65 *American Journal of Comparative Law* 527.

judiciary to try to fill the gap.<sup>3</sup> The precise story varies from country to country. But the broad result is that the judiciary ends up acting very expansively in policy areas in ways that do not usually occur in the North.<sup>4</sup> These Southern developments offer a novel challenge to a range of theoretical and descriptive understandings of the world. And, as we shall see, they have important implications for the regulation of MNCs and their supply chains — some potential, some already in full swing.

## II INDIA: PIL, FORESTS AND MINING

Over the last forty years, the Indian Supreme Court has had a good claim to be the most powerful court in the world. Since 2014, for the first time in decades, it has had to contend with an assertive governing party with its own outright majority, in the form of Prime Minister Modi's BJP, and this may change things.<sup>5</sup> But at least prior to that date no other court in the world could match it for sheer unbridled ability to arrogate to itself decisions on a vast range of issues. Among these issues, of interest to us here, has been that of MNC activities at the far end of supply chains and, in particular, the regulation of mining activities in environmentally sensitive areas affecting vulnerable cultural communities. Two examples will suffice for our purposes here.

### A Mining in Bellary

The district of Bellary lies in the state of Karnataka in south-western India. It is an important site of iron ore and other mining, and in many respects the story of this mining activity follows a script that will be familiar to those interested in MNC regulation.<sup>6</sup> The mining has had a series of significant

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<sup>3</sup> See, eg, David Landau, 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harvard International Law Journal* 319.

<sup>4</sup> Nor that *did* occur historically. Since the modern wave of rights-constitutionalism is a recent phenomenon, we will not find easy parallels to current Southern developments merely by looking to previous generations of Northern history. This fact can also mean that familiar features of the Northern picture, such as the institution of rights review, can really represent something novel if introduced in a Southern system prior to, rather than largely after, considerable economic development. But I will not engage these complexities here.

<sup>5</sup> See also Arun K Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Hart Publishing, 2017) 234–40.

<sup>6</sup> For the background discussed in this paragraph, see Report on the Reference Made by the Government of Karnataka under Section 7(2-A) of the Karnataka Lokayukta Act, 1984 (Part – II), No. COMPT/LOK/BCD/89/2007 (27 July 2011) <<http://www.indiaenvironmentportal.org.in/files/file/Karnataka-Lokayukta-Report-on-Illegal-Mining.pdf>>; Shah Commission materials are available at <<http://www.indiaenvironmentportal.org.in/content/345125/336675/>>.

impacts on local communities and the environment. The corporations concerned have often acted with various degrees of disregard for these impacts in the name of recouping their investment and generating a profit. Local and state-level regulation of illegal mining activities has often been limited due to institutional weakness and corruption. And a variety of institutions and actors, including local and international activists, a state anti-corruption ombudsman (the Lokayuta), and a commission of enquiry under retired Justice M B Shah have attempted to respond. But what may not seem so standard, at least to those unfamiliar with the Indian system, is the role played in these efforts by the Indian Supreme Court.

One key prerequisite for the Court's intervention in the case had been established some years previously. The Court had been attempting to deal with another case raising broad and complex issues about the management of India's forests in light of the many different cultural and economic groups that have various interests in them. The Court's response in that case included setting up, in May 2002, a special commission of experts that would oversee the issue, conduct research, suggest remedial approaches to the Court, and monitor their implementation.<sup>7</sup> The Court makes regular use of this commission device in a variety of settings; in this forestry context, the commission came to be known as the Central Empowered Commission (CEC). As is common practice, the Court did not tightly delineate the CEC's mandate, and it was impliedly intended to continue to function for as long as the Court felt it necessary to engage with issues related to forestry management.<sup>8</sup>

Thus when the issue of mining in the forests in Bellary reached the Supreme Court in 2011, the Court's natural response was to have the CEC investigate the matter. The CEC's report revealed widespread illegal mining.<sup>9</sup> Largely on the strength of that report, the Court shut down all mining activities in the district while the matter could be further investigated and illegal mining

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<sup>7</sup> See Armin Rosencranz and Sharachchandra Lélé, 'Supreme Court and India's Forests' (2008) 43(5) *Economic and Political Weekly* 11.

<sup>8</sup> See Supreme Court of India, order dated 9 May 2002 in Writ Petitions (Civil) Nos 202/95 and 171/96 <[http://www.doccentre.org/docsweb/RWH-dw/cec\\_main.htm](http://www.doccentre.org/docsweb/RWH-dw/cec_main.htm)>.

<sup>9</sup> For a summary of the CEC's activities, and its finding in this and some related matters, see Central Empowered Committee, Report (Final) of the CEC regarding the Mining Leases Surveyed by the Joint Team in Districts Bellary Chitradurga and Tumkur and Related Issues (20 February 2012) <<http://www.indiaenvironmentportal.org.in/files/file/CEC%20report%20on%20mining%20Feb%202012.pdf>>.

distinguished from legal mining and stopped. Mining in Bellary would stop for two years before the Court began to lift the ban.<sup>10</sup>

This is obviously a dramatic order. Bellary's mining supports a multi-billion-dollar steel industry that relies on the local iron ore deposits. The order therefore reflects a far greater willingness to take strong action antipathetic to the foreign investment environment than many would expect from a Southern institution, or from a court. It is also an order that rests on a non-standard amount of judicially-driven investigative work, and this is highly significant for my argument.

A common concern is that litigation-based strategies in the South will be hampered by the relative inability of local actors to generate the sort of evidentiary record needed to mount a serious legal challenge to MNC activity. This is frequently a very real concern. But it is a concern about the difficulties of credible litigation in the context of resource imbalances and widespread poverty, and that is an issue that the Indian Supreme Court has been actively grappling with since the late 1970s. Its response is known as Public Interest Litigation or PIL. Although the precise features and concerns of the PIL model have evolved over the years,<sup>11</sup> some features have remained constant. The main constant across the decades has been that judges do whatever they decide is necessary to act on problems that they feel should be acted upon, including trying to remove whatever obstacles might otherwise prevent those whose rights have been violated from being able to vindicate them in court. Judges have taken active, innovative approaches to issues including standing, evidence, and remedies in order to compensate for the relative weakness of many potential Indian litigants. The commission device is an example of this, seeking to remove from the litigants what can be the heavy burden of investigating a complex issue, and proposing possible remedial action that a court might credibly order.

