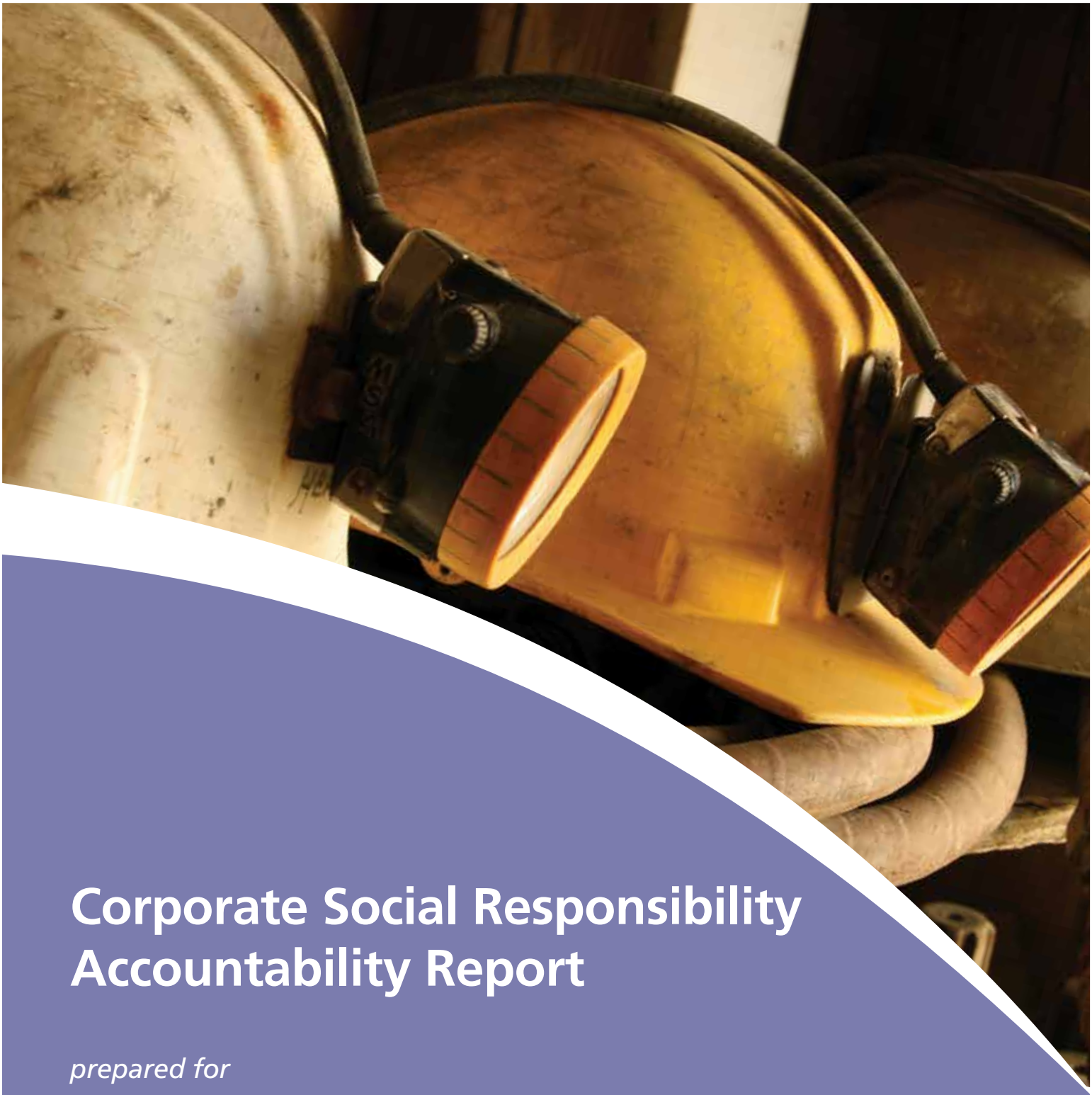

Corporate Social Responsibility Accountability Report

prepared for

Mining Association of Canada

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EXECUTIVE SUMMARY

1. INTRODUCTION

We are pleased to provide this accountability report (the "CSR Accountability Report") to the Mining Association of Canada's (MAC) International Social Responsibility (ISR) Committee (the "ISR Committee"). The purpose of the CSR Accountability Report is to provide the recently formed ISR Committee with an understanding of the current state of accountability for mining projects of Canadian companies and how Canada's accountability regime compares to the accountability frameworks in place in the following foreign jurisdictions: Peru, Guatemala, Tanzania and Papua New Guinea (each a "Foreign Jurisdiction" and collectively, the "Foreign Jurisdictions").

The ISR Committee identified four main areas for study: (i) the accountability mechanisms presently in place for mining projects in Canada; (ii) the accountability regimes applicable to Canadian mining companies regardless of where they operate, by virtue of being located in and listed in Canada; (iii) the accountability regimes for mining projects located in the Foreign Jurisdictions; and (iv) the gaps between the Canadian accountability regime when compared to the Foreign Jurisdictions. The first phase of our accountability review ("Phase One") covers the first two areas. Areas three and four are addressed in the second phase ("Phase Two").

2. PHASE ONE

a) Introduction

Based on our understanding of the ISR Committee's objectives for the CSR Accountability Report, and as set out in the original proposal provided to us by MAC and the ISR Committee, the following is a list of the objectives which guided and framed our analysis for Phase One:

- What national social and environmental 'rules' (statues, laws, regulations and guidelines) apply to corporations operating in Canada?
- What social and environmental 'rules' apply to corporation in this jurisdiction? What are the enforcement powers of bodies administering such legislation?
- What types of penalties arise from the violation of such 'rules' (including civil, criminal, administrative, monetary, fines and possible settlement agreements)?
- What accountability measures apply to Officers and Directors? What are the liability implications for non-compliant Officers and Directors?

- What are the accountability requirements under Ontario securities regulation as well as listing requirements of the Toronto Stock Exchange?
- Are there other accountability mechanisms not covered by the above (including community engagement requirements for companies in the extractive sector)?
- To what extent are companies held 'accountable' through voluntary codes of conduct initiated by domestic organizations (including local business associations)?
- What are the loan agreement covenants/conditions with Equator Banks and consequences for non-compliance?
- To what extent are Canadian companies held 'accountable' through voluntary codes of practice including those developed by the Prospectors and Developers Association of Canada (PDAC), MAC and the International Council of Mining and Metals (ICMM)?

For Phase One, we used the legislation and regulations applicable to a mining operation in Ontario (Federal, Provincial, and regional) as the basis for our analysis of the Canadian context. This work is not truly reflective of the experience across Canada, and a later, more in-depth study comparing Canadian jurisdictions may be required to come to defensible generalizations about accountability across Canada.

The results of Phase One are attached as Appendix 1 and briefly summarized below.

b) Summary (parts one and two)

Unsurprisingly, Canada scores well in the areas covered in the CSR Accountability Report consistent with its status as a developed and politically stable nation. Canada has both a sophisticated legislative framework of compliance and strong enforcement capacity. Nevertheless, as would be expected, there are ongoing challenges and some sources of legislative uncertainty. In particular, ongoing domestic and international developments and initiatives insert a measure of uncertainty in what is required of companies when engaging with indigenous communities. Further, there is a gap between what is strictly required by law and what may be advisable to ensure a strong social license to operate. Canada was also singled out by the Organization for Economic Co-operation and Development (OECD) for weaknesses in the enforcement of its legislation prohibiting the bribery of foreign public officials- the *Corruption of Foreign Public Officials Act* (the "CFPOA"). Between 1999 and 2011, there have been only two convictions under the CFPOA. In contrast, between 2005 and 2011 alone, 85 corporate enforcement actions were brought under equivalent legislation in the United States (*Foreign Corrupt Practices Act*).

The industry itself, through member organizations such as MAC, PDAC and ICMM, has sought to improve performance of companies in the area of CSR by developing programs and systems to track, evaluate and improve upon social, environmental, health and safety performance. MAC's initiative- Towards Sustainable Mining (TSM)- focuses on improving the mining industry's performance in evaluating the quality, comprehensiveness and robustness of their CSR management systems. Adherance to the TSM initiative is mandatory for all MAC members. PDAC created the PDAC e3 Plus Framework, a set of principles for social, environmental and health and safety performance, accompanied by guidance on how to integrate the principles into companies' operations. The ICMM's Sustainable Development Framework (SDF) commits its corporate members to implement and measure their performance against a set of ten sustainable development principles. ICMM's assurance program certifies member compliance with the guidelines.

The Federal Government has taken steps specifically in the area of CSR, releasing a voluntary compliance framework in March 2009- *Building the Canadian Advantage: a Corporate Social Responsibility Strategy for the Canadian Extractive Sector* (the "Strategy") - to encourage CSR best practices in Canadian companies. In taking this step, Canada is exhibiting some initiative and leadership in the broad area of CSR for its extractive sector although, given the voluntary nature of the Strategy, the Federal Government's efforts have been criticized by some as lacking teeth.

3. PHASE TWO

a) Introduction

- Upon completing a review of the Canadian accountability context, Phase Two has two parts: i) to consider the practices in the Foreign Jurisdictions; and ii) to compare the Canadian context findings with the practices of the Foreign Jurisdictions.
- For Phase Two of the CSR Accountability Report, the following objectives (similar to the objectives for Phase One) guided our analysis for each of the Foreign Jurisdictions:

- What national social and environmental 'rules' (statues, laws, regulations and guidelines) apply to corporations operating in the Foreign Jurisdiction?
- What social and environmental 'rules' apply to corporations in the Foreign Jurisdiction? What are the enforcement powers of bodies administering such legislation?
- What types of penalties arise from the violation of such 'rules' (including civil, criminal, administrative, monetary, fines and possible settlement agreements)?
- What accountability measures apply to Officers and Directors? What are the liability implications for non-compliant Officers and Directors?
- What are the accountability requirements under national securities regulation and Stock Exchange rules?
- Are there other accountability mechanisms not covered by the above (including community engagement requirements for companies in the extractive sector)?
- To what extent are companies held 'accountable' through voluntary codes of conduct initiated by domestic organizations (including local business associations)?

The results of part one of Phase Two is found at Appendix 2, A-D and is summarized briefly below.

b) Summary (part one)

Each Foreign Jurisdiction tends to have law 'on the books' in each relevant area examined in the CSR Accountability Report; however, governance weaknesses in each Foreign Jurisdiction inhibits meaningful enforcement of the legislation. Inconsistent application of rules further aggravates the situation, producing an uncertain investment environment. The below countries are listed based on the relative strength of accountability within each jurisdiction, from strongest to weakest.

Peru

In general terms, Peru ranks the highest of the Foreign Jurisdictions in the CSR Accountability Report in both legislative and enforcement capacity. Elections in 2011, however, resulted in a change in government with a more ambiguous and uncertain commitment to supporting foreign inverstment, particularly in the natural resource sector. Recent developments in the requirements for consultation with indigenous populations through the incorporation of ILO 169[1] (which itself carries uncertainty in interpretation) poses challenges for both government and mining companies operating in Peru. While legislative and political efforts have attempted to reduce the incidents of domestic corruption and bribery, effectively combating corruption and bribery, particularly on the regional level, remains a going-concern in Peru.

Guatemala

Like Peru, Guatemala generally has the laws 'on the books' in each of the areas covered in the CSR Accountability Report but struggles acutely with enforcement. Since the 1996 Peace Accords, which ended 36 years of civil war, the country has pursued important reforms and macroeconomic stabilization policies. The country, however, continues to face critical political and social hurdles in coming to terms with the past. Relationships with indigenous populations have also created significant instability and conflict in the country. There are particular deficiencies in the enforcement of human rights, labour, employment and occupation health and safety and anti-bribery laws.

Tanzania

Tanzania's governance is inhibited by an under-resourced and inefficient government bureaucracy and limited enforcement capacity. Already weak constitutional protection of human rights is further undermined by significant and frequent violations without effective recourse for the victims. Corruption remains one of the main issues and barriers to entry for investment. Labour rights are routinely violated and, again, the legislative and enforcement tools provide limited recourse. Land disputes are quite common with conflict between customary and national land rights.

Papua New Guinea

Papua New Guinea (PNG) struggles with the fundamentals of good governance and exhibits weak adherence to the rule of law as reflected by significant political interference, limited bureaucratic capacity and significant struggles with domestic corruption. PNG's limited governance capacity produces serious challenges in dealing with the necessary work permits, environmental compliances, etc. so crucial for foreign investment in the extractive sector. PNG's political and regulatory challenges are aggravated by the sheer diversity and isolation of many of its communities. (PNG has several thousand communities, each with a different tradition, culture and often language.) Currently proposed legislative changes would revert

1 Indigenous and Tribal Peoples Convention, 1989

ownership of minerals and resources to traditional landowners, impacting companies' consultation practices with indigenous communities going-forward as well as existing relationships.

c) Summary (part two)

The final part of the CSR Accountability Report, and the second part of Phase Two, is to compare the accountability of Canadian mining companies who chose to operate in Canada and those who operate in foreign jurisdictions (a "Gaps Analysis"). The purpose of the second part of Phase Two is to gain an understanding of the 'gaps' between the Canadian accountability regime and the accountability regimes in place in each of the Foreign Jurisdictions. Given the limitations of this initial study the results will be more useful as general guidance regarding whether further study in the area would provide fruitful and meaningful results. This could lead to more in-depth studies that could be designed so that the conclusions reached may be relied upon publicly. To come to broader conclusions of where Canada fits worldwide, these further studies should also include a broader selection of countries. In particular, an analysis of the accountability regimes in place in countries with comparable governance capacity, a key weakness in the Foreign Jurisdictions, would provide the ISR Committee with a more accurate picture of where Canada fits amongst politically, legally and economically developed and stable regimes.

The 'Gaps' Analysis is at Appendix 3 of the CSR Accountability Report and is summarized below.

The 'Gaps' Analysis is divided into three parts.

i) Part One - The Enforcement 'Gap'

The first part highlights the most significant gap which can be described as the 'enforcement gap'; the gap between the rules and regulations 'on the books' and the enforcement of these same rules and regulations. The consequence of this 'enforcement gap' is significant: While each of the Foreign Jurisdiction tends to have 'laws on the books' in each of the key areas of analysis, the gap between what is 'on the books' and what is effectively and consistently applied and enforced is often sizeable. This 'enforcement' gap can be sourced to three factors: (a) lack of governance capacity; (b) a weak civil society; and (c) bribery and corruption (which is both aggravated by weak governance and an inhibitor to strengthened governance capacity). The key distinction is the extent to which the Foreign Jurisdiction has the governance capacity and political will to ensure effective, consistent and meaningful enforcement of its legislation, free of corruption.

While this CSR Accountability Report is able to highlight in broad terms the nature of the 'enforcement gap' in each of the Foreign Jurisdictions and as between each Foreign Jurisdiction and Canada, further work would be needed to provide a detailed analysis of the specific enforcement gaps in each regulatory area.

ii) Part Two - International Accountability

The second part looks at the role of international guidelines and other domestic accountability regimes applicable to Canadian companies operating in the Foreign Jurisdictions ("International Accountability") in light of the enforcement gap. The pressure on Canadian companies in the extractive sector exerted by governments, financing institutions, international and domestic organizations, and civil society, to incorporate international guidelines is significant and intensifying. One of the main drivers of International Accountability is the recognition that many foreign jurisdictions including the Foreign Jurisdictions (to a greater or lesser extent) suffer from an enforcement gap. As such, International Accountability acts as a sort of 'stop-gap' assisting Canadian companies to operate in accordance with best practices wherever they invest and operate. While International Accountability can assist in the proper management of natural resources in foreign jurisdictions suffering from an enforcement gap, International Accountability has its limits which must be recognized. Many of the problems inherent to International Accountability is the confusion between what companies, even the best-regulated companies, can effectively do in Foreign Jurisdictions with an enforcement gap and what ultimately can only be effectively the responsibility of the state.

There are three main, overlapping ways in which international guidelines and initiatives are incorporated into the activities of Canadian mining companies. One, there are the guidelines and initiatives that are driven by financing institutions which 'harden' otherwise voluntary principles. Two, the Federal Government has endorsed certain performance guidelines and has mandated the office of the Extractive Sector CSR Counsellor to review CSR practices of Canadian extractive sector companies operating outside of Canada in the context of these identified performance standards. Finally, Canadian mining associations have developed separate guidelines and reporting requirements which while often voluntary can be made mandatory by virtue of membership. Each of these sources is discussed in greater detail in the Phase One Report and in the 'Gaps' Analysis attached as Appendix 3.

iii) Part Three- General Observations

The third part of the Gap Analysis provides some additional observations that flow from the review of CSR accountability regimes. CSR is an ever-evolving and challenging area, not only for companies but for governments, financing institutions, domestic and international organizations. The challenges emerge in part from the inherent limitations of International Accountability, namely that a well-functioning state is always more effective in managing the natural resources of a country for the benefit of its citizens. A well-functioning state also needs to be accompanied by an active, engaged and informed civil society with consistent access to the resources and information necessary to effectively influence government action and to hold government to account. Finally, on a practical level, the proliferation of CSR related rules and guidelines, both domestic and international, also produce uncertainty – which rules are applicable?- as well as conflict- rules related to one area of CSR may directly conflict with the requirements imposed in another area of CSR accountability.

4. LIMITATIONS OF CSR ACCOUNTABILITY REPORT

The information gathered for each of the foreign jurisdictions country reports is based on analyses of legislation and regulatory requirements available to the public. Additional requirements may exist and apply to corporations other than those apparent on public websites. As such, we wish to acknowledge that the CSR Accountability Report may not fully capture all accountability measures applicable to firms operating in this jurisdiction. Rather, it is meant to provide an instructive guide as to the salient regulatory requirements currently in place. While we have reviewed the relevant laws and CSR policies and practices in the Foreign Jurisdictions and have provided our analysis, we must stress that we are not qualified to provide legal advice on the laws of Foreign Jurisdictions where we are not qualified to practice law.

The emergence of CSR standards to which companies 'must' or 'should' comply with is constantly evolving. As such, there exists a measure of imprecision in any endeavour attempting to highlight legal obligations apart from aspirations, or corporate 'best practises.' The CSR Accountability Report emphasizes those noteworthy obligations applying to companies at the time of drafting, while, wherever possible, highlighting emerging trends.

For the purposes of consistency throughout this CSR Accountability Report, we use the following definition of Corporate Social Responsibility (CSR): the economic, legal, social, ethical and discretionary expectations that society has regarding the activities of private sector corporations. Corporations have positive responsibilities, not only to their shareholders, but also to a diverse range of stakeholders including employees, suppliers, customers, the local community, local state and federal governments, environmental groups and other non-governmental organizations.[2]

Finally, as we completed this initial project, further possible avenues of analysis arose, but were beyond the purpose of this work. These avenues of analysis may include:

(a) Building on the CSR Accountability Report, comparing the accountability regimes in other countries hosting mining sites. This would include looking at other countries at varying states of development.

(b) Comparing accountability regimes in other major home states in addition to Canada.

(c) Analysing how governance gaps revealed in host state accountability regimes are met by home state accountability. Do the 'stop-gap' international CSR initiatives adequately address the gaps that exist or are there opportunities to develop new initiatives to fill these gaps?

In order to ensure that Canada is, and remains, a leader in CSR, the above noted avenues of analysis will help focus attention on any deficiencies that can be met with new initiatives while at the same time shining a greater light on the Canada's strong CSR profile and leadership in the area.

2 Kevin O'Callaghan, "A Framework for Understanding the Legal Structure of Corporate Social Responsibility," (2011) presented at the 57th Annual Rocky Mountain Mineral Law Institute, July 21-23, 2011. [unpublished]

PHASE ONE - CSR ACCOUNTABILITY REPORT FOR CANADA

1. INTRODUCTION

Phase 1 of the accountability review and report to the Mining Association of Canada's International Responsibility Committee (the "ISR Committee") (the "Report") aims to provide an understanding of the accountability standards applying to mining companies operating in Canada. Following this initial phase, such measures will be compared to country specific analyses, the goal of which is to underscore Canada's regulatory state in relation to other mining investment recipient countries with regard to corporate social and environmental accountability requirements.

2. OBJECTIVES

The following objectives will guide this analysis:

Corporate Accountability Measures in Canada:

- What national social and environmental 'rules' (statues, laws, regulations and guidelines) apply to corporations operating in Canada?
- What social and environmental 'rules' apply to corporation in this jurisdiction? What are the enforcement powers of bodies administering such legislation?
- What types of penalties arise from the violation of such 'rules' (including civil, criminal, administrative, monetary, fines and possible settlement agreements)?
- What accountability measures apply to Officers and Directors? What are the liability implications for non-compliant Officers and Directors?
- What are the accountability requirements under Ontario securities regulation as well as listing requirements of the Toronto Stock Exchange?
- Are there other accountability mechanisms not covered by the above (including community engagement requirements for companies in the extractive sector)?
- To what extent are companies held 'accountable' through voluntary codes of conduct initiated by domestic organizations (including local business associations)?

International Accountability Measures Applying to Canadian Corporations:

- What are the loan agreements covenants/conditions with Equator Banks and consequences for non-compliance?

- How have the principles figured into Export Development Canada's (EDC) loan assistance policy?
- Other finance-related obilgations.

For the purposes of consistency throughout this Report, the term Corporate Social Responsibility (CSR) will be used to describe the economic, legal, social, ethical and discretionary expectations that society has regarding the activities of private sector corporations. Corporations have positive responsibilities, not only to their shareholders, but also to a diverse range of stakeholders including employees, suppliers, customers, the local community, local state and federal governments, environmental groups and other non-governmental organizations.[1]

Limitations

This Report on the Canadian accountability regime will not be truly reflective of the experience across Canada, and a later, more in depth study comparing Canadian jurisdictions may be required to come to defensible generalizations about accountability across Canada.

The emergence of CSR standards to which companies 'must' or 'should' comply with is constantly evolving. As such, there exists a measure of imprecision in any endeavour attempting to highlight legal obligations apart from aspirations, or corporate 'best practises.' This report emphasizes those noteworthy obligations applying to companies at the time of drafting, while, wherever possible, highlighting emerging trends.

3. GENERAL OVERVIEW: LEGAL TRADITION AND REGULATORY LANDSCAPE

All jurisdictions in Canada (provincial, territorial and federal) are common law other than the Province of Quebec, which is a civil law jurisdiction. Canada is a federal state with powers divided between the federal and provincial levels of government under the Canadian constitution. Generally speaking, the regulation of human rights and the environment falls under both federal and provincial authority. This analysis will primarily focus on federal legislation as it applies to mining companies and, to the extent that it is possible, relevant Ontario-based legislation.

Corporations are principally regulated by the jurisdictions in which they are incorporated. The corporate and securities law regimes in Canada do not, as a general matter, explicitly address human rights or environmental protection. Social and environmental issues are specifically dealt with in statutes covering human rights, labour and employment, occupational health and safety, and environmental protection adopted at both levels of government.

Beyond statutory legal obligations created under such legislation, common law obligations exist under Canadian law and apply to corporations operating hereunder.

The Canadian Constitution, including the Charter of Rights and Freedoms, does not impose specific obligations on corporations. However, corporations must comply with applicable human rights codes and other legislation of general application (outlined below).

In 2006, the Government of Canada published a guide for businesses regarding CSR. This guide sought to assist Canadian businesses in developing and implementing CSR strategies and internal policies. In 2006, the Government of Canada instigated a consultative process (further to a Parliamentary report of the Standing Committee on Foreign Affairs and International Trade commissioned by the Liberal Government in 2005). This consultative process culminated in the release by the Government of Canada of *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector* (the "Strategy")[2], a framework for Canadian companies operating in the international extractive sector. This is a voluntary framework that encourages Canadian companies to adopt CSR best practices, including signing on to the Voluntary Principles on Security and Human Rights.[3] While the 'Building the Canadian Advantage' framework serves as a guide for companies, it does not create any mandatory legal obligations.

4. CORPORATE ACCOUNTABILITY MEASURES

- *What social and environmental 'rules' apply to corporations in this jurisdiction?*

a) Human Rights Legislation:

The *Canadian Human Rights Act* (the "CHRA"),[4] in conjunction with provincial human rights codes, provides the human rights framework within which Canadian businesses operate. Human rights legislation in Canada prohibits discriminatory practices on the basis of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and

1 Kevin O'Callaghan, "A Framework for Understanding the Legal Structure of Corporate Social Responsibility," (2011) presented at the 57th Annual Rocky Mountain Mineral Law Institute, July 21-23, 2011. [unpublished]

2 DFAIT, "Corporate Social Responsibility Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector," (March 2009) online: DFAIT <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-stategie.aspx?view=d>.

3 Voluntary Principles on Security and Human Rights, online: <http://www.voluntaryprinciples.org/principles/introduction>.

4 R.S.O., 1985, c. H-6.

conviction for which a pardon has been granted.[5] The CHRA protects employees and customers of federally regulated organizations.

Businesses in Canada are required to provide equal pay and equal opportunity for persons of similar skill levels and abilities. Ontario's *Pay Equity Act,*[6] for example, requires that employers establish and maintain compensation practices that provide for pay equity between genders.[7]

In addition, a business' duty not to discriminate includes a duty to accommodate disabilities. Business inconvenience, resentment or hostility from other co-workers, the operation of collective agreements and customer 'preferences,' cannot be considered in the accommodation process.[8] Where a disabled employee requires support in order to work or use a particular service, employers and service providers have a duty to provide these supports and services. Ontario human rights legislation prescribes three considerations in assessing whether an accommodation would cause undue hardship on an employer; cost, outside sources of funding if any, and health and safety requirements, if any.[9]

Specialized administrative bodies have been created under Canada's human rights legislation to administer and enforce human rights laws. At the provincial level, the Ontario Human Rights Commission is charged with administering the *Ontario Human Rights Code* ("OHRC") and providing dispute resolution services. Formal complaints may be initiated against businesses under the OHRC and referred to the Ontario Human Rights Tribunal by any person or by reference from the Ontario Human Rights Commission.[10] Similar administrative bodies exist at the federal level as well as in other Canadian provinces.

International Human Rights Legislation

International conventions to which Canada has become a party to do not automatically become part of the law of Canada. Rather, treaties that affect the rights and obligations of individuals and businesses must be implemented by domestic law.[11] Many of the international human rights treaties ratified by Canada have been implemented and enacted domestically through human rights codes and employment and labour laws. As a general rule, treaties and conventions, such as the ones listed below, are state-to-state agreements and do not apply directly to corporations.

UN Treaties Ratified by Canada:

1. International Covenant on Economic, Social and Cultural Rights
2. International Covenant on Civil and Political Rights
   a. Optional Protocol (allowing individual complaints)
   b. Second Optional Protocol (aiming at abolishing the death penalty)
3. Convention on the Elimination of All Forms of Discrimination Against Women
   Optional Protocol (permitting individual complaints)
4. Convention Against Torture and Other Cruel, Inhuman and or Degrading Treatment or Punishment
5. Convention for the Elimination of Racial Discrimination
6. Convention on the Rights of the Child
   a. Optional Protocol on the Involvement of Children in Armed Conflict
   b. Optional Protocol on the sale of children, child prostitution and child pornography
7. Convention on the Rights of Persons with Disabilities

b) Labour, Employment & Occupational Health and Safety Legislation:

Human rights issues are also addressed by labour, employment and health and safety laws in Canada. In Ontario, the *Labour Relations Act 1995* ("LRA"),[12] governs the interaction between the management of a company and representatives of its employees. The LRA applies primarily to workplaces in the private sector, but also applies to certain parts of the public sector (municipal workers, hospital employees, Ontario Hydro, etc.) with some modifications. The *Employment Standards Act*, ("ESA")[13] however, sets out minimum

5 Ibid., s. 3 (1).
6 R.S.O. 1990, Chapter P.7
7 Ibid., s. 7 (1).
8 See generally Ontario Human Rights Commission, "Policy and Guidelines on Disability and the Duty to Accommodate," (December 2009) online: OHRC <http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2/pdf>, at 18 – 22.
9 Ibid., p. 22.
10 R.S.O. 1990, CHAPTER H.19, s. 34 & 35.
11 A.G. Can. V. A.G. Ont. et al. (Labour Conventions Case), [1937] 1 D.L.R. 673
12 S.O. 1995, Chapter 1.
13 S.O. 2000, Chapter 41.

employment conditions and establishes basic worker rights in the Province, including equal pay for equal work measures.[14]

In addition to such employment legislation, provincial governments have enacted occupational health and safety laws to guard workers against health and safety hazards in the workplace. In Ontario, the *Occupational Health and Safety Act*[15] requires that employers provide a safe work environment for employees through various measures, including establishing workplace policies on violence and harassment, providing proper supervision and training to workers and ensuring that equipment, materials and protective devices are maintained in good working order.[16]

c) Environmental Legislation:

The *Canadian Environmental Assessment Act* ("CEAA")[17] is a federal law that requires federal authorities to consider the environmental effects of projects before making any decisions or exercising any powers that enable the project to proceed, (i.e. before initiating the project, providing funding, granting land, or issuing certain regulatory approvals). Mining projects in Canada are subject to the CEAA where there is a federal decision-making responsibility to enable a project (as defined by the CEAA).

