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Getting to Yes: Lessons for a Transnational Activist — Protest, Challenge, and Features of the Transnational Legal Order

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Abstract

States rich in natural resources often have poor human rights records. Political scientists have labelled this correlation the “resource curse”. To address structural causes and the misappropriation of resources by the rulers of those countries, Leif Wenar proposes in his book, *Blood Oil*, the so-called Clean Trade Act. We draw on Wenar’s work to theorise how activists interested in bringing about these changes might utilize the existing features of international law to adopt Wenar’s proposals. Activists interested in taking up Wenar’s challenge to reform the ownership and distribution of global commodities would move beyond Wenar’s narrow public law framework, and study the myriad forms of regulation and interactions that define the contemporary transformation of political sovereignty and rule-making under the conditions of globalisation. It is not enough that Clean Trade Laws are passed in developed nations.

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Many petroleum rich states have abysmally poor human rights records, little or no popular sovereignty, and great inequality.¹ Teodoro Obiang, who has ruled Equatorial Guinea since 1979, is alleged to have amassed a fortune of 600 Million USD. His country, which touts the highest GDP per capita on the continent, nevertheless posts child mortality rates and life expectancies well-below the Africa average. The House of Saud claims the right to rule Saudi Arabia, and is recognized as the legitimate government, unchallenged by the international community, even as human rights violations continue against women and minorities. Exxon Mobil and its partner Australian oil companies have collaborated with local partners to exploit Papua New Guinea's petrochemical reserves, a country which suffers from endemic violence, rebellion in its oil producing regions, and poverty, even if it nominally remains a democracy. Nigeria, another nominal democracy, remains a country rife with corruption. A low-scale insurgency against a corrupt central government has continued in the Nigerian delta for many years, while Boko Haram has taken over large portions of the north. During his reign from 1993 to 1998, General Sani Abacha was accused of taking 2.2 Billion USD in state funds during his presidency, even as oil flowed from Nigeria to the global market through pipelines and refineries built in large part by Western companies. In Sudan, President Omar al-Bashir, in addition to being indicted for committing crimes against humanity in Darfur, has been accused by the ICC Prosecutor of taking 9 billion USD in oil revenues from state coffers.

It is against this background that Leif Wenar develops an argument for his proposed *Clean Trade Act* – a legislative mechanism that can be enacted in developed countries to prevent the unjust enrichment of despots in the developing world through the sale of developing countries' natural resources. In the first sections of *Blood Oil*, Leif Wenar surveys the legal regime governing the extraction and sale of natural resources in the developing world. He then argues that the exploitation of those resources often occurs under

conditions of profound injustice, rewarding those governments who seize power by force and lack democratic credentials. Wenar, using as a backdrop the violence brought about by resource exploitation in the developing world, proposes moving away from the doctrine of effective control of governments over territory as the defining criteria for the legitimacy of transactions to the doctrine of popular sovereignty. Wenar's attack centres on the disparity between the ownership of natural resources, which putatively under international law belongs to peoples,² and the exercise of the right to dispose of those resources, which under international law generally belongs to the government exercising effective control over the territory of the state, however that government arrived in power.³ Taking a novel approach, Wenar advocates for moving towards an approach, borrowed from private international law, which places public policy constraints on the acquisition of, transfer, and trade in foreign resource wealth as opposed, to a somewhat more conventional approach, of changing the public international law rules for the recognition of governments (e.g. to require that only governments of a democratic character be recognised for the purposes of disposing of a nation's resource wealth).

Wenar's proposal is that governments must not allow their nationals to trade in foreign resources unless four conditions in the country of origin are met.⁴ These are that the foreign populations whose resources are being sold must be able to consent to the transaction, by having appropriate information (1) to judge how resources are spent, that they be sufficiently independent (2) to have said to have been properly deliberated (3) on the distribution of that wealth, and that dissent (4) from proposed transactions be tolerated within

¹ Leif Wenar (2016) *Blood Oil: Tyrants, Violence, and the Rules that Run the World*. Oxford: OUP [hereinafter Wenar] provides citations to these statistics.

² ICCPR, 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967); Article 1, the ICESCR, 993 UNTS 3 / [1976] ATS 5 / 6 ILM 360 (1967); Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); "Recommendations concerning international respect for the rights of peoples and nations to self-determination," UNGA Resolution 1314 A/RES/1314(XIII) (1958).

³ Wenar, p. xiv.

⁴ We say governments, but the reality is that Wenar focusses his proposal towards the United States, perhaps because of its economic footprint.

civil society in those states.⁵ These four principles form the backbone of his proposed *Clean Trade Policy*, under which individual states would pass laws forbidding the trade in resources where the standards are not met.⁶ States that adopt such laws would also work with civil society organisations to develop clean trade standards, and policies that govern the trade in resources (including policies of verification – mirroring those that occurred during the Kimberley Process).

In our paper, we draw on the proposed changes in Section IV of Wenar’s book to theorise how activists interested in bringing about these changes might utilise the existing features of international law to adopt Wenar’s proposals. We begin with Jessup’s description of transnational law,⁷ as a description not of a particular legal field, but as a method of understanding the interaction of public, private, national and international legal regimes, and the process of norm creation and enforcement outside states.⁸ We argue that activists interested in taking up Wenar’s challenge to reform the ownership and distribution of global commodities would do to move beyond Wenar’s narrow public law framework, and study the myriad forms of regulation and interactions that define the contemporary transformation of political sovereignty and rule-making under the conditions of globalisation.⁹

Although Wenar borrows his proposed *Clean Trade Policy* from private law, our method aims to bring to light the public law assumptions of Wenar’s theory, which allows us to show that the proposed rules he develops are mired in a much more complex regulatory net than he himself assumes. Rather than understanding issues of social justice as governing relationships between

peoples and states,¹⁰ we argue that resource policy is embedded in transnational governance orders, in supply chains which mix regional and global markets, in transnational corporations that operate amongst multiple legal systems, and in a myriad of other structures in an internationally pluralist regime. Activists interested in bringing Wenar’s proposals to life would do well to adapt to the pluralism of contemporary international law. Only by effectively exploiting these structures could such a regime come into existence. It is not enough that Clean Trade Laws are passed in developed nations. These laws must be enforced not just by international organisations, but by transnational civil society, including transnational public spheres, public-private partnerships, and NGOs. In our paper, we draw on historic examples to flesh out the details of how this might work.

A Post-Westphalian World?

Wenar argues that the end of colonization played a key role with respect to the ability of states to dispose of their property. Decolonised people’s rights to dispose their natural wealth was affirmed by the two Covenants and several GA resolutions,¹¹ and has achieved the status of codified custom.¹² Nevertheless, the right to permanent sovereignty over natural resources does not mean that individuals or even peoples enjoy that right but rather that the right belongs to governments with effective control over the national territory.¹³ This is not a highly controversial proposition, as it flows from the idea

⁵ Wenar, pp. 227-228.

⁶ Wenar, p. 281 *et passim*.

⁷ Philip C. Jessup, *Transnational Law*, New Haven, Yale University Press, 1956.

⁸ Peer Zumbansen (2011) ‘Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism’, *Osgoode Hall Law School Comparative Research in Law and Political Economy*, Research Report No. 21: 5.

⁹ David Held and Anthony G. McGrew, David Goldblatt and Jonathan Perraton (1999), *Global Transformations: Politics, Economics, and Culture*, Stanford: SUP; Jeffrey Dunoff and Joel Trachtman. *Ruling the World?: Constitutionalism, International Law, and Global Governance*, Cambridge, CUP, 2009.

¹⁰ Peer Zumbansen, ‘Transnational Law, Evolving’, *Osgoode Hall Comparative Research in Law & Political Economy*, Research Report No. 27/2011; Gunther Teubner, editor. *Global Law without a State*. Dartmouth, Aldershot, 1997; Peer Zumbansen, ‘Law after the Welfare State’, *The American Journal of Comparative Law* 56 3 (2008), pp. 769–808; Helmut Willke, ‘Contingency and Necessity of the State’, in *Problems of Form*, edited by Dirk Baecker Stanford, Stanford University Press, 1999, pp. 142-54.