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<sup>10</sup> See *Samaj Parivartana Samudaya v State of Karnataka* (2012) 7 SCC 407; *Samaj Parivartana Samudaya v State of Karnataka* (2013) 8 SCC 154. See also, James Crabtree, 'India Partially Lifts Mining Ban', *Financial Times* (online), 18 April 2013 <<https://www.ft.com/content/d0ea5fe8-a829-11e2-8e5d-00144feabdc0>>.

<sup>11</sup> Important recent efforts to give a sense of the PIL model, including its horizontal evolution, include Anuj Bhunia, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press, 2017); Arun K Thiruvengadam, 'Swallowing a Bitter PIL? Reflections on Progressive Strategies for Public Interest Litigation in India' in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts in Brazil, India and South Africa* (Pretoria University Law Press, 2013) 519; Surya Deva, 'Public Interest Litigation in India: A Critical Review' (2009) 28 *Civil Justice Quarterly* 19; Lavanya Rajamani, 'Public Interest Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 *Journal of Environmental Law* 293.

In other words, the fact that local inhabitants or NGOs or law firms may not be well-resourced does not necessarily make Southern judicial strategies a long shot — at least to the extent that Southern judges are able and willing to take the burden off litigants in the kinds of ways envisaged by the Indian PIL model. It also becomes harder for MNCs to simply out-spend local actors if a court is taking over many of the burdens of the case (with many of the costs, such as the costs of commissions' work, usually being passed on to the government).

In addition, PIL-type strategies can also have a force-multiplier effect on the actions of Southern NGOs and social movements — and, by the same token, on the contributions of their Northern supporters. To be sure, the idea that PIL can turn one poor person's handwritten plea into a mass litigation has mostly been a myth, and perhaps especially so in recent decades. In practice, an effective PIL on a large-scale issue often requires real legal resources, mobilised social action, and so on.<sup>12</sup> PIL's real significance, especially in its more recent instantiations, is not so much about *removing* the need for local actors to have money and skills and social power. It is about *leveraging* what they have, so that a relatively modest contribution by petitioners can be turned, by judicial effort, into a full-scale credible judicial engagement with the problem. It is in this sense that PIL techniques can be a force-multiplier. If they are in use, the resources needed to get over the threshold of what is required for effective litigation will be much fewer than they would need to be if the judiciary adopted a less active role. A small local effort can go a lot further. And this means that a Northern NGO, understandably reluctant to commit the kind of resources necessary to bear all the costs of a litigation, may be able to re-do its calculations. A much smaller investment of skills or money may be sufficient to start a judicial action that will largely run and pay for itself. Southern litigation can be a very different strategic prospect to the extent that PIL-type strategies are in operation.

### **B Mining in the Niyamgiri Hills**

The other Indian example I will consider here concerns mining in the north-eastern Indian state of Odisha, in another forested area known as the Niyamgiri Hills. I focus on an episode involving the local subsidiaries and Odisha state government partners of Vedanta Resources, a company listed on

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<sup>12</sup> I discuss this issue and the available evidence in James Fowkes, 'How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL' (2011) 27 *South African Journal on Human Rights* 434, 438–9, 442–3.

the London Stock Exchange with interests in metals, gas, oil and power on four continents and current annual revenue of around US \$11 billion.<sup>13</sup>

In 2004, Vedanta was granted a licence to mine bauxite in the Niyamgiri Hills as part of the Odisha state government's efforts to attract foreign investment. The area, in addition to being environmentally sensitive, is the historic and spiritual home of an indigenous group, the Dongria Kondh. Several public interest petitions were filed about the issue, and as a result the Supreme Court and its Central Empowered Committee become involved in this issue as they had in the *Bellary* case. Indeed, the Court became involved at what elsewhere might seem an unusually early stage in a mining application: witness the somewhat grumpy observation in a submission by the Attorney-General of India that 'Vedanta was seeking clearance from the Court even before its proposal was placed before the Central Government'.<sup>14</sup>

In a 2007 judgment, the Supreme Court gave pride of place to the principle of Free Prior and Informed Consent (FPIC) and ruled that the project could not go ahead without the local community's agreement. It also, however, suggested that the project could be approved with greater safeguards and, in August 2008, it gave clearance to a Vedanta proposal revised along these lines. The Ministry of Environment and Forests and the Attorney-General, however, declined to adopt the Supreme Court's decision as their own and continued with their investigations. As a result of appeals by Vedanta against adverse decisions in these processes, and amidst continuing community concerns and protests, the issue returned to the Supreme Court. The Court took note of fresh evidence of environmental violations, but its most decisive finding was that the issue of tribal religious interests in the area should be

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<sup>13</sup> Vedanta is not, however, the only actor with operations or troubles in the area; the South Korean multinational steel-maker Posco, for example, has been involved in a related saga nearby. See, eg, Dillip Satapathy, 'Posco Closes Last Chapter in Odisha Project', *Business Standard* (online), 18 March 2017 <[https://www.business-standard.com/article/companies/posco-closes-last-chapter-in-odisha-project-117031700810\\_1.html](https://www.business-standard.com/article/companies/posco-closes-last-chapter-in-odisha-project-117031700810_1.html)>; Sandeep Sahu, 'Why Green Nod to Odisha Project May Not Be End of Posco's Troubles', *First Post* (online), 21 December 2014 <<https://www.firstpost.com/business/why-green-nod-to-odisha-project-may-not-be-end-of-poscos-troubles-1336447.html>>. Vedanta itself is also in difficulties elsewhere. On the ongoing controversies around its iron ore mining in Goa, see, eg, Raman Kirpal, 'Yeddy, Reddy, Kamat? Goa's Rs 800 cr Mining Scam Is Next', *First Post* (online), 18 Oct 2011 <<https://www.firstpost.com/politics/yeddy-reddy-kamat-goas-rs-800-cr-mining-scam-is-next-76286.html>>.