The CEAA applies to projects outside Canada where a federal responsible authority proposes to initiate or provide funding for a project. The environmental assessment process for foreign projects is set out in the *Projects Outside Canada Environmental Assessment Regulations* established under the CEAA. Mining projects outside of Canada do not typically trigger an assessment under these regulations.[18]

The *Canadian Environmental Protection Act, 1999* ("CEPA")[19] regulates the release of toxic substances into the environment. Part II of the statute deals first with the identification of substances that could pose a risk either to the environment or to human life and health. Part II also provides a procedure for adding such substances to Schedule I of the CEPA, which is a List of Toxic Substances.[20]

Mining activities can result in the emission of various pollutants, including smog-causing pollutants, greenhouse gases, and substances that have been declared toxic under CEPA. CEPA does not apply when mining companies conduct activities abroad.[21]

The quality of effluent discharged from metal mines in Canada is regulated under the Metal Mining Effluent Regulations (MMER) under the *Fisheries Act*.[22] Subsection 36(3) of the *Fisheries Act* prohibits the deposit of deleterious substances in water frequented by fish unless permitted under regulations. Mining operations that are not captured under the MMER, such as coal mines, diamond mines, quarries and other non-metallic mineral mining facilities, are subject to the prohibition in subsection 36(3) of the *Fisheries Act*.

There are two environmental statutes in Ontario that have application to control of mining operations: (1) the *Environmental Protection Act*[23] ("EPA"); and (2) the *Ontario Water Resources Act*[24] ("OWRA").

The EPA contains a general prohibition on pollution, establishes a permit program for dischargers which in effect constitutes an exception to the general pollution prohibition, authorizes the issuance of a variety of environmental remediation orders, creates an appeals tribunal in respect of approvals and orders and establishes a set of offences and penalties. The OWRA is intended to protect surface and groundwater from adverse impacts caused by contaminants. The provisions of the OWRA are, in most respects, identical to those in the EPA.

In addition to such legislation, the Ontario *Environmental Bill of Rights* ("EBR") provides for public participation and governmental responsibility with respect to matters of environmental concern. As a means to help implement and oversee the provisions of the legislation, the Act provides for the appointment of an Environmental Commissioner. Under the legislation, the public has certain rights including, a statutory cause of action against any person who has contravened provincial environmental legislation or caused harm to a public resource.[25]

d) Anti-Corruption and Bribery Legislation:

The Government of Canada has sought to prevent and prohibit potential domestic corruption through a combination of federal statutes, parliamentary rules and administrative provisions. The *Criminal Code* includes offences which prohibit bribery, frauds on the government and influence peddling, fraud or a breach of trust in connection with duties of office, municipal corruption, selling or purchasing office, influencing or negotiating appointments or dealing in offices, possession of property

14 Ibid., s. 42.
15 S.O. 2000, Chapter O.1.
16 Ibid., s. 32.01, 42. (1), 37. (6).
17 S.C. 1992, c. 37.
18 Office of the Auditor General of Canada, "Federal regulation of Canadian mining companies operating in Canada and abroad," online: OAG <http://www.oag-bvg.gc.ca/internet/English/pet_304_e_34995.html>.
19 S.C. 1999, c. 33
20 Supra note 19.
21 Office of the Auditor General of Canada, "Federal regulation of Canadian mining companies operating in Canada and abroad," online: OAG <http://www.oag-bvg.gc.ca/internet/English/pet_304_e_34995.html>.
22 R.S.C., 1985, c. F-14
23 R.S.O. 1990, c. E.19
24 R.S.O. 1990, c. O.40
25 See generally S.O. 1993, c. 28

or proceeds obtained by crime, fraud, laundering proceeds of crime and secret commissions.[26]

Corporate Criminal Law in Other Jurisdictions:

The approach by other advanced legal systems to corporate criminal liability has varied considerably.

In the United States, the federal courts and most states apply a vicarious liability approach to corporations for illegal acts committed by their officers, agents or employees while exercising corporate powers within the scope of their employment for the benefit of the corporation.

In May 2000, the U.K. Home Office proposed the creation of an offence of "corporate killing," where a person's death was a result, in whole or in part, of a "management failure" by a corporation. While various proposals on this subject languished in an out of Parliament for several years, in July 2007 the British government enacted the *Corporate Manslaughter and Corporate Homicide Act 2007*; creating a new offence of corporate manslaughter in England, Wales and Northern Ireland and in Scotland, the offence of corporate homicide. The provisions of the Act have a major impact on the health and safety needs of companies. It is now possible for employers to be prosecuted if someone has been killed at or by work because of a failure in how the company's activities are managed or organised, amounting to a gross breach of duty.

Sources:
David Goetz, "Bill C-45: An Act to Amend the Criminal Code," Parliamentary Information and Research Service, online: <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c45&Parl=37&Ses=2>.

Corporate Manslaughter and Corporate Homicide Act 2007 (U.K.) c. 19.

On December 17, 1997, Canada, along with other members of the Organization for Economic Co-operation and Development (OECD) signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention")[27]. To meet the Convention's requirements, the Federal Government passed the *Corruption of Foreign Public Officials Act*[28] (the "CFPOA") which came into force on February 14, 1999. the CFPOA makes it illegal for Canadian businesses and individuals to bribe foreign officials to obtain or retain business.

Jurisdiction extends to individuals as well as corporations (as with the US *Foreign Corrupt Practices Act* (the "FCPA"); however, unlike the FCPA and most other anti-bribery legislation focused on foreign public officials, the CFPOA does not employ the nationality jurisdiction basis for asserting jurisdiction. The Canadian test for jurisdiction has been developed through case law. Generally, Canada has jurisdiction over the bribery of foreign public officials when an offence under CFPOA is committed in whole or in part in its territory. To be subject to the jurisdiction of Canadian courts, a significant portion of the activities constituting the offence must take place in Canada. The test for establishing a sufficient basis for jurisdiction is the establishment of a 'real' and 'substantial' link between the offence and Canada. In making this assessment, the court must consider all relevant facts that happened in Canada that may legitimately give Canada an interest in prosecuting the offence. Subsequently, the court must then determine whether there is anything in those facts that offends international comity.[29]

This was about to change as part of Prime Minister Harper government's "Tough on Crime" agenda with Bill C-31 in 2009. Bill C-31 proposed to amend the CFPOA by clarifying that it applies to Canadian individuals acting outside of Canada (comparable to domestic concerns under the FCPA). With prorogation, Bill C-31 died on the Order Paper in 2009. This type of legislation, however, may well be re-introduced in the next parliamentary session, and would reflect the general trend toward extending extra-territorial reach in the area of anti-corruption legislation for foreign officials.

Canadian companies may also be held liable for the acts of agents or contractors if the agent or contractor plays an important role in managing the company's activities, or if an officer of the company knows about the agent or contractor's conduct and does not take all reasonable measures to stop them.[30]

e) Consultation with Indigenous Groups:

In Canada, Aboriginal rights are set out and defined in section 35 of the Constitution Act of 1982, the *Indian Act* and in relevant case law. Since the entrenchment of aboriginal rights in the Canadian Constitution in 1982,

26 *See generally Criminal Code*, s. 119, 462.3.
27 To date, all 34 OECD members and four non-member countries - Argentina, Brazil, Bulgaria, and South Africa - have adopted this Convention
28 S.C. 1998, c.34
29 *See* R. v. Libman (1985), 21 C.C.C. (3d) 206 (S.C.C.).
30 Note that the UK Bribery Act (2010), considered the 'high water mark' of anti-corruption legislation for the bribery of foreign public officials, expressly provides that any UK business or any foreign business which conducts any business in the UK ("*relevant commercial organization*") is liable if an "*associated person*" bribes another person (public or private) in the conduct of business for that organisation, *wherever that offence occurs*. An "*associated person*" is any person providing or performing services on the Company's behalf – be it an employee, an agent, a contractor, supplier or any other person [section 7]. The guidance published by the UK Ministry of Justice on March 30/11 to provide companies with guiding principles on the interpretation of the Act, indicates that the concept of a person who 'performs services for or on behalf of the organisation' is intended to give section 7 broad scope to cover a range of persons connected to the organisation that could commit bribery on the organisation's behalf.

several Supreme Court decisions have clarified the scope and nature of Aboriginal rights, as well as the Crown's duty to consult with Aboriginal peoples on actions that may infringe on these rights.[31] In *Delgamuukw*, for example, the Court confirmed the Crown's duty to consult with Aboriginal groups regarding decisions wherein aboriginal title may be affected. The Court explained that, while the extent of such consultations will be context specific, at a minimum, they "must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal people whose lands are at issue."[32]

While case law is relatively clear on the Crown's duty to consult with aboriginal groups, it is less so with regards to whether consultations undertaken by private corporations can satisfy the Crown's obligations.[33] In Ontario, greater clarity on this point was provided in October 2009, with the introduction and enactment of Bill 173, *An Act to Amend the Mining Act*. Under the amendments, companies seeking approvals for exploration, mining and mine rehabilitation are required to be proactive in their contact and consultation with aboriginal communities.[34]

f) Other Legislation:

Criminal Law

In March 2004, Canada amended its *Criminal Code*[35] through the introduction of Bill C-45 so as to, among other things: 1) create new rules for establishing criminal liability of organizations for the acts of their representatives, 2) establish criminal culpability for the failure of any person "directing the work of others," to take reasonable steps to prevent bodily harm in the workplace, 3) set out the factors that courts must consider when sentencing an organization and, 4) provide optional conditions of probation that a court may impose on an organization.[36]

- *What types of penalties arise from the violation of such 'rules' (including civil, criminal, administrative, monetary, fines and possible settlement agreements)? What are the enforcement powers of bodies administering such legislation?*

i) Liability for Violation of Human Rights Protection:

Section 60 of the CHRA prescribes offences and penalties for contravention of the Act. Sub-section (1) (c) provides that any employer that reduces wages in order to eliminate a discriminatory practice, obstructs an investigator in the investigation of a complaint or threatens, intimidates or discriminates against an individual because that individual has made a complaint under the CHRA, is guilty of an offence and is liable on summary conviction to a fine not exceeding $50,000.

In addition, under section 49 (1) of the CHRA, the Commission may request the Chairperson of the Tribunal to institute an inquiry into human rights complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

In Ontario, the Ontario Human Rights Tribunal has the authority to hear applications regarding contraventions of the *Ontario Human Rights Act.*[37] Among the statutory powers conferred on the Tribunal, it may order an employer to pay monetary compensation, restitution or any other action it deems necessary where an employee's rights under the Act have been infringed.[38]

ii) Liabilty for Violation of Labour, Employment and Health & Safety Legislation:

Under the LRA, the Labour Board has broad jurisdiction to hear applications relating to union certification, unfair labour practices, illegal strikes or lockouts and union member grievances. Penalties for violations of the LRA vary and are to the discretion of the Labour Board.

Under the ESA, employment standards officers have the authority to conduct inspections and investigate violations of the Act.[39] If an employer is unwilling or unable to comply with an employment standards officer's decision, the officer can issue an order to pay wages to an employee or employees, a compliance order, a ticket, a notice of contravention or, for certain violations, an order to reinstate and/or compensate an employee. Orders, tickets, and notice of contraventions are not mutually exclusive, and an officer can issue one or more of these orders or a notice of contravention in the course of an investigation or inspection.

31 William Hipwell, Katy Mamen, Viviane Weitzner and Gail Whiteman, "Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change," (2002) Working Paper Prepared for the North-South Institute, online: <http://www.nsi-ins.ca/english/pdf/syncanadareport.pdf>.
32 Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 at para. 168.
33 Hipwell *et al.* at p. 6.
34 Mining Act, R.S.O. 1990, Chp. M.14, s. 78.2 (1), 78.3(1), 139.2 (4.1), 140. (1), 141. (1).
35 R.S.C. , 1985, c. C-46. [*Criminal Code*].
36 Bill C-45 responded to a mining accident in Plymouth, Nova Scotia where 26 miners died in the Westray Mine; See generally Michael Kerr, Richard Janda, Chip Pitts, Corporate Social Responsibility: A Legal Analysis, (Markam, ON: LexisNexis Canada, 2009), at 100.
37 R.S.O. 1990, Chapter P.7, s. 34.
38 Ibid., s. 45.2.
39 Ontario Ministry of Labour, "Role of the Ministry of Labour," online MOL: <http://www.labour.gov.on.ca/english/es/pdf/es_guide.pdf>.

An order to pay wages cannot exceed $10,000 for each employee covered by the order. In addition, tickets carry set fines of $295, with a victim fine surcharge added to each set fine plus court costs.[40]

In most jurisdictions in Canada, a worker has the right to refuse unsafe work. Fines for violations of health and safety legislation can be significant. Recent changes to Canada's *Criminal Code* provide for the prospect of criminal charges for senior managers, officers and directors of corporations for health and safety violations. A criminal conviction may result in a jail sentence. Section 718.21 sets out a number of factors a court shall take into account when sentencing an organization.[41] In addition, section 732.1 (3.1) sets out several conditions of probation to which a court can prescribe to an organization.[42]

iii) Liability for Violation of Environmental Legislation:

The Compliance and Enforcement Policies for CEPA and the pollution prevention provisions of the *Fisheries Act* set out the principles for the enforcement of the legislation.

When an alleged violation is discovered, Enforcement Officers verify compliance with these pieces of legislation and responses to violations are taken in accordance with departmental policies.

Enforcement responses can include warning letters, inspector's directions, and prosecutions by the Public Prosecution Service of Canada. Upon conviction, enforcement officials will recommend that Crown prosecutors request penalties that are proportionate to the nature and gravity of the offence. Penalties provided under these Acts include, but are not limited to, fines or imprisonment or both. The courts have authority to impose penalties following the conviction of an offender.

Some relevant statutory provisions of CEPA are noted below:

272. (1) Every person commits an offence who contravenes

(a) a provision of this Act or the regulations;

(b) an obligation or a prohibition arising from this Act or the regulations;

(c) an order or a direction made under this Act;

(d) an order, direction or decision of a court made under this Act; or

(e) an agreement respecting environmental protection alternative measures within the meaning of section 295.

(2) Every person who commits an offence under subsection (1) is liable

(a) on conviction on indictment, to a fine of not more than $1,000,000 or to imprisonment for a term of not more than three years, or to both; and

(b) on summary conviction, to a fine of not more than $300,000 or to imprisonment for a term of not more than six months, or to both.

Failure to truthfully disclose pertinent information under CEPA can also give rise to an offence. Section 273 provides that every person commits an offence that, with respect to any matter related to CEPA or the regulations, a) provides any person with any false or misleading information, results or samples; or b) files a document that contains false or misleading information. This offence can be prosecuted on either summary or conviction offence, with penalties including both imprisonment and fines.

In addition to these sanctions, section 274 attaches additional punishment where a person's conduct gives rise to damage to the environment and risk of death or harm to persons:

Every person is guilty of an offence and liable on conviction on indictment to a fine or to imprisonment for a term of not more than five years, or to both, who, in committing an offence under subsection 272(1) or 273(1),

(a) intentionally or recklessly causes a disaster that results in a loss of the use of the environment; or

(b) shows wanton or reckless disregard for the lives or safety of other persons and thereby causes a risk of death or harm to another person.

Subsection 274 (2) specifically provides that sections 220 and 221 of the *Criminal Code* apply in the case of anyone contravening the CEPA whose wanton or reckless disregard for the lives or safety of other in fact causes death or bodily harm.[43]

As mentioned earlier in this analysis, metal mining companies in Canada are regulated by the *Metal Mining Effluent Regulations* under the *Fisheries Act*.

40 Ibid.
41 Criminal Code, s. 718.21
42 Ibid., s. 732.1 (3.1).
43 CEPA, s. 274 (2).

Any person who contravenes or fails to comply with subsection 36(3) of the *Fisheries Act*, including the Metal Mining Effluent Regulations, made pursuant to subsections 34(2), 36(5) and 38(9) of the *Fisheries Act*, is guilty of an offence and may be liable under the Fisheries Act. Some relevant statutory provisions are noted below:

40.(2) Every person who contravenes subsection 36(1) or (3) is guilty of

(a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or

(b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

iv) Liability for Violation of Anti-Bribery and Corruption Legislation:

Section 3(2) of the CFPOA provides that every person who bribes a foreign public official is "guilty of an indictable offence and liable to imprisonment for a term not exceeding five years". The possession and laundering offences carry a prison term of up to ten years imprisonment, if an indictable offence and a $50,000 fine and/or imprisonment of up to six months upon summary conviction.

Imposition of fines for indictable offences is at the complete discretion of the Court. Section 735(1) of the *Criminal Code* provides that, except as otherwise provided by law, where it is an indictable offence, the Court has discretion in determining the fine amount.

In March 2011, the OECD criticized Canada's enforcement record noting that, to date, Canada had completed the prosecution of only one company.[44] Further, the OECD felt that the penalty imposed in that one case fell short. More recently, enforcement appears to be picking up. In 2008, a dedicated RCMP Special Unit, the RCMP Sensitive Investigations and International Anti-Corruption Unit (the "RCMP Special Unit") was formed. In January 2011, the RCMP Special Unit revealed that 23 CFPOA investigations are underway. The recent NIKO Resources case also indicates a level of seriousness by the Canadian government in enforcement not previously seen. In June 2011, Niko Resources, a publicly traded oil and gas company based in Calgary, plead guilty to bribing a Bangladeshi minister, and was the first company to strike a plea deal under with the RCMP under the CFPOA. The company was fined C$9.5 million (US$9.7 million). The company cooperated in the investigation and spent C$900,000 to uncover the facts. Niko's plea deal included three years of probation during which time regular compliance audits will be made and monitored by the court. The RCMP also reported that they are investigating the Canadian mining company Blackfire Exploration for bribery in southern Mexico.

DIRECTOR AND OFFICER LIABILITY

- *What accountability measures apply to Officers and Directors? What are the liability implications for non-compliant Officers and Directors?*

a) Relevant Company/Corporate Legislation:

Canadian corporate law provides that corporations have separate legal personality from their shareholders.[45] Accordingly, shareholders of a corporation enjoy limited liability. There is a line of case law with respect to "piercing the corporate veil" which has created exceptions to the doctrine of separate legal personality and limited liability under Canadian corporate law. While such jurisprudence is highly fact specific, courts will generally impose liability on a controlling shareholder for a corporation's obligations where there is some element of fraud or impropriety or a high degree of disregard for the separate corporate existences that the third party claimant had no real knowledge as to the identity of the corporation it was dealing with.[46]

While there are certain pre-requisites to incorporating in Canada, such as age and solvency criteria, there is no recognition of a duty to society under corporate law. Corporations may be formed by special statute, such as certain crown corporations, which may provide for particular duties or constraints. One Canadian corporation, Magna International Corporation, has adopted a shareholder ratified corporate constitution, which lays out specific principles and guidelines for the allocation of profits between employees, shareholders and management, and the allocation of not more than 2 per cent of pre-tax profit for "charitable, cultural, educational and political purposes to support the basic fabric of society."[47]

44 Calgary-based Hydro Kleen was fined $25,000 for bribing a U.S. immigration official to favourably process visa applications for its employees.

45 *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44 [CBCA].

46 Robert Yalden, Janis Sarra, Paul D. Paton, Mark Gillen, Ronald Davis, Mary Condon, *Business Organizations: Policies, Principles and Practice* (Toronto: Edmond Montgomery Publications Limited, 2008), at 167.

47 Available online at: <http://www.magna.com/magna/en/responsibility/constitution/pdf/Corporate_constitution.pdf>.

Directors Duties

In Canada, corporate directors have two statutory duties: a duty of care and a duty of loyalty and good faith, both of which are prescribed in section 122 of the CBCA. A director can be held personally liable if a stakeholders 'reasonable expectations' are unfairly disregarded. A statutory oppression remedy is also available to stakeholders under corporate law in Canada. This being said, the exact parameters of director's duties in Canada are not clearly defined despite recent Supreme Court decisions.

Duty of Care

Under the CBCA, the duty of care owed by directors is described as a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.[48] In the case of *Peoples Department Stores Inc. (Trustee of) v. Wise*[49] the Supreme Court opined that the standard of care required by directors is an objective and contextual standard:

> The main difference is that the enacted version includes the words "in comparable circumstances", which modifies the statutory standard by requiring the context in which a given decision was made to be taken into account. This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care.[50]

As a result of the *Peoples* decision, the duty of care imposed on directors in Canada is that of other persons in comparable circumstances and not a higher standard as that applied to certain professionals. There general consensus within Canada's corporate community that board's have an affirmative duty to monitor corporate compliance with applicable legal standards.[51] *A duty to ensure that the corporation maintains procedures to prevent human rights abuses and resolves any material violations that come to its attention is, arguably, a logical extension of this duty.*

Duty of Loyalty & Good Faith

The duty of loyalty and good faith is described in the CBCA as being a duty to act honestly and in good faith with a view to the best interests of the corporation.[52] Directors in Canada have been challenged in determining the parameters of the phrase "best interests of the corporation" as have Canadian courts.

The Supreme Court of Canada indicated in *BCE Inc. v. 1976 Debentureholders*[53] (the "BCE Decision") that "[i]n considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflect by the business judgment rule."[54]

However later in its analysis, the Supreme Court emphasized that a director's duty of loyalty and good faith is to the corporation and not outside stakeholders:

> People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, *it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.*[55]

The Court also referred to a "fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen"[56] and noted that "where the corporation is an ongoing concern it [i.e. the duty] looks to the long-term interests of the corporation."[57] The Supreme Court did not define "corporate citizenship" or prescribe guidelines for managerial discretion to consider stakeholder interests.

Given the lack of clarity around the precise meaning and extent of this duty, it is quite possible for directors to consider the reasonable expectations of stakeholders in their decision-making. However, such considerations

48 CBCA, s. 122 (1) (b).
49 [2004] 3 S.C.R. 461.
50 Ibid at 490-491.
51 Ed Waitzer and Johnny Jaswal, "Peoples, BCE, and the Good Corporate "Citizen," (2009) 47 Osgoode Hall Journal 440, at 476.
52 Supra note 48, s. 122 (1) (a).
53 2008 SCC 69.
54 Ibid. at para. 40.
55 Ibid. at para. 66.
56 Ibid. at para. 81.
57 Ibid. at para. 38.

are not mandatory and must give way when competing with considerations as to the "best interests of the corporation." The extent to which the interests of outside stakeholders should factor into the analysis of what is in the best interests of the corporation and thus relevant to director liability for failing to so act, remains unclear in Canadian jurisprudence.

However, it is possible to construe the duty of loyalty and good faith, as well as the duty of care, as encompassing the avoidance of risk and damage to a company's reputation.

Oppression Remedy

In addition to the aforementioned statutory duties, corporate directors in Canada owe additional duties to certain stakeholders not to engage in conduct that amount to "oppression," "unfair prejudice," or "unfair disregard."[58] At common law, the oppression remedy is contemplated as a duty to treat individual stakeholders affected by corporate actions "equitably and fairly", based on the reasonable expectations of those stakeholders. This analysis is undertaken by determining "whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen."[59]

Consequences of Failure to Effect Director Duties

In order to enforce the rights of the corporation, as opposed to the individual rights of complainants, the CBCA permits **derivative actions** brought on behalf of the corporation against directors by "Complainants." Under Section 238 of the CBCA (and provincial equivalents) "Complainants" are either (i) current or former registered or beneficial owners securities of a corporation or its affiliates; (ii) current or former officers or directors of the corporation; (iii) the Director of the CBCA; or (iv) any other person who, in the court's discretion, is a proper person to make an application.[60] According to Section 239 of the CBCA (and provincial equivalents), with leave of the court, a Complainant may bring a derivative action in the name and on behalf of the corporation to enforce a right of the corporation where management has not done so, including rights that correspond to the duties that directors owe to the corporation.[61]

Under this section 241 of the CBCA, a complainant (or stakeholder) may bring an **oppression action** where the court is satisfied that (i) the corporation has acted (or omitted to act); (ii) the business of the corporation has been conducted; or (iii) the powers of the directors have been exercised, in each case in a manner that is oppressive or unfairly prejudicial or that unfairly disregards the interest of any security holder, creditor, director or officer. The court may make a wide variety of orders to rectify oppressive conduct.

More pertinent to stakeholders other than those listed in section 238 of the CBCA are the civil remedies available in tort for breach of duty of care. The duty of care owed by directors, while statutorily prescribed, may be the basis for liability to other stakeholders in accordance with the law of tort and extra-contractual liability. While a director can be indemnified by a corporation as well as obtain insurance paid for by a corporation for actions initiated by third parties, such indemnification will not cover any action that results from a director failing to act in the best interests of the corporation.

There is no Canadian equivalent of the *U.S. Alien Tort Statute*, which empowers foreign plaintiffs to sue domestic corporations for actions committed extra-territorially. However, Canadian courts have considered tort claims filed by international claimants in the context of mining operations abroad.

In **Piedra v. Copper Mesa Mining Corporation**[62] three Ecuadorian villagers sued Copper Mesa Mining Corporation, two company directors, and the Toronto Stock Exchange for damages following an armed assault allegedly carried out by private security forces hired by the company. The plaintiffs alleged that the corporate directors had been given specific information about the attack and had sufficient warning about the risk of further violence and therefore, should have taken decisive steps to avoid it. The courts ultimately rejected this line of argument, ruling that neither the TSX nor the directors of Copper Mesa had a legal duty to consider possible harms to the plaintiffs when conducting their business. On March 11th, 2011, the Ontario Court of Appeal affirmed a lower court decision which had dismissed the claim.[63]

58 Supra note 48, s. 241.
59 Supra note 53 at para. 82.
60 Supra note 48, s. 238.
61 Ibid at s. 239.

62 (2010) ONSC 2421.
63 Ibid.

Common Law Duties

The **business judgment rule** is a common law principle that colours the statutory duty of care and duty of loyalty and good faith owed by directors. The rule affords discretion to directors to determine what is in the best interests of the corporation. It is based on the idea that the courts are hesitant to interfere with decisions made by directors in good faith on the basis that judicial scrutiny of such decisions is problematic given the complexity of the decision making process and the expertise of the directors in relation to the particular issues facing a corporation. In *Kerr v. Danier Leather Inc*[64] the Court on the business judgement rule by highlighting the fact that managers should be free to take reasonable risks without worrying that their decisions will be second-guessed by the courts.

Environmental Duties and Liability

Directors and officers currently face significant personal exposure under federal and provincial environmental statutes. In general, environmental offences fall within the classification of "strict liability" offences. In these circumstances, the prosecution only needs to prove beyond a reasonable doubt that the defendant committed the prohibited act; then the onus falls on the defendant to prove on a balance of probabilities that he or she took reasonable care to prevent the offence from occurring.

Most jurisdictions impose liability on directors and officers if they have directed, authorized, assented to, acquiesced or participated in the commission of an offence by the corporation.[65] The directors and officers will be usually liable whether or not the corporation has been prosecuted or convicted. In some jurisdictions the directors or officers will not be guilty of an offence if they establish that they exercised all reasonable care to prevent the commission of the offence.[66]

The leading case in Ontario on the due diligence defence in the environmental context is *R. v. Bata Industries Ltd.*[67] In that case the court determined that the defence of due diligence required proof that the directors established a proper system to prevent commission of the offence and took all reasonable steps to ensure the effective operation of the system.

In Ontario, the EPA and the OWRA provide that directors and officers who fail to take all reasonable care to prevent a corporation from causing or permitting an unlawful discharge into the environment, or the shore, bank or water (as the case may be) are guilty of an offence. Individuals are subject to penalties of from $20,000 to $50,000 per day, as well as to imprisonment for up to one year. Corporations are subject to fines from $100,000 to $200,000 per day.[68]

The Supreme Court of Canada in *R. v. Sault Ste. Marie (City)*[69] considered what is now section 30(1) of OWRA and held that the "causing" aspect of the offence required the director or officer's active undertaking of an activity that causes pollution. The "permitting" aspect of the offence relates to the director or officer's passive lack of interference or failure to prevent an occurrence that it should have foreseen in the circumstances. The case also held that the due diligence defence was available to the accused.

Employment-related Duties and Liabilities

Canadian law also provides that directors of a corporation are jointly and severally liable to employees for all debts not exceeding six months' wages that become payable to employees for services performed while they are directors.[70] Generally, director liability in this context only arises in certain circumstances, such as when a corporation had commenced liquidation or dissolution proceedings or made an assignment in bankruptcy.

Other Duties

As highlighted above, director's duties encompass both a duty to serve the best interest of the corporation, including ensuring there is compliance with all legal obligations applying to a company, and to avoid conduct that is oppressive to the "reasonable expectations" of stakeholders. Such an expectation may be that a corporation is compliant with applicable human rights legislation. Many provincial pieces of legislation (over 100 in Ontario alone) also impose specific personal liabilities on directors, thereby creating incentives for directors to be monitoring legal compliance with applicable laws, including human rights laws.[71]

64 [2007] 3 S.C.R. 331.

65 See CEPA, s. 280(1); Alberta, Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, s. 232; British Columbia, Environmental Assessment Act, S.B.C. 2002, c. 43, s. 41(4); Manitoba, Environment Act, C.C.S.M. c. E125, s. 35; Newfoundland, Environmental Protection Act, S.N.L. 2002, c. E-14.2; North West Territories, Environmental Protection Act, R.S.N.W.T. 1988, c. E-7, s. 14.1; Saskatchewan, Environmental Management and Protection Act, 2002, S. 2002, c. E-10.21, s. 74(3); Yukon, Environment Act, R.S.Y. 2002, c. 76, s. 179.