¹¹ Wenar, p. 190 Article 1, ICCPR, 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967); Article 1, the ICESCR, 993 UNTS 3 / [1976] ATS 5 / 6 ILM 360 (1967).

¹² Wenar, pp. 194-195; General Assembly Resolution 1803 (XVII), 1962; General Assembly Resolution 523 (VI), G.A. Res. 626 (VII), at 20, U.N. Doc. A/2332 (Dec. 21, 1952); G.A. Res. 837 (IX); U.N. Doc. A/2829 (Dec. 14, 1954); 11 G.A. Res. 1314 (XIII), U.N. Doc. A/4019 (Dec. 12, 1958). It is included in the constitutions of many states, including Angola, Vietnam, Equatorial Guinea, and Iraq.

¹³ Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, New York: Praeger, 1950, p. 52. Kelsen argues that peoples probably means states only.

that a government, having duly established a right to rule over its territory, can dispose of the natural wealth of a country. Moreover, it affirms the international law principle that other states should not interfere in the internal affairs of other states by setting conditions for which governments they will allow to engage in trade and commerce.

The problem with state control over natural resources is that leaders could abscond with the natural resource wealth of their nations. Wenar proposes so solve the problem by having Western states enact laws that would prevent nationals and corporations of democratic states from engaging in trade with nations that violate fundamental human rights. The proposal, which he terms the *Clean Trade Act*, would make popular sovereignty over natural resources a prerequisite for engaging in trade.¹⁴ Wenar's proposed *Act* would make it illegal to purchase resources from disqualified countries and impose penalties on individuals and corporations who make purchases or facilitating imports from disqualified countries would obtain.¹⁵ To designate a country as disqualified, Wenar suggests that we could use Freedom House metrics (or some other metric) to determine the moment at which countries would be subject to these sanctions.¹⁶

The *Act*, if implemented by, e.g. the United States, would go beyond making it illegal to trade directly with disqualified countries as it could also deny the use of commercial and financial facilities in the United States to vendors of a disqualified country's resources, deny the entry of regime members and elites from disqualified countries, prevent the purchase of real estate or other property in the United States by those individuals, deny the sales of domestic goods and services

(including financial services, such as the ability to list companies on US stock exchanges, or the investment in the United States by the wealth funds of disqualified nations) to disqualified countries and their nationals (perhaps making a suitable exemption for humanitarian goods), deny access to US courts for those individuals, and render any existing contracts unenforceable, as a matter of public policy. Effectively, Wenar is suggesting not extending comity to the internal rules of other states with respect to determinations of the ownership of natural resources, tax monies, etc. with respect to the refusal to enforce contracts.¹⁷

To illustrate, the United States could simply designate Obiang a person from whom Americans do not have the right to buy Equatorial Guinea's oil, or to enter lease agreements.¹⁸ This would have the effect of depriving him revenues from the United States and make it impossible for him to travel here. Moreover, Wenar argues, it would pose no threat to American national security and little to its economic well-being.

If the United States decided not to engage Obiang, he would be extremely unlikely to launch an attack on the United States or otherwise be able to effect vital American interests. However, such a scenario is only the tip of the iceberg. For the United States' position to be meaningful, not only must it and its corporate nationals divest from disqualified nations, so too must resource hungry countries like China and India. This is because while Obiang might not launch an attack, he would surely sell that oil to China, or to Petronas, or allow some other country's national petroleum company to exploit whatever fields have been suddenly vacated by American corporations. Moreover, while the United States could perhaps survive without imported hydrocarbons from authoritarian regimes,¹⁹ many European countries

¹⁴ Wenar, p. 283 *et passim*.

¹⁵ The UNSC has adopted a similar approach in the past for Iraqi Oil (albeit with questionable success) under Resolution 867 (S/RES/687) and by the United States government with respect to Sudanese Oil (Executive Order 13067, of 1997 and Executive Order 13400, of 2006). For similar proposals, see Reuel Marc Gerech and Mark Dubowitz. "The Case for an Iranian-Oil-Free-Zone." *The Wall Street Journal*, May 31, 2011. Available at: <https://www.wsj.com/articles/SB10001424052748703730804576321372879366338> (Last accessed October 4, 2017).

¹⁶ Wenar, p. 286

¹⁷ Wenar, p. 245.

¹⁸ Wenar, p. 248.

¹⁹ On many measures, the USA is now a net exporter of natural gas. See Stephanie Yang and Alison Sider, 'New Milestone: The U.S. Is Now a Net Exporter of Natural Gas', *The Wall Street Journal*. Nov. 26, 2016. Available at: <https://www.wsj.com/articles/new-milestone-the-u-s-is-now-a-net-exporter-of-natural-gas-1480258801> (Last accessed October 4, 2017). It is largely Europe (which depends on Russian natural gas) and Japan, which are dependent on foreign natural gas.

are highly dependent on authoritarian natural gas.²⁰

However noble the proposal is, would it even be possible, on legal, political, and scientific grounds, to implement it through a public law framework? First, could we even track where oil had come from? Since oil is fungible, could we know if oil comes from Equatorial Guinea? Based on rather scant evidence, Wenar argues that it would in fact be possible.²¹ We return to this problem in our discussion of how transnational law-making could proceed, and compare Wenar's proposal to previous attempts to document chain of custody in the trade of natural resources and manufactured goods. Second, would such a ban not violate the rules of the WTO? Again, based on rather scant evidence, Wenar argues that it would not.²² We believe the answers to these questions are not as clear as Wenar believes. Instead, we propose that there are other tools available in transnational law and governance to make such proposals legal, political possible, and technological feasible. Third, how would a country actually be certified as clean trade compliant? One can imagine the large number of lobbies that would likely form to get certain countries listed as compliant.²³ Fourth, previous sanction regimes were of very questionable success. The Iraq Sanctions Regime in the 1990s is widely regarded as a disaster. Dictators, as we have suggested, could always sell to China. And if their countries suffer economic side effects, they have a ready-made enemy in the United States to blame.

Transnational Law-Making

Jessup introduced the term transnational law in his Storrs Lecture as a broader way to classify the effects of law across borders. Transnational law refers to those situations which emerge involving the interaction of individuals, corporations, states,

and other groups at the interstices of states and state power. As examples, he writes that:

“A private American citizen, or a stateless person for that matter, whose passport or other travel document is challenged at a European frontier confronts a transnational situation. So does an American oil company doing business in Venezuela; or the New York lawyer who retains French counsel to advise on the settlement of his client's estate in France; or the United States Government when negotiating with the Soviet Union regarding the unification of Germany. So does the United Nations when shipping milk for UNICEF or sending a mediator to Palestine. Equally one could mention the International Chamber of Commerce exercising its privilege of taking part in a conference called by the Economic and Social Council of the United Nations.”²⁴

Theorists of transnational law argue that global governance today is composed of multiple different law-making entities located in multiple jurisdictions. For instance, Scott has suggested that transnational law might productively be defined, at least by practitioners, as “‘transnational’ legal rules, legal principles, legal standards, and even legal systems as [those] ‘applicable’ or otherwise relevant in a given factual context.”²⁵ Similarly, Zumbansen has written that transnational law is not so much a legal system (or even systems) but is instead a method of understanding the interaction of public, private, national and international legal regimes.²⁶ Common to both definitions is the idea that the transnational in transnational law requires the lawyer to look towards different legal systems to understand their interaction over any particular factual circumstances.

²⁰ Wenar, p. 264.

²¹ Reuel Marc Gerech and Mark Dubowitz, ‘The Case for an Iranian-Oil-Free-Zone’, *The Wall Street Journal*, May 31, 2011. Available at: <https://www.wsj.com/articles/SB10001424052748703730804576321372879366338> (Last accessed October 4, 2017)

²² Wenar, p. 297. We will examine this argument in greater detail below.

²³ Barry Hashimoto provided helpful suggestions here of problems with the proposal.

²⁴ Philip C. Jessup, *Transnational Law*, New Haven, Yale University Press, 1956, pp. 1-2.

²⁵ Craig Scott, ‘Transnational Law’ as Proto-Concept: Three Conceptions’, *German Law Journal* 10 6/7 (2009): pp. 859-876, 860.