<sup>14</sup> Letter from Office of Shri Goolam E Vahanvati, Attorney-General for India, 20 July 2010, <<http://www.moef.nic.in/sites/default/files/attorney-general-of-india20072010-1.pdf>>. I am referred to this letter by Leena Ajit Kaushal, 'A Case Study on Vedanta Alumina Ltd (VAL) Orissa India: State and FDI versus Democracy?' (2017) 8(1) *Valahian Journal of Economic Studies* 107, 110, also summarising some of these events.

referred back to the Gram Sabha. This is the lowest level of India's government, made up of village-level bodies comprising every local resident over the age of 18. Gram Sabha meetings in the affected areas rejected the project in light of the religious and other interests of the local community in the Niyamgiri Hills, and the Supreme Court turned down Vedanta's challenge to the Gram Sabha's decision in May 2016.<sup>15</sup>

The case is a useful supplement to the *Bellary* case because of the greater role of other government actors. The jurisdictional tangle in the case (whose full complexities I have not set out here) is a testament to what happens when the Supreme Court acts with the intention of managing the issue itself, as it did to a greater degree in the *Bellary* case, but where other government actors also continue to pursue processes of their own. The Court's ultimate decision also rests very heavily on traditional sources of government policy, as opposed to the *Bellary* decision's reliance on the CEC's findings. The 2013 judgment is based on the requirements of national legislation, especially the *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, passed in 2006, and associated government policy documents and regulations.

The *Vedanta* case should therefore temper one of the concerns that naturally arise from the sort of sweeping judicial action illustrated by the *Bellary* case, namely that this is reckless judicial unilateralism. It is quite true that PIL invests judges with a lot of discretion, and that some judges can exercise this discretion heedless of justified objections, pursuing agendas of their own, breaking free of important procedural and other constraints on judicial behaviour, and making mistakes of all kinds while wasting time and money.<sup>16</sup> This is no way to conduct good regulation of MNC activities or anything else, and any fair assessment of PIL's ability to contribute to MNC regulation has to take account of this risk. But the *Vedanta* case shows that the judicial role in PIL often demands more nuanced assessment. It may be, but by no means necessarily has to be, a unilateral exercise in which judges try to design policies out of whole cloth, with or without the assistance of experts, via the commission device. It sometimes is that, and often struggles when it is, though sometimes there is no better option. But PIL is much more obviously an exercise in claiming *ultimate* constitutional authority than it is about

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<sup>15</sup> The key judgment is *Orissa Mining Corporation Ltd v Ministry of Environment and Forests* (2013) 6 SCC 476, which also summarises the earlier developments in the case. The Business and Human Rights Resource Centre has a useful chronology of the main events, <<https://www.business-humanrights.org/en/vedanta-resources-lawsuit-re-dongria-kondh-in-orissa>>.

<sup>16</sup> See above n 11.

insisting on *exclusive* authority. As a recent study of the Indian judiciary's role in the telecommunications sector observes:

[T]he Supreme Court of India has been extremely aggressive in claiming the final word on legal and constitutional matters. However ... [it] has been less interested in stamping its own authority on issues, and has instead sought to bolster the authority and legitimacy of the telecom regulatory institutions.<sup>17</sup>

Later in this article, when discussing the Colombian Constitutional Court, I will pay more explicit attention to this master move to make the constitution the ultimate authority on all issues, and thus to make the court of highest constitutional jurisdiction the ultimate authority on all issues. The point here is about the nuanced role the Indian Court is playing. We need to see beyond a view in which the *Bellary* case is merely about risky judicial recklessness and the *Vedanta* case is merely about the government re-asserting itself so that things return to a more traditional pattern of judicial deference. The *Vedanta* case is not, as it may seem, about the court (ultimately) settling down again to the obedient implementation of statutes.

Instead, the Supreme Court in *Vedanta* is potentially just as willing to do and decide things itself as it was in the *Bellary* matter. This is the import of its 2008 and 2009 decisions, where it intervened strongly as a manager of the issue. We can imagine a *Vedanta* counterfactual in which other government actors had been less active in response and so the case would have stayed under judicial management as happened in the *Bellary* example. But instead, here, the government was more active. And instead of this leading the Supreme Court to retreat from non-traditional boldness to traditional deference, we should instead understand this as a situation where a court has the same view of its own ultimate managerial responsibility but simply has more, and more useful, government activity to draw on in discharging it.

That the Court in *Vedanta* is not just passively implementing government statutes can be seen in the free discretion it exercises throughout. For instance, a more formalist court might well have held that the legal concerns being raised in 2013 had already been ruled on in 2008 and 2009 when the court approved the project. It might therefore have declined to re-open the issues in 2013 on grounds of *res judicata*. A more formalist court might also have ruled that the requirements of the 2006 Act, central to the crucial decision to refer

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<sup>17</sup> Arun K Thiruvengadam and Piyush Joshi, 'Judiciaries as Crucial Actors in Southern Regulatory Systems: A Case Study of Indian Telecom Regulation' (2012) 6 *Regulation and Governance* 327, 340.

questions back to the Gram Sabha, could not apply retrospectively to a licence application process that had begun in 2004. But, instead, the Court understood itself to have the same ongoing responsibility to find a general solution to the problem that it exercised in *Bellary*, and so it found it natural to take up the evolving issue again in 2013. It is just that it then had to do less of the entailed policy work itself, because the government here had done more.