66 CEPA, s. 283; Alberta, s. 229, British Columbia, s. 41(3) – note that this defence is limited to false statements.

67 (1992), 9 O.R. (3d) 329 (Prov. Ct.).

68 EPA, s. 194(2); OWRA, ss. 30(1) and 116(2).

69 (1978), 85 D.L.R. (3d) 161 (S.C.C.).

70 See CBCA, s. 119(1).

71 Edward J. Waitzer & Aaron Fransen, "Corporate Law Project: Canada," Mandate of The Special Representative of the Secretary General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises," (2009).

Section 217 of the *Criminal Code*, for example, applies to and extends liability to officers in a corporation directing work. Specifically, section 217 provides that "every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task."

In addition, with respect to offences of negligence committed by an organization, Section 22.1 of the *Criminal Code* sets out a two step test to establish the guilt of an organization. The first step requires proof that a "representative" of that organization is a party to the offence. The second step requires proof that a "senior officer" within the organization departed *markedly* from a standard of care that, in the circumstances, reasonably could have been expected to prevent a representative of the organization from being a party to the offence.[72]

5. REPORTING MEASURES

- *What are the accountability requirements under national securities regulation and Stock Exchange rules?*

a) Securities Disclosure Requirements Regarding Governance and CSR:

General Requirements

The disclosure and reporting system in Canada is primarily guided by securities laws for public companies. Under this regime, disclosure is a matter of analysis carried out by the corporation and discretion as to what it must disclose and what it will voluntarily disclose. This analysis is relevant because officers and directors, and the corporation itself, are exposed to liability for any "misrepresentations" regarding whether such disclosure is voluntary or mandatory. Deference for the business judgement rule does not extend to decisions made by directors with respect to the 'materiality' of information that must be disclosed under securities laws.

Specific Reporting Obligations

Canadian Securities Administrators' (CSA) regulatory disclosure requirements include filings that call for environmental, social and governance ("ESG") information of various types. Of particular importance is National Instrument 51-102 – *Continuous Disclosure Obligations* (NI-51-102) – which sets out the ongoing disclosure requirements of all "reporting issuers" under Canadian securities laws.[73] **NI 51-102** regulates the preparation, filing and dissemination of ongoing disclosure documents such as financial statements, annual information forms ("AIF"), management, discussion and analysis ("MD&A") and material change reports. Furthermore, the annual financial statements, MD&A and AIF are subject to chief executive officer ("CEO") and chief financial officer ("CFO") certification.[74] Section 122 of the *Ontario Securities Act*,[75] exposes directors and officers, as well as the corporation itself, to liability for any "misrepresentations" in continuous or periodic public disclosure materials.

According to the CSA, the purpose of MD&A disclosure is to help current and prospective investors understand what the financial statements do not show.[76] Further, the MD&A form requires management to disclose and discuss, "commitments, events, risks or uncertainties that you reasonably believe will materially affect your company's future performance...," and "known trends, demands, commitments, events, or uncertainties that are reasonably likely to have an effect on your company's business." There is room under this instrument for the disclosure of social and environmental issues, both positive and negative, however this remains to the discretion of the issuer.

A "material fact" under securities laws is a fact that would reasonably be expected to have a significant effect on the market price or value of the securities issued. A "material change" under securities laws is a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer.[77] Both definitions are based on a subjective "market impact test", which makes it difficult to determine what must be disclosed as there is no certainty regarding the nature of information that the market will react to.[78]

Pursuant to NI 51-102, a reporting issuer is required to prepare an AIF to be filed in the SEDAR electronic database, which is available to the public.[79] With regards to ESG disclosure, the AIF is noteworthy. The form (NI 51-102F) requires that a company report **if** it has implemented social or environmental policies that are fundamental to its operations (such as

72 Criminal Code, s. 22.1.

73 Continuous Disclosure Obligations, O.S.C National Instrument 51-102 (July 4, 2008); generally speaking, "reporting issuers" are issuer, whether incorporated or not, whose securities are held by the public and are listed on a securities exchange, or issuers who have filed a prospectus in connection with the distribution of their shares; see Ontario Securities Act, R.S.O 1990, c. S.5, s. 1.1.

74 Certification of Disclosure in Issuers' Annual and Interim Filings, O.S.C National Instrument NI 52-109 (March 30, 2004).

75 R.S.O 1990, c. S.5, 122.

76 Management's Discussion & Analysis, O.S.C. National Instrument 51-102F1 (July 4, 2008)

77 Supra note 70.

78 Ibid.

79 Annual Information Form, O.S.C. National Instrument 51-102F2 (January 1, 2011), s. 5.1(4).

policies regarding the company's relationship with the environment or with communities in which it does business, or human rights policies), it is to describe them and the steps it has taken to implement them.[80] However, it does not require a company to make any statement in the event it has not implemented social or environmental policies. A 2008 study conducted by the Ontario Securities Commission ("OSC") into the environmental disclosure practices of 35 companies in meeting their obligations under NI 51-102 found that many of the companies analyzed were not providing meaningful or sufficiently detailed environmental disclosure.[81]

National Instrument 58-101 – With respect to fostering better corporate governance practices, National Instrument 58-101 – *Corporate Governance Disclosure* – requires reporting issuers to disclose whether or not their boards have adopted and implemented an ethical code of conduct.[82] Companies are also required to describe the steps that the board of directors takes to encourage and promote a culture of ethical business conduct.

National Instrument 58-102F2 – Of particular significance to Canada's mining community is the varied corporate governance disclosure form for venture issuers. NI 58-102F2 requires the disclosure of any steps the board takes to encourage and promote a culture of ethical business conduct.[83] This instrument does not require reporting issuers to explain why they have not adopted an internal code of conduct. In 2007, CSA staff reported on its review of disclosures made on corporate governance practices.[84] Numerous deficiencies were found in the quality of disclosures made.

National Policy 58-201 – *Corporate Governance Guidelines* ("NP 58-201") sets out best practices for corporations with respect to corporate governance. Public companies are encouraged to adopt a written code of business conduct and ethics that provides for, among other things, the reporting of any illegal or unethical behaviour. If a company adopts a written code of conduct it must be filed and made publicly available. Any material deviations from a code of conduct or ethics would likely constitute a material change and would therefore be required to be disclosed via a material change report.

The Johannesburg Stock Exchange ("JSE") follows a 'comply or explain' model in that it requires that all listed companies provide a narrative statement in their annual reports of how they have applied the principles set out in the King Code, the extent of the company's compliance with the King Code and the reasons for non-compliance with any of the principles in the Code.[85] The King Code calls for disclosures of a wide range of environmental, social and governance issues.

Recently, a revised version NP 58-201 was proposed by the CSA that would have embraced a set of principles to guide governance and related disclosure practices.[86] The amendments suggested nine guiding principles for good corporate governance, including the promotion of integrity. The proposed revisions further stated that in connection with the adoption a code of conduct, issues to be addressed should include "the issuer's responsibilities to security holders, employees, those with whom it has a contractual relationship and the broader community." *In November 2009, the CSA announced that it would not be implementing the proposed changes to NP 58-201.*[87]

b) Stock Exchange CSR Reporting Requirements:

The Toronto Stock Exchange ("TSX") does not specifically require the disclosure of ESG factors other than that required of public companies under applicable securities laws.

c) Disclosure Requirements Under Other Legislation:

The Canadian Environmental Protection Act, 1999, requires businesses to disclose their use of certain toxic substances through the National Pollutant Release Inventory ("NPRI"). Information collected through the NPRI is used by Environment Canada in its chemicals management programs and it is made publicly available to Canadians each year. Public access to the NPRI is meant to motivate industry to prevent and reduce pollutant releases. NPRI data helps the Government of Canada track progress in pollution prevention, evaluate releases and transfers of substances of concern, identify and take action on environmental priorities, conduct air quality modeling, and implement policy initiatives and risk management measures.[88]

80 Ibid.
81 Environmental Reporting, O.S.C. Staff Notice 51-717 (February 27, 2008).
82 O.S.C. National Instrument 58-101F1 (July 4, 2008).
83 Corporate Governance Disclosure (Venture Issuers), O.S.C. National Instrument 58-101F2 (July 4, 2008).
84 Corporate Governance Disclosure Compliance Review, CSA Staff Notice 58-303 (June 3, 2007).
85 Canadian Institute of Chartered Accountants, "Environmental, Social and Governance (ESG) Issues in Institutional Investor Decision Making," January 2010, online: CCA <http://www.cica.ca/research-and-guidance/mda-and-business-reporting/other-performance-reporting---publications/item41881.pdf>.
86 CSA, Request for Comment – Proposed Repeal and Replacement of NP 58-201 Corporate Governance Guidelines, NI 58-101 Disclosure of Corporate Governance Practices, and NI 52-110 Audit Committees and Companion Policy 52-110CP Audit Committees (2008) 31 OSCB 12158.
87 CSA Staff Notice 58-305 – Status Report on the Proposed Changes to the Corporate Governance Regime, (2009) 32 OSCB 9347.
88 Environment Canada, "Frequently Asked Questions about the National Pollutant Release Inventory (NPRI)," online: <http://www.ec.gc.ca/inrp-npri/default.asp?lang=en&n=D874F870-1#ws7786DB31>.

6. OTHER ACCOUNTABILITY MEASURES

- *Are there other accountability mechanisms not covered by the above (including community engagement requirements for companies in the extractive sector)?*

a) Office of the CSR Counsellor for the Extractive Industry:

The Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor (the "Office") is one of the concrete results of a consultative process instigated by the Federal Government in 2006 (further to a Parliamentary report of the Standing Committee on Foreign Affairs and International Trade commissioned by the Liberal Government in 2005). This consultative process culminated in the release by the Federal Government of the Strategy on March 26, 2009.

The Office is one of the four pillars in what is a four pillar Strategy and was established on October 20, 2009.[89] The Office takes a multi-stakeholder, collaborative and non-punitive approach to managing issues in the extractive sector. The Office's stated mandate is two-fold: (1) review CSR practices of Canadian extractive sector companies operating outside of Canada in the context of identified performance standards (the "Performance Standards") which are: International Finance Corporation Performance Standards, the Voluntary Principles on Security and Human Rights and the Global Reporting Initiative; and 2) to advise stakeholders on the implementation of the Performance Standards. The OECD Guidelines for Multinational Enterprises (the "Guidelines") have also been endorsed by the Federal Government as one of the applicable performance standards for the Canadian extractive sector. The National Contact Point[90], however, will remain the primary authority concerning the Guidelines. Any request for review made to the CSR Counsellor which relates only to the Guidelines, will be referred to the NCP. If the request for review includes the Guidelines as well as any of the other Performance Guidelines, the CSR Counsellor will lead the review and consult with the NCP on any issues relating to the Guidelines.

Please see sections below for a description of the Guidelines, Voluntary Principles on Security and Human Rights and the Global Reporting Initiative.

Rules of Procedure for the Review Mechanisms of the Office

The Rules and Procedure governing the review mechanisms of the Office came into effect October 20, 2010. As such, the review mechanisms remain virtually untested - two requests for reviews are currently before the Office - but none have yet gone through the whole process. Consequently, it remains an open questions how effective the Office will be in resolving issues and providing important support and advice to the Canadian extractive sector. The challenge for the Office is to be seen as an effective forum for the resolution of issues by a diverse range of stakeholders.

- *To what extent are companies held 'accountable' through voluntary codes of conduct initiated by domestic organizations (including local business associations)?*

b) Mining Association of Canada (MAC) – Towards Sustainable Mining (TSM):

Developed by the Mining Association of Canada in 2004, adherence to the TSM initiative is mandatory for all MAC members. MAC membership includes all major mining companies in Canada. The focus of TSM is to improve the mining industry's performance in evaluating the quality, comprehensiveness and robustness of their CSR management systems. The foundation of this initiative is a series of guiding principles developed in consultation with various community stakeholders.[91]

The principles include specific performance indicators that companies are required to report against each year in a "TSM Progress Report." The TSM Progress Report aims to develop a consistent reporting format to clearly demonstrate performance and allow for the comparison of member performance over time.

Performance indicators of TSM have been developed for:[92]

- Crisis Management
- Energy and Greenhouse Gas Emissions Management
- External Outreach
- Tailings Management
- Biodiversity Conservation Management

89 The other three pillars of the Strategy are support for: (i) host country capacity building initiatives focused on resource governance; (ii) CSR Performance Guidelines and reporting initiatives; and (iii) the development of CSR Centre of Excellence (which was formally launched in January 2010.

90 An interdepartmental committee makes up the Canadian NCP's institutional structure. The members include representatives from Canadian International Development Agency, Foreign Affairs and International Trade Canada, Environment Canada, Finance Canada, Human Resources and Skills Development Canada, Industry Canada, Indian and Northern Affairs Canada and Natural Resources Canada. The NCP Committee is chaired by a Director General from DFAIT.

91 Mining Association of Canada (MAC), "About Us: Member Companies," http://www.mining.ca (select "About Us" and then select "Member Companies").

92 MAC, "Towards Sustainable Mining 101: A Primer" (2010), http://www.mining.ca (select "Towards Sustainable Mining").

- Safety and Health
- Aboriginal and Community Outreach

During the first two years of TSM reporting, results published in the TSM Progress Reports are based on a company's self-assessment. After two years, the TSM verification system is engaged and includes the following three elements:[93]

- Verification of company self-assessments by an external verifier;
- Letter of assurance from a CEO or authorized officer confirming the verified results (to be published on MAC's website); and
- Annual post-verification review of two or three member companies' performance by the Community of Interest Panel.

The verification system allows MAC to monitor the mandatory aspects of the TSM initiative to ensure members are meeting the required standards.

c) Prospectors and Developers Association of Canada - e3 Plus:

The Prospectors and Developers Association of Canada (PDAC) created e3 Plus in 2009, as a new iteration of the original PDAC e3 program. The reference materials assist exploration companies in the continuous improvement of their social, environmental, health and safety performance. As an informational resource, there is no mandatory requirement for mining operators to adhere to the e3 Plus guidelines. Each of the principles, listed below, is accompanied by a two page report to help companies integrate the principles into their operations. Although still in development, PDAC is planning to add performance reporting and verification guidelines to e3 in the near future.[94]

The e3 Plus principles include:[95]

- Adopting responsible governance and management
- Objective: To base the operation of exploration on sound management systems, professional excellence, the application of good practices, constructive interaction with stakeholders, and the principles of sustainable development.
- Applying ethical business practices
- Objective: To have management procedures in place that promotes honesty, integrity, transparency and accountability.
- Respecting human rights
- Objective: To promote the principles of the United Nations Universal Declaration of Human Rights by incorporating them into policies and operational procedures for exploration.
- Committing to project due diligence and risk assessment
- Objective: To conduct an evaluation of risks, opportunities and challenges to exploration, and prepare strategies and operational plans to address them before going into the field.
- Engaging host communities and other affected and interested parties
- Objective: To interact with communities, indigenous people, organizations, groups and individuals on the basis of respect, inclusion and meaningful participation.
- Contributing to community development and social wellbeing
- Objective: To have measures in place which support the social and economic advancement and capacity building of communities whose lives are affected by exploration while respecting the communities' own vision of development.
- Protecting the environment
- Objective: To conduct exploration activities in ways that create minimal disturbance to the environment and people.
- Safeguarding the health and safety of workers and the local population
- Objective: To be proactive in implementing good practices for health and safety performance in all exploration activities and seek continual improvement.

d) International Council on Mining and Metals (ICMM) – Sustainable Development Framework (2003) (SDF):

The 20 members of the ICMM includes several large extraction companies. Together the membership employs 800,000 of the estimated 2.5 million people

93 MAC, "Towards Sustainable Mining 101: A Primer" (2010), http://www.mining.ca (select "Towards Sustainable Mining"), at Pp. 12-13.
94 Prospectors and Developers Association of Canada (PDAC), "Principles for Responsible Exploration," http://www.pdac.ca (select "e3" and then select "Principles").
95 PDAC, "Principles for Responsible Exploration," http://www.pdac.ca (select "e3" and then select "Principles").

working in the mining and metals sector, with interests in over 750 sites, in 58 countries across the globe.[96]

In 2003, the ICMM's council committed their corporate members to implement and measure their performance against a set of ten sustainable development principles (the SDF).[97] Then in 2008, the ICMM added an assurance program to certify member compliance with the guidelines. ICMM members, under SDF, are also required to adhere to the G3 reporting requirements.[98]

The 10 Principles of SDF are:[99]

- Principle 1: Implement and maintain ethical business practices and sound systems of corporate governance.
- Principle 2: Integrate sustainable development considerations within the corporate decision-making process.
- Principle 3: Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.
- Principle 4: Implement risk management strategies based on valid data and sound science.
- Principle 5: Seek continual improvement of our health and safety performance.
- Principle 6: Seek continual improvement of our environmental performance.
- Principle 7: Contribute to conservation of biodiversity and integrated approaches to land use planning.
- Principle 8: Facilitate and encourage responsible product design, use, re-use, recycling and disposal of our products.
- Principle 9: Contribute to the social, economic and institutional development of the communities in which we operate.
- Principle 10: Implement effective and transparent engagement, communication and independently verified reporting arrangements with stakeholders.

The Assurance Procedures require members to:[100]

- Include in a public report, statements on how the company complies with the ICMM-SDF Principles and reporting commitments.
- Seek confirmation that Sustainable Development reports meet level A+ of the G3 guidelines.
- Have sustainable development reports assured by a third party consistent with this procedure.

The ICMM guidelines reference elements of other initiatives including: OECD, IFC, and the Global Compact. In addition to this framework, the ICMM has released guidance documents regarding indigenous peoples: "*Position Statement on Mining and Indigenous People and the Good Practice Guide: Indigenous Peoples and Mining*."[101] While the elements of this statement are not mandatory, they may become mandatory for ICMM members in the future.

7. INTERNATIONAL ACCOUNTABILITY MEASURES APPLYING TO CANADIAN CORPORATIONS

- *What are the loan agreement covenants/conditions with Equator Banks and consequences for non-compliance?*

The Equator Principle ('EPs")s were developed by financial institutions in consultation with the IFC and parallel to the IFC-PSs. Launched in Washington D.C. on the 4th of June, 2003, the EPs were initially adopted by ten global financial institutions: ABN AMRO Bank, N.V., Barclays PLC, Citigroup, Inc., Crédit Lyonnais, Credit Suisse First Boston, HVB Group, Rabobank Group, The Royal Bank of Scotland, WestLB AG, and Westpac Banking Corporation.[102] As of May 2011, there were 72 financial institutions that have adopted the EPs including all of the "big five" Canadian banks.[103]

The EPs are intended to serve as a common baseline and framework. Each institution may then build its own internal policies, procedures and standards. The key aspect of the EPs is that each institution has committed to not provide financing for projects unless that project can demonstrate that it will comply with the EPs. The principles apply to all new projects financed anywhere in the world with total capital costs of US$ 10 million or more, across all industry sectors. While EPs do not to apply to already existing projects, they do apply to

96 International Council on Mining and Metals (ICMM), http://www.icmm.com (select "Members").
97 ICMM, "Sustainable Development Framework," http://www.icmm.com (select "Sustainable Development Framework" and then select "10 Principles").
98 ICMM, "Assurance," http://www.icmm.com (select "Sustainable Development Framework" and then select "Assurance").
99 ICMM, "10 Principles," http://www.icmm.com (select "Sustainable Development Framework" and then select "10 Principles").
100 ICMM, "Assurance," http://www.icmm.com (select "Sustainable Development Framework" and then select "Assurance").
101 ICMM, "Mining and Indigenous Peoples Issues" (2008) http://www.icmm.com (select "Sustainable Development Framework" and then select "Position Statements").
102 The Equator Principles, "Leading Banks Announce Adoption of Equator Principles" (2003), http://www.equator-principles.com (link to release found at the bottom of the home page).
103 Ibid, http://www.equator-principles.com (on homepage).

expansion projects or the upgrading of facilities, where the changes may create significant environmental or social impacts. Project finance advisory services must also adhere to the guidelines.

The EPs do not create any rights in, or liability to, any person (public or private). As a result, the institutions that are adopting and implementing the EPs do so voluntarily and independently, without reliance on or recourse to the IFC or the World Bank.[104]

The EPs are grouped into the following categories:[105]

- Principle 1: Review and Categorisation
- Principle 2: Social and Environmental Assessment
- Principle 3: Applicable Social and Environmental Standards
- Principle 4: Action Plan and Management System
- Principle 5: Consultation and Disclosure
- Principle 6: Grievance Mechanism
- Principle 7: Independent Review
- Principle 8: Covenants
- Principle 9: Independent Monitoring and Reporting
- Principle 10: EPs Financial Institution Reporting

As part of the obligation to review a project's expected social and environmental impacts (see Principle 2), financial institutions are to use a system of social and environmental categorisation, based on the IFC's environmental and social screening criteria: Category A (potential significant adverse social or environmental impacts); Category B (potential limited adverse social or environmental impacts); and Category C (minimal or no social or environmental impacts). Where the project takes place in the developing world, the assessment must refer to the IFC-PCs.

The key principle from a legal perspective is Principle 8: Covenants. For Category A and B projects, the borrower will covenant in financing documentation:[106]

- to comply with all relevant host country social and environmental laws, regulations and permits in all material respects;
- to comply with the Action Plan (see Principle 4 - describes and prioritises the actions needed to implement mitigation measures, corrective actions and monitoring measures necessary to manage the impacts and risks identified in the Principle 2 assessment) during the construction and operation of the project in all material respects;
- to provide periodic reports in a format agreed with financing institution (with the frequency of these reports proportionate to the severity of impacts, or as required by law, but not less than annually), prepared by in-house staff or third party experts, that i) document compliance with the Action Plan, and ii) provides representation of compliance with relevant local, state and host country social and environmental laws, regulations and permits; and
- to decommission the facilities, where applicable and appropriate, in accordance with an agreed decommissioning plan.

If a borrower does not comply with these covenants, the financial institution will work with them to ensure compliance. If that is unsuccessful, the financial institution reserves the right to exercise any remedy considered appropriate.

As a result, the EPs are voluntary for the financial institutions that adhere to the principles, but are mandatory for project proponents who sign the covenants. Borrowers must meet the first 9 principles, with the 10th principle requiring financial institutions to audit their own performance in ensuring that their borrowers meet the EPs commitments.

- *How have the principles figured into Export Development Canada's ("EDC") loan assistance policy?*

Export Development Canada (EDC) is a Crown corporation established to support and develop Canada's export trade and capacity to engage in trade and respond to international opportunities. EDC provides credit insurance, financing (including equity), contract insurance and bonding and political risk insurance.

Environmental Reviews

EDC's Environmental and Social Risk Management Policy governs the Corporation's overall environmental commitments. This policy establishes the principles that are followed when assessing the environmental risks of transactions that EDC is asked to support.

104 The Equator Principles, http://www.equator-principles.com (select "About the EPs and Adoption").
105 Ibid, (select "The Equator Principles").
106 The Equator Principles, http://www.equator-principles.com (select "The Equator Principles").

EDC's Environmental and Social Review Directive establishes the systematic process that EDC follows when assessing the environmental and social impacts of projects it is asked to support.

The directive requires EDC to categorize relevant projects on the basis of their potential adverse environmental and social effects. Categorization determines the nature and extent of information that will be required by EDC in conducting its environmental and social review of a project, as well as the extent of that review.[107]

Where the directive requires that EDC conduct a review of a project, EDC uses international standards as benchmarks. The directive establishes grounds upon which EDC is justified in entering into a transaction related to a project where that project, despite the implementation of mitigation measures, is likely to have adverse environmental and social effects.

Loan Assistance Policy & the Equator Principles

EDC adopted the Equator Principles in October 2007, and as such its loan assistance programme follows the EP environmental and social screening criteria.

In 2009, EDC reviewed eight projects under the Equator Principles: four Category A and four Category B projects, three of which were in the extractive sector.[108]

Other Finance-Related Obligations

i) International Finance Corporation (IFC) Performance Standards on Social and Environmental Sustainability (PSs)

The IFC is a member of the World Bank Group and is the largest private sector development institution focused on emerging market economies. Through international workshops, the IFC has developed and published the IFC-PSs.[109] In a recent press release; the CEO of the IFC stated that the IFC-PSs "have become a global benchmark for environmental and social performance."[110]

Through direct and or indirect adherence, the IFC-PSs are applied by over 70 financial institutions worldwide. In addition to this, 15 European development financial institutions and 32 export credit agencies from the OECD refer to the IF-PSs in their CSR policies. As a result, the IFC-PSs are applied by most major public and private financial institutions worldwide.[111]

The IFC-PSs define the roles and responsibilities of each institution's clients regarding the management of their projects and the requirements for receiving and retaining IFC support. The standards include requirements to disclose information. It is mandatory for those procuring financing from the IFC to abide by the IFC-PSs.

The standards include strong social consideration for: [112]

- Performance Standard 1: Social/Environmental Assessment and Management Systems
- Performance Standard 2: Labour and Working Conditions
- Performance Standard 3: Pollution Prevention and Abatement
- Performance Standard 4: Community Health, Safety and Security
- Performance Standard 5: Land Acquisition and Involuntary Resettlement
- Performance Standard 6: Biodiversity Conservation and Sustainable Natural Resource Management
- Performance Standard 7: Indigenous Peoples
- Performance Standard 8: Cultural Heritage

The PSs are outlined in a 37-page document with each standard reviewed under the headings: Introduction, Objectives, Scope of Application, and Requirements.[113] In addition, the IFC has published a 137-page set of guidance notes that discuss the requirements for performance of each standard in detail.[114]

The IFC-PSs were reviewed and revised in 2010[115] with the new standards approved by the IFC Board on May 12, 2011.[116] The most significant change in the IFC-PSs is the controversial move from "free-prior informed consultation" to "free prior informed consent" under "special circumstances." FPIC is required when projects: (i) are to be located on or make commercial use of natural resources on lands subject to traditional

107 EDC, Environmental and Social Review Directive, online: <http://www.edc.ca/english/docs/ERD_e.pdf>.
108 EDC, Summary of the 2009 Corporate Social Responsibility Report, online: <http://www.edc.ca/publications/2010/csr/english/PDF/csr_summary_report_e.pdf>.
109 International Finance Corporation, "IFC Sustainability - Environmental and Social Standards," http://www.ifc.org (search "Performance Standards").
110 International Finance Corporation, "IFC Updates Environmental and Social Standards, Strengthening Commitment to Sustainability and Transparency" (2011), http://www.ifc.org (search "IFC Updates Environmental and Social Standards").
111 Jim McArdle, "Bankers Get Social: Managing Social and Human Rights Issues" (2011), http://www.edc.ca (search "Bankers Get Social").
112 International Finance Corporation, "Performance Standards on Social & Environmental Sustainability" (2006), http://www.ifc.org (search "IFC Performance Standards").
113 Ibid.
114 Ibid, (search "Guidance Note Full").
115 International Finance Corporation, "The Review Process," http://www.ifc.org (search "Review Process").
116 International Finance Corporation, "IFC Updates Environmental and Social Standards, Strengthening Commitment to Sustainability and Transparency" (2011), http://www.ifc.org (search "IFC Updates Environmental and Social Standards").

ownership and/or under customary use by indigenous peoples; (ii) require the relocation of indigenous peoples from traditional or customary lands; or (iii) involve commercial use of indigenous peoples' cultural resources. This application of FPIC does not include the language "consult to obtain" found in UNDRIP as there is no reference to indigenous ownership of resources.

The revised IFC-PSs include new measures targeted at enhancing energy and water efficiency, and greenhouse-gas reduction. These revisions also address: human trafficking, forced evictions, and communities' access to cultural heritage. The complexities of supply chain management are also taken into account, expanding on requirements for clients to assess whether their primary suppliers are contributing to the degradation of natural habitats. If suppliers are degrading natural habitats producers are required to alter their purchasing activities to procure equipment and supplies from suppliers that do not degrade natural habitats, or to work with their suppliers to improve their environmentally harmful practices. Finally, the IFC-PSs' new "Access to Information Policy" allows the IFC to publicly disclose information during each stage of a project's development. Additionally, a new revision to the "Sustainability Framework" requires disclosure of all contracts, with the goal of increased transparency and accountability.

ii) World Bank – Environmental, Health, and Safety (EHS) Guidelines (2007)

The World Bank produces the EHS Guidelines, as a reference document with general and industry-specific examples of international best practices. Originally published in 2007, the IFC uses the guides as a source of technical information during the project assessment processes. The 99-page guide describes the performance and measurement levels that are considered to be achievable in new facilities through the use of existing technology.

The EHS Guidelines are organized as follows:[117]

- Environmental
- Occupational Health and Safety
- Community Health and Safety
- Construction and Decommissioning

There are significant similarities between the EHS Guidelines and the IFC-PSs. For example, the EHS Guidelines are referred to in IFC Performance Standard 3 – Pollution Prevention and Abatement. Even though the EHS Guidelines are general in nature, there are specific supplemental guidelines for a number of industries, including the Oil and Gas and Mining industries.[118]

iii) Performance Guidelines (endorsed by the Government of Canada)

- **Organization for Economic Co-operation and Development (OECD) - Guidelines for Multinational Enterprises (1976) (GME)**

The Guidelines set out recommendations for multinational OECD based enterprises operating within any states adhering to the Guidelines.