²⁶ Peer Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism’, *Osgoode Hall Law School Comparative Research in Law and Political Economy*, Research Report No. 21/2011, p. 307.

Transnational law making is visible not just in municipal law, but in public-private partnerships, networks of officials, private compacts, and treaty law. Global supply chains come closest to matching the ideal type of transnational law.²⁷ Supply chains bring together elements of public international law (for instance, through the various ILO treaties), public and private state law (e.g. rules governing contract law), global governance regimes (e.g. certification standards for clothes), and corporate governance standards.²⁸ Examples commonly discussed in the literature include forestry supply chain governance,²⁹ fisheries governance,³⁰ and transnational labour regimes governing supply chains and sub-contracting.³¹

Political theorists have often taken a dim view of transnational legal theorists, under the belief that the latter are advocating a post-regulatory, neo-liberal agenda.³² Legal pluralism and reflexive law exist in unhappy tension with progressive politics, as reflexive law is often associated with the neoliberal agenda,³³ and the belief that the

development and rise to power of the multinational corporation constitutes a direct threat to national regulatory authority.³⁴

Transnational law, in particular, is thought to challenge the state's role in the emergence of law, restricting democratic control of the production of law.³⁵

We believe that this fails both as a descriptive and a normative position. Descriptively, we follow Gunther Teubner, who argues that 'global law reproduces itself through legal acts which are guided by different programs but are in the end oriented towards the binary code legal/illegal. The unity of global law is just not, as in the nation state, based on the consistency of legal norms structurally secured by the hierarchy of the courts: rather, it is process-based, deriving simply from the modes of connection between legal operations, which transfer binding legality between even highly heterogeneous legal orders.'

³⁶ Normatively, we agree with the proposition that 'as we open spaces for conflict and struggle...we ought to take a break from the search for a universal ethics. Constitutionalism offers an improved institution platform from which global ethicists can speak for the universal against those who must be cast out from the community of the universal – just when we need, conversation, heterogeneity, interaction, ethical pluralism.'³⁷ In short, transnational law opens the space for new realms of contestation.

As Karl Heinz Ladeur and others have argued, 'the recurring attempts to modify the contours of a state-based administrative regulatory science falls

²⁷ Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism', *Osgoode Hall Law School Comparative Research in Law and Political Economy*, Research Report No. 21/2011, p. 312.

²⁸ Ryan J. Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier', *Melbourne Journal of International Law* 17 1 (2016): 188-209; Zumbansen, Peer, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism', *Osgoode Hall Law School Comparative Research in Law and Political Economy*, Research Report No. 21/2011.

²⁹ Lars H. Gulbrandsen, *Transnational Environmental Governance: The Emergence and Effects of the Certification of Forest and Fisheries*, Cheltenham, Edward Elgar, 2010; Christine Overdevest and Jonathan Zeitlin, 'Assembling an experimentalist regime: Transnational governance interactions in the forest sector', *Regulation & Governance* (2014) 8, pp. 22–48.

³⁰ Lars H. Gulbrandsen, *Transnational Environmental Governance: The Emergence and Effects of the Certification of Forest and Fisheries*, Cheltenham, Edward Elgar, 2010.

³¹ Larry Catá Backer, 'Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Building Collapse', *UC Irvine Journal of International, Transnational, and Comparative Law* 1 (2016); David J. Doorey, 'In Defence of Transnational Domestic Labour Regulation', *Comparative Research in Law & Political Economy. Research Paper No. 2/2010*, p. 953.

³² It is often seen as embracing the economic analysis of the law and the view that states are in a regulatory competition which requires that the law be rendered economically optimal. For reasons beyond the scope of this paper, we reject this view.

³³ Graf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, London, Hart, 2012, p. 4; Graf-Peter Calliess, 'Reflexive Transnational Law. The

Privatisation of Civil Law and the Civilisation of Private Law', *Zeitschrift für Rechtssoziologie* (2002): 185-216; Graf-Peter Calliess and Moritz Renner, 'Between Law and Social Norms: The Evolution of Global Governance', *Ratio Juris* 22 2 (2009): pp. 260-280.

³⁴ Graf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, London, Hart, 2012, p. 29

³⁵ Florian F. Hoffmann 'Systems Clash: human rights, human security, and the struggle for discursive hegemony', in Oren Perez and Peer Zumbansen (ed.), *Law after Luhmann: Critical Reflections on Niklas Luhmann's Contribution to Legal Doctrine and Theory*, Oxford, Hart Publishing, 2008.

³⁶ Gunther Teubner and Peter Korth, 'Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society', in *Regime Interaction in International Law: Facing Fragmentation*, edited by Margaret Young, Cambridge, CUP, 2012, pp. 23-54.

³⁷ David Kennedy, 'The Mystery of Global Governance', *Ohio Northern University Law Review* 34 (2008), 827-860, p. 859.

short of capturing the dynamics of a radically transformed society.³⁸ The newest version of global capitalism, which have been in development since the 1980s, differ from older forms of governance which rely on international rule-making. Instead, it is characterised by new relationships between state and society (through, e.g. the privatisation of services), increased delegation to experts from politicians, proliferation of new regulatory mechanisms (most notably self-regulation), and the formalisation of network regulation between institutions in different jurisdictions.³⁹ The supervisory state depends on different types of regulation by changing information intake procedures and regulatory instruments, while outsourcing rule-making functions.⁴⁰

Strategies of Transnational Law-making

The novelty of Wenar's adaption work makes it easy to overlook the fact that it is a rather old-fashioned approach to the making of international law, focusing almost exclusively on the actions of states, and on the rules of municipal law. It is not only archaic as a description of the international arena, but almost certainly wrong. It ignores much of what is current in contemporary studies of international law.

Against the more nuanced view developed by theorists of transnational law, Wenar's account depends almost entirely on public international law mechanisms. In our previous work, we have argued that the specific conditions for realising justice depend on the nature of the specific legal regime to be regulated. International criminal law, we have suggested, will, at least in the short term, depend greatly on the exercise of state power and

international treaty-making prerogatives.⁴¹ Other aspects of administrative law, however, we have argued, display features of the displacement of state power.⁴² In this section, we draw out the features of transnational law making to analyse how Wenar's proposal might come into being. Drawing on previous successful (and unsuccessful campaigns), we argue that an attempt to limit a state's ability to dispose of its national resources by restricting who might acquire those resources will only be successful through the successful navigation of transnational law-making.

Wenar provides three examples of how international campaigns have led to changes in international and domestic practice, but unfortunately does not use these examples to properly theorise how transnational law mechanisms might be harnessed against the trade in so-called blood oil in the 21st century. First, Wenar begins his discussion of how civil society pressure has brought legal change with the example of the British campaign against the slave trade. In 1787, a group of men met in London to pledge themselves to end slave trade. The challenge was monumental: 'Parliament, the Church of England, and London's gentlemen's clubs all counted plantation owner among their members. The slave trade employed thousands of sailors, shipbuilders, blacksmiths, and merchants; financial houses like Barclays and Lloyds grew richer on slave profits; slavery even gave Britain its first millionaire – a Member of Parliament named William Beckford, who owned more than 22,000 acres of plantations in Jamaica.'⁴³ By some estimates, sugar harvested by slaves in the West Indies account for almost 5% of British national income.⁴⁴ While we know too little of the actual campaign to end slavery to be sure that it was a

³⁸ Graf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, London, Hart, 2012, p. 53.

³⁹ Graf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*. London, Hart, 2012, pp. 57-58. David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism', *The Annals of the American Academy of Political and Social Science* Vol. 598, Special Volume: The Rise of Regulatory Capitalism: The Global Diffusion of a New Order (March 2005), 12-32, p. 27.

⁴⁰ Helmut Wilke, *Smart Governance: Governing the Global Knowledge Society*, Frankfurt, Campus, 2007.

⁴¹ Kevin W. Gray and Kafumu Kalyalya, 'Overcoming Statism from Within: The International Criminal Court and the Westphalian System', *Critical Horizons* 17 (1) (2016): 53-65.

⁴² Kevin W. Gray and Kafumu Kalyalya, 'Global Justice and the New Regulatory Regime', *The Ethics Forum* 10 2 (2015), 122-138.