This affects how we understand Southern institutional dynamics. It is a further illustration of the greater centrality that courts can assume even in contexts where Southern government officials are far from inactive themselves. (Thus a widespread pattern of weak government can give rise to a system where a court of established broad authority stays unusually active even in cases where the government has not acted weakly).

But it also illustrates another opportunity for Northern action, and for leveraging limited or imperfect efforts. One of the old concerns about activities in Southern contexts is that it is much easier for Northern actors to help design cutting-edge policy frameworks and shiny, new legislation than to get the results implemented. One of the familiar fears, therefore, is that this policy- and legislation-drafting work might be wasted effort, or even actively negative if it serves to give cover to government inaction or malfeasance. What the *Vedanta* case shows is how a PIL-type court stands ready to use whatever supports are available. It can try to fill in policy voids itself where it has to. But PIL often works best as a mechanism for getting pre-existing statutes and other policy frameworks implemented, filling in only smaller gaps.<sup>18</sup>

From the perspective of Northern or Southern actors, this means that contributions that might be stillborn on their own can take on a new significance, and a potential second life, as supports of judicial action. Even absent any government implementation or enactment at all, a new policy instrument may serve as a source of policy ideas and as fuel for judicial action. Enactment will make it more useful still, even if the government's motives are purely cosmetic and no steps towards meaningful implementation are taken — because it can be very effective, both practically and politically, for judges to be able to present themselves as assisting to enforce a government's own policies. And whatever genuine efforts at government implementation are forthcoming, or can be induced, can similarly be built on. Pessimism on that score is not always justified: witness the contrasting actions of the state and national governments in the *Vedanta* case, with only the state

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<sup>18</sup> Fowkes, above n 12, 446; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008) 141.

government conforming to the negative stereotype. But even where pessimism *is* justified, the judicial possibilities mean that the fate of the whole effort does not stand or fall on what Southern political leaders choose to do. This is not a decisive reason to avoid Southern policy efforts and to focus instead of Northern channels. Since a PIL court can potentially get mileage from a whole range of imperfect efforts, supporters can justifiably be less risk-averse when deciding whether to start engaging in that work.

### III INDIGENOUS COMMUNITY RIGHTS IN THE AFRICAN REGIONAL SYSTEM

The arguments just made naturally have diminishing returns in systems with weaker or more deferential courts. The Indian Supreme Court is unusually powerful and pursues an unusually independent agenda. However, regional systems have some ability to play the same role, even where the odds seemed to be stacked against them in ways that cause many commentators to dismiss their significance. This can be illustrated by two cases from the African human rights system concerning the impact of commercial activity on indigenous communities.

The African continent-wide justice system enforces, among other things, the African Charter on Human and People's Rights and other international rights instruments ratified by the African states parties. In 2010, the African Commission on Human and People's Rights delivered its verdict on a case concerning the Endorois, a tribal community evicted from their ancestral land in the 1970s by the Kenyan government to make way for ruby mining and tourist development.<sup>19</sup> In 2017, the African Court on Human and People's Rights (which, unlike the Commission, has the power to make binding orders) ruled on a case concerning another tribal group in Kenya, the Ogiek, who had been fighting eviction orders from their ancestral land issued in 2009.<sup>20</sup>

In each case, the Kenyan domestic courts had not provided an effective remedy. The Endorois had litigated in 1998 and 2000 in the Nakuru High Court and had the case dismissed both times.<sup>21</sup> In the Ogiek matter, several cases had been filed and some were still pending, but had been subject to

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<sup>19</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya (Comm 276/03) (African Commission on Human and Peoples' Rights, 2009) 59 <<http://www.achpr.org/communications/decision/276.03/>>.

<sup>20</sup> *African Commission on Human and Peoples' Rights v Kenya* (2017) Application No 006/2012, African Court of Human and Peoples' Rights.

<sup>21</sup> Centre for Minority Rights Development, above n 19, 59.

extraordinary delays (10–17 years), apparently chiefly due to government stalling tactics.<sup>22</sup> In each case, the African regional system proved willing to act instead. The Endorois decision was the first in the world to be based on the right to development (along with other rights). The Ogiek decision was the first in Africa to be based in part on the rights of indigenous groups to land, culture and religion, free disposal of wealth and natural resources, and economic, social and cultural development. In legal terms, both represent sweeping victories for the indigenous groups concerned.<sup>23</sup> Their legal findings are also of great significance in an African context where many states have weak records on the issue, including states with good governance records in other respects, such as Botswana.<sup>24</sup> The Endorois and Ogiek decisions, and their sweeping legal findings, appear to be signs of intent on the part of the regional human rights system to play a stronger role in this area.

Of course, implementation concerns can loom particularly large in such cases. The government of Kenya ostensibly welcomed the Endorois decision at the time but thereafter pursued delaying tactics. This led to the African Commission's first ever resolution against a state party for non-implementation of a Commission decision, issued in November 2013, and the formation of a Task Force by the Kenyan government in October 2014. That too stalled, and Kenya was criticised by UN bodies in 2016 and 2017 for its failure to give effect to the decision. A memorandum was then signed with the Kenyan Wildlife service recognising Endorois rights, and there matters

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<sup>22</sup> *African Commission v Kenya*, above n 20, 93–6.

<sup>23</sup> For commentary, see Elizabeth Ashamu, 'Centre for Minority Rights Development (Keyna) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: A Landmark Decision from the African Commission' (2011) 55 *Journal of African Law* 300; Wilmien Wicomb and Henk Smith, 'Customary Communities as 'Peoples' and Their Customary Tenure as 'Culture': What We Can Do with the Endorois Decision' (2011) 11 *African Human Rights Law Journal* 422; Gabrielle Lynch, 'Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois' (2012) 111 *African Affairs* 24; Ricarda Rösch, 'Indigenusness and Peoples' Rights in the African Human Rights System: Situating the Ogiek Judgment of the African Court of Human and Peoples' Rights' (2017) 50 *Verfassung und Recht in Übersee* 242; Lucy Claridge, 'Litigation as a Tool for Community Empowerment: The Case of Kenya's Ogiek' [2018] *Erasmus Law Review* 57.