The Guidelines consist of a comprehensive set of voluntary principles and standards for responsible business conduct related to: employment and industrial relations, human rights, the environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation[119] which have been endorsed by governments and are recommended, i.e. voluntary to corporations. Each of the signatories (of which Canada has been one since 1976) is required to establish and maintain a NCP who is responsible for promoting and making available the Guidelines, helping to resolve issues that arise under the Guidelines and reporting annually to the OECD Investment Committee.[120]

There are 34 members of the OECD and 8 non-OECD states that adhere to the principles including: Australia, Canada, the U.S.A., and the U.K.

- **Voluntary Principles on Security and Human Rights**

The Voluntary Principles on Security and Human Rights (VPs) are a set of non-binding principles developed in 2000 to address the issue of balancing safety and security needs while respecting human rights and fundamental freedoms. Their development was led by the governments of the United States, the United Kingdom, Norway and the Netherlands. Membership is open to governments, companies and non-governmental organizations. As of September 2011, the following organizations were members: [121]

117 International Finance Corporation, "Environmental, Health, and Safety Guidelines" (2007), http://www.ifc.org (search "Health and Safety Guidelines").

118 International Finance Corporation, http://www.ifc.org (search "Sector Guides").

119 OECD Guidelines for Multinational Enterprises (2008), http://www.oecd.org (search "Guidelines Multinational").

120 The OECD-GME is currently being updated with a new version coming before the OECD council in May of 2011.

121 The Voluntary Principles, "Who's Involved: Participants," http://www.voluntaryprinciples.org (select "Participants").

- Participant Governments: Canada; Netherlands; Norway; United Kingdom; United States of America
- Engaged Governments: Colombia; Switzerland
- Corporations: Anglo American plc; AngloGold Ashanti; Barrick Gold Corporation; BG Group; BHP Billiton; BP; Chevron Corporation; ConocoPhillips; ExxonMobil; Freeport-McMoRan Copper & Gold Inc.; Inmet Mining Corporation; Hess Corporation; Marathon Oil Company; Newmont Mining Corporation; Occidental Petroleum Corporation; Rio Tinto plc; Shell; Statoil; Talisman Energy Inc.
- Non-Governmental Organizations: Amnesty International; The Fund for Peace; Human Rights First; Human Rights Watch; IKV Pax Christi; International Alert; Oxfam; Search for Common Ground; Pact, Inc.; Partnership Africa Canada.
- Observers: International Committee of the Red Cross; International Council on Mining & Metals; International Petroleum Industry Environmental Conservation Association

The principles provide guidance in managing the risks associated with security and human rights practices - especially in countries often associated with conflict and alleged human rights abuses. The VPs also suggest methods of engaging and working with state and private security forces to ensure respect for human rights and the fundamental liberties of individuals.

The VPs are organized into three groups: Risk Assessment; Interactions between Companies and Public Security; and Interactions between Companies and Private Security. What follows is a brief summary of the VPs:[122]

1. Risk Assessment

- General Principles: the ability to successfully assess security risk is essential to the success of a project; utilizing a broad spectrum from simple to highly complex risks; quality assessments depend on taking into account many different perspectives.
- Specific Factors: identification of security risks; potential for violence; human rights records (public and private); rule of law; conflict analysis (root causes and nature of local conflicts); equipment transfers (to public or private security).

2. Interactions Between Companies and Public Security

- Governments have the primary role of maintaining law and order; security; and respect for human rights.
- Companies have an interest in ensuring that actions taken by governments are consistent with human rights.
- Specific Principles regarding: security arrangements; deployment and conduct; consultation and advice; and responses to human rights abuses.

3. Interactions Between Companies and Private Security

- Private security may be necessary where host governments are unable or unwilling to provide adequate security.
- Private security should observe the policies of the company (by contract) regarding ethical conduct and human rights; the law and professional standards of the country in which they operate; emerging best practices developed by industry, civil society, and governments; and promote the observance of international humanitarian law.
- Companies need to monitor and conduct detailed investigations into allegations of abusive or unlawful acts; the availability of disciplinary measures sufficient to prevent and deter; and procedures for reporting allegations to relevant local law enforcement authorities when appropriate.

Recently, the IFC, ICMM, the global oil and gas industry association for environmental and social issues (IPIECA), and the International Committee of the Red Cross (ICRC) co-financed a project to develop a non-prescriptive, practical guide to assist companies in implementing the VPs which can be a challenge, particularly in areas of conflict or weak governance. The publication- Implementation Guidance Tools- are meant to serve as a reference guide or resource mainly for companies in the extractive sector.

122 The Voluntary Principles, "The Principles: Introduction," http://www.voluntaryprinciples.org (select "The Principles").

- **Global Reporting Initiative (2000) (GRI)**

This is a multi-stakeholder initiative founded in 1999 by the Coalition of Environmentally Responsible Economies, in conjunction with the United Nations Environment Program. The GRI's first edition of the "Sustainability Reporting Guidelines" was released in 2000. Development occurred through a consensus-seeking, multi-stakeholder process. Participants were sourced from global business, civil society, labour, academic and professional institutions. The third iteration of the GRI guidelines has been released and is referred to as G3.[123] The G3 guidelines were first published in 2006.[124] When approved, the Board of Directors recommended improvements in the areas of human rights, gender and community impacts. Accordingly, GRI developed further guidance on these issues. As a result, GRI released the G3.1 Guidelines in March of 2011. Although the GRI currently acknowledges use of the outdated G3 guidelines the contemporary G3.1 guidelines are recommended.[125]

These voluntary guidelines assist in the standardization of measuring and reporting on an organization's economic, environmental and social performance. Organizations that adhere to the G3 guidelines must report on each element or explain why the reports may be considered unnecessary.

The metrics used to measure GRI performance covers a myriad of topics, including: the economic impact, the use of natural resources, the impact on biodiversity and agricultural lands, local community education and child labour. A sector supplement has also been developed for the Minerals Extraction Industry and can be found on the GRI website.[126]

123 Global Reporting Initiative, "History," http://www.globalreporting.org (search "History").
124 Global Reporting Initiative, "History," http://www.globalreporting.org (search "History").
125 http://www.globalreporting.org/ReportingFramework/G3Guidelines/
126 Global Reporting Initiative, "GRI Portal - Mining and Metals," http://www.globalreporting.org (search "Mining Metals").

PHASE TWO - CSR ACCOUNTABILITY REPORTS FOR FOREIGN JURISDICTIONS

1. INTRODUCTION

Phase Two of the accountability review and report to the ISR Committee (the "Report") aims to provide (i) an understanding of the social and environmental accountability standards operating in each of Peru, Guatemala, Papua New Guinea and Tanzania (the "Foreign Jurisdictions"); and (ii) an analysis of any weaknesses or gaps in the Canadian accountability regime when compared to the Foreign Jurisdictions.

For the purposes of consistency throughout this Report, the term Corporate Social Responsibility (CSR) will be used to describe the economic, legal, social, ethical and discretionary expectations that society has regarding the activities of private sector corporations. Corporations have positive responsibilities, not only to their shareholders, but also to a diverse range of stakeholders including employees, suppliers, customers, the local community, local state and federal governments, environmental groups and other non-governmental organizations.[1]

2. OBJECTIVES

The following objectives, as originally identified by the ISR Committee, will guide the analysis for each of the Foreign Jurisdictions:

Corporate Accountability Measures in Foreign Jurisdictions:

- What national social and environmental 'rules' (statues, laws, regulations and guidelines) apply to corporations operating in each of the Foreign Jurisdictions?
- What social and environmental 'rules' apply to corporation in the Foreign Jurisdiction? What are the enforcement powers of bodies administering such legislation?
- What types of penalties arise from the violation of such 'rules' (including civil, criminal, administrative, monetary, fines and possible settlement agreements)?
- What accountability measures apply to Officers and Directors? What are the liability implications for non-compliant Officers and Directors?

1 Kevin O'Callaghan, "A Framework for Understanding the Legal Structure of Corporate Social Responsibility," (2011) presented at the 57th Annual Rocky Mountain Mineral Law Institute, July 21-23, 2011. [unpublished]

- What are the accountability requirements under national securities regulation and Stock Exchange rules?
- Are there other accountability mechanisms not covered by the above (including community engagement requirements for companies in the extractive sector)?
- To what extent are companies held 'accountable' through voluntary codes of conduct initiated by domestic organizations (including local business associations)?

Limitations

The information gathered for this country report is based on analyses of legislation and regulatory requirements available to the public. Additional requirements may exist and apply to corporations other than those apparent on public websites. As such, we wish to acknowledge that this report may not fully capture all accountability measures applicable to firms operating in this jurisdiction. Rather, it is meant to provide an instructive guide as to the salient regulatory requirements currently in place. While we have reviewed the relevant laws and CSR policies and practices in the Foreign Jurisdictions and have provided our analysis, we must stress that we are not qualified to provide legal advice on the laws of Foreign Jurisdictions where we are not qualified to practice law.

The emergence of CSR standards to which companies 'must' or 'should' comply with is constantly evolving. As such, there exists a measure of imprecision in any endeavour attempting to highlight legal obligations apart from aspirations, or corporate 'best practises.' This Report emphasizes those noteworthy obligations applying to companies at the time of drafting, while, wherever possible, highlighting emerging trends.

Finally, mining companies are increasingly operating in jurisdictions where regulatory infrastructures are under-developed and social services are either inept or non-existent. This reality underlies the recent recommendations of the U.N.'s Special Representative of the Secretary-General, John Ruggie, under the 'Protect, Respect and Remedy' Framework.[2] While duties to protect human rights continue to rest with nation-states, there is international consensus forming around the notion that corporations have a duty to respect human rights, especially when operating in less developed countries. Accordingly, additional accountability measures may apply to mining companies operating in foreign jurisdictions above and beyond home state regulation.

2 SGSR Report to the UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights (7 April 2008) online: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

CSR ACCOUNTABILITY REPORT PERU

1. GENERAL OVERVIEW: LEGAL TRADITION AND REGULATORY LANDSCAPE

Peru has a national legal framework that follows civil law tradition.

According to its Constitution, adopted in December 1993, Peru is a democratic, social, independent and sovereign Republic. Its government is unitary, representative and decentralized, organized under the separation of powers into executive, legislative and judicial branches, each of them autonomous and independent in accordance with the provisions of article 43.[1]

Peru is one of the four largest producers of copper, lead, zinc and tin; the largest producer of silver; and the fifth largest producer of gold.[2] Mining has played an integral role in the history of Peru, including the European colonization of the region during the 16th Century. It is felt that, historically, many of the resource extraction projects have operated without consideration of the social and environmental impacts. As a result, some Peruvian communities may not welcome the further development of the Nation's mining industry.[3]

In the past two decades, the Government of Peru has pursued a neo-liberalisation of Peruvian laws to encourage further development of the country's mineral resources, primarily through the encouragement of foreign investment.[4] More recently, legislation has been enacted to improve the overall social and environmental impacts of mining on local communities. Even with recent advancements in CSR related laws, there has been some criticism of the Government in relation to the lack of enforcement of the CSR related laws.[5]

On June 1st, 2011, former Peruvian President Alan Garcia Perez announced the *Supreme Resolution 142-2011-pCM* (the "Resolution") in response to widespread protesting by Aymara First Nations and in advance of the Country's Presidential Elections on June 5th, 2011. Ollanta Moisés Humala Tasso was elected the 94th President of Peru and has yet to alter the Resolution as enacted by President Alan Garcia Perez. The Resolution suspends all mining concessions across several Peruvian provinces for one year. A review committee consisting of members of: the Ministries of Energy and Mines, Agriculture, and Environment; in addition to representatives from provincial and

1 *Constitución Política del Perú de 1993*, El Peruano, edición especial, (1993).
2 Oxfam International, "Corporate Social Responsibility in The Mining Sector in Peru", http://www.oxfamamerica.org (search "Mining Peru").
3 Ibid.
4 Jeffrey Bury, "Mining Mountains: Neoliberalism, Land Tenure, Livelihoods, and the New Peruvian Mining Industry in Cajamarca" (2005), 37 *Environment and Planning* 221-239.
5 Oxfam International, "Corporate Social Responsibility in The Mining Sector in Peru", http://www.oxfamamerica.org (search "Mining Peru").

municipal government, will review Peru's mining regulation framework during this time. Several mining projects have been affected by this Resolution, including those currently operated in Peru by Bear Creek Mining and Rio Alto.[6]

In June 2011, Peruvians elected their 94th President, Ollanta Humala. President Humala's campaign ran on pledges to raise mining royalties and tighten state control over natural resources. Since entering office, President Humala has put forth legislation that will overhaul Peru's mining tax regime by reducing overall tax paid by mining companies, while at the same time generating much needed revenues to support the government's ambitious stimulus plans. Such manoeuvres have been positively received by the international investment community. Humala's recent enactment of an indigenous consultation law, which brings Peru more in line with its obligations under ILO Convention 169, has also received praise from the human rights community domestically and abroad while creating uncertainty as to its application to existing mining projects. Notwithstanding such developments, challenges with regard to combating corruption within the public and private sectors remain a top priority for this government going forward.

2. CORPORATE ACCOUNTABILITY MEASURES

- *What social and environmental 'rules' apply to corporations in this jurisdiction?*

a) Human Rights Legislation:

The 1993 Constitution and the human rights treaties to which Peru is a party constitute the main legal framework for the promotion and protection of human rights. Pursuant to article 1 of the Constitution, protection of the individual and respect for individual dignity are the supreme goals of society and the State.

Article 2 of the Constitution provides protection against discrimination on the basis of origin, race, sex, language, religion, opinion, economic situation or any other reason.[7]

Article 44 establishes that it is a prime duty of the Peruvian State to guarantee the full enjoyment of human rights. There are a number of mechanisms for achieving effective protection of these rights. To this end, the Constitution includes a number of constitutional guarantees.[8]

The Peruvian Constitution established the Office of the Human Rights Ombudsman (the "**Office**") as an autonomous organ, headed up by the Human Rights Ombudsman who is elected and removed by Congress. The Office is responsible for defending the constitutional rights and fundamental rights of the person and of the community, supervising the state administration, performance of its duties, and supervising the delivery of public services to citizens. In 1995, the Peruvian Congress approved the Organic Law on the Office of the Human Rights Ombudsman, and on September 11, 1996, the Office of the Human Rights Ombudsman initiated its activities.

The Office can both respond to complaints from citizens as well as act on its own initiative.

The Office is considered to be reasonably independent and free to operate without government interference. As such, the Office is considered effective although it continues to be insufficiently resourced.

The government has the reputation of cooperating with international governmental organizations and the United Nations.

Peru is a party to the seven main international human rights treaties and to the American Convention on Human Rights, among others.[9] Human rights treaties are automatically incorporated into domestic law on ratification by the President of the Republic, in accordance with articles 55 and 56 of the Constitution, subject to prior approval by Congress. They have constitutional rank according to the fourth Final and Transitory Provision of the Constitution which provides that the rules governing the rights and freedoms recognized by the Constitution are interpreted in accordance with the Universal Declaration of Human Rights and with the international human rights treaties and agreements ratified by Peru, which complement the other rights protected under the Constitution. In addition, article 3 of the Constitution guarantees the protection of rights not expressly covered by the Constitution but analogous to fundamental freedoms based on human dignity.[10]

Peruvian law provides additional human rights protections for the country's large indigenous population. Specifically, the *Law for the Protection of Indigenous or Native Peoples in Isolation and in Initial Contact Situations* aims to establish special cross-protection rights for Indigenous Peoples of the Peruvian Amazon that either live in isolation or in initial contact

6 Dorothy Kosich, "Peru Suspends Mining Concessions in Several Provinces" (2011), http://www.mineweb.com (search "Peru Suspends Concessions").
7 Constitution of Peru, Supra note 1.
8 UN Human Rights Council, "National Report Submitted in Accordance with Paragraph 15A of the Annex to Human Rights Council Resolution 5/1: Peru" (April 2008) A/HRC/WG.6/2/PER/1, at p. 3.
9 Ibid.
10 Ibid.

Key International Agreements For Which Peru is a Signatory	Ratification*	Year
International Covenant on Civil and Political Rights (ICCPR)	Yes	1978
- Optional Protocol to ICCPR (ICCPR-OP1)	Yes	1980
International Covenant on Economic, Social, and Cultural Rights (ICESCR)	Yes	1978
- Optional Protocol to ICESCR (OP-ICESCR)	No	
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	Yes	1971
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	Yes	1982
- Optional Protocol to the Convention on the Elimination of Discrimination Against Women	Yes	2001
Convention on the Rights of the Child (CRC)	Yes	1990
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)	Yes	2005
Convention on the Rights of Persons with Disabilities (CRPD)	Yes	2008
Regional Treaties		
American Convention on Human Rights	Yes	1978
Additional Protocol to the Convention on Human Rights in the Area of Economic, Social, and Cultural Rights "Protocol of San Salvador"	Yes	1995

* Category includes ratification, accession, or succession to the treaty
Source: International Center for Non-Profit Law, online: http://www.icnl.org/knowledge/ngolawmonitor/peru.htm.

situations, including ensuring their rights to life, health safeguarding their existence and integrity.[11]

b) Labour, Employment & Occupational Health and Safety Legislation:

Title 1 of the Peruvian Constitution guarantees basic employment rights, such as the right to fair and equitable pay. The provision of wages is also the primary obligation of employers to their employees under the Constitution.

Title 1 also provides Peruvians with the right to fair and adequate compensation, a maximum workday of eight hours and forty-eight weekly, weekly rest, annual pay and protection against arbitrary dismissal.[12]

The Constitution formally recognizes employee rights to organize, engage in collective bargaining and to strike.

With regard to gender equity, the *Equal Opportunities between Men and Women Act*,[13] aims to align public policy at the national, regional and local levels to ensure women and men are able to freely exercise their rights to equality, dignity, free development, welfare and autonomy. The legislation also prohibits discrimination in all spheres of life, public and private, with the aim of providing for full equality.

In addition, Peruvian law provides for the elimination of child labour under the *Code of Children and Adolescents.* This legislation addresses, among other issues, civil rights, economic, social and cultural rights of children and adolescents with disabilities, the duties of children and adolescents and guarantees.[14]

Employees in the private sector are also covered by the Supreme Decree No. 003-97-TR on Productivity and Competitiveness. Title I of the legislation regulates probation, suspension and termination of employment contracts, worker rights and the termination of the employment relationships. It also provides for the termination of employment for objective reasons, or 'just cause' criteria.[15]

11 *El Peruano*, 2006-05-18, no. 9470, pp. 318954-318955
12 Supra note 1.
13 Law no. 28983. *El Peruano*, 2007-03-16, nm. 9773, pgs. 341606-341608.
14 *Code of Children and Adolescents*, Law no. 27337, *El Peruano*, 07.08.2000, no. 7350, pp. 191401-191418.
15 El Peruano, 1997-03-27, núm. 6116, págs. 147995-148004.

Supreme Decree No. 009-2005-TR, on the *Regulation of Health and Safety at Work,* covers occupational health and safety issues.[16] The legislation applies to all economic sectors and covers all employers and workers in the private sector. Employers are obliged to guarantee the safety and health of workers in performing all tasks while at work.[17] They must provide workers with adequate personal protection equipment and must ensure that exposure to physical, chemical, biological, or ergonomically adverse factors do not cause harm to workers.[18] Additionally, employers must provide workers with information concerning risks in the workplace and with occupational safety and health training when they begin their employment and when any changes in function, job description, or technology occur.[19]

Mining companies must provide additional services to employees working in remote locations. In particular, companies are required to furnish workers in remote areas and their families with adequate housing, basic education, recreational facilities, social services and free medical and hospital care. Each work center must also create a Health and Safety Committee in which employees are represented.[20]

c) Environmental Legislation:

The Peruvian Constitution establishes the State's obligation to promote the sustainable use of natural resources and the conservation of bio-diversity through a defined environmental policy.[21]

Several environmental laws address domestic mining operations. The *Code of Environment and Natural Resources*, for example, requires the development of an EIA report for all natural resource projects and also requires public participation during the production of any EIA report. The *Code* also requires anyone causing pollution to either rectify the adverse effects or compensate the people of Peru for such harm.[22]

The EIA is the Peruvian equivalent to an environmental impact assessment as known in North America and Europe. It is required for new projects, and consists of an analysis of possible adverse effects on the physical and social environment that the proposed project may have. This information enables the ministerial authority assessing a potential project to judge whether or not to grant permission to the developer.[23]

Supreme Decree No. 018 allows authorities to extend permits to domestic and foreign companies involved in mining in Peru.[24]

The process for obtaining an environmental permit required to carry out exploration activities in Peru takes place in stages and is set out in the *Environmental Regulations for Mining Exploration*, Supreme Decree, No. 020-2008-EM, 2008. The purpose of this regulation is the prevention, minimization, mitigation and control of the risks and effects that might result from exploration activities and mining on the health and safety of people and the environment as well as rehabilitation of the environment at project closure.[25]

Regulations setting out EIA requirements are laid out in the *Environmental Protection of Mining and Metallurgical Activities*, Supreme Decree No. 016-93-EM, 1993.

Certification requirements are further required under the *Law on the National System of Environmental Impact*, Law No 27446, 2001. This law requires environmental certification before the all public and private investment projects begin. In particular, it requires companies to plan for and implement various environmental management strategies that may be employed at each stage of the mining process; from exploration to post mine closure.

Significant areas of natural land in Peru are protected under the *Protected Natural Areas Law,* No 26834 of July 4, 1997. This law protects natural areas in Peru, including over 12% of the country's land mass.[26]

Under the *Law on the Sustainable Use of Natural Resources,* No. 26821 of June 26, 1997, the State is required to consider the best interests of the Nation when granting any concession for the extraction of natural resources.[27]

In addition, Supreme Decree No. 042-2003-EM – IT, 2003*,* requires that mining and petroleum extraction companies effect sworn declarations and commit to protecting the environment, consulting with local communities, employing local residents and purchasing materials from local suppliers. The *Decree* also requires that companies produce an annual report identifying the actions taken in relation to this commitment.[28]

16 El Peruano (I) of 2005-09-29, no. 9236, pp. 301166-301175.
17 Ibid., Article 39.
18 Ibid., Article 45, 50.
19 Ibid., Article 43.
20 Presidential Decree no. 014-92-EM, by approving the consolidated text of the *General Mining Law*, El Peruano, 04.06.1992, no. Special Offprint 4339, pp. 107326-107348.
21 Supra note 1.
22 *See* Legislative Decree No 26811 of October 2005; Estudio Grau, "The Environmental and Natural Resources Code", http://www.ecolegal.com (search "Environmental Code").
23 Supra note 18.
24 Alfredo C. Gurmendi, "2009 Mineral Year Book: U.S. Department of the Interior" (2011), http://minerals.usgs.gov (search "2009 Peru").
25 Canadian Institute of Mining, Metallurgy and Petroleum, *Center for Excellence in CSR,* "Peru Laws and Regulations", online: CIM <http://www.cim.org/csr/MenuPage.cfm?sections=141,144&menu=160#block420>.
26 Raul A. Tolmos & Jorge Elegren, "Peru's System of Natural Protected Areas: an Overview", http://www.oecd.org (search "Peru's Protected Areas").
27 Elizabeth Bastida and Tony Sanford, "Mine Closure in Latin America: A Review of Recent Developments in Argentina, Bolivia, Chile and Peru", http://www.sdsg.org (search "Mine Peru").
28 Oxfam International, "Corporate Social Responsibility in The Mining Sector in Peru" (2008), http://www.oxfamamerica.org (search "Mining Peru") at Pp. 21-22.

In 2010, *Supreme Decree No 052-2010-EM*, made the declaration requirements broader in scope and more strictly binding.

With regard to mine closures, the *Law Regulating Mine Closure*, No. 28,090, 2003 requires that public hearings be held prior to the approval of a project plan. In addition, operators are required, under article 6, to guarantee all costs included in the mine closure plan.[29]

Regulations under the *Legacies of Mining Activities Act*, Law No. 28271, 2004, set out the identification of historical mining activity impacts, responsibilities with regard to remediating and rehabilitating affected areas, and the development of financing for the rehabilitation and mitigation of environmental legacy impacts on local communities.[30]

Finally, Peru's *Water Law*, Law No 29338, 2010 prioritizes the use of water for human consumption ahead of over other uses. The use of water for agricultural and fishing industries also takes priority over use by the mining industry.[31]

d) Anti-Bribery and Corruption Legislation:

Peru ratified the United Nations Convention against Corruption (UNCAC) in 2004 and the Inter-American Convention Against Corruption in 1997. Peru has a strong legal framework for fighting corruption, but most observers agree that enforcing such legislation is a major problem.[32]

Corruption is criminalised through Decree No. 635 of the Peruvian Penal Code, which covers attempted corruption, extortion, passive and active bribery, money laundering, and bribing a foreign official.[33]

In response to the serious incidents of corruption in its recent past, Peru has enacted a *Law on the Public Service Code of Ethics*. The law, applicable to all areas of the public administration, governs the behaviour of public officials in accordance with ethical principles to guide public service.[34] Along a similar vein, in February 2010, the Peruvian government announced the creation of a new Anti-Corruption Commission, aimed at promoting transparency and deterring corruption.[35]

Furthermore, in June 2010, the Peruvian government adopted the *Law on Whistleblower Protection*. The bill provides civil servants who report cases of corruption with protection from incrimination or other negative consequences.[36]

Notwithstanding such positive legislative developments, combating corruption remains a going-concern in Peru.[37]

The public institutions granting relevant business licences suffer from widespread corruption and a deficiency in rule of law.[38] Companies continue to complain about excessive red tape and confusion about what licences they need and where to obtain them. It is reported that corruption acts as a regressive tax because small companies pay higher bribes and suffer extortion by tax officials more often than medium and large companies do.[39]

Large-scale corruption in relation to public procurement is common. Foreign companies report that they frequently pay sizeable sums in bribes to win public contracts.[40] Bribery and corruption reportedly occur frequently in connection with resource extraction concessions (logging, mining, and oil), particularly when these concessions are located on protected or Indigenous titled land.[41]

As part of the Government of Peru's stated commitment to fighting bribery and corruption, Peru is one of the pilot countries in a major anti-corruption initiative, the G8 Anti-Corruption and Transparency Initiative. The Government of Peru has also participated in a pilot programme to test methodologies for UNCAC implementation review which participation was voluntary. A country report was completed, reporting on the implementation of the UNCAC articles.

Peru is also taking steps to join the Extractive Industries Transparency Initiative (EITI), under which governments and extractive industries agree to openly publish all company payments and government revenues from oil, gas and mining. EITI implementation in Peru also involves local government and regional projects focused on the provinces of Cusco and Cajamarca, which are the main regions for natural gas and mining activities.

29 Elizabeth Bastida & Tony Sanford, "Mine Closure in Latin America: A Review of Recent Developments in Argentina, Bolivia, Chile and Peru" http://www.sdsg.org (search "Peru").
30 The World Bank, "Republic of Peru Wealth and Sustainability: The Environmental and Social Dimensions of the Mining Sector in Peru" (2005) 14.
31 Law No. 29338 (Decreto Supremo No. 001-2010-AG, Aprueban Reglamento de la Ley No. 29338, Ley de Recursos Hídricos), online: <http://www.bdlaw.com/assets/attachments/Peru%20-%20Law%2029338%20Water%20Law.PDF>.
32 Business Anti-Corruption Portal, "Country Profile: Peru", online: <http://www.business-anti-corruption.com/country-profiles/latin-america-the-caribbean/peru/initiatives/public-anti-corruption-initiatives/>.
33 Ibid.
34 Ibid.
35 Ibid.
36 *Law on Whistleblower Protection in the Administrative Field and Effective Cooperation in Criminal Matters*, Law No. 29542.
37 See generally, Bertelsmann Foundation, Country Report: Peru 2010, online: <http://www.bertelsmann-transformation-index.de/index.php?id=106&L=1#chap3>.
38 See Miller & Chevalier, Latin American Corruption Study 2008, online: <http://www.milchev.com/portalresource/lookup/poid/Z1tOl9NPluKPtDNlqLMRVPMQiLsSwOZCm0%21/document.name=/CorruptionSurveyReport102708.pdf>
39 Business Anti-Corruption Portal Supra note 34.
40 U.S. Dept. of State, "2011 Investment Climate Statement: Peru", (March 2011) online: DOS http://www.state.gov/e/eeb/rls/othr/ics/2011/157342.htm>.
41 Business Anti-Corruption Portal Supra note 32.

The Government of Peru published an Executive Decree that approved an EITI Action Plan and Working Group in 2006. Peru was admitted as a candidate country by the EITI board in 2007. In February 2010, Peru applied to extend their deadline for completing EITI validation.

One of 28 EITI candidate countries, Peru is the only participant from Latin America. Peru recently was characterized as "close to compliant" by the EITI Board.[42]

e) Consultation with Indigenous Groups:

Several pieces of legislation were enacted with an interest to preserving indigenous life.

The Ministry Resolution No 596-2002 of May 1, 2002 creates a duty to consult local communities during the EIA reporting stage of permitting. Some of the requirements include: publication of the project plans in the area that will be affected, participation in the EIA development and public hearings where the EIA report will be presented.