⁴³ Wenar, p. 264; William Darity, 'British Industry and the West Indies Plantations', *Social Science History* 14 1 (1990), 117-49, p. 127; S. I. Martin, 'How Africa Slaves Created a Prosperous New Britain', *The Voice* August 23 2011, 55-56; Margaret Achrill and Leslie Hannah, *Barclays: The Business of Banking, 1690-1996*, Cambridge, CUP, 2001.

⁴⁴ Wenar, pp. 264-5; Chaim D. Kaufmann and Robert A. Pape, 'Explaining Costly International Moral Action: Britain's Sixty-Year Campaign Against the Atlantic Slave Trade', *International Organization* 53 4 (1999): 631-68, p. 634.

popular driven movement,⁴⁵ there can be no doubt that the British people did experience large and uncompensated financial costs as a result of the campaign. 'British taxpayers paid for government efforts against slavery; consumers paid higher prices for sugar and other tropical produce; and manufacturers, shippers, merchants, and bankers who traded with the West Indian colonies or with Africa lost business... [As for compensating benefits,] anti-slave trade efforts did not yield Britain any noticeable material benefits, either in wealth or power.'⁴⁶ By some estimates, the anti-slavery campaign cost nearly 1.8 % of national income every year of sixty years.⁴⁷ Popular sentiment, harnessed by religious groups, like the Quakers, and Evangelical political leaders like William Wilberforce, militated to bring an end to Atlantic Slave Trade. While Wenar tells it an uplifting story, it is not the whole story. Economic change in the Caribbean, coupled to American independence and increased trade with the French and Dutch, made Britain less-dependent on slave produced goods. Slave resistance as well made the undertaking less secure. The economic conditions were ripe for the end of slavery.

More recently, when the United States introduced laws to ban the paying of bribes by American nationals and corporations, voices were raised in Congress that this would put American corporations at a competitive disadvantage. The SEC, in the 1970s, found that American companies had paid hundreds of millions of dollars in bribes in recent years to secure foreign business. An inquiry by the US Senate in 1977 found that the practice was common amongst American oil companies operating overseas.⁴⁸ For a country which had embraced the ideology of the free market, the findings were of deep concern. There

⁴⁵ Pace Eric Williams, *Capitalism and Slavery*, Chapel Hill, UNC Press, 1944, and Adam Hochschild, *Bury the Chains*, London, Macmillan, 2005.

⁴⁶ Wenar, p. 269; Chaim D. Kaufmann and Robert A. Pape, 'Explaining Costly International Moral Action: Britain's Sixty-Year Campaign Against the Atlantic Slave Trade', *International Organization* 53 4 (1999): 631-68, p. 638.

⁴⁷ Wenar, p. 269; Chaim D. Kaufmann and Robert A. Pape, 'Explaining Costly International Moral Action: Britain's Sixty-Year Campaign Against the Atlantic Slave Trade', *International Organization* 53 4 (1999): 631-68, pp. 636-37.

⁴⁸ Mike Koehler, 'The Story of the Foreign Corrupt Practices Act', *Ohio State Law Journal* 931 (2012), 934-935, p. 947.

was broad consensus the practice undermined the free enterprise system and hurt American interests. In the end, those Senators, including Senator Harrison Williams, who thought that the passage of the law would give Americans an advantage in being the first mover against corruption and improve its advantage prevailed, and the Foreign Corrupt Practices Act passed Congress in 1977 and became law.⁴⁹ The law made it a crime for any American person or corporation to pay a bribe to a foreign official to obtain or retain business. It also required corporations whose securities were listed in the United States, wherever they were headquartered, to meet certain SEC mandated provisions – most notably by requiring transparent and open accounting practices. Here again, the story is not merely one of altruism but of political and economic concerns. FCPA rules were by the concern, in the post-Watergate environment, that corporations were using hidden bank accounts and off-shore accounts to make payments to both domestic and foreign politicians. In 1975, the Church Committee held hearings concerning bribes paid by Gulf Oil, Northrop, Exxon, Mobil Oil, and Lockheed, who were accused, of making payments, respectively to politicians and government officials in Korea (Gulf Oil), Saudi Arabia (Northrop), Italy (Exxon, Mobil Oil, Lockheed), Japan (Lockheed) and the Netherlands (Lockheed). The accusation that Lockheed had paid bribes was particularly galling, as Lockheed had received 250 Million USD in money from US taxpayers as loan guarantees to stave off bankruptcy.⁵⁰

These first two examples purport to show how the actions of individuals or countries can bring about change to the international order, even if those changes may bring competitive or economic disadvantage (initially at least) to their own countries. The third example purports to show the power of civil society in action. In 1993, a group of friends meeting in London started an NGO called Global Witness. Their goal was to support efforts to hold countries and corporations accountable for their foreign actions. At first, Global Witness

⁴⁹ Mike Koehler, 'The Story of the Foreign Corrupt Practices Act', *Ohio State Law Journal* 931 (2012), 934-935, p. 949.

⁵⁰ Mike Koehler, 'The Story of the Foreign Corrupt Practices Act', *Ohio State Law Journal* 931 (2012), 934-935.

focused on the sale of illegal harvested timber by the remnants of the Khmer Rouge operating in eastern Cambodia, and the role of those sales in prolonging the Cambodian civil war. It published documents showing the tacit support of Hun Sen's government in Cambodia and the complicity of the Thai military. Within months, the IMF withdrew funding from Cambodia, Thailand closed its border and, subsequently, the rebellion came to an end.⁵¹ Here again, though, a key detail is missed: Pol Pot, the leader of the Khmer Rouge, died in 1998, already isolated because of internal strife inside the Khmer Rouge's leadership.⁵² His death opened space for peace in Cambodia.

Unfortunately, Wenar never provides a comprehensive and compelling account of how the proposed *Clean Trade Act* would come to fruition, and whether it would be legal under international law. We are doubtful that his three studies on the role of civil society in promoting changes in trade and human rights are sufficiently theorised. Moreover, we are substantially less sanguine than Wenar that his proposal, as it stands, would be compatible with the WTO rules on quantitative restrictions, and those governing like treatment, less-favourable treatment, and MFN.⁵³ Wenar's entire argument for compatibility is sketched out in a short paragraph which contains a brief reference to Loran Bartels's writings on WTO law and clean trade.⁵⁴ There are two particular problems with Bartels's approach, both of which are worth considering before proceeding to our transnational law inspired approach. First, Bartels neglects to consider all the relevant jurisprudence on fair trade and WTO rules. Attempts to ban imports because of conditions overseas have been tried before, with

limited success.⁵⁵ First, in the early 1990s, Austria introduced measures, including a 70% tariff on timber which was not sustainably harvested, to prevent the import of unsustainably harvested timber into the country.⁵⁶ Under threat of WTO action, however, it was forced to remove those regulations. Instead, Austria turned to private transnational actors, and helped finance private certification regimes, which large stores then adopted in their dealings with producers under pressure from civil society groups.⁵⁷ Only through collaboration with civil society actors and private networks could it accomplish its conservation goals without violating international trade law. Second, while Bartels is correct to note that it is possible to obtain a waiver from WTO rules, as required by the Kimberley process,⁵⁸ that waiver is not particularly easy to obtain. It would require an affirmative vote by three-quarters majority of states present, and it seems unlikely that Wenar's proposal could obtain such a vote. What made the Kimberley process successful was the fact that it was an example of a stakeholder driven process, one in which countries potentially affected by the ban in the trade of blood diamonds actively supported the process.⁵⁹

It is for that reason that attempts to limit the sales of stolen or illegally harvested or trafficked goods, or goods obtained contrary to the public order of WTO member states typically follow a different,

⁵¹ Wenar p 314; Wenar skips over this point, but it helped, of course, that Pol Pot died in 1998.

⁵² Global Witness used this success to proceed to its next battle, the fight against blood diamonds, which we discuss in greater detail below.

⁵³ For a detailed account of such rules, which is beyond the scope of this paper see, e.g., George Bermann, Mark Wu, and Petros C. Mavroidis, *Law of the World Trade Organization (WTO): Documents, Cases & Analysis*, Eagen, West, 2010.