<sup>24</sup> On which see, eg, James Anaya, *Report of the Special Rapporteur on the Situation and Human Rights of Indigenous Peoples, Addendum: The Situation of Indigenous Peoples in Botswana* UN Doc A/HRC/15/37/Add.2 (2 June 2010); Amelia Cook and Jeremy Sarkin, 'Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development' (2010) 19 *Transnational Law and Contemporary Problems* 453, 455; Jacqueline S Solway, 'Navigating the "Neutral" State: "Minority" Rights in Botswana' (2002) 28 *Journal of Southern African Studies* 711.

currently stand.<sup>25</sup> The government of Kenya has also (and much more quickly) appointed a Task Force to implement the Ogiek ruling, albeit in the face of concerns that the Ogiek community was not consulted and the Task Force does not include any Ogiek members.<sup>26</sup> It remains otherwise too early to assess implementation efforts on the 2017 Ogiek ruling, although the Endorois' story does not inspire confidence.

As a more general matter, it is also clear that the African regional judicial system is not yet nearly as powerful as its counterparts in the European and the Inter-American regional systems. The development of both those systems strongly suggest that the power of regional judicial systems has much to do with the willingness and ability of national courts in the countries concerned to absorb the rulings and enforce them on the domestic plane. The African system, for the most part, awaits comparable developments. It will not do, then, to get too starry-eyed about these decisions. But this should not lead us to dismiss their significance, or the significance of these judicial institutions in our assessment of the regulation of corporate supply chains. Our calculations will go awry if they use outdated views about the passivity of the African regional system, based on the world of two decades ago, when only the Commission existed and when it was, in addition, much less assertive. They will also go awry if they simply do not take account of the African regional system at all on grounds of general Afro-pessimism.

For one thing, we should use a realistic yardstick to assess these African cases, which invariably take time and encounter implementation difficulties. Even in the context of a much stronger and more established judicial institution, the Indian case of the Dongria Kondh in the Niyamgiri Hills produced an extended saga running over 12 years. We should not, therefore, write off the Endorois and Ogiek cases as failures merely because their implementation has been protracted.

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<sup>25</sup> ESCR-Net, 'First Meeting of the Kenyan Task Force for the Implementation of the Endorois Decision' (24 November 2014) <<https://www.escr-net.org/news/2014/first-meeting-kenyan-task-force-implementation-endorois-decision>>; Minority Rights Group International, 'Kenya: Protecting the Endorois' Right to Land' (13 November 2016) <<http://minorityrights.org/law-and-legal-cases/centre-for-minority-rights-development-minority-rights-group-international-and-endorois-welfare-council-on-behalf-of-the-endorois-community-v-kenya-the-endorois-case/>>.

<sup>26</sup> Minority Rights Group International, 'Kenyan Government Task Force to Implement African Court's Ogiek Judgment Deeply Flawed, MRG and OPDP say' (Press Release, 13 November 2017) <<http://minorityrights.org/2017/11/13/kenyan-government-task-force-implement-african-courts-ogiek-judgment-deeply-flawed-mrg-opdp-say/>>; Eric Matara, 'Ogiek Reject Land Rights Implementation Team', *Daily Nation* (online), 27 March 2018 <<https://www.pressreader.com/kenya/daily-nation-kenya/20180327/281715500164832>>.

For another, even if their implementation were to continue to be defective, decisions like these are potential examples of how imperfect developments in one context can serve to support actions by other interested parties. From the perspective of standard Northern enforcement strategies, their chief significance may be that they set a progressive Southern standard — in the case of the *Endorois* decision, a world first. Northern actors are now able to invoke that standard, something of particular value in a general context where Northern colonialism has much to answer for and Northern actors can have a credibility problem as a result. Holding African countries to African standards can be a different political game, just as a court holding a government to its own standards can be. Additionally, from the perspective of both Northern and Southern actors, the *Ogiek* and *Endorois* cases are points on a trend line, showing how civil society bodies are increasingly making strategic use of litigation in the African system. The enforcement difficulties, therefore, should not lead us either to conclude that these cases will prove useless to the communities concerned, or to miss the significance of the trend they represent for regulating MNC supply chains rooted in African contexts.

#### **IV THE CONSTITUTIONAL REGULATORY STATE: COLOMBIA**

We could easily continue the list of Southern cases, but it is also valuable to get a sense of the master doctrinal argument that increasingly underpins this activity. The argument in question is by no means a uniquely Southern argument, but it has found powerful expression there, and nowhere more so than in the Constitutional Court created by the 1991 Colombian Constitution.

When thinking about courts in the context of regulation it is conventional to see the judiciary as only a partial check on the activities of regulators. The core of regulatory activity, on this view, happens outside the courts in government departments and legislatures. It is in these locations that the question, ‘How should we regulate issue X?’ is asked and, at least in principle, answered. The judiciary’s role is subsidiary. Judges fill in gaps in the regulatory regime as and when individual cases reveal them, tempering harsh consequences, and constraining regulatory activity in the partial, often procedural, ways that lie at the heart of all systems of administrative law. This traditional conception is often expressed by the idea that courts must begin by disclaiming any power to decide on the best policy and only ask, for example, whether the government’s policy choice is rational.

Just as PIL breaks with traditional models of litigation, so Colombian developments are a challenge to this traditional understanding of the position

of courts in the regulatory state. Since local regulatory activity has obvious and enormous implications for MNC activity, so does this shift, and thinking about regulation in the Global South needs to take account of it.