Supreme Decree No 028-2008-EMI, 2008, defines public and community participation during the concession, exploration, exploitation, execution and closing of mining process. Supreme Decree No 023-2001—EM, 2001, creates policy and administrative requirements for the Ministry of Energy and Mines to consult with indigenous peoples before making decisions or approving any administrative measures related to mining and extraction activity in Peru.[43]

The Ministry Resolution No 266-2002-EF/15 of May 1, 2002 requires 50 per cent of all taxes collected from the extraction of natural resources to be distributed, through regional and municipal governments, to the areas affected by the extraction projects. Funds gathered are used to provide social programs for those affected.[44]

Most recently, on September 6, 2011, the President of Peru signed into law a bill that had been approved by the Peruvian Congress on August 23, 2011, recognizing the right of indigenous peoples to prior consultations with regard to legislative or administrative measures and development plans, programs, and projects that could affect their rights.[45]

The law establishes, among other significant points, that the aim of 'consultation' is to reach agreement or consent between the State and the indigenous peoples through an intercultural dialogue that guarantees their inclusion in the State's decision-making and the adoption of measures that respect their collective rights. It also establishes that the contents of the law must be interpreted in line with Peru's obligations under *Convention No. 169* of the International Labour Organization ratified in 1995, and that the guiding principles of the right to consultation include those of timeliness, inter-culturalism, good faith, flexibility, reasonable time period, lack of constraints or conditions, and timely information.[46]

Under the legislation, should an agreement not be reached between the government and indigenous peoples, the government has final say on proceeding with a proposed project. This provision has been criticized for running counter to the governments' obligation to obtain free, prior and informed consent before adopting legislative or administrative measures that affect indigenous peoples.[47]

In a "complimentary provision", the bill also exonerates existing projects and legislation from the need for consultation, despite Peru's commitments under ILO 169.[48]

f) Other Legislation:

N/A

- *What types of penalties arise from the violation of such 'rules' (including civil, criminal, administrative, monetary, fines and possible settlement agreements)? What are the enforcement powers of bodies administering such legislation?*

i) Liability for Violation of Human Rights Protections:

Article 24 (a) of the Peruvian Constitution provides that no one may be required to do anything not ordered by law or prevented from doing what the law does not prohibit.[49]

In addition, article 24 (d) of the Constitution prescribes liability for acts of violence committed against another person. Specifically, the provision reads:

42 See generally EITI, online: <http://eiti.org/Peru>.
43 Rodrigo, Elías & Medrano, Abogados, "Supreme Decree N° 023-2011-EM Client Circular" (2011).
44 Alfredo C. Gurmendi, "2009 Mineral Year Book: U.S. Department of the Interior" (2011) http://minerals.usgs.gov (search "2009 Peru").
45 See generally OAS, Inter-American Commission on Human Rights, "IACHR Welcomes the Enactment of Prior Consultation Law in Peru", Press Release No. 99/11 online: OAS <http://www.cidh.oas.org/Comunicados/English/2011/99-11eng.htm>; Gregor ManLennen, "Peru's Consultation Law: A Victory for Indigenous Peoples?" Amazon Watch (September 6, 2011) online: <http://amazonwatch.org/news/2011/0922-perus-consultation-law-a-victory-for-indigenous-peoples>.
46 Ibid.
47 As required under Article 19 of the *UN Declaration on the Rights of Indigenous Peoples*.
48 Gregor ManLennen, "Peru's Consultation Law: A Victory for Indigenous Peoples?" Amazon Watch (September 6, 2011) online: <http://amazonwatch.org/news/2011/0922-perus-consultation-law-a-victory-for-indigenous-peoples>.
49 Constitution of Peru, Supra note 1.

24 (h) No one may be the victim of moral, physical. or psychological violence or be subjected to torture or inhumane or humiliating treatment. Anyone may immediately request a medical examination of the person wronged or prevented from appealing to the authorities himself. Statements obtained by violence are invalid. Anyone resorting to violence will be held liable.[50]

ii) Liability for Violation of Labour, Employment and Health & Safety Legislation:

Article 29 of the *Law on Productivity and Labour Competitiveness* ["LPCL"],[51] nullifies any dismissal motivated by or on the basis of a prohibited ground of discrimination (including pregnancy; filing a complaint against the employer; race; sex; religion; political opinion; trade union membership and activities; language). If an employee's dismissal is declared null and void (in that it was based on prohibited grounds), reinstatement is mandatory. However, the affected worker in such situations may opt for compensation instead.[52]

The *Law Against Acts of Discrimination* also amended the Penal Code to include a Chapter on Discrimination, which provides that the penalty for discrimination against a person or group of people based on racial, ethnic, religious, or gender differences is 30 to 60 work days of community service or the loss of 20 to 60 vacation days.[53]

Enforcement

The Ministry of Labour and Employment Promotion ("**MTPE**") is responsible for investigating alleged discrimination and has authority to fine organizations that have violated this law; fines are greater for repeat offenders.[54]

The MTPE also has the authority to order an entity to suspend operations for a period not exceeding one year.[55] However, the law does not provide for the investigation or sanction of non-compliance with laws prohibiting wage discrimination on the basis of gender.[56]

Disputes regarding acts of employment discrimination are typically handled by courts at the regional level, although all levels of the judicial system have the capacity to try such cases. Cases involving constitutionally-defined rights, including the constitutionally-defined right to equality before the law and the prohibition of discrimination, may be submitted directly to a constitutional tribunal.[57]

With regard to occupational health and safety, inspectors are authorized by law to conduct workplace inspections. An inspector has the authority to enter a workplace for inspection at any time, take samples and measurements that he or she considers necessary, examine books, and solicit information in relation to safety and health in the workplace.[58]

When an occupational safety and health inspector observes a serious and imminent risk to workers, he or she can order an immediate work stoppage. It is considered a very serious infraction of the law if an employer does not suspend work immediately after an inspector warns of imminent danger or to renew work without having remedied the situation that prompted the closure. In such cases, the employer may be sanctioned by the MTPE in accordance with the scale of fines for each sector.[59]

Employers who, through threat or violence, force employees to work in an environment without adequate occupational health and safety conditions determined by the authorities may be penalized with up to two years imprisonment.[60]

Finally, in addition to conducting random inspections, the MTPE receives and responds to workers' complaints regarding occupational safety and health. If companies are determined to be in violation of the law, they are subject to fines and/or closure.[61]

iii) Liability for Violation of Environmental Legislation:

A breach of environmental laws and permits can give rise to administrative liability. If damages are produced, civil liability (i.e. for third party damages) and criminal liability may also arise.

Defences will vary depending on the circumstances surrounding each case. In certain cases, demonstrating that the breach of the law or permit did not entail any consequence to the environment can reduce the penalty or even justify an exemption.

50 Supra note 1.
51 Law on Productivity and Labour Competitiveness [LPCL] of 27 March 1997 as amended up to Act No. 28051 of 02-08-2003.
52 Ibid., article 38.
53 *Ley Contra Actos de Discriminación 2000*, Article 1.
54 Government of Peru, Dictan normas reglamentarias de la Ley No. 26772, sobre prohibición de discriminación en las ofertas de empleo y acceso a medios de formación educativa, Decreto Supremo No. 002-98-TR, (1998), Articles 5-7; available from <http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=PER&p_classification=05&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY>.
55 *Ley Contra Actos de Discriminación 2000*, Article 2.
56 U.S. Department of Labour, Bureau of International Labour Affairs, "Peru: Labour Rights Report", online: DOL <http://www.dol.gov/ilab/media/reports/usfta/PLRReport.pdf>.
57 Ibid., at 31.
58 *Aprueben Reglamento de Seguridad y Salud en el Trabajo*, Article 64 and 92.
59 Ibid., Article 105.
60 Ibid., Article 107.
61 U.S. Department of State, "Country Reports – 2005: Peru", Section 6e.

In relation to criminal liability, the EIA provides the owner with an important protection as no lawsuit for environmental crimes can be brought against the holder as long as he conducts his operation in compliance with stated terms.[62]

Enforcement

Environmental administration is based on the Sistema Nacional de Gestión Ambiental - SNGA (national system of environmental management). The SGNA is headed by the Consejo Nacional del Ambiente - CONAM (national council of the environment), and integrated by all the environmental agencies from national, regional and local governments. The main purpose of CONAM is to articulate the work of all agencies in the SNGA.

In general, public administration at the national level is organised by Ministries corresponding to different Sectors (i.e. industry, agriculture, public health, etc.). Environmental affairs are managed by specialised offices within each Ministry. These offices are in charge of issuing environmental permits and controlling compliance with environmental regulations in each Sector. These agencies play an important role in the enforcement of environmental law in Peru.[63]

Environmental regulators can impose corrective measures (mitigation of risks, compensatory obligations, etc.) as well as penalties. Penalties may range from fines (up to US$ 10 million approximately) to the shutting down of facilities.[64]

In addition, environmental regulators have ample powers to require production of documents, take samples, conduct site inspections, interview employees, etc. In some Sectors, such as Energy and Mines, they are allowed to get support from the police in the case of resistance by operators.[65]

iv) Liability for Violation of Anti-Bribery and Corruption Legislation:

In 2006, severe penalties were introduced for public officials found guilty of corruption, and a clear punitive difference has been established between those who propose and those who extort a corrupt transaction. Those found guilty of carrying out a corrupt act now face sentences that are 2-4 years longer than under the previous sanctions regime. Sentences for illicit enrichment have also been increased to 8-18 years for senior public officials.[66]

v) Other Penalties:

Pursuant to Peru's Penal Code, including amendments made in 2004, a person who forces another to work without payment by means of violence or threat may be punished with imprisonment for up to two years.[67]

In addition, Law No. 28950, provides protection to victims and witnesses, prescribes a penalty for trafficking in persons and forced labour of 8 to 15 years imprisonment. The penalty is 12 to 20 years imprisonment if the victim is between 14 and 18 years old.[68]

3. DIRECTOR AND OFFICER LIABILITY

- *What accountability measures apply to Officers and Directors? What are the liability implications for non-compliant Officers and Directors?*

Director Duties and Liability

Under Peruvian law, directors have unlimited joint and several liability to the corporation, the shareholders and third parties for damages and injuries caused by actions that: are contrary to Peruvian law; contrary to the corporation's by-laws; arise from wilful misconduct; beyond the scope of their authority; are grossly negligent.[69]

Environmental Duties and Liability

Administrative liability is limited to the company. However, directors and officers can be held personally responsible in the case of environmental criminal liabilities, damages to third parties and damages to diffuse environmental interests, provided there is wilful misconduct or negligence.[70]

Criminal Liability

Companies in Peru cannot be prosecuted criminally. However a company can be involved in a criminal proceeding as a third party. In exceptional cases, a company found liable under a civil judgement may be sanctioned with the suspension of its operations or the closing of its premises.[71]

Section 105 of the Peruvian Penal Code permits the court to exact the following punishment on a corporation for the criminal action of one of its representatives during the course of their work:

62 Harten & Gutierrez, *Supra* note 26.
63 Ibid.
64 Ibid.
65 Ibid.
66 Supra note 4.

67 *Código Penal del Perú*, Article 168.
68 Government of Peru, Ley Contra la Trata de Personas y el Trafico Ilícito de Migrantes, Ley No. 28950, (2007); available from http://www.congreso.gob.pe/ntley/Imagenes/Leyes/28950.pdf.
69 José Antonio Olaechea, Estudio Olaechea, "Doing Business in Peru", online: <PLC http://www.practicallaw.com/0-500-7812?q=*&qp=&qo=&qe=>
70 Supra note 22
71 Estudia Olaechea, "Criminal Liability of Companies: Peru", Lex Mundi Publications (2008) online: <www.lexmundi.com/Document.asp?DocID=1076&SnID=2>.

(i) Temporary or definite closing of the company's premises.

Dissolution of the corporation, association, foundation, cooperative or committee.

(ii) Suspension of all the activities of the corporation, association, foundation, cooperative or committee during a term no longer than two years.

(iii) Prohibition to the corporation, association, foundation, cooperative or committee for carrying out those activities which favoured or covered the offence.[72]

(iv) Such a sanction may be temporary and shall not last longer than five years.

Director liability falls on the general manager of the company. However, pursuant Section 27 of the Penal Code, where a representative of a company commits an offence acting as such, he or she shall be liable for that action and not for the actions of other representatives of the company participating in that criminal offence.[73]

To be criminally liable, the following attributes must be present. The director or officer must have:

(i) Direct or indirect knowledge of an offence which has not been reported to the authorities nor to the public.

(ii) Participated in the impugned actions, or

(iii) The impugned action has been committed under his or her direct instructions.[74]

4. REPORTING MEASURES

- *What are the accountability requirements under national securities regulation and Stock Exchange rules?*

a) Securities Disclosure Requirements Regarding Governance and CSR:

The Securities Law and the Investment Funds and Operating Companies Law took effect in December 1996.[75] The Securities Law regulates asset securitization, short-term commercial papers, and investment funds. The Securities Law establishes that companies incorporated abroad and making public offerings in Peru must comply with the provisions established by the National Securities Commission. The Securities Law also governs the international offering of securities registered in Peru[76]

While Peruvian securities law prescribes material fact disclosure requirements for listed issuers,[77] there are no discernable mandatory social or environmental disclosure requirements under this regime based on the resources consulted for this report.

In addition, there are no discernable social and environmental reporting requirements under listing rules of the Lima Stock Exchange ("**BLV**").

5. OTHER ACCOUNTABILITY MEASURES

- *Are there other accountability mechanisms not covered by the above (including community engagement requirements for companies in the mining sector)?*

a) Canada – Peru Free Trade Agreement

On August 1, 2009, the Canada-Peru Free Trade Agreement (FTA) entered into force, along with a parallel Agreement on the Environment.[78]

Among its several attributes, the agreement encourages Canadian and Peruvian businesses operating within either country's borders to respect and follow internationally recognized standards, practices and principles related to corporate social responsibility. The FTA also includes measures designed to combat bribery and corruption.[79]

72 Ibid.
73 Ibid.
74 Ibid.
75 *See* Legislative Decree Number 861; Legislative Decree Number 862.
76 Ibid.
77 OECD, "White Paper Progress Report: Peru", The Seventh Meeting of the Latin American Corporate Governance Roundtable, (June 2006) online: OECD <http://www.oecd.org/dataoecd/17/55/37329696.pdf>.
78 Department of Foreign Affairs and International Trade, "Minister Day Announces Canada-Peru Free Trade Agreement", online: DFAIT <http://www.international.gc.ca/media_commerce/comm/news-communiques/2009/387444.aspx?lang=eng&view=d>.
79 Ibid.

CSR ACCOUNTABILITY REPORT GUATEMALA

1. GENERAL OVERVIEW: LEGAL TRADITION AND REGULATORY LANDSCAPE

With 14.7 million inhabitants, Guatemala is the most populous country in Central American. GDP per capita is roughly one-half that of the average for Latin America and the Caribbean.[1]

The 1996 Peace Accords, which ended 36 years of civil war, removed a major obstacle to foreign investment. Since then Guatemala has pursued important reforms and macroeconomic stabilization policies. More than half of the population is below the national poverty line and 15 per cent lives in extreme poverty. Remittances from the expatriate community in the United States are equivalent to nearly two-thirds of exports.[2]

Guatemala's extractive sector represents 2% of GDP.[3] The main commodity is gold, with an annual production in 2008 of about 7,500 metric tonnes (as a reference for the same year, Burkina Faso produced 7.600, Kyrgyzstan 18,100 and Peru 180,000 metric tonnes). The second largest commodity is silver, with a sales volume equivalent to a quarter of gold sales. There is limited oil production as well.[4] In 2010, the country produced 3.5 million barrels. Guatemala is a net importer of oil. On the other hand, mineral deposits of coal, cobalt, copper, gold, iron ore, limestone, sand and gravel and uranium that could provide investment potential for further development have been identified. The Ministry of Energy and Mines oversees the extractive sector in Guatemala.[5]

The *Political Constitution of the Republic of Guatemala* ("PCR") was issued by the National Constitutional Assembly in 1985 and came into force 1986.[6]

Guatemalan constitutional law has two main procedures that can be described as follows:

i) Procedures primarily concerned with the protection of constitutional supremacy through general and concrete remedies against laws deemed contrary to the constitution.[7]

ii) Procedures primarily concerned with the protection of constitutional individual rights, especially the *writ of habeas corpus* and the *writ of amparo* (which protects individual fundamental rights from arbitrary governmental action).

1 U.S. Dept. of State, "Background Note: Guatemala," online: DOS, <http://www.state.gov/r/pa/ei/bgn/2045.htm>.
2 Extractive Industry Transparency Initiative, "Overview: Guatemala", online: EITI <http://eiti.org/Guatemala>.
3 Ibid.
4 Canadian Institute for Mining, Metallurgy and Petroleum, CSR Center for Excellence in CSR, "Guatemala", online: <http://www.cim.org/csr/MenuPage.cfm?sections=141&menu=143>.
5 EITI Supra note 2.
6 *Constitución Política de la República de Guatemala*, 1985 con reformas de 1993 Reformada por Acuerdo legislativo No. 18-93 del 17 de Noviembre de 1993 ["PCR"].
7 Ana Cristina Rodríguez, "Guide to Legal Research in Guatemala", Globalex (updated June 2006), online: <http://www.nyulawglobal.org/Globalex/Guatemala.htm>.

Guatemala is a civil law jurisdiction. Laws are only valid once the complete enactment procedure is followed and they are brought into force through publication in the Official Gazette.[8]

Guatemala takes a 'monist' approach to international law, in that customary international law is automatically accepted domestically without the need for ratification by the legislature. However, the treaties enunciated in articles 171 and 172 of the PCR must be approved by Congress before they are duly ratified and incorporated into domestic law. These include, but are not limited to, treaties affecting existing laws for which the PCR requires ratification, anything involving Guatemalan sovereignty, financial obligations of the state and treaties affecting national security.[9]

On September 11, 2011, the fourth presidential election in Guatemala's democratic history was held. A run-off election was ordered between front runner Otto Perez Molina, who captured 36 per cent of the popular vote, and Manual Baldizon, who captured 24 per cent.[10] Otto Perez Molina won the presidential election in the run-off.

2. CORPORATE ACCOUNTABILITY MEASURES

- *What social and environmental 'rules' apply to corporations in this jurisdiction?*

a) Human Rights Legislation:

The PCR is the primary source of human rights protection in Guatemala. Chapter One includes, but is not limited to, the prescription of basic rights to life, liberty and equality as well as rights of the accused, freedom of movement, association and expression.[11]

Of particular importance to the Country's human rights regime is Article 46 of the PCR, which covers the pre-eminence of international law. This provision establishes that, in the field of human rights, treaties and agreements approved and ratified by Guatemala have pre-eminence over the juridical internal order or domestic law.[12]

As a result of this provision, and based on several rulings from Guatemala's Constitutional Court, human rights treaties are at least on an equal footing with the PCR. Both the PCR and any human rights treaty would overrule any other law or governmental resolution on any other subject matter in the event of a legal conflict.[13]

While the subheading of article 46 of the PCR spells out "pre-eminence of international law", it does not refer to all of the sources of international law, only treaties exclusively regarding human rights.[14]

Guatemala is party to the United Nations International Bill of Human Rights, the body of United Nations human rights treaties, and other universal and regional instruments.[15]

In the regional context, Guatemala is party to the American Convention on Human Rights, and has recognized the jurisdiction of the Inter-American Court of Human Rights. Guatemala is also party to other regional conventions such as the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons.[16]

Important national laws have been adopted, such as the *Comprehensive Child Protection Act*, complying with the Convention on the Rights of the Child, which establishes the primacy of the best interests of the child.[17]

In 2008, the Government enacted special legislation for the protection of women's rights. Decree no. 22-2008 ensures life, liberty, integrity, dignity, protection and equality of all women before the law. The Decree prohibits discriminatory practices of physical, psychological, or economic contempt against women.[18]

b) Labour, Employment & Occupational Health and Safety Legislation:

Section XIII of the PCR covers worker's rights and labour and employment standards. Article 102, for example, prescribes a minimum floor of rights, including fair remuneration, freedom from liens on wages, rights to rest days and vacation pay, and special protections for women, children, and the disabled.[19]

Sub-section (q) of Article 102 establishes basic labour rights. Specifically, the provision permits the unionization of workers, without any discrimination. Workers cannot be dismissed for participating in the establishment of a trade union.[20]

Article 104 prescribes basic rights to strike and work stoppages.[21]

8 Ibid.
9 *See generally*, PCR, Articles 171, 172, 173.
10 Associated Press, "Guatemalan presidential election to go to runoff", (12 September 2011) online: CBC <http://www.cbc.ca/news/world/story/2011/09/12/guatemala-president-election.html>.
11 *See generally*, PCR, Chapter 1.
12 PCR, *Article* 46.
13 *Rodríguez*, Supra note 7.
14 Ibid.
15 UN General Assembly, Human Rights Council, "National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1", (8 April 2008) A/HRC/WG.6/2/GTM/1.
16 Ibid., 6.
17 Decreto 02-04 emitido el 7 de enero de 2004.
18 Decreto núm. 22-2008 por el que se dicta la Ley contra el femicidio y otras formas de violencia contra la mujer. Diario de Centro América, 2008-05-07, núm. 27, págs. 2-4.
19 PCR, Section XIII.
20 Ibid.
21 Ibid.

Article 105 requires that, where necessary, employers provide basic housing and health care to their employees.[22]

Article 106 provides additional protections for labour rights. In particular, the provision provides for the encouragement and protection of collective bargaining. Furthermore, it holds that, "provisions that call for the renunciation, reduction, distortion, or limitation of rights recognized for the workers in the Constitution, in the law, in international treaties ratified by Guatemala, in regulations or other provisions relating to work will be void *ipso jure* and will not obligate workers even though they may be included in a collective or individual labour contract or other document."[23]

In addition to such Constitutionally entrenched labour protections, the Guatemalan Labour Code regulates the collective bargaining process. The Code provides direction with respect to lawful strikes, procedures for dispute resolution and basic health and safety requirements.[24]

c) Environmental Legislation:

The PCR establishes the basis for environmental regulation in Guatemala. Articles 64, for example, requires the State to promote the creation of national parks, reservations, and natural sanctuaries as well as the fauna and flora therein.[25]

Article 97 further requires that:

> The State, the municipalities, and the inhabitants of the national territory are obliged to promote social, economic, and technological development that would prevent the contamination of the environment and maintain the ecological balance. It will issue all the necessary regulations to guarantee that the use of the fauna, flora, land, and water may be realized rationally, obviating their depredation.[26]

Article 125 of the PCR relates to the exploitation of hydrocarbons, minerals, and other non-renewable natural resources. The provision declares that such exploitation be for public utility and need and requires the State to establish conditions for their exploration and commercialization.[27]

Article 126 declares the conservation of Guatemala's forests to be of national urgency and requires the State to develop sustainable industrial use policies.[28]

With regards to the protection of the County's water, Article 127 commits all waterways to the public domain and, under Article 128, the exploitation of the waters of lakes and rivers for agricultural, tourism, or any other purpose contributing to the development of the national economy.[29]

International environmental agreements and laws have allowed for strategic policy development in Guatemala. As of 2009, Guatemala has ratified 54 treaties and more than one hundred laws on the environment have been issued.[30]

The *Law on the Protection and Improvement of the Environment* establishes the general framework for environmental protection.[31] The Ministry of the Environmental and Natural Resources is responsible for advising and coordinating actions related to environmental policies and their application in Guatemala.

Environmental permits are required whenever an activity may affect the environment or national patrimony. Moreover, urban planning activities and forestry projects require additional permits. The National Environment Commission requires the performance of environmental impact assessments for major industrial projects.[32] With regard to mining activities, Chapter II of the *Mining Law, Decree 48-97* requires the performance and presentation of an environmental impact study to the Ministry of Environmental and Natural Resources prior to any mining activity commencing.[33]

Guatemala has recently allotted significant mineral concessions to multinational corporations as it looks to foreign markets as a way to build revenue. **Since 2010, the Guatemalan government has granted 144 licenses for exploration and four exploitation licenses.** These expansive licensing measures have significantly increased mining's share of the national economy though it is still relatively small compared to the other sectors.[34]

22 Ibid.
23 PCR, Supra note 6, Article 106.
24 *See generally* Código de Trabajo. Edición Actualizada, 2001, Librería Jurídica, Guatemala.
25 PCR, Supra note 6, Article 64.
26 Ibid., Article 97.
27 Ibid., Article 125.
28 Ibid., Article 126.
29 Ibid., Article 127, 128.
30 Jose Pablo Sanchez & Christian Alejandro Lanuza Monge, "Guatemala", International Comparative Legal Guide to Environmental Law 2009, Global Legal Group (2009), online: GLG <http://www.iclg.co.uk/khadmin/Publications/pdf/2755.pdf>.
31 Ibid.
32 Ibid.
33 Law Decree No. 48-97; Government Agreement No. 176-2001.
34 Kathryn Martorana, "Mining a Grave Concern in Guatemala's Election", Guatemalan Times (9 September 2011), online: <http://www.guatemala-times.com/opinion/columns/2450-mining-a-grave-concern-in-guatemalas-election.html>.

d) Anti-bribery and Corruption Legislation:

Guatemala has ratified the UN Convention against Corruption in November 2006 and the Inter-American Convention against Corruption in July 2001, but has not yet implemented all of its provisions, such as criminalising illicit enrichment.

The Penal Code of Guatemala prohibits active corruption and bribery of foreign officials (Article 442) and passive corruption (Articles 439 and 440). The Penal Code also has provisions against the use of public resources for private gain (Article) 447 and extortion (Article 251).

The *Access to Public Information Act* came into force in April 2009. Citizens have the right to request all documents on the administration of public funding and the salaries of some public employees. According to the local chapter of Transparency International, this legislation is not sufficiently enforced.

In December 2010, the Congress passed the *Asset Recovery Law* which allows the Guatemalan courts to seize goods and assets derived from illicit activities, including corruption, embezzlement, misappropriation of public funds, extortion, trafficking, and money laundering.

Articles 439 and 442 of the Penal Code provide protection for persons reporting corruption. However, according to a 2008 by Global Integrity, whistleblower protection is very weak. Whistleblowers are not protected against retaliation, the threat of which is very real.

Under the National Programme for Global Transparency, there have been a number of public initiatives aimed at addressing corruption including the establishment of anti-corruption agencies (including the Commission for Transparency and Anti-Corruption and the District Attorney's Office). The Commission for Transparency and Anti-Corruption was created under President Colum's administration in February 2008 to increase transparency and fight corruption within the executive branch.

Guatemala was accepted as an EITI Candidate country on March 1, 2011. It has until August 28, 2013 to complete EITI validation process.[35]

e) Consultation with Indigenous Groups:

Guatemala is a party to the International Labour Organization Convention 169 ("ILO 169"); ratified in 1996. Notwithstanding this ratification, Guatemala has experienced significant difficulty in implementing this legislation. In the recent past, commentators have called for the suspension of mineral licensing and permitting until the Government is better equipped to comply with ILO 169.[36]

Beyond this Agreement, Guatemala has not enacted specific legislation regarding the prior consultation of indigenous groups regarding industrial projects and mineral development.

f) Other Legislation:

N/A

- *What types of penalties arise from the violation of such 'rules' (including civil, criminal, administrative, monetary, fines and possible settlement agreements)? What are the enforcement powers of bodies administering such legislation?*

i) Liability for Violation of Human Rights Protections:

Enforcement

Guatemala has a national human rights committee composed of congressmen representing different political parties. The Ombudsman is part of the committee and has the main responsibility of investigating human rights allegations and promoting efficient management in the area of human rights. The Ombudsman is appointed for five years and presents an annual report on human rights through the aforementioned committee.[37]

On June 7, 2011, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, published a report on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects and other types of projects, in their traditional territories.[38]

According to this report, the business activities under way in the traditional territories of the indigenous peoples have generated a highly unstable atmosphere of social conflict, which is having a serious impact on the rights of the indigenous people and threatening the country's governance and economic development. The repercussions include numerous allegations concerning the effects on the health and the environment of the indigenous people as a result of the pollution caused by the extractive activities; the loss of indigenous lands

35 EITI supra note 2.

36 ILO, "Report of the Committee of Experts on the Application of Conventions and Recommendations", International Labour Conference, 98th Session, 2009, online: <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_103484.pdf>.

37 Ibid.

38 UN General Assembly, Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, "Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories", (7 June 2011) A/HRC/18/35/Add.3.

and damage to indigenous people's property and houses; the disproportionate response to legitimate acts of social protest, and the harassment of and attacks on human rights defenders and community leaders. In his report, the Special Rapporteur expresses his grave concern at this situation and calls upon the Government and other interested parties, including businesses, to take urgent measures to guarantee the rights of the indigenous people concerned.

Ayana also notes that the current debate in Guatemala has focused on the lack of consultation with indigenous people on extractive sector projects, furthered by the lack of domestic regulations on consultation and a series of misunderstandings about the content and scope of the regulations that do exist. In addition, the Special Rapporteur identifies other basic issues which, in his opinion, have also contributed to the currently unstable situation. In particular, he emphasizes the lack of legal protection for the rights of indigenous people over their traditional lands and territories, which leaves Guatemala lagging behind other countries in the region that have made progress in that regard.

ii) Liability for Violation of Labour, Employment and Health & Safety Legislation:

Sub-section (s) of Article 102 of the PCR establishes just cause criteria for the dismissal of employees. If an employer cannot prove a reasonable cause for the dismissal of an employee, it must compensate the worker for damage and inconvenience of up to fifty percent of the worker's wage for a maximum of six months.