⁵⁴ The relevant paper is Loran Bartels, 'WTO Law Aspects of Clean Trade', available on SSRN (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2634567). Last accessed August 4, 2017.

⁵⁵ To his credit, Bartels does consider three other cases, but we would suggest that they are less on point. These include Shrimp/Turtle (WTO Appellate Body Report, US –Shrimp, WT/DS58/AB/R, adopted 6 November 1998, para 161.: WTO Appellate Body Report); WTO Panel Report, EU Ban on Seal Products (EC –Seal Products, WT/DS381/R, adopted as modified, 18 June 2014); Tuna/Dolphin (WTO Panel Report, US –Tuna II, WT/DS381/R).

⁵⁶ Elliott B. Staffin, 'Trade Barrier or Trade Boon: A Critical Labelling and Its Role in Greening of World Trade', *Columbia Law Review* 21 2 (1996), 205-296.

⁵⁷ Shaffer, Gregory, 'How the WTO Shapes the Regulatory State', in *Comparative Law and Regulation: Understanding the Global Regulatory Process*, edited by Francesca Bignami and David Zaring, Cheltenham, Elgar, 2016, 447-479, 463.

⁵⁸ Wenar, p. 396; Joost Pauwelyn, 'WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for 'Conflict Diamonds'', *Michigan Journal of International Law* 24 (2003), 1177; World Trade Organization, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Decision of May 15, 2003, WT/L/518 (2003).

⁵⁹ Annie Wallis, 'Data Mining: Lessons from the Kimberley Process for the United Nation's Development of Human Rights Norms for Transnational Corporations', *Northwestern Journal of International Human Rights Volume* 4 2 (2005), 388-417, p. 388.

but well-trodden path. Civil society activism draws attention to and brings pressure, sometimes accompanied by lawsuits against corporations.⁶⁰ That publicity brings states, civil society organisations and labour groups to the bargaining table, which leads to changes in corporate codes of conduct, most notably how corporations acquire the contested resource or participate in certain activities, including procedures for transparency and resource validation in supply chains and natural resources extraction (where necessary) and/or commercial disengagement. Finally, exporting and importing states pass laws regulating the relevant trade, and engage in international treaty-making, bringing transnational legal instruments into the domestic sphere. We will consider each one of these in turn to suggest how activists might bring Wenar's proposal to fruition.

1. Civil Society Fact-Finding and Transparency

The best-known example of civil society activism against trade injustice is the Kimberley Process (discussed briefly above). The extraction of diamonds mined in Sierra Leone became combined, in the popular imagination, with stories of violence, civil war, amputations, and the use of child soldiers.⁶¹ Multiple NGOs (most notably, Global Witness, in 1998), seized on these stories, issuing reports documenting the conditions of diamond miners and the involvement of militias in the diamond trade, and the role of international diamond trading consortia in bringing those diamonds to the market.⁶²

In the case of global textile supply chains, the work of NGOs has brought to light the role of supply chains in apparel procurement. In some cases, civil society activism has led to increases in

minimum wages for workers, by putting pressures on corporations to improve working conditions.⁶³ A recent example includes the work of NGOs to highlight the issue of subcontracting in textile supply chains.⁶⁴ A coalition of various NGOs, in the face of the Rana Plaza collapse in Bangladesh and other disasters at manufacturing facilities in the developing world,⁶⁵ has begun to campaign against the use of subcontracting to third-party suppliers and the questionable safety standards of those suppliers. A coalition consisting of the Clean Clothes Campaign, Human Rights Watch, IndustriALL Global Union, the International Corporate Accountability Roundtable, the International Labour Rights Forum, the International Trade Union Confederation, the Maquila Solidarity Network, UNI Global Union, and the Worker Rights Consortium, came together to lobby prominent fashion manufacturers to commit to the Transparency Pledge, which would require companies to reveal the full name of all authorised production units, the site addresses, the parents companies of the business at the site, the products made and the number of workers who can be employed at each work site.⁶⁶ The purpose of these standards has been to ensure

⁶³ For instance, Cambodia raised the minimum wage to 153 USD a month, due to pressure from unions and transnational civil society (compared to a wage of 64 USD a month in Bangladesh). Prak Chan Thul, 'Cambodia raises 2017 minimum wage for textile industry workers', *Reuters*, September 29, 2016, <https://www.reuters.com/article/cambodia-garment/cambodia-raises-2017-minimum-wage-for-textile-industry-workers-idUSL3N1C510D> (last accessed October 4, 2017).

⁶⁴ Human Rights Watch, 'Follow the Thread', New York, Human Rights Watch, 2017, available at: <https://www.hrw.org/report/2017/04/20/follow-thread/need-supply-chain-transparency-garment-and-footwear-industry> (last accessed October 4, 2017).

⁶⁵ The Rana Plaza building collapse on April 24, 2013 killed over 1,100 garment workers and injured more than 2,000. It was preceded by two large factory fires in 2012: one at Pakistan's Ali Enterprises factory which killed 289, and another in Bangladesh's Tazreen Fashions factory in 2012 which killed at 117 workers. Western fashion companies had claimed that they had not contacted with the various companies who operated in the factories where the disaster occurred, even though in many cases it turned out that their products were in fact manufactured there through a complicated web of subcontracting.

⁶⁶ Human Rights Watch, 'Follow the Thread', New York, Human Rights Watch, 2017, available at: <https://www.hrw.org/report/2017/04/20/follow-thread/need-supply-chain-transparency-garment-and-footwear-industry> (last accessed October 4, 2017); Clean Clothes, 'Transparency Pledge', Available at <https://cleanclothes.org/transparency/transparency-pledge> (last accessed October 4, 2017).

⁶⁰ Substantial literature exists in political science investigating the role of civil society in creating new norms of international law Karen Alter, *The New Terrain of International Law*, Princeton, Princeton University Press, 2014, and Beth Simmons, *Mobilizing Human Rights: International Law in Domestic Politics*, Cambridge, Harvard University Press, 2009.

⁶¹ For a comprehensive account, see, e.g., Greg Campbell, *Blood Diamonds: Tracing the Deadly Path of the World's Most Precious Stones*, Boulder, Westview, 2002.

⁶² Annie Wallis, 'Data Mining: Lessons from the Kimberley Process for the United Nation's Development of Human Rights Norms for Transnational Corporations', *Northwestern Journal of International Human Rights Volume 4 2* (2005), 388-417; Ingrid J. Tamm, 'Diamonds in Peace and War: Severing the Conflict – Diamond Connection,' World Peace Fund Report No. 30 (2002), p. 22.

that every factory in a supply chain is appropriately audited to ensure, much like the rules for ensuring chain of custody in the Kimberley Process, that all items of clothing are manufactured under safe conditions which protect workers' rights.

2. *Lawsuits*

Either as an alternative method or to compliment NGOs' campaigns, the reform of international trade regimes or to obtain compensation for the wrong-doing of multinationals, has in some cases, begun with domestic legal action. This has been most prominent in litigation in the United States for damages related to the Holocaust, where the threat of lawsuits has often brought international wrongdoers to the negotiating table. In the face of American court action against German companies for crimes committed during the Holocaust, American lawyers brokered a deal to create a foundation to compensate victims and protect individuals from future human rights violations.⁶⁷ In the Swiss Banks litigation, the threat of lawsuits compelled a consortium of Swiss banks to settle with Holocaust survivors and to provide settlements valued at 1.2 Billion USD.⁶⁸ A lawsuit by the heir of Holocaust victims in the United States ultimately led, after the US Supreme Court held that Austria was not entitled to sovereign immunity, an arbitration which confirmed that the heir to Holocaust victims was entitled to return of the paintings.⁶⁹ The success of that litigation has led other museums to settle with Holocaust survivors and their heirs, often by returning illegally taken artworks.⁷⁰

⁶⁷ Annie Wallis, 'Data Mining: Lessons from the Kimberley Process for the United Nation's Development of Human Rights Norms for Transnational Corporations', *Northwestern Journal of International Human Rights Volume 4 2* (2005), 388-417, p. 389. Wallis mistakenly cites the figure of 5 billion USD, rather than Deutsche Marks (See also, <http://www.stiftung-evz.de>, last accessed October 4, 2017)).