### **A      *The Constitutional Regulatory State***

The Colombian Constitutional Court has articulated the master teleological move in a way that, in the Indian context discussed above, often stays implicit or is expressed merely rhetorically. It is a simple enough argument to state (and is not unique to Colombia, although the sheer extent of its application there might be).<sup>27</sup> Constitutions are sometimes thought of as a limited set of basic rules and rights-based checks on power. If this view is accepted, then constitutional review is a partial matter, about a limited set of concerns. But more modern ideas often conceive of the constitution as the all-encompassing blueprint for all public activity. Constitutional rights and values are a statement of state's entire basic normative framework, rather than a more limited catalogue of certain important things. As a result, in principle, anything in such a state can and should be framed in constitutional terms. The ultimate measure of anything is whether it fits the constitutional framework; the ultimate purpose, a constitutional one. So goes the new master argument.

This has enormous implications for courts. It means, for instance, that the judicial role is not merely to safeguard certain key rules from violation, but to do whatever is necessary to give effect to the constitution. That does, of course, include responding to negative violations, but it also means working more actively to promote constitutional goals. Or, as the Constitutional Court of Colombia put it in a key early decision:

In the legal system of the social state of law, we are dramatically confronted with the problem of the necessity of adapting, correcting and conditioning the application of law by means of judicial intervention. But this *intervention is not only manifest as a necessary mechanism to solve a dysfunction, but also, and above all, as an indispensable element to improve*

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<sup>27</sup> The roots of the argument are above all German, and in the Global South it is probably most commonly if rather loosely associated with the term 'transformative constitutionalism', originally developed, with somewhat different goals, in the context of post-apartheid South African system. See further Hailbronner, above n 2; Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; Armin von Bogdandy et al (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press, 2017); Vilhena, Baxi and Viljoen, above n 11.

*the conditions of communication between law and society*, in other words, to favour the achievement of justice.<sup>28</sup>

This broad constitutional view also means that judges' duty to give effect to the constitutional purposes of the state is the same whether or not other branches of government have first given detailed effect to them in legal frameworks or through other action. Under the new master argument, legal gaps or omissions by other branches are no excuse. If detailed rules exist, the judge must check them against basic constitutional principles and re-interpret or invalidate them as necessary. If detailed rules do not exist, the judge must develop her own way to ensure that effect is given to the constitutional principles. The Colombian Court in 1992 foresaw this need arising often because of the complexity of the modern state and also because a weak legislature would have difficulty checking a very powerful executive branch:

The increase in the factual and legal complexity of the contemporary state has brought as a consequence a decrease in the regulatory capacity of general and abstract norms. In these circumstances the legal text loses its traditional predominant position, and principles and judicial decisions, previously considered secondary sources within the normative system, acquire exceptional importance. This redistribution occurs, above all, for functional reasons: since the law can no longer determine all of the possible solutions through legal texts, one needs teleological criteria (principles) and instruments of a concrete solution (judges) to achieve better communication with society.<sup>29</sup>

The Court then refers to the positive duty to give effect to values and continues:

But this is not the only reason explaining this change ... The difficulties derived from the unchecked growth of executive power in the interventionist state and of the loss of political leadership of the legislative organ, must be compensated, in constitutional democracy, by the strengthening of the judicial power ... Only in this manner can a true equilibrium and collaboration between the powers be achieved; otherwise, the executive power will predominate.<sup>30</sup>

This sort of move has great normative implications for regulation, our concern here. By way of illustration, consider the Court's starting point in a 2003

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<sup>28</sup> *Decision T-406 of 1992*, as excerpted and translated in Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (Oxford University Press, 2017) 28 (emphasis in original).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* See further especially Landau, above n 3.

decision on water rights. Here the Court referred to the concept of '*Estado Social de Derecho*', the first concept mentioned by the 1991 Constitution, which is usually translated as a 'social state of law', referring to a social democratic state grounded on the rule of law.<sup>31</sup> (Those familiar with German doctrines can also think, roughly, of a combination of the *Sozialstaat* and *Rechtsstaat* principles). The Colombian court made this the basis of a first-principle statement of why all regulatory activity, concerning water or anything else, is constitutional activity in the service of this conception of the state:

Regulatory agencies have to exercise their competences aiming to achieve the goals that justify their existence in a market within a democratic and social state grounded on the rule of law (*Estado Social de Derecho*) ... Regulation, as a mechanism of State intervention, seeks to guarantee the effectiveness of social principles and the adequate operation of the market.<sup>32</sup>

In other words, both the free market and regulatory intervention in that market must be justified in terms of their ability to achieve the kind of state envisaged by the constitution, and it is in these big-picture terms that the court must approach regulatory issues. Matters that might traditionally be thought to lie within the competence of engineers or economists, and not judges, are thus swept into the legal discussion. All these issues are part of an overarching constitutional enquiry into what sort of water system best achieves the goals of the constitutional state. Or, as René Urueña puts the point:

The resulting landscape is not just two parallel institutions (the Court and regulatory agencies) that either ignore or compete with each other. Instead, the constitutional regulatory state is the result of the interaction between the neoliberal mind-set of the independent agency, and the human rights rationale of the Constitutional Court.<sup>33</sup>

Thus all concerns, including traditionally non-legal or non-justiciable ones, are relevant to the master constitutional question: has the proper balance been struck between the practical business of organising water supplies and the social justice concerns of adequate access to water for all? And because it is a constitutional question, it is one that, in its entirety, is a question for judges to answer. It is in this context that the Court has effectively created a right to

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<sup>31</sup> *Constitution of Colombia (1991)*, Art 1: 'Colombia es un Estado social de derecho...' (Colombia is a social state of law...).

<sup>32</sup> *Decision C-150 of 2003*, quoted in and translated by Rene Urueña, 'The Rise of the Constitutional Regulatory State in Colombia: The Case of Water Governance' (2012) 6 *Regulation and Governance* 282, 291.