Article 1663 of the Guatemalan Civil Code prescribes responsibility to employers for harm or damage caused by their employees during their provision of employment services. Also under this rule, employers are obligated to answer for false misrepresentation with regard to a product or service.[39]

Enforcement

Notwithstanding such penalties, commentators have highlighted the persistent lack of enforcement of labour and employment legislation in Guatemala. The U.S. Department of State notes that while Guatemalan law prohibits employer retaliation against strikers engaged in legal strikes, employers may suspend or fire workers for absence without leave if authorities have not recognized a strike as legal.[40]

Organized labour continues to object to the government's use of national security and emergency arguments to enjoin what organized labour considers "legal" strikes.[41] Unions also continue to criticize arrests, incarcerations, and fines imposed against protesters as violations of ILO conventions on the right to strike.[42]

In addition, while Guatemalan law prohibits anti-union discrimination and employer interference in union activities, enforcement of these provisions remains weak. According the U.S. Department of State, many employers in Guatemala routinely resist union formation attempts and there have been credible reports of retaliation by employers against workers who tried to exercise their labour rights. Common practices included termination and harassment of workers who attempted to form workplace unions, creation of illegal company-supported unions to counter legally established unions, blacklisting of union organizers and threats of factory closures.[43]

Finally, with regard to occupational health and safety laws, reports of enforcement inadequacies persist. These have indicated that when serious or fatal industrial accidents occurred, the authorities often failed to investigate fully or assign responsibility for negligence. Employers were rarely sanctioned for failing to provide a safe workplace. Similarly, legislation requiring companies with more than 50 employees to provide onsite medical facilities for their workers was not enforced.[44]

While workers have the legal right to remove themselves from dangerous work situations without reprisal, few were willing to jeopardize their jobs by complaining about unsafe working conditions.[45]

iii) Liability for Violation of Environmental Legislation:

As mentioned above, the Ministry of the Environment and Natural Resources is responsible for the enforcement of environmental regulation in Guatemala. Regulators have legal powers to request the suspension or close any activity without permits or causing environmental harm. Refusal to follow these orders is subject to prosecution by the State. In criminal environmental law cases the State Prosecutor, through the Environmental Office, may pursue both criminal and civil proceedings against an alleged transgressor.[46]

The *Environment Act* and *Criminal Code* contain environmental crimes arising from both violations of the law and the lack of environmental permits.

39 *Codigo Civil, 1963*.
40 U.S. Department of State, "2010 Human Rights Report: Guatemala", (8 April 2010) online: DOS <http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154507.htm>.
41 Ibid.
42 Ibid.
43 Ibid.
44 Ibid.
45 Ibid.
46 Sanchez & Monge Supra note 30.

The *Health Code* also stipulates crimes by actions or omissions because these also violate health provisions. The Health Department and Environmental Commission can suspend, close or impose imprison those found in violation of these laws.[47]

While the State has the general authority to impose fines for environmental degradation, reparation for environmental harm is not available under Guatemalan law. As such, when public assets like forests, wetlands and rivers are damaged by a polluting activity, major actions are directed to suspend or temporarily close the operation causing the harm.[48]

An Environmental Impact Study is also required before every project that can harm natural resources begins. If this requirement is not fulfilled, the law establishes a fine between approximately US$625 and US$12,500 and the closure of the business until the fines are paid.[49]

Environmental offences in Guatemala are held to a strict liability standard. As such, even where pollution is allowed under an EIA permit, a company can be held liable for environmental damage. According to article 1650 of the Guatemalan *Civil Code,* even if the activity is carried out within permit limits, an operator can be liable for environmental damage.[50]

iv) Liability for Violation of Anti-Bribery and Corruption Legislation:

Enforcement

Guatemala continues to be beset by corruption issues and progress in combating corruption has been slow. There is a significant gap between the law and the enforcement capacity and political will to push through reforms. Political interference limits the capacity of the anti-corruption agencies to act effectively and a lack of resources and coordination further hamper anti-corruption efforts.

Some surveys indicate that the country has made some progress in reducing corruption in business, especially in the number of bribes solicited by low-level public officials. According to the World Bank & IFC Enterprise Surveys 2010, the percentage of companies reporting they expect to give gifts in order to get things done has gone down from 13% in 2006 to 6.3% in 2010.

Companies are likely to encounter demands for unofficial payments when applying for several permits and licences and when connecting to public utilities. A lack of transparency and clarity in Guatemala's legal and regulatory systems provides undesirable space for the exercise of 'discretion'. Government regulations are inconsistently enforced.

Other impediments to business include (i) complex and confusing legal and regulatory frameworks; (ii) inconsistent judicial decisions with high levels of corruption; and (iii) bureaucratic weaknesses and insufficient resources. According to the World Economic Forum Global Competitiveness Report 2011-2012, companies cite crime and theft, corruption and inefficient government bureaucracy as the three most significant impediments to doing business in Guatemala.

3. DIRECTOR AND OFFICER LIABILITY

- *What accountability measures apply to Officers and Directors? What are the liability implications for non-compliant Officers and Directors?*

General Duties and Liability

Generally, corporate governance is regulated by the *Code of Commerce* as it is the main source of corporate law. There has been no major updating of the main corporate law of Guatemala since the early 1970s, and therefore the rules applicable to corporations not publicly traded are equally applicable to those few publicly traded. Whether a debt or equity issuer, corporations are required to appoint independent auditors. However, there are no legal regulations as to executive compensation, a code of conduct, or internal control systems.[51]

Transparency and duties of care and loyalty are dealt with in terms of disclosing conflicts of interest and to abstain from participating in deliberations or decisions where the director may have any personal interest. Transactions with related companies are regulated only in terms of the general prohibition to enter into transactions in fraud of third parties.[52]

With this said, directors are generally liable under Guatemalan law to the company, shareholders and creditors for losses or damages they cause directly. The directors are specifically liable to shareholders for: a) their capital contributions and their value, b) net profits to be distributed as dividends to shareholders, c) ensuring that financial records comply with applicable accounting standards and, d) compliance with shareholder's resolutions. The directors are also jointly

47 Ibid.
48 Ibid.
49 BomChil Group, "Doing Business in Guatemala", (2006) online: <http://www.bomchilgroup.org/doing_business_in_latin_america/Doing_Business_in_Guatemala_the_Bomchil_group.pdf>.
50 Sanchez & Monge Supra note 30.
51 Eduardo A Mayora, "Capital Markets Regulation", Latin Lawyer Business Law Resource, online: <http://www.latinlawyer.com/reference/topics/49/jurisdictions/81/guatemala/>.
52 Ibid.

responsible for the actions of a company's general manager.[53]

Directors may also be held to account through various legal actions that can be initiated by Shareholders under Guatemalan law. In particular, shareholder possessing 10% of the capital stock of the company can may initiate an action against the directors, provided the lawsuit comprises the claims all of the liabilities against the company and not just the specific claims of the plaintiffs. Furthermore, the shareholder may, by special resolution file an action of responsibility against a director after which such director is subject to immediate removal from their post.

Civil and Criminal Liability

Article 24 of the Guatemalan Civil Code attaches responsibility to all legal persons for the actions of their representatives when, in the exercise of their functions, they harm another person or violate the law.[54]

Under Article 38 of the Guatemalan Criminal Code, legal persons (including corporations) will be held responsible from crimes committed by directors, managers, executives, representatives, administrators, staff members or employees who have become involved in an act without whose participation said act would not have transpired.[55]

Environmental Duties and Liability

Directors and officers can be liable for environmental wrongdoing under civil, criminal and administrative law. Article 171 of the Civil Code establishes civil liability for managers of the Company. In cases when environmental damage was caused by various managers they are all jointly liable. Moreover, Guatemalan Mining Laws prescribe civil responsibilities for directors and officers and establishes a duty to repair any damage caused.[56]

4. REPORTING MEASURES

- *What are the accountability requirements under national securities regulation and Stock Exchange rules?*

a) Securities Disclosure Requirements Regarding Governance and CSR:

The main legislation concerning the offering and trading of securities in Guatemala is the *Securities and Commodities Markets Act of 1996* (the LMVM) and its regulations. Article 24 of this Act regulates the exchanges as self regulatory organisations. As such, the organised exchanges have the legal powers and faculties to regulate their administration, organisation, operations and markets within the rules of the LMVM.[57]

The only existing exchange, Bolsa De Valores Nacional, SA (the BVN) has promulgated a general statute, one statute for the registration of securities offerings, and several other statutes concerning the provision and updating of information.[58]

Disclosure requirements for public or private issuers generally cover two different aspects:

(i) the legal and financial status/situation of the issuer in general; and

(ii) the nature of the risks specific to the particular issue (including, where applicable, whether there are any collateral, security interests or so).

Financial information has to be certified by independent accountant at least once a year and debt securities issues require the opinion of an independent rating agency. As well, the LMVM limits the publication of promotional information as to any securities offered on the market without previous review and approval by the Securities and Commodities Registry (Guatemala's securities regulator) and requires that reference be made to the technical sources behind such advertisements.

Failure to disclose relevant information with intent to commit fraud is a criminal offence.

b) ESG Reporting Requirements:

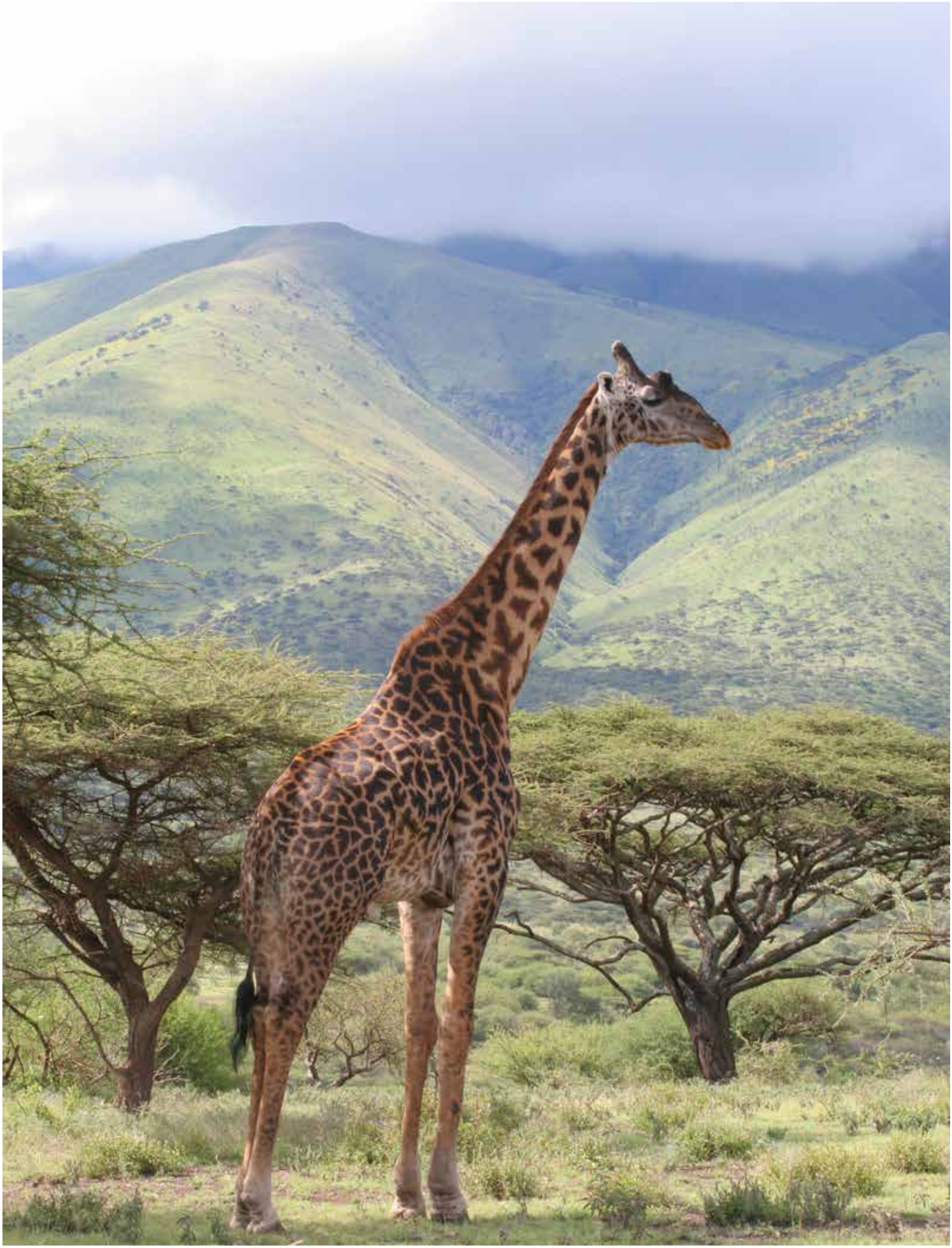
Environmental Reporting: Guatemala's commitments under international environmental law requires that neighbouring states are informed of transboundary contamination of the environment emanating from within its territory.[59]

5. OTHER ACCOUNTABILITY MEASURES

- *Are there other accountability mechanisms not covered by the above (including community engagement requirements for companies in the mining sector)?*

N/A

53 Ibid.
54 Ibid.
55 Ibid.
56 Ibid.
57 Ibid.
58 Ibid.
59 Sanchez & Monge, Supra note 30.



CSR ACCOUNTABILITY REPORT TANZANIA ("TZ")

1. GENERAL OVERVIEW: LEGAL TRADITION AND REGULATORY LANDSCAPE

TZ is a republic led by its president, Jakaya Kikwete. TZ also has a prime minister, who leads its cabinet and parliament.

From the time of independence in 1961 until the mid-1980's, TZ was a one-party state. Reforms led to multi-party elections in the 1990's. Notwithstanding this, TZ is better described as a one party dominant state with opposition parties permitted, but with little chance of success in gaining power. In the last election, there was significant campaigning activity from opposition parties. Still, the incumbent, President Jakaya Kikwete of Tanzania, was re-elected with 61 percent of the vote. There were allegations of vote rigging and significant delays.

TZ possesses significant minerals including gold, diamonds, uranium, nickel, chrome, platinum, coltan and other minerals. There is vast potential in the the natural resources sector, however, governance issues, corruption issues, and weak infrastructure is limiting the potential contribution of the natural resource sector the TZ's economy.

Like those of Australia, New Zealand and the United Kingdom, TZ's legal system is based on the common law. Its Constitution enumerates a great many rights and freedoms (see below), all of which are subject to an exceptionally expansive "notwithstanding clause",[1] which effectively renders all of those rights and freedoms "toothless".

The semi-autonomous state of Zanzibar has enacted its own Constitution,[2] which enumerates the same (or similar) rights and freedoms, and which applies in the state of Zanzibar only. It, too, has a "notwithstanding clause", to which those rights and freedoms are subject.[3] However, the clause is much narrower than that in the TZ Constitution. Subject to their respective limits, both the TZ Constitution and the Constitution of Zanzibar protect the right to freedom and equality, the right to equality before the law, the right to life, the right to personal freedom, the right to privacy and personal security, the right to freedom of movement, the right to freedom of expression, the right to freedom of religion, the right to assembly and association, the right to freedom to participate in public affairs, the right to work and just and fair remuneration, and the right to own property and freedom from the unjust deprivation thereof (TZ Constitution, s. 12-24).

1 *The Constitution of The United Republic of Tanzania*, s. 30(2)(a)-(f).
2 *The Constitution of Zanzibar, 1994.*
3 *The Constitution of Zanzibar, 1994*, s. 24(1)(a)-(c).

The TZ Constitution also affords every person in TZ the right to equal protection under the law (s. 29(2)).

Section 30(2)(a)-(f), which limits the basic rights and freedoms enumerated in Part II, is so broad as to render those rights and freedoms useless:

The provisions contained in Part II of the Constitution do not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law for the purposes of:

(a) ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals;

(b) ensuring the defence, public safety, public peace, public morality, public health, rural and urban development planning, *the exploitation and utilization of minerals* or the increase and development of property of any other interests for the purposes of enhancing the public benefit;

(c) ensuring the execution of a judgment or order of a court given or made in any civil or criminal matter;

(d) protecting the reputation, rights and freedoms of others or the privacy of persons involved in any court proceedings, prohibiting the disclosure of confidential information, or safeguarding the dignity, authority and independence of the courts;

(e) imposing restrictions, supervising and controlling the formation, management and activities of private societies and organizations in the country; or

(f) enabling any other thing to be done which promotes, or preserves the national interest in general [emphasis added].

Though many of these rights apply to "persons", it is unclear whether they apply to associations and corporations in the same way that they apply to individuals.

2. CORPORATE ACCOUNTABILITY MEASURES

- *What social and environmental 'rules' apply to corporations in this jurisdiction?*

a) Human Rights Legislation:

In TZ, human rights standards are found in several different pieces of legislation, rather than in a single, dedicated and definitive document. Such standards are contained in TZ's employment and labour laws, as well as laws relating to the environment and property (see below).

The Commission for Human Rights and Good Governance (the "CHRGG") was founded in 2001 by art. 129-131 of the TZ Constitution and its constating act, *The Commission for Human Rights and Good Governance Act, 2001* (the "*Human Rights and Good Governance Act*"). It operates as both a national ombudsman and a human rights commission.

The CHRGG promotes awareness of human rights and investigates violations thereof. Since its foundation, the CHRGG has been active in a number of protective functions. First, it receives and investigates complaints and/or allegations of human rights violations and any contraventions of principles of administrative justice. It also conducts public hearings on those complaints and contraventions and proposes compensations where appropriate. Second, it initiates proceedings on its own. Third, it handles individual complaints concerning human rights violations generally, and it investigates, conducts hearings and settles disputes as necessary. It also has the right to decide not to proceed with a complaint. Fourth, it promotes and advises by educating the public on human rights and good governance issues, carrying out research on human rights and good governance, and monitoring compliance with human rights standards and good governance principles. Fifth, it advises the government and other public organs and private sector institutions on specific issues relating to human rights and administrative justice. Finally, it offers mediation and conciliation through alternative conflict resolution.[4]

The CHRGG's formal powers are set out at s. 15(1)-(2) of the *Human Rights and Good Governance Act*. Pursuant to s. 15(3), the CHRGG may, for the purposes of performing its functions under the TZ Constitution and the *Human Rights and Good Governance Act*, bring an action before any court and may seek any remedy which may be available from that court.

The CHRGG is led by a judge and composed of nine other commissioners, not all of whom are lawyers.

The commissioners have the power to arrest and prosecute, but they tend to prefer arbitration and conflict resolution out of court.

The CHRGG is not without its limitations. It is barred from investigating the president, who can direct the commission to discontinue an investigation if and when

4 Electoral Institute for the Sustainability of Democracy in Africa, "Tanzania: Commission for Human Rights and Good Governance" (December 2009) <http://www.eisa.org.za/WEP/tanagency.htm>.

national defence or security is at risk. The CHRGG has not yet developed its capacity to serve the whole country. There is a need to coordinate more closely between the CHRGG's operations and those of other related bodies, such as the Good Governance Coordination Unit in the president's office, the Prevention of Corruption Bureau, the police and civil society.[5]

The *formal* limits upon the commission's powers are set out at s. 16(1)-(5).

Under s. 37(1) of the *Human Rights and Good Governance Act*, a person that commits an offence under the Act by unlawfully interfering with or obstructing the exercise of any function by the CHRGG under the Act is liable to a fine not exceeding five hundred thousand shillings[6] or to imprisonment for a term not exceeding one year or both.

International Human Rights Legislation

In October 1972, TZ acceded to the *International Convention on the Elimination of All Forms of Racial Discrimination*[7] without any reservations. In July 1980, it ratified the *Convention on the Elimination of All Forms of Discrimination Against Women*.[8]

TZ has also ratified all eight International Labour Organization "core" conventions, which aim to abolish child and forced labour, eliminate discrimination with respect to employment and occupation, ensure equal remuneration and protect employees' freedom of association and rights to organize and collective bargaining.[9]

b) Labour, Employment & Occupational Health and Safety Legislation:

While Tanzania has laws on the books setting out labour, employment, health and safety standards, enforcement is extremely weak. Labour and employment rights are often violated and it is very difficult for individuals to exercise any rights in practice. Child labour is common as is forced or compulsory labour.

The following is an overview of the applicable legislation' which is found 'on the books'.

Employment and Labour Relations Act, 2004

Sections 5 and 6 prohibit child and forced labour, respectively.

Pursuant to s. 7(4), no employer shall discriminate, directly or indirectly, against an employee, in any employment policy or practice, on any of the following grounds:

(i) colour;

(ii) nationality;

(iii) tribe or place of origin;

(iv) race;

(v) national extraction;

(vi) social origin;

(vii) political opinion or religion;

(viii) sex;

(ix) gender;

(x) pregnancy;

(xi) marital status or family responsibility;

(xii) disability;

(xiii) HIV/Aids;

(xiv) age; or

(xv) station of life.

Pursuant to s. 7(5), harassment of an employee is a form of discrimination and is prohibited on any one, or combination, of the grounds prescribed in subsection (4).

Under s. 7(6), it is not discrimination to take affirmative action measures to promote equality or the elimination of discrimination in the workplace, or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

Under s. 7(10), every employer is required to take positive steps to guarantee equal remuneration for men and women for work of equal value.

Section 8 prohibits discrimination in trade unions and employer associations.

5 Electoral Institute for the Sustainability of Democracy in Africa, "Tanzania: Commission for Human Rights and Good Governance" (December 2009) <http://www.eisa.org.za/WEP/tanagency.htm>.

6 For the reader's reference, as at 26 September 2011, one (1) TZ Shilling equalled 0.000617 Canadian Dollars, such that one million (1,000,000) TZ Shillings equalled 617.56 Canadian Dollars.

7 Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

8 Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

9 International Confederation of Free Trade Unions (ICFTU), *Internationally Recognised Core Labour Standards in Tanzania: Report for the WTO General Council Review of the Trade Policies of Tanzania* (October 2006) <http://www.icftu.org/www/pdf/corelabourstandards2006tanzania.pdf>.

Section 9 guarantees an employee's right to freedom of association, while section 10 guarantees the same right for employers.

Sub-Part B of Part II (s. 17-25) restricts an employee's hours of work.

Under s. 37(1), it is unlawful for an employer to terminate an employee unfairly.

Under s. 37(2), a termination of employment is unfair if the employer fails to prove:

(i) that the reason for the termination is valid;

(ii) that the reason is a fair reason:

(a) related to the employee's conduct, capacity or compatibility; or

(b) based on the operational requirements of the employer, and

(iii) that the employment was terminated in accordance with a fair procedure.

Under s. 37(3), it is not a fair reason to terminate the employment of an employee:

(i) for the reason that:

(a) discloses information that the employee is entitled or required to disclose to another person under the Act or any other law;

(b) fails or refuses to do anything that an employer may not lawfully permit or require the employee to do;

(c) exercises any right conferred by agreement, the Act or any other law;

(d) belongs, or belonged, to any trade union; or

(e) participates in the lawful activities of a trade union, including a lawful strike;

(ii) for reasons:

(xvi) related to pregnancy;

(xvii) related to disability, and

(xvii) that constitute discrimination under the Act.

Subject to the limitations and qualifications set out at s. 76, every employee has the right to strike and every employer has the right to lockout, in respect of a dispute of interest (s. 75).

The Mining Act, 2010

Section 96 requires mineral rightsholders to exercise their rights reasonably:

(1) The rights conferred by a mineral right shall be exercised reasonably and shall not be exercised so as to affect injuriously the interest of any owner or occupier of the land over which those rights extend.

(2) The lawful occupier of land in a mining area shall not erect any building or structure in the area without the consent of the registered holder of the mineral rights concerned but if the Minister considers that the consent is being unreasonably withheld, he may give his consent to the lawful occupier to do so.

(3) Where, in the course of prospecting or mining operations, any disturbance of the rights of the lawful occupier of any land or damage to any crops, trees, buildings, stock or works thereon is caused, the registered holder of the mineral right by virtue of which the operations are carried on, is liable to pay the lawful occupier fair and reasonable compensation.

(4) Where the amount of compensation to be paid pursuant to subsection (3) in any particular case is in dispute, either party may refer the matter to the Commissioner who shall deal with the matter in accordance with Part VIII of the Act.

Section 99 prohibits "wasteful practices":

(1) Where the Commissioner considers that a holder of a mineral right is using wasteful mining practices he shall give notice to the holder accordingly (giving in the notice particulars of the practices) and require the holder to show cause, by notice within such period as the Commissioner shall specify in the notice, why he should not cease to use those practices.

(2) Where, within the period specified in the notice given under subsection (1), the holder fails to satisfy the Commissioner that he is not using the wasteful practices concerned, or that the use of those practices is justified, the Commissioner may give notice to the holder directing him to cease using all of those practices, or the practices specified in the notice, by such date as is specified in the notice, and the holder shall do as directed.

(3) Where the holder of a mineral right is aggrieved by a notice given by the Commissioner under subsection (2) he may appeal to the Minister against the directions given in the notice.

Section 114 enumerates the following miscellaneous offences:

Any person who:

(1) in any application under the Act knowingly makes any statement which is false or misleading in a material particular;

(2) in any report, return or affidavit submitted in pursuance of any provision of the Act, knowingly includes or permits to be included any information which is false or misleading in a material particular;

(3) places or deposits, or is an accessory to the placing or depositing of, any material in any place with the intention of misleading any other person as to the mineral possibilities of that place;

(4) mingles or causes to be mingled with any sample of ore any substance which will enhance the value or in any way change the nature of the ore with the intention to cheat, deceive or defraud,

commits an offence and on conviction is liable to punishment by fine.

Under s. 115, where an offence which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or of any person who was purporting to act in any such capacity, he, as well as the body corporate, commits an offence and shall be punished accordingly.

The Occupational Health and Safety Act, 2003

Under s. 43, employers are required to ensure that employees enjoy a safe means of access and a safe place of work.

Under s. 54, an employer must also ensure that an adequate supply of clean, safe and wholesome drinking water is provided and maintained and is readily accessible to all persons employed on the premises.

Under s. 55, an employer must provide his employees with sufficient "sanitary conveniences", or restrooms, as prescribed by the Act.

Under s. 56, an employer must provide his employees with sufficient "washing facilities".

Accommodation must also be made for "clothing not worn during work hours" (s. 57), first aid facilities (s. 58) and sitting areas (s. 59).

Employers must ensure appropriate protection from exposure to asphyxiates or irritants (s. 69).

Under s. 78(1), any person who:

(i) contravenes any provision of the Act, regulations or of any rule or order made under the Act;

(ii) intentionally or recklessly interferes with or misuses anything which is provided in the interest of health or safety,

commits an offence.

Under s. 81(2), in the case of injury to health, the employer shall not be liable to a penalty under this section unless the injury was caused directly by the contravention.

Pursuant to s. 100(1), every Chief Executive Officer shall ensure that the duties of his employer as contemplated in the Act are properly discharged.

Section 102 prohibits the "victimization" of employees.

The Workers Compensation Act, 2008

Pursuant to s. 19, where an employee has an accident resulting in the employee's disablement or death, the employee or the dependants of the employee shall, subject to the Act, be entitled to the compensation thereunder.

Pursuant to s. 22, where an employee contracts a disease, and the disease has arisen out of, and in the course of, the employee's employment, the employee shall, subject to the Act, be entitled to the compensation thereunder.

Nothing in the Act shall limit or in any way affect any civil liability of an employer or any other person in respect of an occupational injury or disease resulting in the disablement or death of an employee if the injury or disease was caused by negligence, breach of statutory duty or any other wrongful act or omission of the employer, or any person for whose act or omission the employer is responsible, or any other person (s. 30(1)).

No person shall threaten an employee or in any manner compel or influence him to do anything resulting in or directed at the deprivation of his right to compensation

under the Act, and any person who does so commits an offence (s. 32(1)-(2)).

c) Environmental Legislation:

The Environmental Management Act, 2004

Section 4(1) affords every person living in TZ the right to a clean, safe and healthy environment.

Pursuant to s. 6, every person living in TZ shall have a stake and a duty to safeguard and enhance the environment and to inform the relevant authority of any activity and phenomenon that may affect the environment significantly.

Pursuant to s. 72, land users and occupiers shall be responsible for the protection, improvement and nourishment of the land, and for using it in an environmentally sustainable manner as may be prescribed by the Minister.

Under s. 81 and the Third Schedule to the Act, any person, being a proponent or a developer of a mining project, is required to undertake or cause to be undertaken an environmental impact assessment study at his own cost.

Under s. 106(1), it is an offence for any person to pollute or permit any other person to pollute the environment in violation of any standards prescribed under the Act or any other written law regulating a segment of the environment.

Section 109 prohibits water pollution.

Section 110 prohibits the discharge of hazardous substances, chemicals, materials, oil, etc.

Under s. 141, every person to whom the Act applies is required to comply with environmental quality standards and criteria.

Sections 184, 186, and 187 list a number of offences relating to *environmental impact assessments*, standards and pollution, and prescribe penalties for contraventions of law.

Section 189 lists a number of offences relating to *environmental restoration, easement and conservation orders*. Pursuant to s. 192(1), a conviction for an offence committed under the Act shall not exonerate any person or body corporate from any civil proceeding that may be instituted under the Act.

Section 200 lists a number of offences relating to *environmental inspectors*. Furthermore, under s. 201(1), where a corporation commits an offence under the Act, every director or partner and any other person concerned in the management of that corporation, commits the offence.

Under s. 201(2), every director or partner and any other person concerned in the management of a corporation to which a licence or order has been issued under the Act shall take all reasonable steps to prevent that corporation from contravening or failing to comply with the license or order.