⁶⁸ <http://www.swissbankclaims.com/> (last accessed October 4, 2017).

⁶⁹ Republic of Austria et al. v. Altmann, 541, US 677 (2004).

⁷⁰ 'Governor Announces Major Holocaust Era Art Recover', Press Release of the Holocaust Claims Processing Office, New York State, May 7, 2004, available at: <http://www.dfs.ny.gov/consumer/holocaust/hcpopr040507.htm> (last accessed October 4, 2017); The Associated Press, 'Painting Nazis Took is Returned to Family', *New York Times*, April 4, 2004, available at: http://www.nytimes.com/2004/04/04/us/painting-nazis-took-is-returned-to-family.html?_r=0 (October 4, 2017). See also Michael J. Bzayler and Kearton G. Everitt, 'Holocaust Restitution Litigation in the United States: An Update', New York, ACLU, available at:

This strategy has also been employed in the oil industry, with activists targeting ExxonMobil for its alleged role in human rights abuses in the developing world. Although the end of the Cold War opened new markets for oil companies, many found themselves excluded by the nationalisation of oil exploration.⁷¹ When Exxon merged with Mobil in 1998, the new company acquired investments from Mobil in the troubled Indonesian region of Aceh. Mobil, as part of its exploration deal, had agreed to pay the salaries of TNI soldiers who were brought in to protect the oil fields and Mobil facilities.⁷² These troops were accused of human rights violations. These violations implicated Mobil: it was alleged that TNI troops had borrowed earth-moving equipment to dig mass graves, that interrogations, involving torture and human rights violations had taken place on Mobil property, and that the soldiers had set up command posts from which human rights violations were directed inside or along the perimeters of gas fields guarded by the TNI.⁷³ The International Labour Rights Fund filed a lawsuit against ExxonMobil for torts committed by the company in Aceh.⁷⁴

The effects of these lawsuits vary considerably. Lawsuits aimed at ensuring compensation for victims of the Holocaust have enjoyed success, while those against oil companies are mixed. In many cases, oil companies have simply denied the underlying allegations, challenged the jurisdiction of courts, and attempted to weathered whatever

<https://www.aclu.org/files/iclr/bazyler.pdf> (last accessed October 4, 2017).

⁷¹ Although ExxonMobil is the largest non-governmental producer of hydrocarbons in the world, it is dwarfed by several national oil companies. Steve Coll, *Private Empire*, New York, Penguin, 2012, p. 18.

⁷² Steve Coll, *Private Empire*, New York, Penguin, 2012, p. 93 *et passim*.

⁷³ Steve Coll, *Private Empire*, New York, Penguin, 2012, pp. 101-104.

⁷⁴ That lawsuit continues in US Courts. Some claims under the Alien Torts Statute were dismissed, but other claims were admitted and continue as part of the litigation (for more information, see: <http://www.cohenmilstein.com/case-study/exxonmobil-aceh-indonesia/>; and <https://100r.org/2015/07/exxon-human-rights-case-survives-claim-that-execs-knew-all-along/>).

Not all claims against oil companies have succeeded, however. In *Kiobel*, the United States Supreme Court greatly reduced the class of cases which could be heard in US Courts. Similarly, the ongoing saga around the Chevron Arbitration and judgments against Chevron in Ecuadorian court show that such court actions may have limited reach (*Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013)).

reputational damage might otherwise occur.

3. Codes of Conduct

The purpose of NGO and legal pressure in the transnational arena is ultimately to bring companies to the table and to embrace legal settlements of some form or other. Voluntary codes are emerging as the most significant feature of a fragile, inchoate regime of transnational labour market regulation. The oil market is like some other regimes, such as forestry, which are characterised by high degrees of regime complexity. No single actor can make rules.⁷⁵ Instead, rule-making will depend on the ability to bring together actors from across multiple legal regimes.

The success of campaigns to get corporations to adopt voluntary codes of conduct depends to a large extent on the reputational risks to which they might be exposed. In the case of the trade in blood diamonds, the fact that De Beers, while controlling the vast majority of the diamond trade, obtained only a small percentage of its diamonds from Sierra Leone through a network of traders in West Africa, made the company particularly vulnerable to pressure from civil society.⁷⁶ Pressure from Global Witness caused De Beers to shut down office in Guinea to avoid trading in blood diamonds.⁷⁷ At the same time, De Beers was able to respond to civil society campaign because Sierra Leone accounted for a small percentage of its production. Fifty percent of diamonds for De Beers were produced in Namibia and Botswana, countries with relatively decent human rights records.⁷⁸ Conversely at most 15% of its diamonds were considered conflict diamonds, meaning, with its other holdings, it

could easily absorb a small cut in supply.⁷⁹ Moreover, De Beers had significant risk if a boycott occurred. Virtually all diamonds are sold as luxury goods, a field in which brand perception truly matters.⁸⁰

For those reasons, African nations were also concerned with the consequences of a boycott. In May 2000, African nations came together in Kimberley, South Africa to negotiate a solution. A fear of an NGO driven boycott and the potential collapse of the industry motivated them to act. They established a system of warranties which committed state parties only to trade with countries which provided warranties that all diamonds had been properly mined, to avoid trading with non-participant countries, to avoid purchasing diamonds from sources lacking due process protections to protect trade in conflict diamonds, to avoid buying diamonds in any region where there is an advisory from a government authority that conflict diamonds might originate there, and to refrain from knowingly purchasing such diamonds or aiding others in doing so, and to ensure that government employees are educated in the rules of the Kimberley Process.⁸¹ It also created a supervisory body which placed NGOs and countries on equal footing.⁸²

Codes of conduct have taken on a different form in the post-Rana Plaza debate. These have involved concerted action by NGOs to encourage companies to sign on to the Transparency Pledge and other instruments to increase accountability in the use of sub-contractors.⁸³ NGOs have also

⁷⁵ Christine Overdevest and Jonathan Zeitlin, 'Assembling an experimentalist regime: Transnational governance interactions in the forest sector', *Regulation & Governance* (2014) 8, 22–48, p. 23; K. J. Alter and S. Meunier, 'The Politics of International Regime Complexity', *Perspectives on Politics* 7 (2009), 13–24.

⁷⁶ Greg Campbell, *Blood Diamonds: Tracing the Deadly Path of the World Most Precious Stones*, Boulder, Westview, 2002, p. 17; S.C. Res. 1459, U.N. Doc. S/RES/1459(2003) (Jan. 28, 2003), available at <http://ods-dds.ny.un.org/doc/UNDOC/GEN/N03/227/58/PDF/N0322758.pdf?OpenElement>

⁷⁷ Greg Campbell, *Blood Diamonds: Tracing the Deadly Path of the World Most Precious Stones*, Boulder, Westview, 2002, p. 126

⁷⁸ Greg Campbell, *Blood Diamonds: Tracing the Deadly Path of the World Most Precious Stones*, Boulder, Westview, 2002, p. 128.

⁷⁹ Annie Wallis, 'Data Mining: Lessons from the Kimberley Process for the United Nation's Development of Human Rights Norms for Transnational Corporations', *Northwestern Journal of International Human Rights Volume 4 2* (2005), 388–417, p. 400.

⁸⁰ Tracey Michelle Price, 'The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate', *Minnesota Journal of Global Trade* 1 44 (2003) 12, p. 42.

⁸¹ Annie Wallis, 'Data Mining: Lessons from the Kimberley Process for the United Nation's Development of Human Rights Norms for Transnational Corporations', *Northwestern Journal of International Human Rights Volume 4 2* (2005), 388–417, pp. 396–7; World Diamond Council, *The Essential Guide to Implementing the Kimberley Process* 11–12 (2003), <http://www.worlddiamondcouncil.com/wdcbk.pdf> at 2–3. Notice the obvious parallels between the Kimberley system, and Wenar's proposed Clean Trade Act.

⁸² Kimberley Process, <https://www.kimberleyprocess.com/> (last visited August 4, 2017).

⁸³ Lucy Siegle and Jason Burke London, 'We Are What We Wear: Unravelling Fast Fashion And The Collapse Of Rana Plaza', *Guardian*

tried to get subcontractors to join trade associations in Bangladesh – it was discovered shortly after the Rana Plaza collapse that many subcontractors were not members of any industry association.