<sup>33</sup> *Ibid* 294.

water in its case law, despite there not being an express right to water in the constitutional text. Judges will also have ultimate jurisdiction to decide whether the proper balance has been struck, for example, between using profit-driven market mechanisms to achieve water supply and the social justice imperative to ensure access to water for all. Hence the Court's basis for ruling, for example, that water companies may not disconnect the water supply of poor users even if these users do not pay their bills.<sup>34</sup>

This argument does not necessarily lead to judicial expansionism in general or on any given issue. It can represent merely a legal re-framing that transfers no real power from more traditional regulatory institutions to the court. The court might announce the grand constitutional narrative, claim all-encompassing jurisdiction, and then conduct a deferential review that basically accepts the government's version. If so, MNC regulatory activity might find itself often in court, but the decisions that matter will still be made elsewhere.

But jurisdiction is latent power, and even very deferential exercises of it can serve to normalise it. And the more the power is acted upon, as it is in Colombia, the more regulatory decisions will be uncertain until they have been judicially reviewed, and the more judicial review will matter for anyone relying on or seeking to affect regulatory outcomes. The Indian examples already discussed illustrate where this sort of argument can lead when judges actually act to cash it out thoroughly: how it can lead to the judicial management of whole issues like forests, to the degree that companies seeking licences start with the court, and how it can mean that courts are routinely engaging with the all-things-considered question of what regulatory approach is best in all its breadth and complexity, which more traditional approaches would treat as a matter for other branches of government.<sup>35</sup>

In the Colombian context, the potential of this expansive logic to impact on commercial activities is probably best illustrated by in an area where many would not expect courts to act at all, let alone so expansively – financial policy.

During the financial crisis of the late 1990s, rising interest rates had devastating effects on the home mortgages of many Colombians who had borrowed under the state system, UPAC, and who found their interest rates

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<sup>34</sup> The decision referred to is *T-546 of 2009*. On the Court's approach to water rights in general, see Cepeda Espinosa and Landau, above n 28, 204–12.

<sup>35</sup> For an effort to articulate some the broader ideas behind the Indian Supreme Court's rise, see Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 *Washington University Global Studies Law Review* 1.

growing much faster than the rate of inflation. About 100 000 homeowners were under threat of foreclosure. The Court intervened in a series of decisions, drawing especially on the constitutional right to housing and ideas of the proper constitutional relationship between the president, legislature, and the Central Bank. The resulting pattern is complex, and includes deference to both the legislature and the Bank on some issues, but it also includes strikingly bold judicial findings on matters of policy. In 1999, the Court ruled that, under the right to dignified housing in article 51 of the Constitution, certain arrangements for the capitalisation of interest would be unconstitutional in home mortgages: mortgages could not be structured so that home owners paid less than the interest due in a given month, with the unpaid interest adding to the principal. Two judges dissented on the basis of research by economists suggesting that the Court's ruling might actually hurt home-owners. The following year, in its final judgment in the series, the Court ruled that interest could be charged on home mortgages only at a rate below the lowest level being charged elsewhere in the economy.<sup>36</sup> These were probably the two most expansive findings in a complex action that, as noted, also includes patterns of deference and more traditional kinds of ruling on the separation of powers. But they illustrate how areas of great commercial significance — usually seen as well beyond the purview of courts — are readily made subject to judicial review if judges so decide, once the master constitutional narrative is in operation.

## ***B The Unconstitutional State of Affairs***

The Colombian example is, lastly, notable for a constitutional doctrine that can be understood as a special sub-set of the general master argument just discussed. It is more rarely invoked, and so, despite its headline-grabbing nature, is less likely to impact MNC activity directly than the more general teleological argument. But it is nevertheless a striking datum to add to the picture of Southern judicial developments. The doctrine concerns the problem of institutional failure.

Every institution works imperfectly, but sometimes the problem ceases to be about a certain number of errors made by a broadly functioning institution and becomes one of systematic dysfunction. In these cases, the more traditional sorts of individual remedies will usually offer little or no relief. A finding of procedural unfairness, for example, often just sends the affected individual back to the same institution for a re-hearing. That is probably useful if the

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<sup>36</sup> Cepeda Espinosa and Landau, above n 28, 154–9.

institution has made a mistake and probably useless if the institution is broken.

In response to such situations, the Colombian Constitutional Court has developed the doctrine of a state of ‘unconstitutional affairs’, or ‘unconstitutional conditions’.<sup>37</sup> This is a doctrine about broad persistent failures to react to large-scale violations of the rights of whole categories of people. It is rarely invoked — only nine times in the twenty years since its inception in 1997. The most famous early case concerned the problem of persons displaced by Colombia’s internal violence, who had mostly fled from the countryside to cities. Although a statute provided a framework for responding to their situation, implementation was very limited, in part because many agencies had partial responsibility and there was no co-ordinated response. Describing this as an unconstitutional state of affairs, the Court took over the issue in an intervention that had much to do with trying to get the necessary administrative mechanisms and procedures established within the government.<sup>38</sup>

It would take a very serious MNC breach, affecting a large group of people and attracting an unusually defective government response, for the actions of an MNC to be at the centre of an unconstitutional state of affairs. Examples of such a breach are not, of course, impossible to imagine. We might profitably wonder, for instance, what the judicial response to the Bhopal disaster and its defective aftermath might have been had it occurred later in Indian PIL’s development, or had it occurred in today’s Colombia. Examples like that are, fortunately, extraordinary. But we can readily imagine situations where a government structurally fails to respond to MNC breaches across a particular sector with widespread effects, attracting judicial management in response. If mining in India’s forests had produced a pattern of national government action closer to the passive, complicit or corrupt behaviour of some of the state governments, we might well be able to frame the issue plausibly as a state of unconstitutional affairs, with massive implications for MNC extraction of raw materials from India. The doctrine of unconstitutional affairs is therefore worth building into our understanding of what Southern judicial review could entail for MNC activity.

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<sup>37</sup> See *ibid* 13–14, 179.

<sup>38</sup> The decision, *T-25 of 2004* (Constitutional Court of Colombia), is usually referred to as the ‘Displaced Persons case’. See Cepeda Espinosa and Landau, *above* n 28, 178–90; Landau, *above* n 3, 359–62.