The Land Act, 1999

Section 175 prohibits the unlawful occupation of land for clearing, digging, ploughing, etc. In addition, Section 176 prohibits the wrongful obstruction of a public right of way.

Under s. 177(5), any person who wilfully

(i) delays,

(ii) obstructs,

(iii) hinders,

(iv) intimidates, or

(v) assaults

any person authorized under the Act to enter and inspect any land in the lawful exercise of power in that behalf commits an offence.

Under s. 177(7), where a court has convicted any person of an offence under this section and the commission of that offence enabled that person to obtain or retain or regain any interest in land that he would otherwise not have been able to obtain, retain or regain, the court may in addition to any punishment provided for by this section imposed on such person, make any such order in relation to that interest in land so obtained, retained or regained by such person as appears to the court necessary to ensure that such person does not profit by the offence of which he has been convicted.

The Village Land Act, 1999

Section 17 governs the occupation of village land, as defined in the Act, by a corporation.

Under s. 17(5), a corporation that wishes to obtain a portion of village land for the better carrying on of its operations may apply to the village council for that land, which shall recommend to the Commissioner for the grant or refusal of such grant.

Subsection 63(3) prohibits the unlawful occupation of village land. Furthermore, subsection 63(4) prohibits the wrongful obstruction of a public right of way on village land.

Under s. 63(5), any person who wilfully

(i) delays,

(ii) obstructs,

(iii) hinders,

(iv) intimidates, or

(v) assaults

any person authorized under the Act to enter and inspect any village land in the lawful exercise of power in that behalf commits an offence.

Under s. 63(7), where a court has convicted any person of an offence under this section and the commission of that offence enabled that person to obtain or retain or regain any interest in land that he would otherwise not have been able to obtain, retain or regain, the court may in addition to any punishment provided for by this section imposed on that person, make any order in relation to that interest in land so obtained, retained or regained by that person as appears to the court necessary to ensure that that person does not profit by the offence of which he has been convicted.

The Wildlife Conservation Act, 2009

The prospective developer of every mining development in a wildlife protected area, the Wildlife Management Area, a buffer zone, migratory route or dispersal area shall prepare and submit to the satisfaction of the Minister responsible for the environment a report on the Environmental Impact Assessment of the proposed development (s. 35(1)).

Any mining development to which section 35 applies shall not commence unless and until an Environmental Impact Assessment certificate has been issued by the Minister responsible for the environment (s. 35(2)).

A mining development shall not be permitted within five hundred meters from the border of a wildlife protected area without the permission of the Director (s. 74).

d) Anti-Bribery and Corruption Legislation:

There is a domestic legal framework in place for the prevention of bribery; however, Tanzania suffers from significant enforcement limitations.

In 2007, pursuant to a Law Reform Commission's recommendations, the *Prevention and Combating of Corruption Act* (the "*Corruption Act*") was enacted, revising the existing legislation. The *Corruption Act* implements the African Union Convention on Preventing and Combating Corruption (2003), ratified in 2006 and the *United Nations Convention against Corruption*[10] ratified in 2005 expanded the list of corruption offences and seeks to address private sector corruption. The Act also established the Prevention and Combating Corruption Bureau which was meant to review the activities of the previously established Prevention of Corruption Bureau ("PCB"), the credibility and independence of which was undermined by its placement under the President's office. A lack of resources and general capacity also severely limited the work of the PCB.

Other relevant pieces of legislation include: (i) 2004 *Public Procurement Act*; (ii) the 2002 *Public Services Act*; and (iii) the 2001 *Public Finance Act* that provides for the effective control, management, and regulation of the collection and use of the government's finances.

The *Public Leadership Code of Ethics Act* also introduced ethical codes for public officials requiring public officials in positions of power to declare all properties, assets and liabilities that they own. An Ethics Commission was established to be responsible for implementation of the *Public Leadership Code of Ethics*. This asset declaration regime, however, is limited by the public's restricted access to the information and the practice of many government officials singly not to disclose. While the Commission can instigate investigations it can only do so upon receiving a complaint. As complaints cannot be filed anonymously, complaints are hereby made.

There is whistleblower protection to protect potential whistleblowers from reprisals and victimisation. Both civil servants and private sector employees reporting cases of corruption are protected from retaliation by law. However, a Global Integrity report from 2007[11] notes that this is often not the case in practice.

10 Opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005).

11 Global Integrity, "Tanzania - Scorecard", Global *Integrity Report 2006* (Undated) <http://www.globalintegrity.org/reports/2006/Tanzania/index.cfm>.

e) Other Legislation:

N/A

- *What types of penalties arise from the violation of such 'rules' (including civil, criminal, administrative, monetary, fines and possible settlement agreements)? What are the enforcement powers of bodies administering such legislation?*

i) Liability for Violation of Human Rights Protection:

Under s. 30(5), where in any proceedings it is alleged that any law enacted or any action taken by the Government or any other authority abrogates or abridges any of the basic rights, freedoms and duties set out in art. 12 to 29 of the TZ Constitution, and the High Court is satisfied that the law or action concerned, to the extent that it conflicts with the Constitution, is void, or is inconsistent with the Constitution, then the High Court, if it deems fit, or if the circumstances or public interest so requires, instead of declaring that such law or action is void, shall have power to decide to afford the Government or other authority concerned an opportunity to rectify the defect found in the law or action concerned within such a period and in such manner as the High Court shall determine, and such law or action shall be deemed to be valid until such time the defect is rectified or the period determined by the High Court lapses, whichever is the earlier.

Enforcement

The TZ Constitution is enforced – in the breach – by the High Court:

Any person claiming that any provision in Part III of Chapter I or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in TZ, may institute proceedings for redress in the High Court (s. 30(3)).

Meanwhile, *The Commission for Human Rights and Good Governance Act, 2001* is enforced by the commission itself.

Human rights are perpetually violated in TZ. Of special concern are violence against women and children, discrimination against persons with disabilities and harsh and life-threatening situations in prisons. Men, women and especially children are trafficked throughout the country, often for the purpose of forced labour and sexual exploitation.[12]

For penalties and sanctions arising from the violation of *The Commission for Human Rights and Good Governance Act, 2001*, see s. 37(1), above.

In 2006, Global Integrity scored the CHRGG as "weak" on several counts.[13] However, it noted that there had been too few cases since its establishment five years earlier to tell whether the government acts on the commission's findings. Generally, the CHRGG did not respond to citizens' complaints within a reasonable time period, and the length of the response period often depended on the relative importance of the case and the status of the complainant.

In 2005, the then chairman of the commission, Justice Kisang, noted that the lack of cooperation and good faith on the part of the government impeded the commission's investigations, as public servants dragged their feet in answering the commission's letters of inquiry or refused outright to do so.[14]

ii) Liability for Violation of Labour, Employment and Health & Safety Legislation:

See above.

Enforcement

A District Court and a Resident Magistrate's Court enjoy the jurisdiction to impose a penalty for an offence under the *Employment and Labour Relations Act, 2004* (s. 102(1)).

Any person aggrieved by the decision of either court may appeal to the High Court (s. 102(5)).

The Mining Act, 2010 is enforced by the Commissioner of Mining. The Minister Responsible for Minerals oversees the mining industry generally.

The Occupational Health and Safety Act, 2003 is enforced by the Chief Inspector under the Act.

The other labour, employment and health and safety legislation is enforced by the TZ judicature.

Labour rights are continuously being violated throughout TZ. Trade union rights are difficult to exercise and are of concern to the ILO's Committee on the Application of Standards.[15] Mainland and Zanzibar governments do not share the same labour laws. In Zanzibar, for example, strikes are illegal and banned.[16] Child labour is very common in both TZ and the state

12 U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, "2008 Human Rights Report: Tanzania" (25 February 2009) <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119028.htm>.

13 Supra note 11.

14 Legal and Human Rights Centre, "Tanzania Human Rights Report 2006: Progress through Human Rights" (2006) <http://www.humanrights.or.tz/wp-content/uploads/2010/09/human_rights_report_2006.pdf>.

15 The International Trade Union Confederation (ITUC), *2009 Annual Survey of violations of trade union rights* (2009) <http://survey09.ituc-csi.org/survey.php?IDContinent=1&IDCountry=TZA&Lang=EN>.

16 Ibid.

of Zanzibar and it is estimated that tens of thousands of children are forced into work.

iii) Liability for Violation of Environmental Legislation:

See above.

Enforcement

The Director of the Environment and the Minister Responsible for the Environment enforce *The Environmental Management Act, 2004*.

The Director of Wildlife and the Minister Responsible for Wildlife enforce *The Wildlife Conservation Act, 2009*.

The other environmental legislation is enforced by the TZ judicature.

Other Penalties

N/A.

iv) Liability for Violation of Anti-Bribery and Corruption Legislation:

Enforcement

Largely in spite of TZ's efforts to establish a legal framework aimed at preventing and sanctioning corrupt practices, corruption – both petty and grand – is still common in the country's political and administrative systems. Last year, TZ was ranked 116 out of 178 countries in the annual Transparency International Corruption Perceptions Index.[17]

The World Economic Forum's *Global Competitiveness Report 2010–2011* states that corruption is the "most problematic factor[] for doing business" in the country.[18] TZ is currently ranked 113 out of 139 countries in the Global Competitiveness Index, compared to 100 in 2009-2010.[19]

Tanzania was accepted as an EITI candidate country on 16 February 2009 and had until 15 May 2011 to undertake validation. A Memorandum of Understanding between the Government and the multi-stakeholder group was signed on March 10, 2010.

The Tanzania EITI multi-stakeholder group launched the first EITI report disclosing payments made by the major mining and gas operating companies to governments for the period 1 July 2008 and 30 June 2009 (Friday, 11 February 2011). This EITI report revealed an unresolved discrepancy of US$36.5 million that was reportedly paid by companies but not accounted as received by government entities. (Mining companies reported having paid US$84.4m in 2008/09. Government entities reported having received only US$48.3m.)

The validation report was received on 14 May 2011. On 16 August 2011, the international EITI Board declared that Tanzania had made "meaningful progress" in its implementations of the EITI. They set out a number of corrective actions needed in order for Tanzania to achieve compliance.

The Board agreed that Tanzania will have its candidacy renewed for 18 months (i.e. until 15 February 2013), by the end of which it must have completed a Validation that demonstrates compliance with the 2011 edition of the EITI rules, including requirement 5(e) regarding regular and timely reporting.

3. DIRECTOR AND OFFICER LIABILITY

- *What accountability measures apply to Officers and Directors? What are the liability implications for non-compliant Officers and Directors?*

Public and private companies in TZ are governed by *The Companies Act, 2002* while public corporations are governed by *The Public Corporations Act, 1992*. Those that are publicly listed are also regulated by the *Capital Markets and Securities Act, 1994*.

Statutory Duties

The Companies Act, 2002 and *The Public Corporations Act, 1992* were enacted to establish the regulatory framework within which private and public entities exist and operate.

Subject to *The Companies Act, 2002* and the limitations of shareholders' resolutions, the articles of a company specify the scope of its directors' duties and powers, which involve managing the company's affairs.

The directors' duties are set out in the company's articles and appointment letters. However, *The Companies Act, 2002* sets out a number of statutory duties, including the duty to disclose to the board any remuneration that they have received and any interests that they may have in contracts entered into by the company.

A director's liability may be limited by the company's memorandum. However, *The Companies Act, 2002* restricts any clauses that exempt a director from any liability that, by virtue of any rule of law, would attach

17 *Corruption Perceptions Index 2010* (October 2010) <http://transparency.org/publications/publications/cpi2010>.
18 Klaus Schwab, ed., World Economic Forum (WEF), *Global Competitiveness Report 2010–2011* (2010) at p. 320 <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf>.
19 Ibid.

to him or her in respect of any negligence, default, breach of duty or breach of trust.[20]

Common Law Duties

The Companies Act, 2002 introduced statutory directors' duties that were initially under common law, such as the directors' duty of care and duty to disclose their age.

Furthermore, *The Companies Act, 2002* prohibits a company from lending money to its directors or those of its holding company, imposes personal liability on a disqualified director for the debts of the company and requires directors to disclose their service contracts.

Environmental Duties and Liability

See *Environmental Legislation*, above.

4. REPORTING MEASURES

- *What are the accountability requirements under national securities regulation and Stock Exchange rules?*

TZ has one stock exchange, the Dares Salaam Stock Exchange (DSE), which was incorporated in 1996. It became operational in April 1998. As at 20 September 2011, there are 16 companies listed on the DSE.

Neither incorporation under TZ law nor listing requires a recognition of a duty to society.

a) Securities Disclosure Requirements Regarding Governance and CSR:

N/A

Stock Exchange CSR Reporting Requirements

The Basic Listing Requirements of the DSE make no mention of any duty to society. Of the 26 specific requirements, none is directly related to an applicant's CSR policies and practices.

5. OTHER ACCOUNTABILITY MEASURES

- Are there other accountability mechanisms not covered by the above (including community engagement requirements for companies in the mining sector)?
- To what extent are companies held 'accountable' through voluntary codes of conduct initiated by domestic organizations (including local business associations)?

The Tanzania Chamber of Minerals and Energy is the leading body representing private interests in the Tanzanian mineral sector. Its membership includes a broad spectrum of key players in the mining industry including small-scale miners, individuals, service providers, and small, medium and large international mining companies who operate in TZ.

The Chamber – as the voice for the industry – plays a pivotal role within the sector as a mediator between the mining investment community and key stakeholders, most notably the Government of Tanzania and the public.

Its strategic goals include:

- ensuring a business and social climate that will enable the mining industry to lead the economic growth of Tanzania; and
- ensuring a positive image of the mining industry.

It is the mission of the Chamber to vigorously promote and represent the industry by:

- cooperating with the Government and other industries to ensure an effective legal and regulatory framework that will support and govern the industry;
- encouraging its members to achieve best practices with respect to:
  - occupational health and safety;
  - environmental conservation and land management; and
  - sustainable social development.
- monitoring public perceptions, and educating both public and private stakeholders on the industry and its contribution to Tanzania; and
- promoting business development that supports the industry and its CSRs.

The Chamber has also developed "policy positions" on the following issues:

- environmentally responsible mining;
- appropriate labour market standards;
- free movement of labour;

20 Nimrod E. Mkono, "Corporate governance", *International Financial Law Review: International Briefings* (December 2005) <http://www.mkono.com/pdf/IFLR_article_NEM_Corporate_Goverance_Dec_2005.pdf>.

- constructive employer-employee relationships;
- social and economic impacts of mine closure; and
- safety, health and social responsibilities.

But note that the Chamber's "policy positions" do not demand any particular policies or practices of its volunteer members.[21]

As at 23 September 2011, seven TZ companies and four local NGOs are listed as members of the UN Global Compact, but of those seven companies, five SMEs are currently non-communicating for failing to submit a Communication on Progress by the relevant deadline.

21 See Tanzania Chamber of Minerals and Energy, "Policy Positions" (Undated) <http://chamberofmines-tz.com/reportspdf/report4a2f58e953f49.pdf>.

CSR ACCOUNTABILITY REPORT PAPUA NEW GUINEA ("PNG")

1. GENERAL OVERVIEW: LEGAL TRADITION AND REGULATORY LANDSCAPE

PNG is a liberal democracy and a member of the Commonwealth.

About 80% of PNG's people live in rural areas although there has been increasing migration over the recent years into urban areas. PNG has several thousand communities, many of them consisting of only a few hundred people, and each community has a different tradition, culture and often language[1]. Isolated, due in large part to mountainous and difficult terrain, those living in rural areas mostly rely on a subsistence economy. Foreign investors dominate the fish, timber and minerals sectors. PNG became a participating economy in the Asia-Pacific Economic Cooperation (APEC) Forum in 1993 and joined the World Trade Organization (WTO) in 1996.

PNG possesses vast mineral deposits, including gold, copper and nickel. PNG also has significant reserves of oil and natural gas. The difficult terrain and weak infrastructure inhibit exploration and extraction of PNG's natural resources.

PNG has enjoyed some economic improvements over the recent years; however, these are due primarily to a rise in commodity prices. PNG continues to suffer from serious issues with corruption, weak adherence to the rule of law, significant political interference coupled with an absence of real political will to pursue much-needed economic and political reforms. PNG's limited governance capacity produces serious challenges in dealing with the necessary work permits, environmental compliances, etc. crucial for foreign investment in the extractive sector. PNG is heavily aid-dependent with Australia providing the majority of its aid.

Like those of Australia, New Zealand and the United Kingdom, PNG's legal system is based on the common law. Its Constitution and "organic laws" are the supreme laws of PNG,[2] overriding federal and provincial legislation and the underlying and judge-made laws to the extent of any inconsistencies. Much of the country's statute law is adopted from Australia, England and New Zealand. Australia administered the territory until independence in 1975.[3]

An "organic law" is one that is a) enacted by Parliament, b) authorized by and consistent with the

1 The indigenous population of PNG remains one of the most linguistically diverse, with over 700 languages.

2 PNG Constitution, s. 11.

3 The independence movement was led by Sir Michael Somare. After returning to office in 2002 and re-elected as prime minister in 2007, he was suspended in April 2011 on charges of irregularities over financial returns. Peter O'Neill, the former works minister, was voted into office by Parliament in August 2011. Elections are planned for 2012. These elections may occur earlier due to the ongoing dispute between Michael Somare and Peter O'Neill as to who is the legitimate prime minister. This dispute has produced significant social unrest.

PNG Constitution, and c) expressed to be an "organic law" (s. 12(1)).

The underlying law consists of a) customary law, derived from the culture and custom of various peoples of PNG, and b) principles and rules that formed part of the common law and equity in England immediately before PNG gained independence in 1975.

Section 3(3)(b) of the *Underlying Law Act 2000* provides that these principles and rules shall be applied notwithstanding their modification through an amendment, repeal or alteration by statute of England unless the modifying statute has been adopted in PNG.

2. CORPORATE ACCOUNTABILITY MEASURES

- *What social and environmental 'rules' apply to corporations in this jurisdiction?*

a) Human Rights Legislation:

In PNG, human rights standards are found in several different pieces of legislation, rather than in a single, dedicated and definitive document. Such standards are contained in PNG's employment and labour laws, as well as laws relating to indigenous peoples and land claims. For example, the *Fairness of Transactions Act 1993* was enacted to ensure the fairness of any transaction in which one party is disadvantaged for economic or other reasons. Other legislation protects employment rights, environmental rights and property rights (see below).

The PNG Constitution is prescriptive, rather than descriptive, and entrenches a number of human rights. Division 3, for example, protects, as *fundamental* rights, the right to freedom and the right to life, the freedom from inhuman treatment and the right to the protection of the law. Division 3 also protects, as *qualified* rights, the right to privacy, the freedom from forced labour, as well as the freedoms of conscience, thought and religion, expression and employment (ss. 32-58). This section of the PNG Constitution applies to associations and corporations in the same way that it applies to individuals.[4]

Residents of PNG have asserted these constitutional rights against corporations in PNG. Section 41, for example, which sets out a number of "[p]roscribed acts", has been found to be an implied term in employment contracts in PNG. As a result, employment contracts in PNG incorporate the principles of natural justice and protection against harsh or oppressive treatment, or any other act that is not "reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind".[5] Meanwhile, the right to freedom of information (s. 51) and the right to protection from unjust deprivation of property (s. 53) have been unsuccessfully asserted against the state in relation to corporate activities.[6]

The Anti-Discrimination and Human Rights Unit of the Ombudsman Commission of PNG has a limited role to investigate human rights violations both in the public and private sectors.

Before any international law is legally binding in PNG, it must be incorporated domestically into PNG's legal system through a municipal statute.[7] Insofar as they are consistent with PNG's legal system, international legal principles can be incorporated into its common law.[8] Aspects of both the *International Convention on the Elimination of All Forms of Racial Discrimination*[9] and the *Convention on the Elimination of All Forms of Discrimination Against Women*[10] were entrenched as rights in the PNG Constitution.

b) Labour, Employment & Occupational Health and Safety Legislation:

The PNG common law seems to suggest that an employer's termination power is subject to an implied term in the employment contract that an employee has the right to be heard before termination.[11] The National Court in *Sukuramu*[12] noted that its decision was in keeping with PNG's obligations under the ILO *Termination of Employment Convention 1982*.[13]

Section 2 of the *Discriminatory Practices Act (Chapter 269)*[14] prohibits "discriminatory practice[s]", as defined in s. 1, on the grounds of colour, race or ethnic, tribal or national origin. In addition, section 4 prohibits incitement to racial hatred, as defined therein.

4 See e.g. *State v NTN Pty. Ltd. and NBN Ltd.* [1992] PNGLR 1; *Koai Keke v PNG Color Laboratories* [1992] PNGLR 265.

5 *Vitus Sukuramu v New Britain Palm Oil Ltd.* (2007) N3124 (Unreported, Cannings J., 16 February 2007); *Bernbert Toa v Ly Cuong-Long* (2008) N3471 (Unreported, Cannings J., 15 September 2008).

6 See e.g. *Kuberi Epi and Others v Turama Forest Industries Ltd. and The State* [1998] PNGLR 87; *PNG Ready Mixed Concrete Pty. Ltd. v The Independent State of Papua New Guinea* [1981] PNGLR 396.

7 PNG Constitution, s. 117(1).

8 Supreme Court Application No. 1 of 1985: *Enforcement of Certain Constitutional Rights and Freedoms pursuant to s. 57 of the Constitution*; Application by Tom Ireeuw, Jimmy Wawar, Cory Ap, and John Wakum and Others [1985] PNGLR 430.

9 Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

10 Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

11 *Vitus Sukuramu v New Britain Palm Oil Ltd.* (2007) N3124 (Unreported, Cannings J., 16 February 2007).

12 Ibid.

13 ILO Convention No. C158 (22 June 1982).

14 The *Discriminatory Practices Act (Chapter 269)* is PNG's only general anti-discrimination law. It concerns holders of statutory licences, and seeks to ensure that they are not discriminatory in their business practices.

Section 97 of the *Employment Act (Chapter 373)* prohibits

i. discrimination against a female person on account of her sex; or

ii. failure to pay a female employee the same wages as a male employee employed at the same level in the same work.

Section 63 of the *Industrial Organizations Act (Chapter 173)* prohibits "injuring [an] employee or [an] employer on account of industrial action"

Pursuant to s. 69, where an industrial organization contravenes or refuses or fails to comply with a provision of the Act, the organization and its officers are each guilty of an offence and where no other penalty is provided, are each liable to a fine.

The *Mining Act 1992* sets out a number of offences including the following:

167 (4) A person who:

iii. carries on exploration or mining on any land without being duly authorized under the Act; or

iv. refuses to provide any information [requested of him] relating to his entitlement to explore or mine; or

v. refuses to comply with a direction [to cease unauthorized exploration or mining]; or

vi. assaults, hinders, obstructs or resists a Warden … carrying out his duties as authorized by the Act; or

vii. ...re-enters or takes possession of any land [from which he was lawfully evicted or removed]; or

viii. takes or removes from the tenement of another person any mineral without [that person's authority]; or

gives false or misleading information to the Director or to an officer of the Department; or

ix. obstructs execution of any right conferred under the Act,

x. is guilty of an offence under the Act.

Moreover, pursuant to s. 167(5), where a person is convicted of an offence under this section, the Court may "where relevant, in addition to imposing a penalty it determines, order the offender to rehabilitate the land to the satisfaction of the Director within a specified time."

Under s. 167(6), where a person does not carry out an order made under subsection (5), the Court shall require the offender to pay the costs of rehabilitation of the land and such a sum determined shall be a debt to the state and may be recovered in any court of competent jurisdiction.

Pursuant to s. 168(1), where a person acts in contravention of or fails to comply with a provision of the Act, that person is guilty of an offence against the Act.

And where a body corporate is convicted of an offence against the Act, every director and officer of the body corporate concerned in the management thereof is guilty of the offence if it is proved that the act or omission that constituted the offence took place with his authority, permission or consent (s. 168(3)).

Currently, as notional owner of mineral resources, the PNG Government collects royalties. There are provisions for landowners to receive a certain minimum share of the royalties.

c) Environmental Legislation:

There are two main pieces of legislation concerning the environment. The *Conservation Areas Act (Chapter 362)* prohibits any person from contravening or failing to comply with a provision of a rule relating to the protection, development, land use, management and control of a conservation area made by the Minister (Section 28).

Subsection 35(1) enumerates the following offences under this Act:

(1) A person who develops or alters or permits the development or alteration of the existing use of land in a conservation area except:

i. accordance with the terms of the management plan for that conservation area; or

ii. accordance with written approval from the Minister under Section 34(1),

is guilty of an offence.

Under s. 35(2), any person who develops or alters or permits the development or alteration of the existing use of land in an area in respect of which a notice of recommendation has been given under Section 12(1), except in accordance with written approval from the Minister under Section 34(1), is guilty of an offence.

Pursuant to s. 8(1) of the *Environment Act 2000*, any person who becomes aware that unlawful serious environmental harm, as defined in the legislation, or unlawful material environmental harm, also as defined in the legislation, is caused or threatened in the course of an activity carried out by that person, or over which that person has effective control, shall as soon as practicable [notify] the Director of the circumstances in which the harm or risk of harm arose.

Any person who fails to comply with Subsection (1) is guilty of an offence (s. 8(2)).

Subsection 11(1) prohibits a person from unlawfully causing a *serious* environmental harm. The person need not have intended to cause the serious environmental harm in order to be found guilty of an offence under Subsection (1).

Subsection 12(1) prohibits a person from unlawfully causing a *material* environmental harm. Again, the person need not have intended to cause the material environmental harm in order to be found guilty under Subsection (1).

Under s. 126(1), an "executive officer" means a person who is:

iii. a member of the governing body of a Corporation; or

iv. a senior manager of the Corporation who is responsible for those activities of the Corporation which are governed by the Act.

Pursuant to s. 126(2), it is the responsibility of a Corporation's executive officers and directors to ensure that the corporation complies with the Act.

Pursuant to s. 126(3), where a Corporation commits an offence against a provision of the Act, the director and executive officer of the Corporation who has:

v. aided, abetted, counselled or procured the contravention; or

vi. been knowingly concerned in, or party to, the contravention,

is also … guilty of an offence of failing to ensure the Corporation complying with the *Environment Act*.

d) Anti-Bribery and Corruption Legislation:

PNG does not have a stand-alone legislation for the prevention of bribery and corruption. There are two main pieces of legislation relevant to bribery: The *Criminal Code* (the "Code") and the *Organic Law on Duties and Responsibilities of Leadership* (the "Organic Law").

The bribery offences in the *Code* do not cover all cases of bribery and corruption. The existing provisions have narrow application to cover only members of Parliament and public servants [sections 61-62, 87-136]. It does not cover such persons as the members of provincial governments, employees of statutory bodies, employees of the business arms of provincial governments or the private sector employees.

The *Organic Law* does not deal directly with bribery and corruption, but it does create a number of offences arising out of misconduct in office, which include use of office for personal gain (section 5); acceptance of bribes (section 11); acceptance of loans (section 12) and disclosure of official information for personal gain (section 14). At least in theory, all parliamentarians and senior officials are subject to the *Organic Law,* the breach of which lead to dismissal from office.[15] In practice, enforcement is spotty due to the fear of retaliation. Further, any person in breach of the Organic Law can escape its application by tendering his resignation (thereby ceasing to be a 'leader').

The *Customs Act* (Chapter No.10) and the *Public Services (Management) Act* also deal with bribery and corruption. The *Customs Act* contains provisions regarding the bribery of customs officers (s.154). The *Public Services (Management) Act* creates a disciplinary offence for a public servant to solicit or accept a fee, reward, gratuity or gift other than his official remuneration (s.45(h)). The *Proceeds of Crime Act* was passed by Parliament in 2005 and allows for the recovery of property and monies that have been obtained through criminal activities including through fraud and corruption.

In April 2004, the National Anti-Corruption Alliance (NACA) was formed with the purpose of fighting corruption through the collaboration of a number of public sector agencies including the Public Prosecutor's Office, Ombudsman Commission, the Auditor General's Office, Solicitor General's Office, Department of Treasury, Department of Provincial and Local

15 A Leader can be prosecuted for the same offence under the Criminal Code and the Organic Law Prosecutions for misconduct in office are carried out before a Leadership Tribunal, not a court of law. A Leader can avoid the jurisdiction of the Tribunal by tendering his or her resignation from office before the decision of the Leadership Tribunal is given.

Government Affairs, Internal Revenue Commission, and the Department of Personnel Management.

Papua New Guinea has ratified the United Nations Convention Against Corruption.

e) Consultation with Indigenous Groups:

Due in part to the sheer number of communities, many isolated, and each with a different tradition, culture and often language, a coherent and consistent consultation process has not been developed by government.

New ownership rules are being contemplated which will have an impact on consultation. In August, 2011, the new government of PNG, led by prime minister Peter O'Neill, announced plans to revert ownership of minerals and resources to traditional landowners. Mining minister Byron Chan said in a speech on August 11 that the government would seek to give traditional owners legal ownership of resources under the land and sea. Currently, the PNG government owns anything more than six feet under the surface. Minister Chan also promised an urgent review of mining and environmental laws, especially those involving deep sea mining. If the changes go ahead, mining companies will have to deal directly with landowners, who would have the power to "make or break the mineral projects", according to Minister Chan.[16]

The government recently restored rights of customary landowners to challenge the government on any decisions made which could be detrimental to the environment by repealing *The Environment (Amendment) Act 2010* which had removed this right.

f) Other Legislation:

Corporations in PNG cannot be held criminally responsible for their corporate culture or internal policies.