Trade associations have played a key role in worker safety. The Alliance for Bangladesh Worker Safety was founded in 2013 (chaired by former U.S. Senate Majority Leader George Mitchell (D-ME) and former U.S. Senator Olympia Snowe (R-ME)) to develop plans for worker safety by bringing together apparel industry companies, the U.S. and Bangladeshi governments, policymakers, NGOs, members of civil society, and organised labour.⁸⁴ This program developed standards for factory safety, remediation programs designed to bring factories up to code (or to recommend closing to the Bangladeshi government for those found not to safety standards), and education and empowerment programs for works.

The similar Bangladesh Accord brought together key textile associations, NGOs and foreign companies to develop a program for fire and building safety in the apparel industry in Bangladesh, also in 2013.⁸⁵ The agreement consisted of a plan developed between multi-national brands and unions to ensure a safe working environment for workers, comprising an independent inspection program in which workers and trade unions are involved, the public disclosure of all factory inspection reports and plans for remediation, democratically elected health and safety committees in all factories to identify and act on health and safety risks, and worker empowerment programs including complaints mechanism and the right to refuse unsafe work.⁸⁶ As is often the case with codes of conduct, reality, unfortunately, has fallen short of expectations.

Shorts 2014; 'Sub-contracting guideline for apparel industry drafted', *Dhaka Herald*, November 6, 2013, available at:

<http://www.dhakaherald.com/news/business/sub-contracting-guideline-for-apparel-industry-drafted/> (last accessed October 4, 2017); European Parliament, 'Workers' conditions in the textile and clothing sector: just an Asian affair? Issues at stake after the Rana Plaza tragedy', Brussels, European Parliament Research Service, August 2014.

⁸⁴ See: <http://www.bangladeshworkersafety.org/>, last accessed August 6, 2017.

⁸⁵ See <http://bangladeshaccord.org/> (last accessed October 4, 2017).

⁸⁶ For details of the action plan, see <http://bangladeshaccord.org/about/> (last accessed October 4, 2017).

While there have been improvements in factory security over the years since Rana Plaza, factory committees, which were supposed to bring together management and workers to develop plans for workers safety, have been slow to materialise.⁸⁷

With respect to forestry certification, the 1992 United Nations Conference on Environment and Development (the Rio Summit) stressed the need to develop norms for forestry management and certification of the origin of timber. The Rio Declaration was adopted with the hope that it would put an end to unsustainable forestry. But Malaysia led a coalition of developing countries which rejected mandatory commitments on the part of developing nations.⁸⁸ As we have seen, early municipal attempts, by countries like Austria, to regulate timber harvesting also failed.

In response to these failures, civil society groups started to develop their own standards.⁸⁹ One of the first such organisations created was the Forest Stewardship Council, which was designed to supervise logging around the world. The FSC has several unusual experimentalist features: it is a multi-stakeholder process, made up of environmental, business, and social organisations, and voting is weighted equally between north-south interests. It was designed to protect labour and indigenous peoples' rights, biodiversity, sustainability, and environmental management. It conducts periodic audits (every five years) which include consultations with employees and local stakeholders. The FSC, like the Kimberly Process,

⁸⁷ Amy Westervelt, 'Two years after Rana Plaza, have conditions improved in Bangladesh's factories?', *The Guardian*, April 24, 2015. There has been only a slight increase in unionization. In 2014, there are 437 unions, representing nearly 5% of workers in the industry. Part of the plan was to establish workers safety committees, but those were slowed by failure of the government to draft policies for their creation. Additionally, there has been recent prosecution and harassment by the authorities of labour leaders. See also: Human Rights Watch, 'Bangladesh: Stop Persecuting Unions, Garment Workers', February 15, 2017,

<https://www.hrw.org/news/2017/02/15/bangladesh-stop-persecuting-unions-garment-workers> (last accessed October 4, 2017)

⁸⁸ S. Bernstein and B. Cashore, 'Non-state Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?', in *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance*, Ashgate Publishing Limited, Aldershot, 2004, pp. 33-63.

⁸⁹ Christine Overdevest and Jonathan Zeitlin, 'Assembling an experimentalist regime: Transnational governance interactions in the forest sector', *Regulation & Governance* 8 (2014), 22-48, p. 30.

instituted a process of certification designed to ensure that wood was appropriately harvested in a sustainable manner, and chain of custody rules to ensure that only appropriately harvested wood was exported under FSC certificates.

Yet when it comes to the oil industry, certification and voluntary standards have been substantially less successful. After repeated attempts by President Bill Clinton and Prime Minister Tony Blair, many international oil and resource extracting companies, Western NGOs and many Western governments came together to sign the Voluntary Principles on Security and Human Rights.⁹⁰ Those principles require companies engaged in resource extraction to engage in a comprehensive assessment of human rights risks associated with their security arrangements, to work with local communities in assessing the use of public and private security service providers, to institute human rights training for their security forces, and to develop systems for reporting and investigating allegations of human rights abuses.

Although the Voluntary Principles have led to some changes,⁹¹ their success has overall been quite limited. Those principles are noticeable for their absence of inclusion of local stakeholders – e.g. NGOs in the developing world or local worker’s groups. Moreover, they do little to require that oil companies only deal in oil that has been certified to have been extracted under environmentally responsible conditions or with the consent of local population. In contrast to these efforts to bring justice to workers in clothing factories in the developing world, or to children and others swept up in diamond mining, we lack a well-developed system of NGOs committed to documenting the abuse of natural resource wealth by unelected governments in the developing world.

4. International Legal Instruments

The use of international legal instruments to improve worker’s rights, environmental standards, or supply chain management, have enjoyed

limited success when not coupled to other transnational methods of law-making. Attempts to put a social clause into WTO rules failed at the Singapore Ministerial meeting in 1996.⁹² The social clause would have increased collaboration between the International Labour Organization and the WTO, and incorporated core labour standards. However, over objections from developing countries, repeating a pattern we saw earlier when Malaysia objected to Western efforts to ban non-sustainably harvested timber the measure failed.

Nevertheless, attempts to include versions of the social clause in various regional and developmental trade deals, most notably between the EU and the United States, on one hand, and various African and Asian countries and regions on the other hand, have enjoyed considerably more success. These trade agreements create a Generalized System of Preferences (GSP), which grants tariff benefits for compliance with core labour standards (include capacity building programs, to encourage union involvement etc.) coupled to provisions governing the withdrawal of benefits for failure to comply with core labour standards.⁹³ For instance, the US-Cambodia Textile Agreement of 1999, required garment factories to be brought into compliance both with Cambodian labour standards and internationally recognised labour standards. Cambodia was incentivised to do this by the offer of bonus quotas beyond most-favoured nation treatment, whereas failure to do so would have resulted in the withdrawal of bonus quotas of textile exports (the agreement expired in 2004 with the end of the Multifiber agreement).⁹⁴ The Central American Free Trade

⁹⁰ See <https://www.state.gov/j/drl/vp/> (last visited August 6, 2017), notably no state oil company joined; see also, Steve Coll, *Private Empire*, New York, Penguin, 2012, p. 220.

⁹¹ ExxonMobil, for instance, as sopped using private security contractors in Nigeria (Steve Coll, *Private Empire*, New York, Penguin, 2012, p. 475).

⁹² Jan Martin Witte, ‘Realizing Core Labour Standards, The potential and limits of voluntary codes and social clauses, A review of the literature’, GTZ, Eschborn, 2008; Virginia A. Leary, ‘The WTO and the Social Clause: Post-Singapore’, *European Journal of International Law* 1 (1997) 118-122; Lorand Bartels, ‘Social Issues: Labour, Environment and Human Rights’, in *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies*, 2nd edh, edited by Simon Lester, Bryan Mercuric and Lorand Bartels, Cambridge, CUP, 2015, (arguing that the WTO punted the issue of labour rights to the ILO).

⁹³ Jan Martin Witte, ‘Realizing Core Labour Standards, The potential and limits of voluntary codes and social clauses, A review of the literature’, GTZ, Eschborn, 2008, p. 29.