## V THE NEXT STEP: NORTH-SOUTH CO-ORDINATION

The main conclusions of this article — that certain Southern judicial developments merit greater attention in our thinking about the regulation of corporate supply chains, and that their presence should prompt some re-thinking — do not, by now, need re-stating. Instead, in conclusion I want to highlight certain areas where there is potential for a useful North-South dialogue on the issues raised, with the ultimate intent of further breaking down the significance of the North-South divide. While there is doubtless more room for the co-ordination of activities between North and South, there is already quite considerable co-operation in this regard. My suggestions here, accordingly, are about the co-ordination of ideas.

Consider, for example, the idea of the social licence to operate (SLO), which has assumed prominence in discussions of corporate social responsibility.<sup>39</sup> It offers both a useful organising principle for relations between a company and the various local stakeholders affected by its business activity, and a practical way to express the business case for good local relations. Like many discussion of this sort, the SLO debate is usually framed in terms of Northern law and institutions. But consider the obvious resonance that it has for the examples considered in this paper from India and Africa. The courts we discussed are effectively engaged in an effort to stipulate the conditions under which commercial activity may occur in their legal systems. They do not, however, draw on the SLO conception in doing so, and so the potential for useful learning here runs in both directions.

Southern legal thinking of the kind considered in this paper might draw from the SLO concept because of the way it emphasises the ongoing nature of a company's relationships with stakeholders. Free Prior and Informed Consent, as a formal concept, is a crucial but once-off checkpoint after which a project can proceed, whereas SLO is, in principle, something that can be lost at any time and must be continually renewed.<sup>40</sup> The Indian Supreme Court's 2007 decision in the *Vedanta* matter gives great weight to FPIC in relation to the local indigenous community, and it is a landmark judgment for that reason. But the Court's general attitude to the case, which also seemed to inform its

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<sup>39</sup> See, eg, Karin Buhmann, 'Public Regulators and CSR: The 'Social Licence to Operate' in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2016) 136 *Journal of Business Ethics* 699. For those unfamiliar with the term, the Social Licence to Operate refers to the ongoing acceptance in the eyes of stakeholders of the activities of a company or industry.

<sup>40</sup> See, eg, Jason Prno and D Scott Slocombe, 'Exploring the Origins of "Social License to Operate" in the Mining Sector: Perspectives from Governance and Sustainability Theories' (2012) 37 *Resources Policy* 346, 349.

later decisions on the matter in 2013 and 2016, is far more open-ended, involving ongoing evaluation of an evolving issue. The SLO conception is not normally applied to judicial activity, but then this sort of ongoing intervention is not normal judicial activity, at least as judged by traditional standards. The conception offers a powerful way to think about the Court's decision to refer decisions back to low-level local political structures, and to express what the judges seem mostly to have left implicit.

By the same token, Northern efforts to use the SLO concept to promote corporate accountability might well profit from drawing on this kind of Southern concretisation of the concept, where it exists. The idea that a company has lost its social licence to operate should be even more effective when this is an expression of hard-law Southern judicial attitudes and not merely a conceptualisation for Northern public relations. And, even in the absence of a binding judicial order in a particular case, the concept is likely to have more teeth the more it draws on Southern courts' own articulations of what it takes to obtain a social licence to operate in their society. The fate of an investment like Vedanta's also offers a cautionary tale — for both sides. When applied with binding legal force, SLO can make the investment environment uncertain, as any investment will be perennially subject to the discretion of a small group of judges. Its potential to discourage investment has to be considered alongside its potential to reform it.<sup>41</sup>

In the light of Southern judicial developments such as those discussed in this article, SLO seems to me a clear example of a North-South conversation begging to be had, but it is not the only one. The sort of big-picture constitutional reframing of public policy that we saw in the Colombian context is striking in itself. Its implications for corporate activity would be substantial even if they remained mostly indirect, arising due to the impacts of such reframing on state regulatory activity that in turn affects companies. But there is potential for far more than that. It is striking that, to my knowledge, this sort of master teleological argument has not been applied in the same sweeping way to company law itself, whether in Colombia or in other Southern jurisdictions that use such arguments. The basic case that incorporation serves public purposes is easy to make, and it is equally easy to

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<sup>41</sup> Reading Southern jurisdictions' interpretations into these standards can make them more meaningful, but it would add to the already looming compliance costs of companies if standards shift in response to multiple jurisdictions or law-givers that diverge from one another. On these issues in relation to European and German standards, see Ingo Saenger, 'Disclosure and Auditing of Corporate Responsibility Standards: The Impact of Directive 2014/95/EU on the German Companies Act and the German Corporate Governance Code' in Jean J du Plessis and Chee Keong Low (eds), *Corporate Governance Codes for the 21<sup>st</sup> Century: International Perspectives and Critical Analyses* (Springer, 2017) 261.

argue that those public purposes should be defined in constitutional terms. The basis for the constitutional re-thinking of company law itself is therefore latent in moves such as those the Colombian court has been making in the regulatory context, and in other systems that are similar in this respect. This remains, however, largely unexplored territory. It is a good bet that it will not remain so.

The arguments here are confined to a few hand-picked examples and doctrines, selected for argumentative effect. They are in some senses outliers. African regional examples remain quite limited, and both India and Colombia are at the extreme end of the Southern (or global) scale of judicial creativity and expansiveness. But they illustrate a judicialising trend that is often uncertain in individual cases but is becoming increasingly established as a global matter. This trend is part of what makes it more and more useless to generalise in pessimistic tones about the abilities of 'Southern' institutions to contribute to the regulation of MNCs. It is also why we are perhaps now as likely to find good new ideas for responding to this challenge in the South as in the North. The Southern trend, in itself, is no substitute for Northern activity, and it would not be a substitute even if it were uniformly established across Southern jurisdictions, which it assuredly is not. But it does mean that Northern activity, more than ever, can frame itself as a complement to Southern activity rather than a substitute for Southern inactivity, and our mental maps should be re-drawn accordingly.