- *What types of penalties arise from the violation of such 'rules' (including civil, criminal, administrative, monetary, fines and possible settlement agreements)? What are the enforcement powers of bodies administering such legislation?*

As stressed earlier, enforcement in PNG is extremely weak. Courtesy of WikiLeaks, confidential US embassy cables were published, describing PNG as a nation suffering from corrupt politicians that divert aid funds and resource revenues for their personal enrichment. Australian government officials are reported to have described the PNG government as a "totally dysfunctional blob".[17]

i) Liability for Violating Human Rights Protections:

Any person who contravenes or fails to comply with a provision of the PNG Constitution may be liable to a penalty of either a fine or imprisonment.

Under s. 23(2), the National Court may make any order that it thinks proper for either preventing or remedying a breach of a provision of the PNG Constitution, and Subsection (1) will apply to a failure to comply with the order as if it were a breach of a provision of the PNG Constitution.

Enforcement

Aside from the *Mining Act 1992*, which is enforced by the "Director" of the PNG governmental Department "responsible for minerals matters" (s. 2(1)); the other labour, employment and health and safety legislation is enforced by the PNG judicature.

The *Fairness of Transactions Act 1993* is enforced by the PNG judicature. In addition, any contravention of the PNG Constitution is enforced by the National Court.

ii) Liability for Violation of Labour, Employment and Health & Safety Legislation:

See above.

iii) Liability for Violation of Environmental Legislation:

See above.

Enforcement

Aside from the *Environment Act 2000*, which is enforced by the Director of the Environment, the other environmental legislation is enforced by the PNG judicature.

iv) Liability for Violation of Anti-Bribery and Corruption Legislation:

Enforcement

While PNG does have a legal framework, albeit still limited, for fighting bribery and corruption, effectively combating corruption requires strong institutions with resources, oversight capacity and independence which PNG lacks.

PNG suffers from a weak legal order and is ranked amongst some of the most corrupt nations in the world. The Transparency International Corruption Index placed PNG at 154 of the 180 countries surveyed in 2010 with

16 PNG Daily News, online: http://pngdaily.com/2011_08_01_archive.html

17 http://www.theage.com.au/world/australia-us-damn-pngs-rotten-political-practices-20110902-1jq9a.html

scores below five on a scale from 0 (perceived to be highly corrupt).

3. DIRECTOR AND OFFICER LIABILITY

- *What accountability measures apply to Officers and Directors? What are the liability implications for non-compliant Officers and Directors?*

All PNG companies – both public and private – are governed by the *Companies Act 1997*. Those that are publicly listed are also regulated by the *Securities Act 1997*.

Statutory Duties

The *Companies Act 1997* lists the duties that directors owe to their companies and shareholders.

Directors have a duty to act in good faith and in the best interests of the company (s. 112(1)).

This duty is owed to the company and not to shareholders (s. 147(3)).

Subsection 113(1) explains that s. 112 does not limit "the power of a director to make provision for the benefit of employees of the company in connection with the company ceasing to carry on the whole or part of its business".

This "carve-out" provides directors with some discretion regarding employees.

Otherwise, directors are not required to consider the company's impacts on non-shareholders.

Directors have a duty to comply with both the *Companies Act 1997* and the constitution of their company (s. 114(1)).

Pursuant to s. 115, a director of a company has a duty to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation to:

i. the nature of the company;

ii. the nature of the decision; and

iii. the director's position and the nature of the responsibilities undertaken by him.

This duty is owed to the company and not to shareholders (s. 147(3)).

Under s. 118(1), where a director is interested in a transaction or proposed transaction, he or she must cause the interest to be entered on the interests register and disclose the interest to the board of the company (if there is more than one director).

This duty is owed to shareholders (s. 147(3)).

Section 123(1) prohibits directors from disclosing company information, except for the purposes of the company or as required by law.

This duty is owed to the company and not to shareholders (s. 147(3)).

Section 126(1) requires directors to disclose dealings of a relevant interest in shares issued by the company.

This duty is owed to shareholders (s. 147(3)).

Common Law Duties

Company law in PNG includes settled principles from the common law and equity[18] through the reception of the common law and equity of England under the PNG Constitution.

The PNG *Companies Act 1997* is modeled on New Zealand's company's law[19] and relevant New Zealand court decisions may be of particular persuasive value.

The company to which a director owes a duty may pursue a breach thereof. In the alternative, the company's shareholders may pursue the breach in a derivative action.

Shareholders to whom a director owes a duty may pursue a breach thereof in a personal action.[20]

Of course, directors are obliged to comply with all other PNG laws, in addition to the *Companies Act 1997*, including the PNG Constitution.

Environmental Duties and Liability

N/A

4. REPORTING MEASURES

- *What are the accountability requirements under national securities regulation and Stock Exchange rules?*

PNG has one stock exchange, the Port Moresby Stock Exchange Limited (POMSoX), which was formally opened in April 1999. The Business Rules and Listing Rules of POMSoX are licensed from the Australian

18 See e.g. *Spirit Haus Ltd. v Robert Marshall* (2004) N2630 (Unreported, Kandaskasi J., 2-3 September 2004) 56.

19 Beck, Andrew and Borrowdale, Andrew, *Papua New Guinea: Companies & Securities Law Guide* (1999), v.

20 Beck, Andrew and Borrowdale, Andrew, *Papua New Guinea: Companies & Securities Law Guide* (1999), 57.

Stock Exchange. As at 20 September 2011, there are 20 companies listed on POMSoX, two of which are currently suspended.

Neither incorporation under PNG law nor listing requires a recognition of a duty to society. But listed foreign entities that wish to be listed on POMSoX must comply with the listing rules of the exchange with which they are nationally affiliated (their "home exchange").

Consequently where the listing rules of a foreign entity's home exchange require some recognition of a duty to society, POMSoX will require such recognition as well.

Securities Disclosure Requirements Regarding Governance and CSR

Companies need not disclose the impact of their operations on non-shareholders. But companies are not prohibited from doing so if they so choose.

Stock Exchange CSR Reporting Requirements

Rule 4.10.3 of the Listing Rules requires a listed entity to include in its annual report a statement of its corporate governance practices during the reporting period.

Appendix 4A thereof suggests that the listed entity may refer to its policies on the establishment and maintenance of appropriate ethical standards in the statement required under Rule 4.10.3.

Rule 3.1 requires continuous disclosure. If a listed entity becomes aware of any information that a reasonable person would expect to have a material effect on the value of its securities, then that listed entity must immediately report that information to POMSoX. The term "material effect" is not defined in the Listing Rules or in the *Companies Act 1997*. If a reasonable person would expect the impact of a company's operations on non-shareholders to have a material effect on the value of its securities, then it may be required, under Rule 3.1, to disclose information relating to those operations.

Reporting conducted pursuant to the Listing Rules must be provided to POMSoX.

Failure to comply with the Listing Rules may result in POMSoX suspending a listed company's securities from quotation. POMSoX may also remove a company from the list if the company is unable or unwilling to comply with, or breaks, a Listing Rule.

5. OTHER ACCOUNTABILITY MEASURES

- *Are there other accountability mechanisms not covered by the above?*

Pursuant to s. 90(2) of the *Companies Act 1997*, shareholders are generally empowered to pass a non-binding resolution, including a resolution relating to a company's human rights policies and practices, which may influence a board's decision making.

- *To what extent are companies held 'accountable' through voluntary codes of conduct initiated by domestic organizations?*

The Business Council of PNG is the leading body representing the private sector in PNG. It takes part in policy development, research and debate. Its Code of Conduct provides for upholding the PNG Constitution, "promoting fair and non-discriminatory behaviour within a safe, healthy and injury-free workplace for all" and maintaining confidentiality of information.[21] However, it is unclear to what extent its Code of Conduct is monitored or enforced.

As at 20 September 2011, no PNG companies are listed as members of the UN Global Compact.

21 See Business Council of Papua New Guinea, BCPNG Code of Conduct (2009) <http://www.bcpng.org.pg/Documents/BCPNG_Code_of_Conduct.pdf> as at 22 September 2011.

COMPARISON OF CANADA TO FOREIGN JURISDICTIONS 'GAPS' ANALYSIS

1. INTRODUCTION AND LIMITATIONS

This final part of the CSR Accountability Report compares the accountability regime when projects are located in Canada to the accountability regime that would apply to projects located in one of Peru, Guatemala, Tanzania or Papua New Guinea (the "Foreign Jurisdictions"). The purpose of this comparison is to determine whether there are any meaningful weaknesses or gaps between the Canadian accountability regime when compared to the Foreign Jurisdictions (a "Gaps Analysis"). The Gaps Analysis seeks to gain an understanding of the key differences facing Canadian companies when looking at projects located around the world.

Given the limitations of the initial studies of the relevant accountability regimes, the gaps or weaknesses identified herein may be more useful as general guidance regarding whether further study in the area would provide fruitful and meaningful results.

The Gaps Analysis is divided into three parts.

The first part highlights the most significant gap which can be described as the 'enforcement gap'; the gap between the rules and regulations 'on the books' and the enforcement of these same rules and regulations. This 'enforcement' gap can be sourced to three factors: (1) a lack of governance capacity; (2) a weak civil society; and (3) bribery and corruption (which is both aggravated by weak governance and an inhibitor to strengthened governance capacity). The key distinction is the extent to which the Foreign Jurisdiction has the governance capacity and political will to ensure effective, consistent and meaningful enforcement of its legislation, free of corruption.

The second part looks at the role of international guidelines and other domestic accountability regimes applicable to Canadian companies no matter where they are operating ("International Accountability") in light of the enforcement gap. In spite of the governance issues in Foreign Jurisdictions, the pressure on Canadian companies in the extractive sector exerted by governments, financing institutions, international and domestic organizations, and civil society, to incorporate international guidelines is significant and intensifying. One of the main drivers of International Accountability is the recognition that many foreign jurisdictions including the Foreign Jurisdictions (to a greater or lesser extent) suffer from an enforcement gap. As such, International Accountability acts as a sort of 'stop-gap' assisting Canadian companies to operate in accordance with best practices wherever they invest and operate. It is important to stress, however, what International Accountability cannot do - it cannot take the place of a well-functioning state. Many of

the problems inherent to International Accountability is the confusion between what companies, even the best-regulated companies, can effectively do in Foreign Jurisdictions with an enforcement gap, and what ultimately must remain the responsibility of the state.

The third part of the Gaps Analysis provides some additional observations that flow from the review of CSR accountability regimes. As is highlighted in the Executive Summary, CSR is an ever-evolving and challenging area, not only for companies but for governments, financing institutions, domestic and international organizations. The challenges emerge in part from the inherent limitations of International Accountability, namely that a well-functioning state is always more effective in managing the natural resources of a country for the benefit of its citizens. A well-functioning state also needs to be accompanied by an active, engaged and informed civil society with consistent access to the resources and information necessary to effectively influence government action and to hold government to account. Finally, on a practical level, the proliferation of CSR related rules and guidelines, both domestic and international, also produce uncertainty – which rules are applicable?- as well as conflict- rules related to one area of CSR may directly conflict with the requirements imposed in another area of CSR accountability.

2. THE ENFORCEMENT GAP

To a greater or lesser extent, depending on the Foreign Jurisdiction under review, the main 'gap' between the Canadian context and the accountability regimes in place in each of the Foreign Jurisdictions is that of enforcement. The consequence of this 'enforcement gap' is significant: While each of the Foreign Jurisdictions tends to have 'laws on the books' in each of the key areas of analysis, the gap between what is 'on the books' and what is effectively and consistently applied and enforced is often sizeable. The absence of enforcement power is a function of (a) restricted governance capacity which includes (i) the lack of resources required to enforce the rules 'on the books', e.g. reviewing permitting applications, carrying out inspections mandated by law, etc.; (ii) the inability to ensure *consistency* of interpretation and application of any given law due to the absence of strong oversight mechanisms; and (iii) the absence of political will (or, again, capacity) to pursue necessary reforms including enhancing oversight capacity; (b) a weak civil society, which weakness is often a function of a lack of information and government 'access'; and (c) bribery and corruption. The prevalence of bribery and corruption in the Foreign Jurisdictions is, in the first instance, a function of restricted governance capacity, limited oversight and a weak civil society, but then also serves to inhibit the development of good governance creating a vicious circle.

The extent of this 'enforcement gap' in broad terms depends on the jurisdiction. The Foreign Jurisdictions reflect a range in both the quality of the 'laws on the books' and crucially, governance capacity, with Peru providing an example of a relatively sophisticated and reliable legislative and enforcement regime (although not without its challenges) and Papua New Guinea representing a jurisdiction that struggles with the fundamentals of good governance. While this CSR Accountability Report is able to highlight in broad terms the nature of the 'enforcement gap' in each of the Foreign Jurisdictions and as between each Foreign Jurisdiction and Canada, further work would be needed to provide a detailed analysis of the specific enforcement gaps in each regulatory area covered in the CSR Accountability Report.

a) Governance Capacity

Weakness in governance capacity underlies one part of the Federal Government's *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector* (the "Strategy")[1], namely to assist countries in which Canadian companies operate to effectively manage their natural resources. This weakness produces a number of issues for Canadian companies investing and operating in foreign jurisdictions including the Foreign Jurisdictions. One, the ability to obtain the necessary permits for operation is negatively impacted by an absence of the necessary resources. Two, weak governance inserts significant uncertainty on how the 'laws on the books' will be interpreted, articulated and applied in each of the Foreign Jurisdictions. This lack of regulatory clarity and consistency not only creates problems for companies seeking to invest and operate in country, but also provides the space for bribery and corruption to flourish.

b) Civil Society

Civil society often is a key piece in effective and good governance. Laws 'on the books' are in some cases ineffective because there is a lack of information which actually flows to citizens. For example, publishing the incomes and assets of government officials is of limited utility if members of society cannot access the

1 DFAIT, "Corporate Social Responsibility Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector," (March 2009) online: DFAIT <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-stategie.aspx?view=d>.

information.[2] Civil society acts also as a crucial player in international initiatives such as the Extractive Industry Transparency Initiative ("EITI"). EITI is motivated by the doctrine 'publish what you pay' which seeks to combat bribery through transparency, requiring participating countries to publish the amounts received by its government agencies and for the companies making the payments, to publish what they pay. By making public any discrepancies, EITI hopes to arm civil society with the information required to pressure its government (and companies). The effectiveness of this initiative depends in part on a well-functioning civil society with access to this kind of information. Instability also can increase when civil society groups, including indigenous populations, feel dis-enfranchised from government and from the development of natural resource projects, further inhibiting the political stability necessary for good governance projects.

c) Bribery and Corruption

As noted above, bribery and corruption impacts all areas of governance and acts as the major inhibitor of improvements in the governance capacity of foreign jurisdictions. As such, bribery and corruption continues to constitute a major, global challenge to the proper and effective management of natural resources for the benefit of citizens. The key challenge, however, as noted at the start of the Gaps Analysis, is not a function of an absence of rules - each of the Foreign Jurisdictions has laws 'on the books' prohibiting bribery and each has, to a greater or lesser extent, pursued positive initiatives to combat bribery - but rather arises from a mix of weak governance capacity, limited civil society capacity and a lack of political will.

3. INTERNATIONAL ACCOUNTABILITY- EXTENSION OF RULES IN AND BEYOND THE DOMESTIC CONTEXT

One of the key developments over the past number of years is the emergence of a growing and hardening system of international guidelines and rules governing the conduct of companies regardless of their place of operation. Canadian companies faces an increasing domestic (and international) pressure to adopt otherwise voluntary principles into their operations wherever these operations happen to be located. The adoption of International Accountability often goes beyond what is required by the regulations of a Foreign Jurisdiction.

2 In Tanzania, for example, The Public Leadership Code of Ethics Act introduced ethical codes for public officials requiring public officials in positions of power to declare all properties, assets and liabilities that they own. An Ethics Commission was established to be responsible for implementation of the Public Leadership Code of Ethics. This asset declaration regime, however, is limited by the public's restricted access to the information and the practice of many government officials simply not to disclose.

One of the main drivers of International Accountability is the existence of an enforcement gap in many foreign jurisdictions with significant natural resources. International Accountability is an attempt to ensure best practices (or, at least, encourage best practices) by Canadian companies in all jurisdictions, regardless of the accountability requirements of foreign jurisdictions. As such, International Accountability can fill in some gaps in foreign jurisdictions; however, International Accountability will always have its limits. A well-functioning state and a healthy and informed civil society is the ultimate goal in all Foreign Jurisdictions. In the interim, Canadian companies cannot take the place of the state. International Accountability, however, can act as an effective 'stop-gap', flexibly helping to improve the situation on the ground for Canadian companies and for the citizens of Foreign Jurisdictions.

There are three main, overlapping ways in which international guidelines and initiatives are incorporated into the activities of Canadian mining companies:

(a) There are the guidelines and initiatives that are driven by financing institutions which 'harden' otherwise voluntary principles.

(b) The Federal Government has endorsed certain performance guidelines through the Office of the Extractive Sector Corporate Social responsibility (CSR) Counsellor (the "Office") (see below) that has greatly increased the 'peer pressure' to follow those guidelines.

(c) Canadian mining associations have developed separate guidelines and reporting requirements which, while most often voluntary, can be made mandatory by virtue of association membership.

These sources of CSR accountability will be briefly examined in turn:

a) Financing Requirements

Canadian companies seeking financing are also held accountable through financing requirements including the following:

1. The Equator Principle (EPs)s developed by financial institutions in consultation with the International Finance Corporation (IFC) and parallel to the IFC-Performance Standards (PSs). The EPs are a series of principles that adopt the PSs dealing with core CSR principles such as human rights, environment, and indigenous people. As of May 2011, there were 72 financial institutions that have adopted the EPs including all of the "big five" Canadian

banks.[3] The EPs are intended to serve as a common baseline and framework. Each institution may then build its own internal policies, procedures and standards. The key aspect of the EPs is that each institution has committed to not provide financing for projects unless that project can demonstrate that it will comply with the EPs. The principles apply to all new projects financed anywhere in the world with total capital costs of US$ 10 million or more, across all industry sectors. While EPs do not to apply to already existing projects, they do apply to expansion projects or the upgrading of facilities, where the changes may create significant environmental or social impacts. Project finance advisory services must also adhere to the guidelines.

2. Export Development Canada (EDC): Environmental and Social Risk Management Policy governs the Corporation's overall environmental commitments. This policy establishes the principles that are followed when assessing the environmental risks of transactions that EDC is asked to support. EDC's Environmental and Social Review Directive establishes the systematic process that EDC follows when assessing the environmental and social impacts of projects it is asked to support. EDC adopted the Equator Principles in October 2007, and as such its loan assistance programme follows the EP environmental and social screening criteria.

b) The Federal Government

In 2006, the Government of Canada published a guide for businesses regarding CSR. This guide sought to assist Canadian businesses in developing and implementing CSR strategies and internal policies. In 2006, the Government of Canada instigated a consultative process (further to a Parliamentary report of the Standing Committee on Foreign Affairs and International Trade commissioned by the Liberal Government in 2005). This consultative process culminated in the release by the Government of Canada of the Strategy, a framework for Canadian companies operating in the international extractive sector. This is a voluntary framework with four pillars including: (1) support for host country capacity building initiatives focused on resource governance; (2) support for CSR Performance Guidelines and reporting initiatives; (3) the development of CSR Centre of Excellence (which was formally launched in January 2010) and (4) the establishment of the Office.

The Performance Standards include: IFC Performance Standards, the Voluntary Principles on Security and Human Rights, the Global Reporting Initiative and the OECD Guidelines for Multinational Enterprises (the "Guidelines"). Through the implementation of the Strategy, the Federal Government's commitment and through the incorporation of some of the Performance Standards into financing-related obligations, the Performance Standards are increasingly mandatory in application rather than strictly voluntary.

c) Voluntary Codes of Conduct (Domestic organizations)

Canadian companies are also held accountable through voluntary codes of conduct initiated by domestic organizations including these examples:

1. Towards Sustainable Mining (TSM) Initiative: Developed by the Mining Association of Canada in 2004, adherence to the TSM initiative is mandatory for all MAC members. MAC membership includes all major mining companies in Canada.

2. In 2003, the ICMM's council committed their corporate members to implement and measure their performance against a set of ten sustainable development principles (the SDF).[4] Then in 2008, the ICMM added an assurance program to certify member compliance with the guidelines. ICMM members, under SDF, are also required to adhere to the G3 reporting requirements.[5]

3. e3 Plus created by the Prospectors and Developers Association of Canada (PDAC). As an informational resource, there is no mandatory requirement for mining operators to adhere to the e3 Plus guidelines. Each of the principles is accompanied by a two page report to help companies integrate the principles into their operations. Although still in development, PDAC is planning to add performance reporting and verification guidelines to e3 in the near future.[6]

3 http://www.equator-principles.com (on homepage).

4 ICMM, "Sustainable Development Framework," http://www.icmm.com (select "Sustainable Development Framework" and then select "10 Principles").

5 ICMM, "Assurance," http://www.icmm.com (select "Sustainable Development Framework" and then select "Assurance").

6 Prospectors and Developers Association of Canada (PDAC), "Principles for Responsible Exploration," http://www.pdac.ca (select "e3" and then select "Principles").

4. GENERAL OBSERVATIONS

a) One-Size Does Not Fit All

Given the complexities of CSR-related demands and expectations themselves and the accompanying variability of the political, economic, environmental and social contexts of operations on the ground, it is not surprising that it can be difficult to ascertain precisely what a company must (or should) do in order to meet CSR requirements and expectations. And, what is appropriate for a company for its operations in one jurisdiction may not work in another jurisdiction. Consequently, it is not always simply a matter of checking the applicable rules and applying them, but rather a much more intensive examination which takes into account the specific context of the operations on the ground. As a result, the CSR initiatives applicable to Canadian companies operating around the world are a useful stop-gap measure – they are flexible enough to apply and provide guidance to companies wherever they operate. The more rigid the rules, the less usefully applied in very different contexts.

b) CSR- An Ever-Evolving Area

Related to point number one above, and complicating the picture further, the emergence of CSR standards to which companies 'must' or 'should' comply with is constantly evolving. Consequently, companies (as well as governments and domestic and international organizations) are always reviewing and grappling with the demands of CSR. This is a challenging task but one which is increasingly crucial for companies, particularly in the extractive sector. While there will always be some measure of imprecision, keeping abreast of emerging trends will assist companies to remain on top of the CSR-related rules as well as 'best practices'.

While the uncertain and evolving nature of CSR impacts all areas, some pose particular challenges for companies operating in jurisdictions with indigenous populations. The nature of the requirements for consultation with indigenous populations continues to be an uncertain and evolving area, regardless of jurisdiction, and a source of real conflict and instability in resource rich areas around the world. There are a number of overlapping reasons for the difficulties companies encounter when engaging with indigenous populations, be it in Canada or in any foreign jurisdiction.

It is not always clear precisely what is required of mining companies. For example, how can one determine the definite content of the duty to consult when, as in Canada, it is described as "context-specific"? Further, the need for free, prior and informed consent ("FPIC") is increasingly required under domestic and international laws although the content of FPIC and the ramifications of same continues to be uncertain in practice. Finally, it is not always clear whether a company can satisfy the consultation requirements (in place of the state), a problem that accompanies a number of international accountability initiatives. For example, in Canada, the Crown has a duty to consult with Aboriginal peoples on any actions that may infringe on their rights as set out and defined in section 35 of the *Constitution Act of 1982*. While case law is relatively clear on the Crown's duty to consult with aboriginal groups, it is less so with regards to whether consultations undertaken by private corporations can satisfy the Crown's obligations.

c) Conflict between CSR Accountability Rules

As is clear from the working definition of CSR adopted for purposes of the CSR Accountability Report, CSR is an extremely broad concept and covers a range of areas. With the proliferation of rules, both domestic and international, the likelihood of conflicts as between CSR standards is increasing. A recent example accompanies the establishment and increasing use of the EITI. EITI is motivated by the notion that shining a light on payments made by companies to government agencies will help stamp out bribery and corruption. As noted above, a key element of this initiative is the role of civil society. By making public any discrepancies, EITI hopes to arm civil society with the information required to pressure its government (and companies). The frequency of discrepancies between the funds reported by the government and the payments disclosed by mining companies illustrates the problem (and potential 'solution); however the EITI principles also create a conflict. For example, confidentiality is often built into Impact and Benefit Agreements with Aboriginal communities (which leadership constitute 'government'). To the extent that the country in question is a member of EITI, these confidentiality provisions would conflict with the requirements of EITI. The potential for conflict will only increase as more entities create new CSR initiatives from very different perspectives.

d) State versus Corporate Obligations – The Example of Human Rights

As discussed, mining companies are operating in jurisdictions where regulatory infrastructures are under-developed and social services are either inept or non-existent. Consequently, companies are taking on obligations traditionally considered to be within the purview of the state. This reality underlies the recent recommendations of the U.N.'s Special Representative of the Secretary-General, John Ruggie, under the 'Protect,

Respect and Remedy' Framework.[7] While duties to protect human rights continue to rest with nation-states, there is international consensus forming around the notion that corporations have a duty to respect human rights, especially when operating in less developed countries. Accordingly, additional accountability measures may apply to mining companies operating in foreign jurisdictions above and beyond home state regulation. Each of the Foreign Jurisdictions has human rights legislation; however, the obligations to ensure their application may often rest with companies. To the extent that human rights are not effectively enforced in the Foreign Jurisdiction, companies may be assuming obligations that traditionally, and properly, belong to the state.

Conclusion: A Role for International Civil Society and Governments

The above data gap analysis demonstrated that the real gap is caused by a lack of good governance in some developing countries. Although CSR initiatives are a good stop-gap measure because of their broad applicability and flexibility (in contrast to extraterritorial legislation), these international CSR initiatives will not make the gap go away, and will never even fully bridge the gap. The only way to effectively and substainably bridge the accountability gap is for there to be widespread good governance. This is not a new idea – but the key role for international civil society and governments to play is assisting states in the creation of good governance – through funding, education, programs, support, and training. This process is already ongoing, but needs significant support and creativity to have any chance of success. In the interim, well designed, flexible, CSR initiatives help even the playing field between Canada and the Foreign Jurisdictions.

7 SGSR Report to the UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights (7 April 2008) online: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

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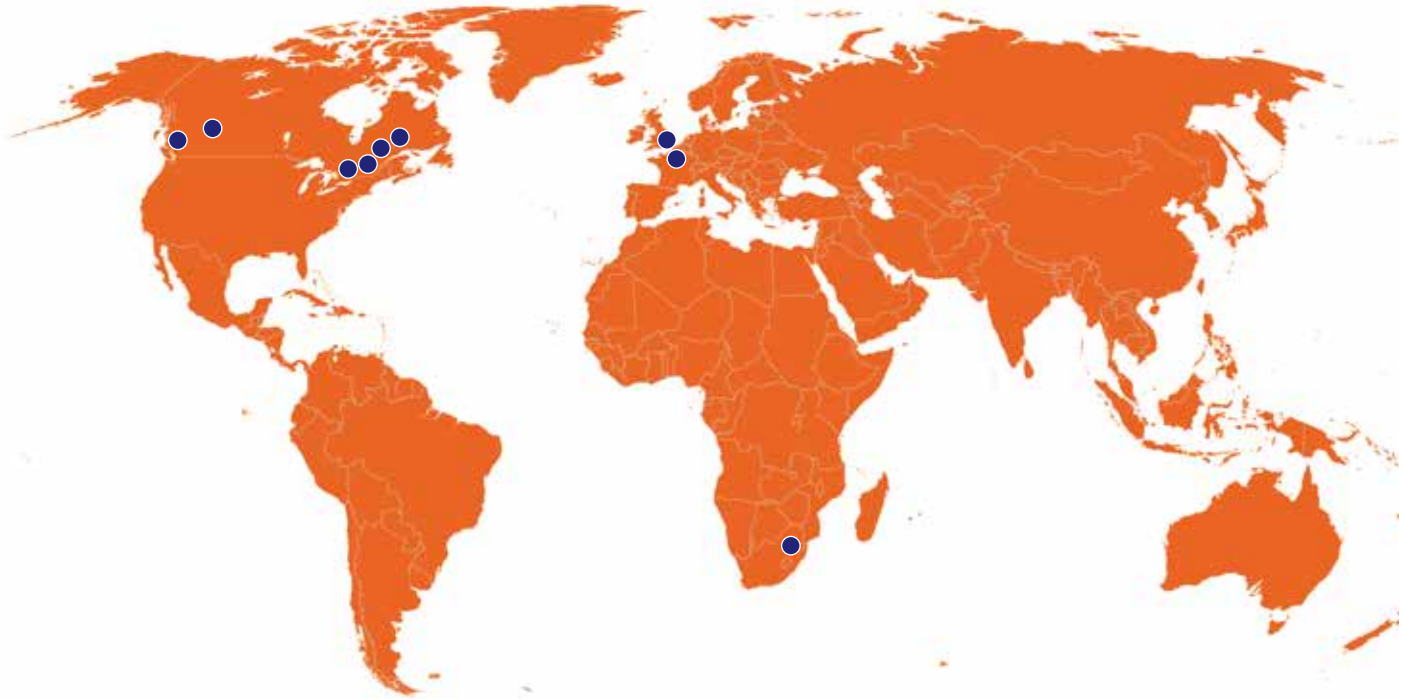

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