⁹⁴ Jan Martin Witte, ‘Realizing Core Labour Standards, The potential and limits of voluntary codes and social clauses, A review of the literature’, GTZ, Eschborn, 2008, p. 31.

Agreement (2004) offered ILO assistance and US funding to upgrade domestic labour laws, coupled to the threat of withdrawal of benefits or monetary fines if the labour violations were found to effect trade.⁹⁵

The coupling of benefits to sanctions has been effective in other international trading regimes. As we saw early, the threat of WTO action required Austria to withdraw its rules limiting timber imports of timber which was not legally harvested or did not meet green procurement standards. To incentivise the adoption of those certification standards, countries like Denmark, Belgium, France, Germany, Netherlands, UK, Japan and New Zealand accepted private certification as evidence of legality and or meeting public green procurement standards.⁹⁶ At the heart of the system of private certification is a legality assurance system, with agreed definitions of legal harvested timber, and comprehensive integration system for controlling the flow of logs from the forest to the point of export (to prevent illegal wood entering supply chain). Wood so harvested would then receive, from these private certification regimes, an FLEGT export licenses.⁹⁷ To complete the system, the European Union began, in 2010, to required that all business selling timber in the European Union must demonstrate due diligence that the wood was properly wood harvested, which could be demonstrated with by possession of a FLEGT VPA export license, the establishment of a private risk management system with full traceability of timber, risk assessment and risk mitigation procedures, or participation in a recognised monitoring scheme.⁹⁸ By requiring compliance both by companies inside and outside the EU, the

scheme ensured compliance with WTO rules on non-discrimination. Moreover, it incentivised business to adopt the FLEGT export license program as it became the easiest way to export timber to the EU. The timber regime is an important example because it showed that private industrial standards could be used as means of economic governance in the international arena.

Contrasting these two examples with attempts to limit trade in hydrocarbons solely through agreements between international organisations and resource exporting countries highlights the dangers with the latter approach. When well-known example involves Chad's construction of a pipeline with World Bank funding to bring oil from Chad to Cameroon and then to oil tankers. Chad's attempt to secure funding from the World Bank it became an inadvertent test case for the bank as it tried to ensure that its loans went to help the most vulnerable citizens of the countries receiving loans. The initial proposal involved an arrangement between ExxonMobil, Petronas, and Chevron Texaco on the one hand, and the Chadian government on another, to extract oil in the south of the countries. As planning for oil extraction began in earnest,⁹⁹ NGOs such as Oxfam and Catholic Relief Services brought pressure on the World Bank to take actions to ensure that ordinary Chadians would benefit from the flow of oil, and that the money would not flow into the hands of corrupt bureaucrats.¹⁰⁰ Under NGO pressure, in exchange for loans, Chad's government would be required to ensure that most of the money it received from the sale of oil would be used for priority areas such as poverty alleviation measures (such as improving education and health), and to improve public infrastructure. To ensure this, money would be funnelled from the oil companies into escrow account in London controlled by the World Bank.¹⁰¹ Some of that money would be put into a fund for future generations of Chadians, some would be made available to the Chadian government, but the bulk would be used for priority areas (such as

⁹⁵ Jan Martin Witte, 'Realizing Core Labour Standards, The potential and limits of voluntary codes and social clauses, A review of the literature', GT, Eschborn, 2008, p. 32.

⁹⁶ Christine Overdevest and Jonathan Zeitlin. Assembling an experimentalist regime: Transnational governance interactions in the forest sector, *Regulation & Governance* (2014) 8, 22–48, p. 32. Lars H. Gulbrandsen, *Transnational Environmental Governance: The Emergence and Effects of the Certification of Forest and Fisheries*, Cheltenham, Edward Elgar, 2010, p. 201.

⁹⁷ Christine Overdevest and Jonathan Zeitlin, 'Assembling an experimentalist regime: Transnational governance interactions in the forest sector', *Regulation & Governance* (2014) 8, 22–48, p. 37

⁹⁸ Christine Overdevest and Jonathan Zeitlin, 'Assembling an experimentalist regime: Transnational governance interactions in the forest sector', *Regulation & Governance* (2014) 8, 22–48, p. 38.

⁹⁹ Annalisa M. Leibold, 'Aligning Incentives for Development: The World Bank and the Chad-Cameroon Oil Pipeline', *The Yale Journal of International Law* 36 (2011): 167–205, p. 170.

¹⁰⁰ Steve Coll, *Private Empire*, New York, Penguin, 2012, p. 167.

¹⁰¹ Steve Coll, *Private Empire*, New York, Penguin, 2012, p. 163.

healthcare and education). Faced with increased insecurity and revolt against his government, Chadian President Déby, in 2005, revised the Petroleum Revenue Management Law, eliminating the fund for future generations, doubling the amount of money going directly to the federal government, and including security as one of the priority areas (allowing an increased in military and police spending). In response, the World Bank froze the funds in the escrow account.¹⁰² In response, Chad threatened to expel the oil companies and partner with other oil companies from China and elsewhere. There was little the World Bank could do, as the pipeline had already been built and oil was flowing. After a brief respite, where the World Bank agreed to Chadian demands and doubled the contribution to the federal government to 30%, all funding was withdrawn in 2008 in the face of further backsliding from the Chadian government.¹⁰³ Chadian oil continues to flow.

The Chadian agreement is an example of what happens when all relevant stakeholders are not brought into a process. First, unlike forestry certification or textile agreements, the Chadian agreement was arrived at after limited (and highly) flawed consultation with local stakeholders in Southern Chad. Moreover, since oil companies, as Wenar has pointed out, have no incentive to negotiate with anyone other than the head of state, stakeholders have little say in when and how contracts are signed.¹⁰⁴ Second, it was unclear to the Chadians what their incentive was to comply with the conditions of the World Bank. The World Bank could not offer Chad any carrots to go along with the stick (of loans being cut off). One approach might have been to offer Chad aid in renegotiating a royalty rate, which was substantially lower than that contained in other similar deals in Africa.¹⁰⁵ This could have been coupled with reductions in the royalty rate, as in

the tariff quota in trade deals, if Chad did not comply. Once the Chadian government got what it wanted, there was little incentive to comply.

Getting to Yes?

Taken together then, we have tried to suggest ways in which Wenar's proposal could be realised. Notably, we are concerned that absent attempts to work with local activists and governments in the developing world, structural conditions are likely to be such that Wenar's proposal has little chance of succeeding. In particular, we have tried to show the ways in which civil society activists have harvested elements of the transnational law-making landscape to change conditions under which the trade in goods and resources take place. The most successful campaigns manage to combine relevant stakeholders, private certification organisations, MNCs, and exporting and importing countries. The lessons for Wenar's proposal are clear: an attempt must be made to include local stakeholders to ensure that conditions under which oil and gas are extracted and then exported meet the standards of the *Clean Trade Act*, to avoid violating WTO rules, companies should consider incorporating private certification regimes into their laws, as a proxy measure of when oil is properly (and improperly extracted), and, unlike Bartels's proposal, these certification regimes, as in the case of timber extraction, should certify domestic and foreign oil production.

Conversely, attempts to impose clean trade through municipal legal instruments alone, we suggest, is a futile enterprise. Any attempt to unilaterally cut off imports will merely lead oil-exporting states into the arms of authoritarian states with little interest in the provenance of their imported energy. And the proposal to impose tariffs on third-parties, we suspect, would merely lead to WTO violations and trade wars.

¹⁰² Steve Coll, *Private Empire*, New York, Penguin, 2012, p. 361.

¹⁰³ Annalisa M. Leibold, 'Aligning Incentives for Development: The World Bank and the Chad-Cameroon Oil Pipeline', *The Yale Journal of International Law* 36 (2011): 167-205, p. 178.

¹⁰⁴ Annalisa M. Leibold, 'Aligning Incentives for Development: The World Bank and the Chad-Cameroon Oil Pipeline', *The Yale Journal of International Law* 36 (2011): 167-205.

¹⁰⁵ Annalisa M. Leibold, 'Aligning Incentives for Development: The World Bank and the Chad-Cameroon Oil Pipeline', *The Yale Journal of International Law* 36 (2011): 167-205, p. 171.

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